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

Reference: Review of the National Native Title Tribunal annual report 2003-04

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**JOINT STATUTORY COMMITTEE ON
NATIVE TITLE AND THE ABORIGINAL AND TORRES STRAIT ISLANDER LAND FUND**

Wednesday, 9 March 2005

Members: Senator Johnston (*Chair*), Ms Vamvakinou (*Deputy Chair*), Senators Carr, Crossin, Lees and Scullion and Mr McMullan, Mr Randall, Mr Slipper and Mr Tollner

Members in attendance: Senators Crossin, Johnston, Lees and Scullion and Mr McMullan and Mr Tollner

Terms of reference for the inquiry:

To inquire into and report on:

Review of the National Native Title tribunal annual report 2003-04.

WITNESSES

DOEPEL, Mr Christopher Bellinger, Registrar, National Native Title Tribunal..... 1

NEATE, Mr Graeme John, President, National Native Title Tribunal 1

Committee met at 7.30 p.m.**DOEPEL, Mr Christopher Bellinger, Registrar, National Native Title Tribunal****NEATE, Mr Graeme John, President, National Native Title Tribunal**

CHAIR—I declare open this public meeting of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund. I welcome the witnesses. The committee prefers all evidence to be given in public but should you at any time wish to give your evidence or part of your evidence or answers to specific questions in camera you may make application to do so and the committee will give consideration to your application. I point out, however, that evidence taken in camera may subsequently be made public by order of the Senate. Should you need to take a question on notice I ask that the answer be provided within a 30-day period, which is the standard period with respect to estimates practice.

I invite you to make some opening remarks about the committee's inquiry into the National Native Title Tribunal's annual report for the year 2003-04. At the conclusion of your remarks and in accordance with standing orders, I will ask senators and members who are present tonight to ask you some questions regarding your annual report.

Mr Neate—The National Native Title Tribunal is represented this evening in response to the committee's invitation to the tribunal to give evidence in relation to the committee's examination, under section 206 paragraph (c) of the Native Title Act 1993, of the 2003-04 annual report of the tribunal. On behalf of the tribunal, I congratulate you, Senator Johnston, on your reappointment as chair of this committee and congratulate other members and senators on their reappointment or appointment for the first time to this committee.

The tribunal has valued the work of this committee in previous years. The committee's report on the effectiveness of the tribunal was tabled during the year covered by this annual report and is referred to in that annual report. We look forward to reading your report on the inquiry into the capacity of native title representative bodies to discharge their responsibilities under the Native Title Act.

The tribunal's annual report for 2003-04 sets out in detail a range of activities, outputs and outcomes for that financial year. I need not go into detail in this opening statement but make the following five brief observations about some of the matters covered in the report.

First, the 10th anniversary of the commencement of the Native Title Act and the establishment of the tribunal occurred on 1 January 2004, midway through the year under review. The range of activities and outputs described in the annual report demonstrates the extent to which those affected by native title matters—whether they be governments, large corporations or individuals—have come to accept native title and find ways to negotiate outcomes using the scheme of the act. Some of the human relationships developed in the course of those negotiations are illustrated in the video *Native Title Stories: Rights, Recognition Relationships* launched by the tribunal in February 2004 and provided to members of this committee.

Second, as the tribunal has noted in previous years and as this committee has acknowledged, much of the nature and volume of the tribunal's work is affected directly or indirectly by

external factors. In the year covered by the report, for example, judicial decisions and appeals from some significant judgments affected the pace of mediation in various matters and the number of native title determinations registered by the tribunal.

Third, in the reporting period there was a steady increase in the number of Indigenous land use agreements negotiated and registered under the Native Title Act. Some 46 ILUAs were registered in that period, bringing to 130 the total number of ILUAs registered in the period between when the act was amended in 1998 and 30 June 2004. That trend has continued and, as at 8 March this year, there were 148 registered ILUAs, with more than 30 agreements currently being notified for registration.

Fourth, there have been shifts in the nature and extent of the future act work of the tribunal, particularly in relation to exploration and mining. Future act consent determinations are becoming an increasingly common means of finalising negotiations, and there has been a reduction in the number of objections to the use of the expedited procedure under the act—in part, at least, because heritage protection regimes have been negotiated in Western Australia and Queensland which are aimed at meeting a major cause of objections to the expedited procedure. Pro forma native title mining agreements have been developed in Victoria, and more than half of the registered ILUAs in the reporting period involved exploration or mining. Leaders of the mining industry have increasingly urged the negotiation of mutually beneficial and sustainable agreements with local Aboriginal communities and have spoken of relationships and partnerships with those communities. Such rhetoric and, more importantly, the range of agreements being reached is one clear instance in the shift in attitudes to native title in the decade since the act commenced.

Fifth, the tribunal has continued to provide various forms of assistance to parties at stages before and during native title proceedings and has assisted parties to negotiate Indigenous lands use agreements. That assistance has included providing a range of geospatial or mapping tools to parties, sometimes in remote locations.

I have mentioned briefly just some of the features covered by the year's annual report. Mr Doepel and I hope to be able to provide adequate answers to the committee's questions this evening. If we are not in a position to provide sufficiently comprehensive answers on this occasion, we will request an opportunity to take those questions on notice and reply in writing to the committee as soon as practicable—and certainly within the period required by this committee.

CHAIR—Mr Doepel, is there anything on behalf of the registry you want to say by way of an opening statement?

Mr Doepel—No, thank you.

Mr McMULLAN—Mr Neate, page 6 of the annual report refers to the fact that guidelines on the government's requirements in relation to evidence of a native title claim group's connection to an area of land or water claimed had not at that stage been published. Have they been published yet?

Mr Neate—Not that I am aware of. When you say government, are you referring to the Australian government?

Mr McMULLAN—Yes.

Mr Neate—As will be apparent from this and previous reports, some of the state governments have published guidelines and, indeed, in the year that is the subject of this report the Queensland government revised its published guidelines. But, so far as I am aware, to date the Australian government has not published guidelines. To the extent that there have been public statements on behalf of the Australian government, the present Attorney and his predecessor have made speeches at various conferences about the process and the requirement of the Australian government that any determination of native title accord with the requirements of the law but have not gone really into more detail than that.

Mr McMULLAN—Do you expect some guidelines?

Mr Neate—I am not aware that any are being produced at the moment.

Mr McMULLAN—Is it significant that we have not got any? On the face of it, it seems to me that it is, but you are more expert in it than me.

Mr Neate—Let me explain a little about how consent determinations of native title are reached and the role that the Commonwealth may or may not play from case to case. The relevant Commonwealth minister, in this case the federal Attorney, has a right under the Native Title Act to be a party to any native title claimant applications. As often as not the Commonwealth chooses not to be a party, but under the act the Commonwealth can intervene at any time in the proceedings if it chooses to do so, as of right. Consequently, many negotiations occur between the native title claimants and respondent parties, including ordinarily the relevant state or territory government as the first respondent, towards a negotiated outcome. On occasions the Commonwealth intervenes or is a party, but not always. There have been a number of determinations, including in the current year, to which the Commonwealth has not sought to be a party or has not been a party, so the absence of Commonwealth guidelines has had no direct impact on the result. Where the Commonwealth is a party, the Commonwealth insists on any determination of native title reflecting the current state of the law. That in itself is unexceptional because one would imagine—

Mr McMULLAN—It is a pretty anodyne remark, isn't it?

Mr Neate—others would want that. Indeed, the court, in making orders—

Mr McMULLAN—We would prefer most of the things we do not to be illegal. That is not a bad basic start.

