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

Reference: Inquiry into indigenous land use agreements

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

Friday, 8 June 2001

Members: Senator Ferris *(Chair)*, Senators Abetz, Crossin, McLucas and Woodley and Mr Causley, Mr Haase, Mr Melham, Mr Secker and Mr Snowdon

Senators and members in attendance: Senators Ferris, Mason and McMullan

Terms of reference for the inquiry:

Inquiry into indigenous land use agreements.

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Committee met at 9.31 a.m.

GRANT, Miss Florence, Interim Secretary, Wiradjuri Council of Elders

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 you this morning. Thank you for making the effort to come and talk with us. We do prefer all your evidence to be given in public, but if I or my colleagues ask a question of you which you would prefer to answer in camera—that is, in private—please tell us and we will consider that request. I should tell you that evidence which is taken in that way could still be made public by an order of the Senate. I now invite you to make some opening remarks to the committee. After that time we will have some questions for you.

Miss Grant—I should say that I am here with the permission and endorsement of the Wiradjuri Council of Elders and I am also here on a personal level. Thank you for this opportunity. The Wiradjuri Council of Elders and many in our community are concerned about the native title legislation because it has opened many doors for other groups within New South Wales to claim our country, to make blanket claims, which are registered by the land council's native title unit. To us this is a redispossession of us, our country and the heritage that we have to pass on to our young people. It is also a problem because, sadly, we have been economically dispossessed. This also goes in to an economic scene because once these claims are registered, they are actually acknowledged and we do not have the chance to go against that unless we go through a form 5 or other various processes.

We are not really sure how the land use agreements function. A lot of the community do not understand it. We again see people buying land just because the people of New South Wales have been dispossessed; therefore, they are able to buy land. They are living in Wiradjuri country. There is no acknowledgment of it being Wiradjuri country, because in New South Wales we have lost our identity. We are starting to bring that back into play because our identity is very important to us. I am Wiradjuri; I am not just an Aboriginal.

In Aboriginal terms, we are now being assimilated because the imposed systems that across the board governments have put in place are Aboriginal organisations who do not recognise and acknowledge. That is why we have the problem of having blanket claims put on our country again, because of the re-dispossession of our people. They are basically the areas that we have got concerns about. There are plenty of others and I will probably answer them as they come up.

CHAIR—Thank you very much. Mr McMullan, would you like to lead off with questions?

Mr McMULLAN—Can I, firstly, congratulate the Wiradjuri Council of Elders on the initiative of getting the recognition of country on those various signs around the region? I think that is something that others around the country should emulate. It is a little bit outside our terms but I really would be interested to get some details. I do not know if you know about this, Chair, but there are a number of signs, about which Miss Grant can tell you better than I, in some of the cities and institutions around the region. I do not know if this is a good example, Miss Grant, but one says, 'Welcome to Wagga Wagga, Wiradjuri Country'. It is a very good initiative that has been taken by the Council of Elders and responded to well by a lot of

institutions and others. While it is slightly outside our terms of reference, I hope you will not mind if perhaps we get a bit of a brief from Miss Grant about it.

CHAIR—I have actually seen that sign at Wagga.

Mr McMULLAN—It is a terrific thing.

CHAIR—I would be very interested to hear your comments.

Miss Grant—I have a copy that I will leave with you as well.

Mr McMULLAN—Can you tell me just how that came about? Who started it and how did it develop? It seems to me, from what you have told me and from what I have seen that was sent to me previously, to be spreading around the region. How did this happen? It does not happen in very many other places.

Miss Grant—My brother is Pastor Cecil Grant and his Wiradjuri name is Wongamar. Several years ago now he wrote to the various shires in Wiradjuri country—that is, from Lithgow, right through to Bathurst, Dubbo, Albury and Wagga and right out to Hillston and we believe as far down as Benalla in Victoria. So it takes in a very large area of central southern New South Wales. He got a tremendous response from the majority of them. Cootamundra shire was the first to write back and say, 'Love the idea. We will do it because we are about to do our signs.' They were the first shire to put 'Wiradjuri Country' on a sign, but Albury was the first city. Albury said, 'You live here. It is a great opportunity for us', and so Albury was the first city to put it on.

Gradually, as people have driven through and thought, 'That is a really great idea', various people have now taken it on. But it was the initiative of Pastor Grant Wongamar, who took it to the Wiradjuri Council of Elders to be endorsed. Our council is made up of people from a variety of different communities and regions within Wiradjuri country.

We have still got a long way to go, but we have reached two shires—the Cootamundra shire and the Bland shire, which is West Wyalong—and then Bathurst, Wagga and Albury cities. Charles Sturt University, because they are in Wiradjuri country, has 'Sharing learning in Wiradjuri country'. The RTA, which is the road authority, have put it on their signs at Dubbo and Gilgandra. So it is beginning to spread right across the areas of Wiradjuri country.

Mr McMULLAN—Charles Sturt University has got a campus in my constituency in Ngunnawal country, so I had better talk to them about it, because there is no sign.

Miss Grant—I actually suggested that about three years ago. We suggested that, as the ACT, or Canberra, has Japan on their signs, they should have recognition of Ngunnawal—but it will still come.

Mr McMULLAN—Yes, it will come. Has the Council of Elders considered this broader question that you are raising here today about native title and claims to your country? What brought it to a head for the council? What is causing concern for you?

Miss Grant—There was great concern right from the start. Nobody wanted native title as it is, because they saw the dangers of changing. The Mabo decision in the High Court was basically where it was initiated, I believe. We have been working in this area with the Land Council's Native Title Unit for quite a long time.

Mr McMULLAN—Is that the New South Wales Land Council?

Miss Grant—Yes, the New South Wales Land Council Native Title Unit. We were told that we could not put a blanket claim over Wiradjuri country, that we had to have all of these written documents to say, 'You belong to this country, how you belong to it and where you belong to it.' And for quite a few years now we have had other organisations and groups of people put in blanket claims, not only over Wiradjuri country—one is coming from the Gullungara people of Goulburn, around that area—but also over the Duruk country right down to Penrith, blatantly over other people's country. That has been registered, and under a registration they get acknowledged by the economic people, who have to go to them. We also now have one from Ngunnawal which a group have put over a large part of our area, right down as far as Wagga and Albury, which they know is not correct. The Land Council know that is not correct, but they have registered these claims.

There is this great hoo-ha about black and white reconciliation, and there is great success in lots of areas. White Australia really want to see a real reconciliation. But, at the same time, there is the reluctance to recognise the economic loss that we have faced. We are continually dependent on the welfare system, which is the government imposed land councils, the ATSICs and all the places where the funding comes in, such as Aboriginal units in the department of education and in DEWRSB and places with finances for Aboriginal people, but to access these is a major problem. These people make decisions in a great area, there is not a lot of money and there are a lot of regulations and structures you have to go under. And the areas with native title are just causing major divisions.

The communities out there are torn apart because of people infringing on their countries. The finance is not going that way. We do not have our own economic independence; we cannot build our own businesses. We want career paths for our young people. But there are these factions and they are enhanced, we believe, by the systems, also by native title or the land use agreements. Most of us do not know much about the land use agreements. Who are they benefiting? Where is the money? How do we access it? There are all these questions. So there are major things out in the local community that the ordinary people do not know about. There is an industry structure of Aboriginal hierarchy. One wage in some of those industry organisations equals the whole community allotment, so again there are these power playing, faction groups. It is tearing our communities apart. It is very difficult.

You know about the historic structure of resettlement—taking children away and putting them into an assimilating structure where they have got to become English thinkers or European thinkers or whatever other thinkers, but that deny their own right. We elders have grown up with our people, with the struggles of our people, with the community togetherness, knowing that we are Wiradjuri or Euraadjuri or Wiradhuri, which are the various dialect names, depending on what area we came from.

I am a Lachlan River person, I am Wiradjuri from the Kalari River, and I think it is very important for us now to be able to put together what we have got and what we have grown up with: our people, the initiated grandparents or grandfathers, the community togetherness and our languages. We have grown up with those and we have got to put that recognition back together. There is a great resistance to us putting that back together because of the resettlement structure. There is resistance from people from the early protection structure of European Australia where reservations were set up and people were picked up and literally stolen. There is a great hoo-ha about whether Lowitja O'Donahue was stolen or given, but she is just one person. There are literal stories in some of the communities in our region where they were put on trucks and taken away.

Some landed in Kempsey and there were children on their own or with some of the community people; the parents could have arrived at Murrum Bridge on the Lachlan. There are a lot of stories out there we could really tell you if you had the time. That protection reservation structure then came into the urbanisation system and then under the urbanisation system the fringe dwellers and people living on reserves were brought into towns. They were promised jobs and better housing, which they got. They were promised different things, but they did not always get the jobs, and so again you have got people who are struggling to make a living and who have left their own history behind.

So we feel there is a great infringement now. In some of the resettlement structures it might not have been as traumatic as it was for the stolen children but today, because we are trying to get back the recognition of our land, it is causing a lot of trauma. These people are saying, 'You Wiradjuri people should be just Aboriginal like the rest of us,' but that is not where it is at. Native title and the land use agreements are opening the door without consulting us on how it works.

CHAIR—Miss Grant, did you have any involvement in the Tumut-Brungle area agreement that involved the Wiradjuri Council of Elders? Were you involved in the signing of that?

Miss Grant—I am very much down in the Tumut region area. We had a meeting down there just the other day to discuss some of the things that are happening down there now.

CHAIR—Mr Russell Dunn came before our committee last Friday and gave some very interesting evidence about the difficulties that your clan group are having, saying that agreement may now be invalidated as a result of an overarching claim which has been registered by the tribunal in relation to the area agreement that you had struck three years ago. I am just wondering whether you have had any involvement in that and whether you would like to make any comment on that particular agreement and the difficulties.

Miss Grant—The agreement with the mining company?

CHAIR—Yes.

Miss Grant—Yes, I was very much part of that.

CHAIR—Could you tell us a little bit about that?

Miss Grant—As a member of the Wiradjuri Council of Elders I was elected by the community to represent the Wiradjuri Council of Elders. Mr Dunn introduced us to the mining group when they came to the local land council and wanted to open up a door of opportunity—there was a bit of native title land there. So they got a committee together and a group of us were elected. The lawyers, by the way, are reaping great benefits from native title right across the country, not just in our country.

CHAIR—Mr Dunn told the same story.

Miss Grant—The fights for native title recognition are in the courts right across the country. I will come to some of that later. But an agreement was eventually reached—very quickly actually, we did quite well, we were very pleased with ourselves. The agreement was for the Wiradjuri and the Walgalu people. Walgalu is up in the mountains and Wiradjuri comes down in the valleys. So the Walgalu people are on the top of the mountains and the area is Walgalu up the top, and a lot of people live at Brungle and around Tumut.

So we are looking at the Wiradjuri and the Walgalu peoples and the benefits that this community could get financially. That got absolutely and totally hijacked. Before the claim went in, that got hijacked by a little organisation that was set up to work the agreement, because you have to have an incorporated organisation. So the community incorporated an organisation. I will be bold enough to say, at the advice of the legal people, that that community organisation became controlled by a small group. We were told literally that, once that incorporated organisation got set up, it had the right to shut the rest of the community out. That was the legal advice; a legal adviser said that. I said, ‘I don’t agree. We are elected by our community, and I must fight.’ I should have brought some information on that.

CHAIR—Were you also given legal advice, Miss Grant, in relation to the decision not to lodge a native title claim over the area but to go for the area agreement, which is what you did? I was intrigued with Mr Dunn’s evidence last week, when he told me that you had decided not to pursue a native title claim even though you could have, because you believed that the agreement would be legally binding and was registered with the tribunal. You now find that you have got a claim over the area—is it a Ngunnawal claim?

Miss Grant—I will not say the Ngunnawal people as a whole; Don and Ruth Bell and a group of people.

CHAIR—And that claim over the area has also been registered by the tribunal. So what was the basis of your decision not to pursue the idea of getting a native title claim registered as well as the area agreement? Was that legal advice?

Miss Grant—Yes, it was. The people said it would go through faster if we just went with an agreement. At the time we did not perceive the greed and power play coming from other people, because people know it is Wiradjuri country. We did not perceive that this would happen. But we also did not perceive that, on that legal advice, one little organisation would bring in other people and shut out the local community.

We are looking at trying to develop economic programs. The gold mine company, which has changed hands a couple of times and is about to change hands again, wanted to work with us in building employment opportunities and training programs so that our young people could learn with them what it was all about. There is a variety of open doors there for employment opportunities such as geologists. So we saw this as a tremendous benefit. You had a million shares as part of the agreement. Those shares became quite lucrative at one stage and somebody got some benefits out of some of them. There were 500,000 shares put into the state land council's care and 500,000 shares found their way into the hands one of the legal advisers who, to his credit, said, 'I don't want this.' I do not know what he did with them. I think he might have given them to the Ningi Corporation, which is the corporation that was set up by the local people. So I think that is what happened with that. I know that Adam did not keep them; he sold them as quickly as possible—as soon as it was legal. We wanted to develop housing and education opportunities for these people, and that would have a spin-off for a whole lot of other people.

CHAIR—Are you going to lodge a native title claim now?

Miss Grant—Yes, we are. We will now do a form 5. We should have done a claim 1 earlier, but because of situations that happened very quickly, all of a sudden they had their claim registered. Now we have got to go in under a claim 5, as a joint party with their claim, against their claim. So we will be doing that.

CHAIR—Yours was one of the first area agreements struck in Australia—it was groundbreaking, as I remember.

Miss Grant—Yes, we were.

CHAIR—Looking back, how do you feel that it has worked out for you? Do you have any suggestions on how it could be changed?

Miss Grant—We feel very disappointed at the fact that, when money comes into the scene, power also takes over; and the legal advisers, the people that are benefiting from these claims because they have to go to court and so they get legal advisers. In relation to the cost, I have some figures that I was told about the other day—and this is not looking at our claim, because we have not broached that yet. I am looking at the Yorta Yorta claim, which was not successful. Yorta Yorta is south of us, but it comes into Wiradjuri country. I think they made a bigger blanket claim than they should have made and that is why it was not successful.

CHAIR—It is in the High Court at present.

Miss Grant—Yes; they were rejected and they are now appealing. Up to date, I believe from advice I was given the other day, it has already cost around $8 million to $9 million. Who is benefiting from that? Not the people—the people are still struggling.

CHAIR—Miss Grant, on either side of me I have lawyers, so I am reluctant to chance my arm on who got that money.

Miss Grant—That is one claim. What about all the others? Very few have actually won. It has really been very difficult. We have already had discussions with the Gullungara. What that has cost I do not know. We have not as yet even sought legal advice because we are not quite sure whether we are able to; we have to find out more about that as we get going with it. Then we will have this other claim—there are two claims within our own country.

We are trying desperately to get benefits. I am involved with what is called the Bawamarra Media—I will leave some information on this with you. We have the opportunity through cable, which is beginning here in the ACT with TransACT television and radio, with a partner in national recording studios to develop our own media training programs and production unit in the next few years. We were hoping to have it off the ground. We have talked to people. Over the next three years we could train 80 people at least—that is just the beginning. There will be many more. We have our own television channel, our own radio channels, and opportunities on the Internet, to open a major voice for the indigenous people of this region. We went to DETYA, but we do not fit their criteria for training. We went to DEWRSB, who were very helpful and would like to take it on, but they are an employment structure. We can meet them once the employment structure comes in. We went to ATSIC, who said, ‘This is a tremendous thing, we have got money there,’ but we have not heard any more from them, and this was six months ago.

CHAIR—What about the New South Wales Land Council?

Miss Grant—That was ATSIC. We have not been to the New South Wales Land Council. Most of us avoid the New South Wales Land Council like the plague, quite frankly. We do not see the New South Wales Land Council as being beneficial to us in any way; they also go to ATSIC and get moneys for their housing and things. But there are benefits here. We have been to the New South Wales parliament. We are going to follow those through. We have been to the ACT Assembly. Everyone says, ‘Yes, it is a great idea, but the funding is allocated for three years.’ You need it today. If we had the finances that are wasted we could set these things up. We have oral history structures.