Mr Neate—I think the point here is that the parties who negotiate the terms of a determination of native title settle between them what those terms might be. It is, hypothetically at least, open to parties to agree to things that perhaps the law would not recognise. I think that is a concern of the Commonwealth that agreements not be reached which go beyond the scope of what the law recognises from time to time.

Mr McMULLAN—I do not want to pursue it any further than this one extra point. The reason it seemed to me to be a problem is that it has the capacity—it would seem to an outside observer—to generate some uncertainty amongst parties other than the Australian government as to whether or not they are proceeding in a manner against which the Commonwealth may subsequently choose to make an intervention that will overturn, slow or disrupt their negotiations. That, on the face of it—to a person looking at it from the outside saying, ‘This must be a reasonable prospect’—is something that could arise. Has it occurred? Is it a possibility? Am I jumping at shadows, in which case I will move on and ask you about something else?

Mr Neate—I would have to say it is a possibility. Whether it has actually occurred I could not say. The Commonwealth certainly takes an interest in the determinations that are reached but chooses from case to case whether it will be involved and, if so, when.

Mr McMULLAN—On page 19 there is a remark—if you want to find it, it is at paragraph 5, but I am not concerned about the detail of the quote. It says:

There are indications that some governments may be considering legislating to create a new form of indigenous land tenure to meet some of the issues ...

What are you referring to there?

Mr Neate—I understand there have been discussions in perhaps one or two state governments about reviewing existing land rights legislation or looking at possible new forms of Indigenous title. I am aware, for example, that the state of Queensland is currently undertaking an extensive review of the Aboriginal Land Act 1991 and the Torres Strait Land Act 1991, in part at least because both of those acts were enacted before the High Court’s decision in Mabo. The native title legislation has come along subsequently and there is a degree of interaction between the two pieces of legislation. This many years down the track the state wants to review its land rights laws to see if they are operating effectively in the current environment.

Mr McMULLAN—Just today—and you probably would not have had a chance to see this because you have been travelling—I saw on the ABC web site, but it may be elsewhere, that Victorian Indigenous groups were considering withdrawing native title claims in favour of what they call ‘land justice settlements’. They are obviously talking about some capacity to enter into agreements. You probably know some of the background in Victoria. These are groups in the areas around Bendigo and through to Mildura. Has that issue arisen for you or are you aware of it?

Mr Neate—It is illustrative of a proposition, which is put at a number of points in this annual report, that increasingly throughout the country Indigenous groups and particularly governments are looking to a range of packages to settle proceedings which commence as native title proceedings but may end or be resolved in ways other than a determination that native title does or does not exist. Examples of this are given in the annual report, and lists of the sorts of ingredients in a package that might be considered or are being considered from place to place. They include things like the grant of title by, say, a state government over areas of land in which Aboriginal people have an interest in return, say, for the withdrawal of a claim or as part of the settlement of a claim. So, whilst I am not directly aware of the example you have cited in your

question this evening, it is illustrative of the sorts of discussions that go on almost on a daily basis in different parts of the country.

Mr McMULLAN—Does the tribunal get involved in some of those?

Mr Neate—We do, in large part because the claimant applications that come to us have in some cases been on the books for many years, are in terms that were framed perhaps many years before some of the recent High Court decisions and have sought outcomes which are no longer available at law or likely to be negotiated. But we take the view—and we have been quite public about this in various forums—that so long as the claim is on foot and the parties are wanting to talk about how best to resolve the substantive issues, the private and without prejudice nature of mediation under the Native Title Act gives parties an opportunity to explore outcomes which might meet the real needs of the applicants on the one hand and the sorts of things that governments are willing to consider offering on the other and lead to settlements which the act actually contemplates. In section 86F the act contemplates agreements to resolve native title applications which can include matters other than native title. So some of these packages are the sorts of things that are contemplated by the act and emerge from native title mediations. So, yes, we are involved in them.

Mr McMULLAN—I do not need to refer to a page number here, but at a couple of points you refer to the section of the act that talks about negotiating in good faith et cetera. First of all, I am interested in the importance of that section. Have you needed to use it in encouraging—if I might use that word—parties to negotiate in somewhat better faith? What is your general view about that section?

Mr Neate—That section only arises in the case of future act negotiations—that is, primarily applications in respect of the grant of mining leases. It is a precondition to the tribunal arbitrating about whether a particular act should be done or not that six months have passed since the section 29 notice was published and there have been good faith negotiations in that period. Parties are well aware that if they are unable to reach a negotiated outcome and come to the tribunal for us to arbitrate, if there is any suggestion that there has been an absence of good faith a party can raise that. If the tribunal determines that negotiations in good faith have not taken place then that precondition is not met, therefore we cannot arbitrate.

There have been instances where that issue has been raised and copious amounts of evidence have been led by the respective parties and the tribunal has had to make a preliminary ruling on that point before being able to move on to the substantive point. I may be wrong but I think in all, certainly in most, cases the tribunal has determined that in fact good faith negotiations have taken place, and then a separate hearing occurs in respect of the substantive issues. It would be fair to say, Mr McMullan, that amongst grantee parties—that is, mining companies and the like, state and territory governments and Indigenous groups—there is enough appreciation of the significance of that section that people structure their negotiations in a way that evidence can be produced that good faith has been exercised.

Mr McMULLAN—It seems to me that laws that require negotiation are really capable of being honoured in the letter but not the spirit. But something like that gives you a little more leverage to get at the spirit reflected as well as the letter.

Mr Neate—It does. Because the act says no more about what the content of good faith negotiations might be, we have had to develop over quite some years now a body of law, which so far as I am aware has been endorsed by the Federal Court, about the sorts of criteria which evidence good faith negotiations. You would appreciate that it is not possible to be completely prescriptive and say there is a list of things that must be complied with in every case, but certain indicia have emerged over the years in various published determinations by the tribunal and judgments of the Federal Court which give people a pretty fair idea.

Mr McMULLAN—This is on something of quite a different character to those matters that go to the act and substance. In the list of consultants at page 135, you paid \$88,000-plus to Colmar Brunton for external communication research. Can you tell me what that was for?

Mr Doepel—Yes. We conducted a client satisfaction survey. I think we have spoken briefly about it in these hearings before.

Mr McMULLAN—That is the survey that is reported in here.

Mr Doepel—That is correct. It was a survey done in two stages. We went through Colmar Brunton to identify individuals and organisations—all levels of government, industry, Indigenous people and their representatives—to frame some sets of questions that went to the heart of people's satisfaction with a range of services that we provide—for example, registration services, services around our future act functions, information and the like. Colmar Brunton, at arm's length from us, in accordance with industry codes of practice, went off and did some sampling for us. We found—I am trying to remember the numbers off the top of my head; I think they are in this report—that the general proportions of satisfaction—

Mr McMULLAN—I have read that. I am interested in the tender, not the outcome. How did they get chosen?

Mr Doepel—This is going back a while.

Mr McMULLAN—It says here 'extension of select tender'. It is a beautifully ambiguous phrase and I am trying to find out what it means.

Mr Doepel—In the reporting period before, we had gone out to a number of these social research groups through a select tender process—we went to about six, from memory—and Colmar Brunton came out in that process. The contract then went over into a second year and that is why it appears here.

Mr McMULLAN—Did you choose them? Did you conduct that review of the six?

Mr Doepel—We did. We chose them according to the general procurement guidelines. One of the things that we were guided by with this group was that they had done a fair bit of work for Commonwealth client service delivery agencies in previous years and had also done work around the delivery of services to Indigenous clients.

Senator SCULLION—Mr Neate, I would like to be able to point to the report and ask you some specific questions, particularly in the representative bodies area, but from a recent glance

through the report I am not able to do that. Firstly, congratulations on the production of a report that is actually readable. I pick these things up and I am continually frightened by graphs and very small numbers; they really mean very little to most people. The inclusion of a number of photographs brings a bit of life to what I think is an excellently prepared report, thank you.

I would like to make a couple of brief comments so you can understand the context of my question in terms of representative bodies. I work closely, as you know, with both the Central Land Council and the Northern Land Council, and what they both are very good at and have always been good at as part of their principal charter is land acquisition. Perhaps their focus has not been that way, but we have not been particularly good at getting some economic or social benefit out the lands which they acquire. Generally, they do not necessarily bring those skills to that task—and they tell me that that is not necessarily their charter.

I have no issue with that, but I do know that it was a hope that under native title the representative bodies would be able to make some transfer from land ownership to some sort of capacity to bring economic, social and other benefits to Indigenous title holders. Perhaps in a broad sense you could give me your view of how we are going with making that translation in terms of representative bodies—we may, who knows, be looking into that in a more official capacity later on this year—and potentially touch on those resources, whether human or other resources, that we need to inject into those bodies to make them work better, if that is the case.

Mr Neate—I might start by answering the question more broadly and then focusing on the role of representative bodies. On pages 23 and 24 of the report, I make the point in the overview:

The resolution of native title issues will not of itself resolve other social issues.

And I have said in this report and elsewhere that native title itself is not an economically valuable commodity, but the recognition that people have native title gives them certain procedural rights which they can then use in negotiations with others who want to undertake, say, exploration and mining activity on the land where they have been held to have native title. Indeed, as members of this committee will know, that right to negotiate extends to people who have registered native title claims, so you do not have to wait until your native title claim has been determined in your favour before you secure those procedural rights.

That means that, for at least some groups in different parts of Australia, one of the very tangible benefits of the native title regime has been their capacity to negotiate with others about how that land is used and secure from those negotiated agreements financial returns, employment and training opportunities and so on. A number of the Indigenous land use agreements that have been negotiated in previous years and in the year covered by this annual report illustrate that proposition.

In terms of how representative bodies are part of that process, it needs to be recognised that the future act regime particularly is an opportunistic regime for which representative bodies no doubt have great difficulty forward planning. They can have their strategic plans, their financial plans and so on, for things like research projects, and the negotiation or indeed litigation of native title claims planned some years out—and I am happy to explain that if members of the committee want to raise it with me. But if an exploration or mining company comes along and secures the right to a particular interest in an area and notices are published to that effect, people

have to immediately decide whether they are going to negotiate in relation to that project. What this has meant, as I understand it, is that representative bodies then have to decide on behalf of their Aboriginal clients how many of their resources they are going to put into these sorts of negotiations and how many resources will remain for the negotiation of the underlying claimant application or some other form of agreement.

So I think a number of representative bodies would find themselves under pressure from time to time from a whole raft of published notices for proposals to grant exploration of mining interests in areas for which they have responsibility, and then they have to go and get instructions from their clients about whether they want, for example, to object to the expedited procedural claim, engage in negotiations in good faith with somebody about a proposed mining tenement or whatever. I am sure that on a very regular basis in the rep bodies around the country, not just in the two areas of the Northern Territory that you are most familiar with, this sort of discussion goes on all the time.

In my experience, representative bodies do put resources into negotiating mining agreements and Indigenous land use agreements because they are seen as agreements which can be negotiated usually much more quickly than a determination of native title and can secure the sorts of tangible outcomes that you are alluding to. Hence I think probably priority in time and resources is given to those sorts of negotiations in order to secure those benefits for Aboriginal people within their area.

Senator SCULLION—In closing I would like to make another remark about the report. In your opening remarks you talked about the increase of ILUAs and about the number of outcomes in the report. It is not often that you pick up a report that does not just deal with the amount of money that we have spent in an area. I commend very much, not only as a member of this committee but as a member of the public, moving towards looking at outcomes and the way we can measure outcomes, so as the various reports come to us they are not only about dealing with the fiscal processes but looking at outcomes very carefully. Frankly, I am far more interested in putting some benchmarks on the outcomes of the functions of the Native Title Tribunal and how much money you spend on that. I commend you for moving in that way, but we would certainly encourage trying to select some other benchmarks in that area that we can have a look at from time to time.

Mr TOLLNER—Like my colleagues I congratulate you on your report. On page 17 in your introduction about future trends you say that the native title work will increase and that there are a number of reasons for that increase nationally. You gave a couple of examples. I wonder whether you can highlight a couple of other examples to show why your work will increase and indicate those areas where you see a decrease in objections and the areas where you see an increase in objections. Are there any particular areas where you think there will be increases in objections and any areas where you think there will be decreases in objections?

Mr Neate—The trends are not so much in relation to objections but more about the nature of the outcomes that are being sought and the processes that will lead to them. There is, as you will see, an enormous number of native title claimant applications yet to be resolved. That work will continue for a long time, unless a range of negotiated outcomes are reached, perhaps of the sort that I mentioned to Mr McMullan earlier, that provide satisfactory outcomes for all the parties

but do not necessarily require demonstration of native title to the level that, say, the High Court has indicated in its decision. So there will be a lot of that sort of work going on.

The negotiation of outcomes in relation to claimant applications may, over time, take on a different character as more and more groups in some parts of the country are tending towards non-native title outcomes as compared with what I will call conventional determinations of native title. These require a lot of work in terms of gathering evidence of connection to land, detailed tenure histories of each parcel of land that is the subject of a claim and so on, if you follow that strict legal approach to those determinations. Whilst there are a large number of claimant applications to be resolved, how they are resolved and what parties bring to the table will change over time and that may, I trust, lead to a much quicker disposition of many of those matters.

We have seen, and it is reflected in this report, that the number of objections to the grants or the notices saying that there will be exploration interests granted on the basis of the expedited procedure has dramatically reduced. I think it will continue to reduce because there are a range of cultural heritage agreements out there now, particularly in Queensland and regions of Western Australia. As I understand it, these will provide sufficient protection for local Aboriginal communities so that their sacred sites and so on will not be interfered with by explorers and sufficient flexibilities for explorers that these grants of exploration interest can go through more or less unchallenged now, so explorers can get out, look around and see if they can find something. If they do find something then the real negotiations will commence in respect of the native title holders' or the native title claimants' rights and interests.

Even if all the native title claims that are on the books were settled tomorrow, native title work would not go away because you would have all those native title holders around the country who would have these procedural rights. Every time, say, a mining company wanted a grant of a mining interest, unless they had already negotiated an Indigenous land use agreement which foreshadowed a number of stages in the project, they would have to keep coming back to negotiate. So in the future, looking quite some way down the track, once the claims have been settled, the rights which people have where they have been held to be native title holders will continue, presumably in perpetuity, so that they will then have that sort of activity to engage in.

If, as may well be the case, companies and governments and so on become more and more familiar with the sorts of agreements that are likely to be negotiated, it may be that we, over time, get more and more pro forma or template agreements which become a sort of industry benchmark. I guess, Senator Scullion, this is something which will interest you over the years: whether community and industry standards emerge so that people say, 'Well, this is the sort of agreement we would expect to negotiate.' The negotiations are really around the periphery. You are not starting from scratch. So, although the volume of the work might continue well into the future, again the negotiations may be truncated because people have got used to dealing with each other or it is generally accepted that there are some fairly standard forms of agreement around and, if that is the sort of thing that is on the table, that is where the negotiations will occur.

I have taken some time to answer your question. I trust I have addressed the point. But it seems to me that, even with the resolution of the vast majority of claims that are on the books

one way or another, depending on what those outcomes are, there will be other forms of work which will then follow.