CHAIR—Miss Grant, I am conscious of the time. Mr McMullan, did you have some further questions?

Mr McMULLAN—No. Miss Grant has covered the issues I wanted to raise, in response to my questions and yours.

Senator MASON—My question is to recap on what the chair has asked about and also what Mr McMullan asked you, Miss Grant. When you are negotiating indigenous land use agreements—you mentioned the example of the goldmine—is it a problem that just a part of the local clan group or native title claimants, call them what you will, can negotiate and effectively exclude other native title claimants?

Miss Grant—I did not quite catch the last part.

Senator MASON—I think this is what your evidence said but I may have misunderstood it—and I do not want to misunderstand it. In the case of the agreement about the goldmine in

Tumut, was it your evidence that either this happened or could happen: where you have a local Aboriginal clan group that are the native title claimants and have a claim over a certain area, it is possible for a small part of that local clan group—rebels, if you like—to claim that in fact they are the native title claimants and therefore exclude the broader Aboriginal group from negotiating with the relevant mining company or whatever? If that is right, it is quite disturbing.

Miss Grant—I am still not quite sure what you mean. We have had a couple of meetings with the people who have gone out there to look at land use agreements. I am still a bit vague on what they do. I know a couple of communities have had land bought for their individual groups or family groups. It is still a bit vague as to where it fits for us, the native title people. Does it buy land for people who have been on resettlement programs, for example?

Senator MASON—That is putting it better than I did. In effect you are saying that the question is: who has to be consulted; how many people have to be consulted effectively when these agreements are being made? That is a better way of putting it, I suppose. If you are saying that sometimes not enough people are consulted, that is an issue.

Miss Grant—Not enough people. We have had people talk to us and we have asked for more information to come to us regarding the land use agreements. What does it do? Does it buy a little piece of land and say, 'Here you are, this is yours,' or does it say, 'Look, we have got this but the caveat is ours, it really belongs to the government because we have put the money there for you and therefore we have the right to the caveat over it'? How does that all work?

The other area that we are confused about is land use agreements. We know a few people who have got some land; it has been given. Because they are outside our country we have never really talked to them about it. I believe there was one area for which Councillor Bell just signed a letter to approve the buying of a small property for training programs. I actually work with the Wiradjuri Christian Development Ministries. We have a small 20-acre property that was not bought for us from governments or anything but from a family and given to us for training and learning programs. We call it the Yal-balinga-da, a Wiradjuri word for learning place. 'Yal-balinga' is learning and 'da' is place, and we are developing some learning programs through living skills and cultural development.

My brother, Stan Grant senior, is doing a series on the Wiradjuri language—we are bringing back our Wiradjuri language—and that is another area. With the property that we have—and I have to find out a bit more about it, where it is going—we will be able to teach these things in some of those areas. With the land use agreement, does it then say, 'We bought you this property for this community.' There could be 10 people in that community. Are they supposed to make a living from it?

A farmer has a family or is just an individual farmer. He has to make that workable for him and his family. Do we have to make it workable for a whole mob of people that could have disagreements because they have to become an incorporated body? Do they then have to pay high-level rates, and pay for the maintenance of that property and the buying of things? Who provides the finances to do all of the rest of the things that go with it?

Senator MASON—Who is included? Who is responsible?

Miss Grant—There is a lot of confusion in a lot of these areas as to who really benefits in the end. Is it again going to tear the community apart? Because once it is incorporated, you get voted out at the next election, and where does it go? These things need to be put out into the community for far more discussion than is happening. We need to see real results. We need to say, 'Are you buying this?' Let us say it is for Flo Grant. We need to say, 'She wants to do this and therefore can she buy this property? She wants to do history and media and language programs. What are you giving to them?' We want to tell people about blood on the wattle, for example, and the massacres, and the comments of people coming into Wiradjuri country being, 'Shoot all the blacks and leave their carcasses to manure the land.' That was a comment made by William Cox. That is something that really rankles with us. That is something that has never been addressed in your history. It does not recognise the atrocities and the problems that have come in from there to today.

CHAIR—So can I go back and ask you again: what would you change if you could start with a fresh sheet of paper on this particular land use agreement? What would you change?

Miss Grant—Have you seen the map of Aboriginal Australia?

CHAIR—Yes.

Miss Grant—The Tindale map is one of a variety of maps and I have got a comment in this document that I will leave with you.

CHAIR—We have got a large one.

Miss Grant—We use the Tindale map because it is not quite as bad as some of the others. Some of the others have not covered things and have not consulted. This was done way back, I think straight after the war or somewhere around there. It is far more accurate than a lot of people say. But you require lines on maps. If you see the Tindale map of Aboriginal Australia, you will see the entire country covered by people. You will see the entire state of New South Wales, which is closest to my heart, covered by people. We have the Wiradjuri, the Yorta Yorta—there were no Victorian boundaries in those old days—the Ngiyampaa and the Barkindji. We need to see our people recognised and their countries recognised. Their map is there—why is the country not recognising them?

We can go to America and find that there are recognitions of their peoples. But everything Aboriginal is denying us—the land councils, ATSIC, maps and boundaries are not recognising us. Therefore there are divisions and it opens doors for other people. If you knew who you were and you wore your name with the pride and the dignity that our people taught us, you would not have the problems that you have got today. We have terrible problems today.

CHAIR—Mr Dunn said last Friday that we need to:

... get someone to do a PhD or something on identifying boundaries. At the moment, we have all these people coming in and cross-claiming land that they do not belong to.

He says we should go out and get identification of boundaries on the map so that everybody knows what they speak for, and then it would make it much easier for claims and agreements to take place. I am just conscious of the time. I am wondering if there is anything else that you wanted to say, because our next witnesses are from ATSIC and they have arrived. You may wish to sit and listen to their evidence. Is there anything else that you wanted especially tell us this morning?

Miss Grant—Yes. I will leave a paper with you so that you can go through it more closely. I have quickly drafted it but I will find out some more information. There are the assimilations and the inequality of funding structures; I am not sure where that comes from. A comment was made to me from a very good source about the inequality of the New South Wales funding. I was given a quote and I would need to check it out. I am going to do a lot more checking on the economic inequalities because we are being denied the opportunities to do the things we are doing. For example, I was told that Queensland gets an allocation of funding of $17 million. I have to find out whether it is ATSIC funding or some other funding. New South Wales, under the same structure, gets $3 million. Why the big discrepancy?

CHAIR—We will raise that with our next witnesses. You might be able to get the answer in a few minutes because they may be able to assist us with that information.

Miss Grant—Are the people of New South Wales that we elect to do these things not doing their job properly? That is a major thing that we want to know, and also some of the voices—the people that you hear are Aboriginal leaders—are not our voice. We have people coming in and talking about treaties and things like that and they are from Western Australia, the Northern Territory, Queensland, Victoria maybe, if they are lucky, and some from South Australia, but not a lot from New South Wales. We really need to see that, under the treaty system, which I believe all comes into this whole structure of the recognition of 'Aboriginal lands'—and I put Aboriginal lands in inverted commas because to us it is more assimilative than the stolen generation ever was because it is causing major problems. People do not know who they are because of, sadly, the stolen generation and growing up under these systems. So there are inequalities right across the board. We would like more answers and more funding opportunities and less of the controlling mechanisms that are in place for us today. Thank you for the opportunity.

CHAIR—Thank you very much, Miss Grant, and thank you for offering to give to us a copy of the map and your submission—

Miss Grant—The magazine, *The Land*, agreement—

CHAIR—and all the other documents. We appreciate that very much. If over the next month or two, when you are doing your extra inquiries, there are some other papers you would like to send to us, we would be very grateful to receive them. Please send them to the secretariat.

Miss Grant—Thank you for the opportunity.

CHAIR—Please feel welcome to stay if you would like to listen to the ATSIC evidence from Mr Sullivan.

[10.13 a.m.]

SULLIVAN, Mr Mark Anthony, Chief Executive Officer, Aboriginal and Torres Strait Islander Commission

CHAIR—Good morning, Mr Sullivan. Thank you for making yourself available. I understand that your chair, Mr Geoff Clark, is not now able to join you. We were notified of that yesterday. We prefer all the answers to the questions we will put to you to be given in public but if we do ask you a question that you would like to respond to in camera, please tell us. I now ask you to make some opening remarks about our inquiry pursuant to section 206D of the Native Title Act. After that time, we have some questions for you and, if you could comment on the questions that were raised by Miss Grant, we would be grateful. I am sure she would be as well.