Mr TOLLNER—I suppose what I am getting at is this: you say this annual report shows there are more native title applications, primarily claimant applications. Why is it that, after such a long period coming to terms with this act, people are now sort of just saying, ‘Hang on, I may be a claimant of native title,’ when I would have thought that that part of the act would have been dealt with for some time. It seems to me—and I may well be wrong and I think you have just answered it—that the number of native title claimants is on the increase.

Mr Neate—I can answer your question with perhaps the clearest example from the northern part of the Northern Territory. The statistics for this will be in annual reports for the year or two prior to this one, but the picture continues through this annual report. I think it was in about the year 2000 that the Northern Territory government decided to abandon any hope of having its own alternative regime for dealing with future acts involving native title and adopted the scheme under the Native Title Act. You may recall that the Northern Territory Legislative Assembly had passed its own legislation which had secured the approval of the federal Attorney-General, but the Attorney-General’s declarations were disallowed by the Senate.

So the Northern Territory government decided to invoke the terms of the Native Title Act. By that stage, there were many hundreds of applications for exploration tenements before the Northern Territory government. There was quite a sizeable backlog because there had been no activity in this area for some years. As the Northern Territory government proceeded to publish notices of intention to grant exploration interests, the question arose for Aboriginal people in the Territory: if we want to take any proceedings under the Native Title Act—for example, to object to the grant of these exploration interests using the expedited procedure without negotiation with Aboriginal people—the only way we can secure those procedural rights is to have a registered native title claim in the system. So, for a period, lots of native title claims were lodged with the Federal Court and referred to the registrar for registration by people who essentially wanted to secure immediate negotiation rights in respect of the proposed grant of an exploration tenement.

So there was a proliferation of new claims lodged, often over quite small parcels of land—they were confined to the area which was going to be the subject of the exploration tenement—in order to secure procedural rights under the Native Title Act. So, whereas for some years there had been some hundreds of native title claims in Western Australia and Queensland and they had led the nation statistically, suddenly there was an upswing in the Northern Territory. The Northern Territory came close to, and I think may have even passed, Western Australia in the number of claims in the system. But the reason for the claims being made at that time and in that form was that all these exploration notices were being published and people wanted that right to negotiate.

CHAIR—That is progressive though. From our experience, we want the rep bodies to marshal and scrutinise these applications and bring them together to eliminate overlaps and to administer an orderly and appropriate application process. I realise that the future act process is tempting and has yielded, as you have pointed out, these responses to mineral discoveries, development proposals or whatever. What are we doing about that? Is it best to sit back and just let them lodge the applications, or do we need to say to the rep bodies, ‘Listen guys, you have to man the pumps and bring these claimants together’?

Mr Doepel—There is a historical perspective to this issue. Since the beginning of the act, there have been some 1,370 claimant applications lodged. Through processes of withdrawal, consolidation—which many of the rep bodies have actually actively contributed to—and determination, the number of claimant applications requiring resolution at the moment sits at 597. So on the way through—

CHAIR—I thought there were 615 active claims.

Mr Doepel—I am referring to the number as at yesterday, sorry. The number changes.

CHAIR—We are talking contemporary figures; not figures from a year ago.

Mr Doepel—Sorry, we have to indicate where our snapshot was taken. Let us take yesterday's figures—there were 597 active claimant applications on the books. So some 770 have gone through various processes, including determination.

CHAIR—Amalgamations and—

Mr Doepel—Amalgamation, consolidation—which is the point you are making about one of the significant roles of native title representative bodies—and just straight-out withdrawal. Again some of that is prompted by the work of native title representative bodies working with groups and people realising that there is nothing fruitful to come from pursuing a claim. In part, Mr Tollner, that goes back to your question about the numbers. There is a historical perspective about where we started, how much has gone into the system and what that has packed down to. It is still a significant number but it is far fewer than the 1,370.

Mr Neate—I think I should say two things, lest I be misunderstood in the Northern Territory. Firstly, the Central Land Council took a different approach from the Northern Land Council and lodged many fewer native title applications on behalf of people in its area than the NLC did. But, secondly, in recent times—and it is stated quite directly in this annual report—the Northern Land Council has revised its approach and has been far more strategic or selective in deciding which applications to lodge. So there has been a marked reduction in the number of claimant applications in the Territory in the year covered by this report and subsequently.

CHAIR—What do you see as the motivation for that change of policy, if you like, by the land council—cost, administrative convenience?

Mr Neate—I would say that cost was one element. I think it would be fair to say that the vast majority of the objections that were lodged to the tribunal against the expedited procedure were dismissed by the tribunal for reasons which were published. Very few of the objections were upheld. That may well have led to people considering carefully which groups really needed to lodge objections and hence which groups needed to lodge claims for registration in order to secure that right.

CHAIR—So they came to the conclusion that there needed to be a rationalisation of claims and resources?

Mr Neate—That may well be the conclusion that was reached. But let me also add that the number of claims and the timing of claims were precipitated in large part, as I said, by future act notices. That is not to say that at some point in the future those groups would not have lodged perhaps more extensive country claims, as we would call them, over those regions, having had more time to prepare them and give more mature consideration to the materials which could be assembled before the claims were lodged. I am not saying that the claims would not have come at some point but simply that the form and timing of them was precipitated by the future act notices.

CHAIR—Do you have any possible way of anticipating what is still out there? That is the \$64 million question, I know.

Mr Neate—It is a fair question. When we are preparing our projections for each year for budgetary purposes we look in every state and region of the country and we ask around. From our own information gathering, as best we can we try and find out which groups are preparing claims, whether they are likely to be prompted by future act activity in a region or whether people have been taking some time, doing research and getting together materials to put the best possible claim they can into the system. In order to say to the parliament, ‘We expect so many claims to be lodged,’ each year, we have to do that sort of inquiry. It is done in a fairly informal fashion but, as you would appreciate, we have contact with representative bodies on a daily basis. Representative bodies do not always represent the groups who lodge the claims, so you pick up a bit of information around the traps. We talk to governments about their projections for notifying proposed grants of exploration mining interests in regions where perhaps there are not currently claims, to get a feel for where there might be some areas which might prompt some claims. On that basis we prepare our best estimates.

Mr TOLLNER—Mr Doepel, I noticed on page 128 of the annual report that the Northern Territory government took you to court. I have never heard of the Killarney native title application. Could you briefly tell me what led them to take that action.

Mr Doepel—This is a decision that deals with the heart of my administrative responsibilities in applying the registration test to native title claimant applications. I guess the context for understanding this decision can be best set out by saying that there is a sort of polarity of views as to what I as registrar, or my delegates working on my behalf, should be doing in looking at claims that coming forward. Do we take simply what is in the application, the assertions of the group, the authorisations or certifications, at face value and deal with what is there in applying this administrative test—that is one view—or am I under an obligation to inquire further into the substance of what is asserted?

CHAIR—The old chestnut.

Mr Doepel—Yes, the old chestnut. I am considerably cheered up because I have court authority that supports both propositions. As an administrator I have to make a choice as to where I go.

Mr McMULLAN—It seems that you cannot be right or you cannot be wrong—one or the other!

Mr Doepel—That is right. In this case, the issue being tested was, effectively: how deeply did I have to go into the material that was before me; basically, what was the extent of my duty to inquire? As can be inferred from this case, the applicants quite clearly thought that I should have gone further, but in this case His Honour set a yardstick or a benchmark that says that I basically look at what is before me. I will be quite open in my comments on this. As I have single-judge decisions supporting the proposition that I go further, that of course has led to an administrative conundrum for me as to what, in fact, I do. We have discussed this with the internal legal advisers and my delegates group, and I guess the approach we take is more or less a halfway house.

CHAIR—The appeal application was withdrawn?

Mr Doepel—It was withdrawn, as is noted here. I have to administer between those points, I guess.

CHAIR—I am interested in the genesis of this case. The Northern Territory government apparently took on a case—and I am ignorant about this, so I am asking legitimately—on behalf of some people who felt aggrieved?

Mr Doepel—No. It is a while back and I am searching my memory as to what the genesis was. In the exercise of my statutory responsibilities, since the 1998 amendments I have been in pretty constant discussion with state and territory governments about the content of my duties under the act. On the behalf of the governments there have been fairly firmly held views as to how far I should go in administering my segments of the act. The view here was that I had not gone far enough. Some very fine points of law were taken. I do not think they were necessarily representing any particular group but, as the territory or state government is always the first-named respondent in the proceedings—

CHAIR—What was their standing, though? What was the point at issue over that particular claim and that particular registration? Did it involve some land they wanted?

Mr Doepel—I cannot recall the detail. As the first-named respondent in every matter, I have from time to time had the primary applicant reviewing my decision being a state or territory government, because they have a view about how the registration test should be applied; they have a view about the group in question and about whether what is, *prima facie*, allowed through registration is eventually going to be substantiated in a determination.

CHAIR—Are you surprised that they have a view?

Mr Doepel—Not at all.

CHAIR—They did not make any submissions to us.

Mr Doepel—What is also important is to remember that rights and interests go on the register as a result of my registration decisions, and those rights and interests are effectively the content around which the right to negotiate is asserted. So I guess that a territory or state government has an interest in the legitimacy of the group and whether the right to negotiate should be attracted by that group. This has been the issue about my functions all the way through. It is not simply

dissatisfied claimants who may seek a judicial review of mine or my delegate's decisions; respondents, particularly government respondents, may seek—and historically have sought—a review if dissatisfied.

CHAIR—But, predominantly, High Court decisions are basically state government driven and Commonwealth driven?

Mr Neate—In those cases the state or the Commonwealth is the first-named respondent. If you look at the manuscripts of those decisions you will find lists of perhaps dozens of respondents. It happens to be the state, territory or Commonwealth who are the first named ones, so they get their names on the law reports, but there are lots of others there as well.

CHAIR—The expenditure of the cost involved in the appeal usually falls to the state or the Commonwealth. I am sure the Miriuwung-Gajerrong award is a classic, and Yorta Yorta.

Mr Neate—Yes, you are certainly right in that respect.

Mr Doepel—Could I add one clarification? When the decisions of the registrar or registrar's delegates are contested, I submit to the jurisdiction of the court. I normally do not make argumentation. I might provide a supporting brief through counsel to inform the court, but usually I am satisfied to have the clarification of the court. It helps, where there is an applicant, if there is a contradictor.

CHAIR—I was just going to say, doesn't the court want a contradictor?

Mr Doepel—It does help if there is a contradictor and usually the Indigenous side comes in as a contradictor.

CHAIR—If it is a land council, I can understand they would have the capacity to do that, but often you might be in a position where the contradictor has no resources.

Mr Doepel—That is right. But normally there is a contradictor and I submit to the court's jurisdiction and see what the court says about the administration of my powers.

Mr TOLLNER—Just in relation to this, was the Northern Territory government, in your view, trying to seek clarification on a point of law, or was it an acrimonious court case where they had some major disagreement with your decision?

Mr Doepel—Look, they were seeking clarification of a point of law. Not just in the area of determination but also in registration, there have been a series of cases over the years where clarifications have been sought on points of law. Certainly the nature of the claimant group and the nature of authorisation are two areas under the registration test—and ultimately the nature of the group comes out in the determination—which go to the very heart of the claim being made. Who is the group? What are the rights and interests? How are they enjoyed or demonstrated in a contemporary sense? Authorisation is the other area where there is often contention. Do we have a claim that is generally supported by a broader kinship group or kinship groups or is it a splinter group or a family? Is it someone acting on their own or within just a family group trying to separate itself from a large group? Those are issues at the heart of how claims are managed and

they come out in the mediations and, in some cases, in the litigated processes. I see them right up front in the registration test application.

CHAIR—Did you get the impression that some other states were contributing to the Northern Territory's costs in the initial Federal Court action?

Mr Doepel—I do not recall that they did. It was a point that that government took. We are talking about a sweep of time here now. I have been taken into court in previous reporting years by other governments. Western Australia has taken me in.

CHAIR—On exactly this threshold issue?

Mr Doepel—On a range of threshold issues about the application of the test. Certainly in the 1998-2000 period just after the legislation was changed I had something like 14 active judicial reviews at one stage, until the parameters of operating that test began to settle down.

CHAIR—I have a couple of questions. I will give you a copy of an article that will get to the heart of the material first. Whilst that is being brought around to you, I want to say I agree with my colleagues that the report is very readable. I want to congratulate the tribunal on its presentation, because I do not see any item of interest that is not addressed. The committee has a stock standard repertoire of items it is interested in and they are all, as I say, addressed. This article is from Thursday, 16 December, and I will take you through it briefly so I am not seen to be ambushing you in any way. The first sentence is:

A Federal Court investigation into native title hearings has revealed unrealistic Mabo-style cases are clogging the system, wasting money and delaying achievable claims.

Firstly, was the tribunal involved in the Federal Court investigation; are you aware of what they are talking about in this article?

Mr Neate—I am aware of the report. In fact, I have been provided with a copy of that report by the court. The court engaged an independent consultant to conduct the inquiry, if I can use that word, or to prepare the report on behalf of the court, and the consultant who was engaged to do that interviewed numerous people throughout the native title system, including me.

CHAIR—Including tribunal officers and you.

Mr Neate—And at least one other member of the tribunal. But this was very much an initiative of the court, commissioned by the court, and was focusing really on the court's role and the performance of the court's functions within the native title system. It certainly was not directed at the mediation process or the role of the tribunal.

CHAIR—I am certainly not suggesting in any way that the tribunal bears any responsibility for any of the comments if they are perceived to be adverse in this report. But it just interests me whether, because we have switched over to a process where the application is direct to the Federal Court—I am interested in your view—this is a natural by-product of having direct input into a sort of black-letter law environment and then reverting back to the registration process from the court? I think it is very complex, quite frankly, for claimants to have to go straight to

court, as opposed to the old system . That is just a personal opinion; that does not count for much. But this report seems to support the fact that there are misconceptions out there and that the educational and communication function needs to be very much an ongoing and, I suppose, energetic one.

Mr Neate—If I can build on a couple of answers that I gave a little earlier, many of the native title applications that are still within the system, notwithstanding the 700-odd that have been withdrawn, are claims that were lodged five, six, seven, eight, nine years ago. In the very early days of the native title system, the understanding of what native title rights and interests might be recognised was much less complete than we now have, and certainly the requirements of judges, if matters were litigated, were far less well known and understood. Perhaps the expectations or aspirations of Aboriginal people in terms of pure native title outcomes were far exceeded by what, even then, the law was capable of delivering and what we now understand the law is likely to deliver.

The claims that, as you have indicated, were originally lodged with the tribunal then became proceedings in the court as of 30 September 1998. So the court inherited hundreds of files that had never been created with a view to lodgment in the court. There were some years of sorting that out, and the registrar had to deal with registration testing of many of them and so on. So it is probably fair to say that many of the claims that are still somewhere in the system were lodged with high expectations, certainly high aspirations, which ultimately are unlikely to be met, and as the claims work their way through the system that becomes more and more apparent to the applicants.