Mr Sullivan—Thank you, Chair. I also carry Geoff Clark's apology. He needed to be in the Northern Territory today. He is attending a cultural festival, the Barunga festival in Katherine tomorrow. We are pleased to be here and we are willing to assist the committee in any way possible. We think an inquiry into indigenous land use agreements is useful. We would caution that it is early days for ILUAs, and I am sure the committee would not jump to conclusions about how ILUAs have worked or have not worked on the basis on the evidence to date.

We are conducting some work ourselves with native title rep bodies in terms of their experience with ILUAs. It is, at this moment, a bit of a mixed reaction. We can comment that their uses are growing. We are pleased to see a willingness of state governments to see ILUAs as a good basis for agreement making under native title. We do have a concern that a litigation based approach to native title is long and expensive and its results are extremely protracted in coming. So if agreement making can happen, it is clearly for us the better way to see certainty as to native title established.

I do not think I want to say much more than that, other than answering any questions you would like to put to me. I walked in near the end of Miss Grant's evidence. In respect of funding levels—and I presume it is funding levels for native title between states—I can provide the committee, and I can certainly provide privately to Miss Grant, just what those funding levels are by rep bodies. In New South Wales, there is a single rep body, which is the New South Wales Land Council, and that council is resourced considerably through agreements with the New South Wales government. ATSIC's funding of the New South Wales Land Council, in respect of its rep body status, is something negotiated with it. Certainly we believe the funding we provided is sufficient for it to operate in its function as a rep body in New South Wales.

CHAIR—Are you able to comment on Miss Grant's comments about Queensland and the amount of money that she has heard is available to Queensland? I know there are a lot more rep bodies there, so that may have something to do with the figures.

Mr Sullivan—There is a considerable number of rep bodies there. Also, there is a particularly good level of native title activity in Queensland and, overwhelmingly, the great majority of ILUAs which have been registered or which are in negotiation are in Queensland. A view is promoted by the state government in Queensland that agreement making is the way to

proceed. In the new structure we have five rep bodies in Queensland. We can certainly get for you and for Miss Grant just how much we fund each of those rep bodies.

CHAIR—It is probably in your annual report?

Mr Sullivan—I am not sure whether our annual report would have the level of funding for each rep body, but we have no problem in providing material on how much we fund rep bodies. That is an absolutely public piece of information.

CHAIR—It would be helpful, thank you. Miss Grant is speaking for the Wiradjuri Council of Elders and, clearly, that is something that they are uncertain about. And it would be useful if we had the material so that when other people ask us the same sorts of questions we will be able to help them with that information as well.

Mr Sullivan—That might be the best way. I will make sure Miss Grant gets it personally, but if we give it to the committee and it is incorporated as part of a supplementary submission from us it is then available to anyone who wishes to see it.

CHAIR—That is very kind of you.

Mr McMULLAN—Will that include how you are going to distribute the extra money that was in the budget?

Mr Sullivan—That is not yet decided. The extra money that is provided in the budget is clearly not to be distributed as other rep body funds are distributed; it is not going to go to rep bodies on some formula. The additional money is to go for work in terms of strategic initiatives and work in respect of strategic litigation, so there will probably be a process of approaching rep bodies generally and saying, ‘Would you wish to bid for these additional funds and what would you be doing with them?’

Mr McMULLAN—Does that mean that the money for rep bodies—out of the $86 million over four years in the budget—is going to go into an ATSIC pool which you will disburse amongst the rep body applications which say, ‘We would like to advance case X. Therefore, can you provide an extra $500,000 to enable us to do that?’

Mr Sullivan—That is right.

Mr McMULLAN—Is that also the case for the money for respondents?

Mr Sullivan—Our only involvement will be with the funding of rep bodies.

Mr McMULLAN—I understand the money for respondents is going to the Attorney-General’s Department. You do not know how that is going to be disbursed?

Mr Sullivan—I do not know.

Mr McMULLAN—That is okay. We can ask them. When do you expect money to be available for application or, more particularly, for disbursement?

Mr Sullivan—Some decisions on disbursement will be made very quickly. We have an outstanding log of unmet applications in respect of strategic litigation which we have acknowledged would be strategic in nature. They will be considered probably first and earliest. I expect some of that money would flow quite early in the new financial year.

Mr McMULLAN—That brings me to the question of resourcing that is referred to in your submission, which I assume even predates the public knowledge of the information about the $86 million?

Mr Sullivan—It does.

Mr McMULLAN—How much of that $86 million is going to ATSIC for rep bodies?

Mr Sullivan—About $18 million over four years.

Mr McMULLAN—I know those figures were in the budget so I will not pursue the detail. I have seen the broad outline of the detail. To what extent does that money allay the concerns that are in ATSIC's submission?

Mr Sullivan—It obviously allays them to an extent. More resources to rep bodies, along with more resources to the tribunal and more resources to the courts are going to make a positive difference. We continue to assert that the rep bodies are not resourced sufficiently to meet their obligations under the Native Title Act and that clearly this resourcing, while welcome and appreciated, does not meet their full needs. So we still see that a resource gap is one of the critical issues in respect of rep bodies being able to perform their functions.

Mr McMULLAN—On page 12 of your submission you say that the recommended funding, not by you but by the independent management consultants, was $80 million a year and the actual amount received from the government was $41 million, and in round figures this will take it to about $45 million. That will not be exactly right because it will vary a little from year to year, but in round figures that is what it will be. Is that correct?

Mr Sullivan—Between $41 million and $42 million comes from government as clearly identifiable as an appropriation to native title issues. The board of ATSIC has put another $5 million or so towards native title, which brings it up to about $46 million and there is another $4 million or so. So it is $50 million.

Mr McMULLAN—I was putting aside the ATSIC money. That is still in the pool for rep bodies. If the rep bodies were more substantially funded by the government, ATSIC would be free to use that money for other purposes. It is not money that is designated for that purpose.

Mr Sullivan—No, it is not.

Mr McMULLAN—It is a board decision. My real interest is the extent to which the resource inadequacy, as you see it and as is reflected in your submission, is in ATSIC's assessment affecting the capacity of indigenous people to pursue effectively their interest in land use agreements.

Mr Sullivan—It is difficult to say what the impact of resources is on a particular element of the strategy that a rep body may pursue. At one level I could say to you that, if litigation fell away, we would probably be able to say, 'We have sufficient resources to be able to pursue agreement making.' The fact is that we have, at the moment, a two-pronged call on our resources: one for litigation and one for agreement making. In some places we even see a conflict in respect of that call for resources. South Australia is a very good example. The rep body in South Australia, along with the South Australian government, has called upon ATSIC to fund the rep body to be able to pursue statewide framework agreements. We have so far committed $1.5 million and we will commit further money to assist that rep body in challenging a case in the Federal Court which the South Australian government has taken which basically argues that native title has been fully extinguished in South Australia. That is typical of the conflict that we have: if the De Rose case was not happening in South Australia, our capacity to fund agreement making in South Australia would clearly be there.

Mr McMULLAN—That is a contradiction I want to pursue in general in terms of the disbursement of this money, but can I just pursue that point that you made. Are you saying that the South Australian government, which has been giving money to the Aboriginal legal reform movement as a rep body to pursue the statewide ILUA or agreement, is simultaneously pursuing a legal claim which would contradict the capacity to deliver the ILUA and is diverting the resources, thereby preventing the indigenous people from being able to negotiate effectively?

Mr Sullivan—Clearly we have that conflict in South Australia. South Australia does pursue the De Rose Hill case. It does argue that it extinguishes native title. It is in the Federal Court. The Federal Court is making strong representations to both parties that they should go down a negotiating path. We welcome the fact that it would appear now that we have the South Australian government doing both things. They are participating in the negotiation of a state framework agreement for native title but they are continuing with the De Rose Hill case.