If you look at pages 82 and 83 of the annual report, you will see under the heading ‘Working with claimants and Indigenous organisations’ that the tribunal was quite active in that year in conducting various workshops and seminars and so on around the country, in large part directed at this very issue: explaining primarily to applicant groups and sometimes their representatives—and certainly always in conjunction and cooperation with the land councils—what the current state of the law is. We were not making any assessment of the merits or otherwise of particular applications. We were simply explaining to people that, in light of the High Court’s decisions in Ward, Yorta Yorta and so on, this is where the benchmark is. I am told by the people who have been delivering these seminars, now to more than 800 people around the country, that these are long and sometimes quite animated sessions and often, in content, quite disappointing for Aboriginal people when they realise what they are unlikely to achieve in many cases.

But when somebody independent of any particular interest comes along and says, ‘Look, this is the way it is, people’—when they are willing to sit down for some hours and talk people through the current state of the law, the processes, where they are up to in the processes, and the things that will have to be overcome ahead, particularly if a matter is litigated—many groups form their own assessment of their prospects of success. They do their own reality checking; they do their own risk analysis. Then they can sit down with their advisers and say: ‘Is this a claim we should be pursuing in this form? Should we be looking at some alternative form of settlement?’—of the sort that Mr McMullan mentioned earlier. As I think these pages of the report indicate, we are doing some of that work. I am not saying that is our primary responsibility, but I understand from talking to the people who deliver these workshops that the response has been universally positive, even though the content of the workshops has been quite disappointing or confronting to some people.

CHAIR—Thank you for that answer. Do we in fact communicate adequately with the Federal Court, bearing in mind that the officers and the registry of the Federal Court, which receives these applications, are probably not that enamoured with this process and its theoretical and historical genesis?

Mr Neate—Every claimant application made to the Federal Court under the Native Title Act is referred to the registrar for registration testing. The registrar then notifies the facts of the claim, people apply to be parties, and so on. As far as I am aware, the court always refers the application and the parties to the tribunal for mediation. Although the law requires for constitutional reasons that these applications commence and end as proceedings in the Federal Court, the act provides that, as a general rule, the court must send the matters to us for mediation—and, as far as I am aware, it always does. The court then supervises the mediation and, as we say in this report, the members report to the court regularly about the progress of mediation. But the court is more than happy for parties to resolve these things and avoid a trial in the court.

You would know, if from no other source than this annual report, but no doubt from elsewhere, what a drain on everybody's resources trials are. Trials are long and expensive, not only in dollar terms but also in judge's time, the enormous amount of research and work that goes on outside the hearings, and the sheer emotional and other effort that goes into them. So the court is not only not averse to mediated outcomes; it actively encourages them.

We have regular contact with the Federal Court at various levels. I communicate periodically with the Native Title Coordination Committee of the court, which is a committee of judges who deal with native title and some of these broader issues. If the tribunal wishes to raise an issue with the court at the institutional level, or if the court wishes to raise an issue with the tribunal, that is how we do it. At a state and regional level, the court periodically convenes user group meetings in which we are involved.

As you will see from this annual report, the members of the tribunal not only report to the court on individual claimant applications but increasingly now report on claims in a region. We sit down with state or territory governments, the representative bodies, perhaps some other major parties and eventually the court, for regional case management conferences, regional directions hearings and regional planning processes so that between us we can work out a sensible priority of matters which are further advanced in terms of their research and preparation, either for a mediated outcome or for trial, and matters which are less advanced, so we can work out a timetable, which of course is subject to change from time to time but it gives some guidance to the court, to us, to rep bodies, to states and so on in performing our respective functions in the way forward. There is an ongoing dialogue with the court at various levels—and usually in a quite open and transparent fashion in terms of reports to the court or directions hearings—where the way to proceed and, indeed, the way to list or prioritise matters is articulated quite openly and regularly.

CHAIR—I just have a few little matters I want to run through. Firstly, on page 41, in your reference to outcomes, the figures in 1.1 and 1.4 are different from the figures with respect to financial performance in terms of actuals in column 2.

Mr Doepel—Sorry, what was your first reference there?

CHAIR—Page 41. At 1.1 we have a total cost of \$3.749 million and yet we have \$3.726 million—but the other figures comply with the cross-referencing. And the same with group 1.4: there is a little bit of a discrepancy of some \$300,000.

Mr Neate—Which figures are you comparing it with?

CHAIR—I am comparing it with the figures over here that do appear to match up with respect to group 1.2 and 1.3—\$13.613 million and \$3.155 million.

Mr Doepel—Which page have you gone to?

CHAIR—I have gone back to page 39. See at the top there?

Mr Doepel—You are on page 39. Which item?

CHAIR—Item 1.1. The actuals are \$3.726 million, in column 2 in bold, ‘subtotal output group 1.1’. Then over on page 41 if we look at the outcome and output framework, we have \$3.749 million.

Mr Doepel—I think the answer may be a simple one that goes to one page, page 39, and looking at what is in the appropriation.

CHAIR—The reason I ask the question is that 1.2 and 1.3 replicate the figures.

Mr Doepel—We do have some income from receipts. It is not a lot, but we do charge some fees for certain products and services and they are not usually reflected in the appropriation figure. They are things that we earn. I cannot off the top of my head give you the reason why precisely that perceived discrepancy is there. I am happy to come back and explain it.

CHAIR—Please take it on notice. I thought there might be some simple—

Mr Doepel—I will make inquiries of our chief financial officer.

CHAIR—I do not want to be seen to be too pedantic. On page 42 you have the break-up of where we are at with respect to our ‘claims analysis’ in terms of status at the end of the reporting period. I note that:

- 137 applications had not been accepted for registration

Is there a common thread in that? I think I have asked you this before. It seems a lot to me.

Mr Doepel—They fail for a range of reasons.

CHAIR—So it is a registration test?

Mr Doepel—It is a registration test. Some of it is around authorisation for the non-certified.

CHAIR—Is it the 151 certificate; is that the section?

Mr Doepel—If they are certified they come through on that criterion, but the claimant group might not be sound. Other things may not have been made out in the applications. There is a range of reasons why they fail. In some instances, I have to say, we give a pretty fair level of assistance to applicants and their representatives and we say, ‘If you insist on putting that forward in that form or if you do not have it amended in a certain way—it is up to you—but if it is not amended to cure these defects it is not going to get through.’

CHAIR—So you give written reasons?

Mr Doepel—We do indeed, yes.

CHAIR—How many of the written reasons generate a return bout, if you like, where an application comes back in with amended terms, references and particulars?

Mr Doepel—I cannot give you a precise figure, but commonly that happens, yes. As a matter of process, our delegates do provide an initial assessment for both strands of registration—the claimant applications and the Indigenous land use agreements. We take a client service philosophy here. There is no point in running people through to trap them.

CHAIR—So there is a first pass that is not sudden death.

Mr Doepel—Yes, that is right. I would say there is a very high level of feedback about content and quality. I quite deliberately do not use the word ‘advice’, but there is feedback from delegates and case managers to applicants and/or their representatives about some of the defects that are in applications. But, yes, in response to some of those initial assessments, applications are reshaped and in some cases there is a requirement for formal amendment in the court to cure some of the problems in the application. As a matter of law, once that amendment is sought, the court has to send that back to me for an application for registration test.

CHAIR—When they fail, do they have to make an application to a judge in the Federal Court to withdraw the application?

Mr Doepel—No, the application can actually stay in the system. It is just that it cannot go on to the Register of Native Title Claims and therefore cannot attract the right to negotiate.

Mr Neate—But in every other respect it is treated as a claimant application in the system, so the court would refer it to us for mediation. When the registrar notifies the public and people who, under the act, he is obliged to notify that a claim has been made, that notice has to include a statement about whether the claim has passed the registration test or not. So clearly that is one piece of information which is available to everybody but, in a formal sense, need not affect the procedures which surround the mediation of that claim. It simply means, as Mr Doepel has indicated, that while the claim remains on foot but not on the register people do not have those procedural rights that registered claimants do have.

CHAIR—But the procedural rights are often the principal reason for the lodging of the claim, as we have alluded to. How do they perfect their procedural rights? They have been given a written reason why they are not going to be registered. How difficult is it to amend the application? Excuse my ignorance of the act, but what do they need to do?

Mr Neate—It may not involve an amendment. It may simply involve the provision of additional information which was not before the registrar or his delegate at that time.

CHAIR—So we are including in the 137 those that simply got through subsequently with additional information, but they were technically a rejection.

Mr Doepel—I need to check this for you to see whether, within that 137—either within the reporting period or since—some have come back through. That will be an interesting figure. I can follow that up for you.

CHAIR—We discussed the reasons and we had some submissions, if I remember rightly, during our inquiry into effectiveness about people not knowing why they did not meet the registration test. It seemed to be a bit of a mystery to them.

Mr Doepel—You made a recommendation that we provide a plain English explanation, which we have done since you made the recommendation.

CHAIR—That is right. I see all the decisions being issued and everything. Tell me: 24 were not identified for testing. What does that mean?

Mr Doepel—They could well be old act matters. There were some old act matters that, because of some of the constructions of the act as it was pre-1998, did not ever have to be tested.

Mr Neate—Many of them did, but if they were applications that had been lodged before a date—

CHAIR—So they came through the tribunal process before they had to go through the Federal Court process, and now they are going to the Federal Court but they come back or they do not come back. They are identified by the court? Who are they identified by?

Mr Neate—I think they are identified under the act as claims which were in a category which did not have to be registration tested. They were excluded from that. This means that they are, as with all the other applications, proceedings before the Federal Court but matters which did not have to be registration tested.

Mr Doepel—That is right. There was a class exclusion—I cannot quite remember the precise terms of it—for certain applications made in a certain period that did not have to come back through the registration test.

CHAIR—Of the 615 active claimant applications, do we know how many of those have not been subjected to the registration test? It would be pretty fatal for them to go forward to litigate, wouldn't it, if they do not meet that test? Correct me if I am wrong. That is my impression, but I might be wrong in that.

Mr Neate—Not necessarily. It might be thought that the passing of the registration test establishes perhaps a prima facie likelihood that the claim will succeed. That is not necessarily the case because, as the registrar has indicated, the courts have directed him to have regard to the material before him. But he does not decide whether the claim ultimately will succeed or not. He

has to decide whether the specific criteria in the act have been met on the information provided to him. The registration test requirements are both procedural and merit based. You could fail a registration test by failing to meet one of the procedural requirements but have in substance a meritorious application. So the fact that something is or, importantly, is not on the register does not necessarily indicate prospects of success. That is the legal answer. In practice, particularly as between Aboriginal groups, there is sometimes expressed the view that 'Our claim's on the register and yours isn't,' which shows that—

CHAIR—That is right: 'We've got future act rights; you haven't.'

Mr Neate—And 'At the end of the day, our claim will get up and yours won't.' So, if there is some competition between neighbouring Aboriginal groups, sometimes that is put in the negotiations. But as a matter of law I think it would have to be said that—

Mr Doepel—Can I give you a bit more content in the answer? Just on yesterday's statistics, on 8 March 2005, there were—as we noted previously this evening—597 active claimant applications. Four hundred and ninety-six of those are on the Register of Native Title Claims. So that leaves 101 as of yesterday that are active claims but have not gone onto the register and therefore have not attracted the right to negotiate.

CHAIR—Where does that leave us with respect to respondents who are proponents or land users? Are they on a wing and a prayer as to what compensation they are going to have to pay should those claims get up? There is no future act entitlement there. I am not sure what is best for them. Some people in a short-sighted way might say, 'Well, we don't have to do any negotiations,' because they are not registered, yet down the track there is a liability in the balance sheet that will be contingent upon what happens. What is your view on that? The number 101 scares me a bit, I must say.

Mr Neate—The first part of your question is absolutely correct. As a matter of law, if people are not on the register, others who may wish to do things on the land have no legal obligation to negotiate and the Aboriginal people have no right to negotiate. I am not in a position to express a view about the degree of risk that might pose for a respondent party. But I think one part of the answer may be this: for some groups it will make little or no difference whether or not they are on the register because there is no future act activity proposed or likely to be proposed.

Let me give you an example. If a claim is over an area which is exclusively a national park and state legislation precludes any exploration or mining or any other activity on that national park, then passing the registration test confers no particular advantage on it. I know from some proceedings that I was involved in that when you get close to a consent determination it helps convince a government and others if you are on the register; it just makes the passage of everybody signing off that much easier. But in strict legal terms, in the early days after the 1998 amendment some groups were saying: 'Why would we want to put all the time and resources into passing the registration test when we don't need to? It confers no benefit on us because of the status of the land.' I know I am not squarely answering the main part of your question, but I would imagine that within those 101 claims there is probably a number for which this is of no practical significance, but I cannot give you examples.

CHAIR—Queensland, it says on page 45, had 37 applications, of which 31 were accepted and six were not. The nearest one to it is the Northern Territory with 15, 12 and 2 and one not accepted—I do not know what that means. Why is the number so high in Queensland? Did we have some activity there that has generated these ones, or is it because the president resides in Queensland and they are much more efficient up there?

Mr Neate—It certainly has nothing to do with my place of residence. It may, as in the Northern Territory, be prompted in part at least by future act activity. The Queensland government itself started following the procedures under the Native Title Act in the year covered by this report and following the trend in the Northern Territory, although not to the same extent; that seems to have precipitated a number of claims.

CHAIR—Yes, that would be an explanation. I think that is probably what we are talking about.

Mr Neate—But it does indicate, as I think we say in the report, that the number of new applications is declining from year to year. New applications are coming in, but the bulk of the applications have been made in years gone by. If a large proportion of these in the last couple of years have been prompted primarily by future act activity, then the timing and shape of the applications has been motivated by something other than simply the desire to make a claim.

CHAIR—The reason I asked the question is that, with Western Australia having one accepted and two not accepted, so a total of three, and given the minerals ‘boom’ that we are confronting in Western Australia with iron ore, nickel and gold, I would have thought we would have had a similar sort of response. That is what prompts me to ask the question. So you think it is the changing nature of the policy of the Queensland government with respect to coming on board with the national scheme?

Mr Neate—And Western Australia has always followed the Commonwealth scheme.

CHAIR—And that was the answer with respect to the Northern Territory too?

Mr Neate—Yes.

CHAIR—I would mention in passing that on page 48 we have four determinations in this year. As can you see, two of them are in the Northern Territory and one is in Western Australia. In that context, we go over to page 53, I think it is, and we see we have ILUAs. There is one registered in WA—and we will talk about registrations—again we have 30 in Queensland and 13 in the Northern Territory. First of all, the overall numbers worry me. The ILUAs are fine. But if you take the Northern Territory and Queensland out, we have four determinations and we have one or two registered ILUAs for the period. I am concerned that the figures are skewed by the 13 and the 30 and, if we were to average them out, we end up with very low numbers. If they are low—let us say they are low because of that skewing, and take those out—what is happening here? Is everything grinding to a halt?

Mr Neate—Everything is not grinding to a halt, but I think, as I have probably said every year in appearances before this committee, you have differences between jurisdictions in any one year but then you also have differences within a jurisdiction from year to year and work in peaks and

troughs in different places at different times. The current figures, as at yesterday, for registered Indigenous land use agreements show four in New South Wales, 38 in the Northern Territory, 88 in Queensland, three in South Australia, 13 in Victoria and two in Western Australia.