Mr McMULLAN—I do not want to pursue that particular example any further. It highlights an anomaly, but let us hope that we get the trend towards the negotiation. One of the issues, which goes very much to the point you made, is that litigation diverts resources from negotiation. Looking at the $86 million in the budget and its proposed disbursement—and I refer particularly to the significant element of it that is disbursed to the Federal Court—I have been speaking to rep bodies around the country and they have been concerned about the propensity of the Federal Court, for the purposes of clearing its backlog, to be initiating cases that demand resources beyond the capacity of the rep bodies to meet them. I am not talking about the things that were initiated previously by the Western Australian state government and currently by the Northern Territory government; I am talking about timing decisions made by the Federal Court to bring on cases. That is raising the serious risk of cases going uncontested because of the inadequacy of resources. If we have more money going to the court than to the rep bodies, doesn't that raise a serious possibility that we are going to see that problem exacerbated?

Mr Sullivan—If you look at the money going to both the tribunal and the Federal Court and the specific funds coming to us to assist in strategic litigation, we are going down several paths with this at the moment. One is to encourage rep bodies to ensure that litigation as much as possible is strategic, that it establishes principle and that it is something we can then use as precedent. There is a lot of litigation on the books, and a lot of that litigation is being held up because of particularly sensitive and significant cases. The view is that, if these are resolved, a lot of litigation will be resolved.

It is clearly the case that the Federal Court is adopting a harder line in respect of requests for adjournments and is seeking to bring matters on. It has clearly created pressure on rep bodies and, through rep bodies, on us that, if we cannot provide additional funding to allow that matter to come on, there is a serious risk that the people putting the matter are not going to be properly represented. That is real, and that worries us. Clearly, some of this money we have that will allow us to fund more strategic litigation will go to some of those cases. We believe that some of the cases will probably have to see some fairly hard decisions taken by rep bodies as to whether they are going to proceed with the litigation at this time or not.

Mr McMULLAN—Do you have some examples already of cases—they may not be nationally significant; they may not be, as you call them, 'strategic' but may be significant to the people concerned—that have gone underrepresented or unrepresented as a result of a lack of resources consequent on the Federal Court saying, 'No, we won't delay a hearing any longer because of lack of resources, we are going to bring it on in accordance with our predetermined timetable,' and where rep bodies have been unable to or unable adequately to contest or participate in those cases?

Mr Sullivan—I am not aware of a case where a rep body has been unable to represent. There are clearly cases, and I would think of cases presented by the Kimberley Land Council in particular, in which they would view that their preparation and the quality of their representation was lower than it should have been.

Mr McMULLAN—The Kimberley Land Council experience has been drawn to my attention in exactly those terms, that there are cases where the interests of the native title holders or claimants, as the case may be, have been acknowledged even by their representatives as being inadequately represented. That in itself is a cause of concern to me. But my concern is also that disbursement of the extra resources, where more of it goes to the Federal Court than to the rep bodies, might mean we spend more money and we actually get further behind. The Federal Court may well have the capacity and will, and I understand why they want to clear the backlog. If you are just administering the court as an administrative task, that is what you would wish to do; but if you are concerned about outcomes you have to have a broader perspective. But we might spend the $86 million and wind up further behind than we are now.

Mr Sullivan—Mr McMullan, I know you know just how complex this is. At one level, we certainly do a lot of work with some of the rep bodies, and when rep bodies initiate court action they probably need to be aware of the fact that the court may bring the action on. Certainly the Federal Court has a process, and in the end you cannot keep saying no. I think the KLC, for instance, is clearly looking hard at its caseloads and where it is going with things. It is interesting that one of the matters which they probably felt they could have represented to them

better was a very significant victory for them the other day, in the Rubibi matter. So the result still sometimes flows.

I would want to make it very clear to the committee that we believe that the funding of rep bodies is still inadequate. It does affect the capacity for agreement making and it does affect their capacity to properly pursue matters of litigation. It has to be clearly understood that, if a party—and the clearest big party is the state—are not willing to negotiate, they must be litigated. The only way you can proceed down the act is through litigation. In the state of Western Australia, for a long time the policy was for no agreement; it was through litigation.

Mr McMULLAN—I am aware of that. Mr Sullivan has taken me to my next point, which is about the role of state governments. There are a lot of things I would like to ask and most of it is set out in your written submission, but in the time available I will ask questions just to reiterate what you have written. I am very interested in the significance you place on the potential for framework agreements and, I suppose, before that the significance of the attitudes of state governments, which is where we finished with your last question. Leading on from the potential for framework agreements, you refer particularly to the Victorian example. Do you see some positive changes in attitude? Does the progress with framework agreements, perhaps since you put in the submission, give you confidence that this is going to facilitate more?

Coming right back to the core of our inquiry today, does it facilitate more agreement making on the ground, which would be good in terms of the resource utilisation question and the outcomes for all the parties, including the people who have land use aspirations, the people who have land claim aspirations, the native title holders and the governments which have public policy objectives? Are we getting somewhere with attitude change and framework agreements that gives you a bit of confidence?

Mr Sullivan—I think we are. In Queensland we do not have a framework agreement, but we have a government which is keen on agreement making. We can only look at the numbers of agreements that are in process in Queensland, and they form the vast majority of agreements in Australia. The Victorian framework agreement is very well advanced. What the framework agreement in Victoria will allow is for minor agreements to not have to go through all of the hoops of an agreement. They can basically sit under the Victorian government’s framework agreement, and it should make agreement making at a regional or community level a lot easier.

South Australia has certainly moved. As I say, at the moment they are having two bob in each camp. They are continuing the litigation, but they certainly are moving, and we are negotiating with the South Australian government, through ALRM, a framework agreement. We would be hopeful at some point that that gets to the stage where the South Australian government decides to end its position in the courts and sees that this is a better way to go.

Clearly, from the Western Australian government we have an indication now that they would wish to enter into a negotiation on a statewide framework agreement for native title. In the same way, we do not have a framework agreement in Tasmania, but we certainly see a Tasmanian government willing to look for agreement making as a process if it can get it through its own parliamentary processes. Clearly, to us, having the states stand with rep bodies, with ATSIC and

with communities in saying that agreement making is the way to do this is something we can only applaud.

Mr McMULLAN—Thank you for your tolerance, Chair.

CHAIR—Of course, the significance about the De Rose Hill case is that it is based on the fact that all 350 of the South Australian pastoral leases contain the same, if you like, bundle of traditional rights that are ascribed to indigenous people in South Australia, and I think the intention is to try to clarify to what extent those clauses in the leases constitute native title rights on those leases.

Mr Sullivan—I understand that is what it is said to try to be doing, but it seeks to extinguish native title. Under the Native Title Act basically the case of the South Australian government is that through crown law it extinguished native title at the turn of the century and, therefore, it then seeks to say through pastoral agreements or pastoral leases that we have agreements. We very much like people who are still making agreements where native title is clearly extinguished. The best example of that is the recent Cape agreement between the Cape people and Comalco through Rio Tinto. Native Title was extinguished there. The corporation and some peoples determined that an agreement was still the right thing to do, and we have a very significant agreement there. They could have gone to a court and said, 'We don't need to worry about this. We have extinguished native title.'

I understand South Australia put submissions to you asking why we were not funding the ALRM to help them make an agreement. I put it very firmly that, if we were not spending $1½ million on maintaining the position of indigenous people in South Australia in relation to their land against the South Australian government, we would have plenty of money to assist in the development of an agreement with the South Australian government. They are saying they can afford to be on both sides of the street; we cannot. At the moment the litigation is so significant that we must support the litigation.

CHAIR—We have had that evidence from Mr Parry Agius as well. Just on the Comalco comments that you made, we took evidence in Gove during the negotiation for that agreement and it is our intention to return there early next month to hear the completion of the agreement detail and to take evidence from those traditional people.

Mr Sullivan—That is good.

Senator MASON—Mr Sullivan, in your opening remarks you gave an overview of indigenous land use agreements. In my home state of Queensland there are many more. Does ATSIC have a watching brief over the completion or the negotiation of indigenous land use agreements? What role do you have?

Mr Sullivan—We fund the rep bodies and so we have a funding role. Rep bodies, particularly in respect of significant land use agreements, often call us in. We can be a party. Most often we will not be a formal party, but we will assist. Certainly, we were involved with the Cape York Land Council in the Comalco agreement.