CHAIR—Why only two in Western Australia, against 88 in Queensland?

Mr Neate—Perhaps I can say, because I have more direct knowledge of this, that the reason for the 88 in Queensland is in large part, though not exclusively, because the state government encourages them. The state government sees Indigenous land use agreements as a very useful tool for a range of matters, particularly for exploration and mining.

CHAIR—How do they do that?

Mr Neate—As part of the administration of their local legislation they encourage people to develop these forms of agreement and have developed template agreements—

CHAIR—What incentive do they provide? That is the crass way that I want to get to how they get people to do these 88.

Mr Neate—There are some acts in Queensland which actually refer to Indigenous land use agreements. In other acts, I understand, where they simply talk about ‘an agreement’, the government makes it clear to people that the form of agreement that will satisfy that legislative requirement is an Indigenous land use agreement. If I can suggest this: success breeds success. Once people have Indigenous land use agreements out there, a multitude of exploration or mining tenements flow from those and a practice develops that this is the way you do business. I might say that in Queensland it is also quite common for a number of Indigenous land use agreements to be negotiated as part of the settlement of claimant applications, and there are numerous Indigenous land use agreements being notified at the moment. Once the Indigenous land use agreements are registered, various consent determinations of native title will become registered also. The registration of the consent determination is contingent upon the registration of Indigenous land use agreements.

So I can say that in Queensland and clearly in the Northern Territory there is a culture developing of encouraging Indigenous land use agreements for a whole raft of purposes. That culture seems not to have developed in Western Australia. I am afraid I cannot tell you why, because I do not know. But one might speculate that, given the mineral resource rich nature of that state and its similar features in that respect to, say, the Northern Territory and Queensland, there may well be opportunities for similar forms of agreements to be negotiated in the west.

CHAIR—Do we know if compensation is being paid by the Queensland government to support these 88 ILUAs?

Mr Neate—Compensation to whom?

CHAIR—To the claimants. The incentive encouragement and the—

Mr Neate—The state is not always a party to these agreements, but I am not aware of any compensation—there may be, I am just not aware of the content of the agreements.

CHAIR—Referring to page 74—I am just about finished and I thank you for your endurance and forbearance with me—the heritage protection working group, my constituents tell me, has been most successful, you would be pleased to know. I am interested in the nature of a pro forma agreement that apparently you are using. Do you know if it is a standard pro forma agreement facilitated by the tribunal and, if so, could we have a look at it and have a copy of it? I would be interested to know what matters are addressed in that, because in our travels I have come to the conclusion that prospectors and miners in particular have different land councils to deal with which have different expectations and contractual pro forma documents they want signed. The tribunal, I think, is hopefully setting a benchmark. I would like to see what you are discussing—and obviously it has been successful.

Mr Neate—The heritage protection working group work was carried out on a regional basis. There is not, as I understand it, a standard form of agreement for the state and, as this report indicates and no doubt the next annual report will flesh out, forms of agreement had been developed in particular regions of Western Australia and were being developed elsewhere. I touch on it also at page 13 of this report, where in my overview I note that—

CHAIR—The last sentence prompts me to ask the question. It reads:

Standard heritage agreements, developed with the support of the Goldfields Land and Sea Council and the South West Aboriginal Land and Sea Council, have been implemented.

Mr Neate—They are agreements for those regions, and then progressively we have been working with the Kimberley Land Council Yamatji—

CHAIR—So they are not particular agreements; they are broad agreements?

Mr Neate—They are template agreements for people in those particular regions. I do not have copies of those agreements. I am not sure of their status in terms of public or private, but I am more than happy to make that inquiry and, if they publicly available or can be made available to the committee, I will certainly arrange for a copy or, indeed, if there are a number of variations on this, region to region, for representative copies to be made available to the committee, if that is appropriate.

CHAIR—I would appreciate that. So they are not as I anticipated. Do you know who the parties are?

Mr Neate—The heritage protection working group was established by the state government. We chaired the meetings and, as I understand it, the main players, perhaps all the players, were the state government, the relevant representative body and mining industry representatives.

CHAIR—Peak bodies? For instance, the chamber of minerals and—

Mr Neate—Yes, they were peak bodies, as I understand it.

CHAIR—And AMEC, yes.

Mr Neate—So the heritage protection working group would be differently constituted from region to region, but there would be some common players such as the state government. As this report says, we facilitated the work of those groups.

CHAIR—I would be obliged if you could, if it is possible and subject to the caveat that you mentioned, let us see what those agreements deal with. I think that would be good. Over to page 77, your assistance contacts—I compliment you on the analysis of this. I think this is very beneficial for people who are interested in the work of the tribunal. Can you tell me, Mr Doepel, what is ‘other’? What comprises ‘other’? If we take out application registrar information and searches, then ‘other’—

Mr Doepel—I knew you would ask me that and I cannot tell you off the top of my head. I will find out for you.

CHAIR—If you could let me know what the predominance of ‘other’ is, I would be interested to know. I note that Mr Cook has been put on the payroll, to use the colloquial. I see that we have three SES officers. I take it that two of them are here tonight. He is the third; am I right about that?

Mr Neate—No. One is here tonight.

Mr Doepel—No. None are here tonight.

CHAIR—I see that you have eight AWAs.

Mr Neate—I apologise.

Mr Doepel—We are statutory officers. None of the SES officers are here.

CHAIR—Is Mr Cook an SES officer?

Mr Doepel—He is indeed. At the moment we have two SES officers in the organisation.

CHAIR—Excuse my ignorance. I should read the statute more readily than I do.

Mr Doepel—Mr Cook is a band 1 SES officer. He is the chief information officer of the tribunal.

CHAIR—Can you tell me what he does?

Mr Doepel—Yes. He is responsible for, in the traditional sense, all the information technology hardware and software of the organisation—procurement and application development. However, we have, as with many organisations, moved from having simple IT sections or branches into a far more comprehensive approach to how we manage information and communications within the organisation. So Mr Cook now looks after the whole spectrum of document management and information management in a broader sense. He is now also responsible for the geospatial group that we have discussed in this forum before.

One of the things that he is looking at at the moment is taking our underlying systems onto the next stage, an operational business framework, which would allow us to ultimately link all the operating systems within the organisation. For example, you would have the future act systems interacting with the claimant application systems, with the assistance database, with the Indigenous land use agreement database, so that you would integrate all the tribunal systems. He is also looking at ways of configuring the delivery of information, in particular geospatial information but other information as well, registrar information, in a much more readily accessible form to our members and staff but also, ultimately, to the public.

I think it would be fair to say that, like many public sector organisations, we have grappled over the years with information and communications technology. We have sought to understand how we use it as a tool to enable our work. A year and a half ago we decided that we really needed to ratchet up the way we approach this. I cast no aspersions on consultants—many of our consultants or most of our consultants do a very fine job for us—but there is nothing like having someone senior on your team who is accountable as part of the administrative executive for pushing some of these things forward.

CHAIR—Gentlemen, before I close, can I simply acknowledge that I note the passing recently of the Hon.—I knew him as Mr Justice Franklyn—Terry Franklyn. Unfortunately I was over here when he passed away and, being out of Western Australia, I could not be at his funeral. May I on behalf of the committee record his good service and our gratitude for the work he did and the judicial capacity he brought to the tribunal and extend to all of his fellow workmates and members, if I can use that colloquialism, our sympathies in noting his passing. Also, gentlemen, finally, can I say to you thank you for your attendance tonight. I look forward to receiving those matters on notice that we have discussed and I suppose I look forward to seeing you again same time same place next year, hopefully, if we are all doing what we are doing now!

Mr Neate—Thank you.

Mr Doepel—Thank you.

Committee adjourned at 9.12 p.m.