Senator MASON—Were you invited?

Mr Sullivan—We were invited by the Cape York Land Council. We were invited because we have pockets and we have got money—to a degree—as well as expertise. I think both parties to that agreement, Rio Tinto and the Cape York Land Council, at times sought ATSIC's expertise as well as ATSIC's funds to assist various elements of the agreement making process. We were happy to do that. We have no right to impose ourselves on a land use agreement negotiation. In most land use agreement negotiations we are not a party, other than by getting a report from the rep body that they are involved in the process.

Senator MASON—I think it is fair to characterise your opening remarks and indeed your submission as not being a wholehearted endorsement of indigenous land use agreements. I think you said in your opening remarks that perhaps the jury is still out—or, at least, it is a bit early. I noted in your submission that Mr Mick Dodson is cited on page 17. His argument really is in relation to a quite familiar article from an indigenous law bulletin entitled 'Power and cultural differences in native title mediation'. The argument in a sentence is that through these processes of mediation, which can include indigenous land use agreements for some purposes, indigenous people may be disadvantaged. What do you think?

Mr Sullivan—The potential for disadvantage is there. If the choices are agreement making or litigation, at some level people would say that in the end the court is a very fair place to be. You can argue about that and whether the resource balance is there, but in agreement making the potential resource imbalance is very real. What we are seeing is an interesting trend: the other party to an agreement often very willingly moves to ensure that resource imbalance is not there. They will contribute. They will not contribute in terms of a negotiating position and not contribute in terms of down payment, but they will clearly contribute. One of the things for an ILUA is that the rep body must have the informed consent of traditional owners, and it must go through a registration process. It is not a situation where people can sit in a room, have a good negotiation and walk away and say, 'The deal is done.' The feedback to the people and the instructions back to the rep body can be resource intensive for a rep body. Certainly we are seeing more and more parties to ILUAs settling up front the sorts of contributions they are willing to make in respect of resources. I also think we are seeing, in better ILUA negotiations, a far better understanding and a far greater willingness to come to grips with the cultural balances involved. We are not seeing some parties now wish to pit groups of traditional owners against each other as much as we did. It was a classic strategy to find a competing group.

Senator MASON—A competing group of native title claimants?

Mr Sullivan—Yes.

Senator MASON—Miss Grant mentioned that.

Mr Sullivan—We have seen some interesting developments. The Rubibi group in Broome is a classic one. There are unfortunately some intense differences between different groups of traditional owners in the Kimberley, and it was resolved that those groups would put aside their differences and would say, in respect of native title, 'We are the traditional owners and we will sort out our differences afterwards.' We saw that stressed during some processes but it held

together. We have a result and now, as Pat Dodson would say, 'The harder job is now to be done.' We have the win; we have to work out whose it is. When you go to the Cape, I am sure you will be told about the fact that we had 12 different groups there and we needed 12 groups to sign off. There was a willingness and an understanding in the negotiation, right to the last day, that we may not get 12 sign-offs but that 10 sign-offs would be good, 11 sign-offs would be excellent and 12 would make the day. It was good to see that sort of understanding develop into the agreement and we saw, in the end, 12 groups sign off on that agreement.

CHAIR—How do you deal with Miss Grant's situation? They were advised not to put in a native title claim when they struck their agreement with the original owners of that goldmine. They now find themselves really behind the eight ball because another native title claim has been accepted by the tribunal, even though the ILUA was signed off by the tribunal. It was one of the ones that did get registered with the tribunal. How does ATSIC provide the leadership there to stop the lawyers getting another basket load of money as they try to sort through a group of people who feel fundamentally disadvantaged because of the advice they got that they did not need to get a native title claim over the area and who now find that the Ngunnawals have had theirs registered? How does ATSIC see its role in trying to provide leadership there?

Mr Sullivan—ATSIC has got its job under the Native Title Act and that is to fund rep bodies to do that. The government has decided how this process will occur and it is through rep bodies.

CHAIR—But these people will not speak to the rep bodies.

Mr Sullivan—No, but rep bodies have responsibilities under the act in respect of claims. We have a claim registered and we have had other claims not registered. I do not know enough to be able to speak about Miss Grant's country and I would not seek, in my job, to speak in respect of Miss Grant's country—it would not be proper.

CHAIR—I am trying to explore the principle—

Mr Sullivan—But certainly if you look at the provisions, a rep body's responsibilities in respect of an ILUA and in respect of progressing a native title claim are to provide advice and to get the informed consent of the traditional owners in an area before proceeding with ILUAs and before proceeding with registration. Where you have disputation—and you certainly see that in respect of, say, the Ngunnawal claim, there has been disputation—the rep body must, under the act, consider a request from a traditional owner for assistance in pursuing their native title claim.

If a rep body rejects that request, it is possible for a traditional owner to apply directly for ATSIC to assist in a claim. We have had a recent Federal Court case in Western Australia which tested that principle fairly thoroughly. It was about a rep body's decision not to support a claim of a traditional owner and then ATSIC's decision not to provide supplementary support to that claim.

In respect of the Ngunnawal claim made by Mr Bell and others, some limited support from the New South Wales Land Council and some limited direct support from ATSIC went to Mr Bell and others to pursue in the tribunal whether or not his claim could meet the registration

test. This is a fairly stiff issue around the area and, at one level, people would have said that, based on the claims of others, that claim would have never made the registration test. But the claim has made the registration test, so it has got to proceed.

All we know in terms of litigation is that while there are competing claims it will not be resolved. We have to resolve competing claims before the court will resolve it. The court will not consider in the end saying, ‘This group claims this and this group claims this,’ and letting you solve it. They are really saying, ‘You go away and you solve that and when you come back, we can determine whether native title exists.’

CHAIR—I agree with all of the observations that you have just made but, in this particular case, the principle was that when the ILUA was struck, they did advertise, as they were required to do under the act, and it attracted no response at all. And then three years down the track, having gone through what appeared to be a breakthrough in the sense that it was the first ILUA, they find that that process was flawed to the extent that, despite the fact that no group had responded to the advertisements, they then found a claim registered. But it is—

Mr Sullivan—Yes. I do not know enough of the detail of that case to be able to say on the facts that you have presented that it is an issue there. I did want to respond in respect of ATSIC’s leadership on resolving these issues. I must point back at the parliament. ATSIC had a view as to the Native Title Act and everything that went with it. It is now law. ATSIC provides a role in respect of advising the minister directly—and when I say ATSIC in respect to rep bodies, it is not my chairman or my board, it is ATSIC as an administrative body providing advice to a minister in respect to the operations of rep bodies, and I do not think that that in the end says that if there are problems with the legislation and with the processes as defined in the act, that ATSIC should be there showing the leadership to get over them. We work with the legislation to get through it as well as we can and our issues are resourcing, and ensuring that these processes flow as quickly as they can.

Senator MASON—I have just one statement and then perhaps a question that relates to the chairman’s observations. In relation to power imbalances, public policy is a difficult thing. We have taken evidence from pastoralists, particularly small pastoralists who feel the power balance is against them. That is just an observation; you do not need to comment on that. Let me conclude on the chairman’s observations. One of the ironic things, indeed it is probably a paradox, is that the recognition of native title by the High Court and then the Native Title Act that passed through this parliament was in some ways supposed to liberate indigenous people. From the evidence earlier today, and from what Mr Dunn said last week, it seems that something has to be done sooner rather than later. Mr Dunn said:

… it is tearing us apart, and we are blueing amongst ourselves. And it is costing a lot of taxpayers’ money that should not have to be fought over. I do not like the idea of drawing a line on a map, but, in my opinion and in the opinion of a lot of other people, it will get to the stage where we have to draw a line on a map.

One of the disappointing things is that what was supposed to be liberating for Aboriginal people has in some cases—not all—led to enormous tension. Can you comment generally on that and look at the solution? Is there one?

Mr Sullivan—There is no easy solution. Native title has caused tension and does cause tension. We promote ways of easing that tension. We see some interesting examples. The Yamatji Land and Sea Council had a number of issues in respect of competing claims around the Geraldton area of Western Australia. They basically reverted in the end to calling a meeting of the council of elders and said they had to sort the boundaries out. They sorted them out. We saw overlapping claims in that rep body zone fall dramatically. The capacity to pursue a claim was suddenly there.

You talk to a lot of elders and they will tell you, 'We know where the boundaries are.' Sometimes the boundaries are not as reflected in various cases. At other times there is a great blurring of boundaries, particularly where there have not been great concentrations of indigenous people but where the land was clearly theirs. At another level native title is to be resolved in one of two ways: either by agreement making—which is dependent on all the parties wanting to agree—or litigation. It is a very young thing. I think there is frustration. People saw Mabo, Wik and others things as being this liberating of people's lands and a capacity to be able to again possess the land that was always theirs. Ten years is a long time. If you mark down how much land is now theirs as a result of the processes, you would say there is some progress but it is not the sort of progress which would see an old fellow who thought he may get his land back getting it back. He may have passed on. People are still waiting. That produces a lot of frustration. The answer to that is very difficult. There is no doubt that if there had been no Native Title Act we would have a significant backlog in the courts at the moment arguing common law title to land. We would have a process and it would probably be a very difficult one. Any process that seeks to protect the interests of so many people is going to produce frustration.

Senator MASON—Many members of the committee were speculating that the next chapter in this evolution might be the greater formalisation of boundaries or some other process by which determinations can be made that will alleviate some of the tension, disputation and cost.

Mr Sullivan—You can say that the solution is to redraw the boundaries, but, if you read the history books, that has created more wars than anything ever has.

Senator MASON—I am not saying it is an easy solution.

Mr Sullivan—And when we look at some of our disputation it is between subclans of clans, it is between groups who have cut themselves away from the group, and they would all say, 'We are all part of this country, but we are separate parts and we claim this bit.' They are not easily disposed of by getting the elders and anthropologists in and saying, 'Can we draw a line somewhere?' Fundamentally, a lot of these groups would say, 'No, you cannot draw a line.'

Senator MASON—And from what date do you draw it, too?

Mr Sullivan—You cannot draw the line; it is not drawable. At a nation level, at a country level, as Miss Grant said, there are a few versions of the Aboriginal map of Australia but the variations are not that great. When you get into intranation disputation it is much harder.

CHAIR—That is probably an appropriate point at which to pause in your evidence this morning. That is one of the great fundamental difficulties of the next stage of trying to find clearer pathways through this somewhat challenging landscape. Thank you very much for your submission and also for your evidence. I am just wondering whether it might be useful for us to send you Mr Dunn's evidence from last week in which he talks about some of the detail of the difficulties of their original land use agreements, and the advertisements and how that process worked. It is an interesting case study because it was the first agreement and I think it is exacerbated by the fact that in New South Wales there are very fundamental tensions between the Wiradjuri group of elders and the New South Wales Land Council, which is not making it easy either. Thank you very much indeed, Mr Sullivan, for making yourself available this morning. I appreciate the time you have given us.

Mr Sullivan—Thanks, Chair.

[11.04 a.m.]

ROYSTON, Mr Ernest James, Planning Services Manager, Shoalhaven City Council

CHAIR—Welcome. Thank you for making the journey to Canberra to meet with us this morning. This is a public hearing and we do prefer that all evidence is given in public, but if you are asked a question that you would like to respond to in private please tell us and we will consider that. However, it is always the case that any evidence given in that way can subsequently be made public by an order of the Senate, so it is useful to realise that.

We have got your letter, received on 29 September last year, in which you have outlined the difficulties you have had in terms of resources and also your application to the Attorney-General's Department. Perhaps it might be easiest if we listen to you make some opening remarks and then we will respond with some questions.

Mr Royston—Thank you very much. I would like to thank the committee for the opportunity to make the presentation. I did send a subsequent letter to the inquiry which related to four particular issues. It is again only a limited response. Essentially, it talks about the issue of resources, which was outlined in our previous submission, and then gives three examples of how we are working with the local community. While these particular agreements we have reached do not come directly under indigenous land use agreements—

CHAIR—Perhaps you could take us through that briefly because I and my colleagues do not seem to have that in front of us.

Mr Royston—It is only very basic anyway.

CHAIR—While we are getting hold a copy of it perhaps you could just take us through it.

Overhead transparencies were then shown—

Mr Royston—I will firstly outline quickly the City of Shoalhaven, which is centred on the town of Nowra on the New South Wales South Coast. We have an area of some 4,660 square kilometres. Currently that area is made up of approximately 11 per cent crown land, 23 per cent state forest and some 37 per cent national parks. In the recent regional forestry assessment process we are looking at 12 per cent of that crown land and state forest going to proposed conservation reserves. So, out of the 4,660 square kilometres in the city, we are looking at some 49 or 50 per cent as national parks, the state forest would be dropping to somewhere of the order of 18 per cent and the crown land at this stage would be of the order of seven or eight per cent.

The land councils we deal with in Shoalhaven are essentially the Nowra, Jerringa and Ulladulla land councils. We have great relationships with those councils. Also, we deal at times with the Wreck Bay community, which is a community in the ACT itself, and the land is around

Jervis Bay. The council is the trustee of many crown reserves in the area, so we do have an involvement in native title on those crown reserves and also on some of the vacant crown land.

One of the big problems we face at the moment is the lack of decision in relation to native title—the determination—and the uncertainty. We feel it is essential that we do represent the local community and, in particular, where land that has been available for public access in the past, that that public access is maintained. As far as the time involved in these negotiations is concerned, it is hard to nominate the amount of time that each individual officer of council is involved. Generally, we have varying interests depending on the nature of the land. We have a whole range of people—from me through to the general manager, the city services manager, the Shoalhaven water manager, the property manager and the economic development manager—who all have an interest in relation to the native title and state land claim issues. As well as that, we do not have in-house solicitors and, like most councils, we have to pay for extensive legal advice in negotiating agreements through the process.

Coming up for us in the future is a claim that has been lodged with the tribunal in relation to the southern section of the city. It does not show up all that well but it is a claim by the Walbanja people. It is a fairly extensive claim that takes in the lower half of Shoalhaven right through down Eurobodalla and, I believe, right down into the Bega valley.

CHAIR—Is that area currently crown land or is it privately owned?

Mr Royston—There are varying tenures in that area but, essentially, that claim is over the crown land. There are very limited leases, no pastoral leases or anything of that nature with which there have been problems in other areas. Essentially, we are trustees or are involved with 160 parcels of land in that claim area so it is going to be a fairly extensive resource exercise to be able to work through that with the community and come up with agreements over all those particular parcels.

While I am here to say that it is resource hungry, I would just like to put some positive things that council has done over the years and in recent times, and some of the things that we have been able to achieve with the local community. The first of these is in fact an aviation technology park that has been provided in the area adjacent to HMAS *Albatross* which is the naval airbase south west of Nowra. Some time ago council saw that, with the new Seasprite helicopter program, there was going to be an opportunity for the back up facilities to be provided at *Albatross*. We very much encouraged the ability for that backup service to be provided at Nowra rather than at some other location. In fact, we spoke with the local Aboriginal land council in relation to the possibility of working together to provide an aviation technology park at Nowra.

This overhead shows some of the sites around the area—the darker orange area you can see is subject to state Aboriginal land claims, and the darker blue area, the airfield purposes area, was part of that particular claim. In the past, when these state land claims were lodged, the general attitude of council was to object to all of these claims on the basis that it was locking up land that should be available to the general public et cetera. That attitude flowed through the mid-1980s, when a lot of these claims were lodged, and council objected along those lines. I think

we have seen a different attitude in recent times and a much better attitude as to how the objectives of both communities can be achieved.

In this particular situation, following extensive negotiations with the Nowra Aboriginal Land Council, we were able to draw up an agreement over that parcel of land that did not have any cultural significance to the local community and we were able to, in this agreement, support the whole of the claim in the area on the basis that we had an agreement which would enable the land council to on-sell that land to council for the purpose of this aviation technology park. The state land council very much assisted the Nowra land council in achieving that. Following the granting of the claim, council purchased that area outlined in red for the aviation technology park. In setting up that technology park, we had to bring in electricity, water, sewerage, everything, to that location—while it is adjacent to the airfield at Nowra, it did not have any of those sorts of infrastructure. The area immediately to the west and the north is still maintained and owned by the Aboriginal community so they are going to build on that opportunity.

CHAIR—Just to interrupt you for a point of clarification, when you say you purchased that land, you purchased it from the Aboriginal community?

Mr Royston—Yes. After the land grant.

CHAIR—How did you set the price?

Mr Royston—It was just terms compensation and an agreed position.

CHAIR—Was it based on evaluation of the land that was carried out by some independent party?

Mr Royston—Yes.

CHAIR—The council was happy with that valuation?

Mr Royston—Yes.

CHAIR—Was it market value?

Mr Royston—I believe it was market value. It did have some of the impact of us bringing services and setting up the site and having that land available as industrial land.

CHAIR—Are you able to tell the committee how much the council paid for that?

Mr Royston—No, I do not have that information, but I could provide that to the committee.

CHAIR—I am just interested because we always look for case studies that illustrate issues related to native title and land use agreements . It seems to me that this is a very interesting one that falls into that category. It would be useful if you were able to give the committee, when you have time, an indication of what you think the negotiations to undertake that agreement cost the

ratepayers of the Shoalhaven Council. How much was paid in terms of just terms compensation? Did you get an independent valuation? What did you expect to have had built into that cost, such as the provision of infrastructure and did that diminish the overall value of the property when you purchased it? Can we have any other information that you think might be useful in the case study that we could develop on that?

We have been receiving some very interesting evidence from parties on the development of these agreements. Last Friday we had some extremely useful evidence from the defence department on an agreement that they have struck in Townsville. It was not a local government agreement. It would be very helpful to us as part of our inquiry if you could supply us with that. We need the length of time it took.

Mr Royston—This has been going for some five or six years from day one.

CHAIR—Was it costly in terms of the legal advice you had to get?

Mr Royston—Yes. It was not only the legal advice but the time involved of council staff. It would normally have been very easy to achieve if it has been freehold title. We could have purchased it straight out.

CHAIR—Do the indigenous people that you purchased it from still have a role in the management of it or did they completely surrender their title?

Mr Royston—Not so much in the part that we have purchased. One of the positive things about being in local government is that, in conjunction with state government, we were able to change the zoning of the land to open it up. Previously it was just for defence purposes. Now we have been able to open it up a bit to give some opportunities for technology based industry to be accommodated there and the Aboriginal community can take advantage of that opportunity.

CHAIR—It would be very helpful if you could do that for us when you get back home. I do not want to take up too much more of the council's time.

Mr Royston—Sure. Some of the other things we negotiated related to rate concessions. For timber rights, there were certain areas that had to be cleared for industrial use. The timber rights were something that was maintained with the Aboriginal community. Also we always had archaeologists readily available during constructions if any problems arose, which they did not.

CHAIR—Did you have indigenous people involved in site clearance?

Mr Royston—Yes. One other example was the campus of the Wollongong University. That darker blue area outlines some 63 hectares of land on which the first stage of the Shoalhaven campus of the Wollongong University has been established and opened last year. It is to the south west of Nowra but much closer to the town than the aviation technology park is.

CHAIR—Was that crown land?

Mr Royston—The orange land—plus a services corridor through there, plus the university site—was in fact all crown land and subject to a state Aboriginal land claim. I will repeat the issue of native title when I get to the end of this. This was a different form of negotiation where, again, the Nowra Aboriginal Land Council agreed to relinquish the services corridor plus the university campus site from the state land claim purely on the basis that they saw it was something of benefit to the overall community—their community as well—and particularly to the university. For that reason, they were quite happy to relinquish the claim without any compensation for those particular circumstances.

This was an area where council had in the past objected to the claim because it was needed for future urban uses and such. Obviously, these days, there is a different attitude—that there is no reason that the Aboriginal community cannot provide that urban expansion or make use of the land for that particular use. It was subject to us agreeing to the residue of the claim, which we did do, and the residue of that claim has since been granted. I suppose the irony about this one was that, when council achieved that negotiation, the state government came in and said, 'If you want the land for the university'—which is normally a Commonwealth funded thing—'the council is going to have to buy it from state government.' It was ironic that the claim would probably have been granted anyway, and the Aboriginal community probably would have had the land and we could have negotiated the purchase off them. But, following our objection to that process, the land has now been acquired by the state Department of Education and Training. That was an acquisition which took away the issue of native title.

The positives for the Aboriginal community out there is that they own the land adjacent to this facility. The issues of student accommodation opportunities in the longer term, employment, all those things, will come into play because council has had to extend infrastructure—water, sewerage and everything—out to that location so it has brought the opportunity for the residue of the land to be developed.

Not so much in this instance, because the acquisition overcame that native title issue, but going back to the aviation technology park, I omitted to say that, while we have acquired the land off the Aboriginal community under the state legislation, the native title issue is still something that has not really been resolved. Our legal advice was that, because that claim was pre-1994 and was a state act, that probably cancelled out native title on the land but, at this point in time, we have no guarantee that that is the case. We were also advised that, because the land claim has been granted under state legislation, it is less likely that someone else or some other group will come along wanting to claim native title over that particular parcel, but it still exists there. So that is a bit of a quandary we face, and it is something that probably needs to be resolved at some time in the future.

The last illustration goes to negotiations we are having with the local community, the Jerringa Aboriginal Land Council. Their area is essentially the Jervis Bay area. That blue area at the bottom of the overhead is Jervis Bay itself. The darker blue areas are where, at the moment, we have some Aboriginal land claims under the state legislation which at this point in time have not been determined. In recent times, the state has created the Jervis Bay National Park in this location. In the regional plan, these lands were proposed for addition to the national park.

I believe that at the moment the negotiations between the state government and the Jerringa people are floundering, on the basis that they want the people to sign an agreement that it will be available by lease for national park, as has happened with the Commonwealth national park at Booderee, where the Commonwealth has leased that, I think for a 99-year period, and the land use is as national park. The situation here is that that has reached a stalemate to some degree.

We now want to ensure that, if the land claim is granted, some of the issues that we have in relation to access over the land, and also the provision of water and sewerage infrastructure, will be addressed. That is the Beecroft Peninsula, the northern-eastern section of that area, which at the moment is crown land. You can see from the red and green outline there that there is a series of walking tracks throughout the area that provide access to the foreshore adjacent to the village of Currarong. We are presently negotiating with the Jerringa people to obtain a right of way over those particular parcels of land. In addition, there are some other areas within those claims—again the red and green areas—where we are negotiating for pedestrian and vehicular access to boat ramps and other facilities, and also for infrastructure. There is a major sewerage scheme which in fact involves part of the crown land that is currently under claim.

Hopefully we will reach that agreement within the next couple of months so that we can ensure that that foreshore area is available not only to the Aboriginal community but to the general community as well. At this point in time we have used GPS coordinates to mark all of those particular trails, but eventually we will probably have to carry out detailed surveys.

We are also talking about agreements for helping the community with management plans for the adjoining lands, and also the normal rate concessions and those things that would be applied. While that one has not been completed, we are again working with a different land council in the area to achieve something that will benefit both them and ourselves. I suppose it all comes back to the fact that these processes are very costly, both in time of council staff and—

CHAIR—Can you tell me how much, roughly, you would have spent as a council? You are a pretty big council. I have been down to your council chambers and taken evidence on another inquiry, so I am fairly familiar with your area. Would you have any idea, let us say over the last five years, how much your ratepayers have paid for the advice? You say in your letter of 29 September that you made an application for federal government assistance, so presumably when you made that application you must have totalled up the amount that you had spent until then.

Mr Royston—That was purely for the Walbanja claim. I think the application we made was for $40,000. The whole idea of that was essentially to have someone to coordinate, to provide a better means of communication between the—

CHAIR—I am not critical of that. I am trying to get around in my mind how much a council like yours, and the ratepayers of a council like yours, would have spent over the last five years. Let us be frank here, you have got large areas of crown land which are not developed in your shire—beautiful areas, I might say—but you have also got some quite valuable coastal land, and then of course you have got the industrial, city and Defence land. How much would the

ratepayers of your area have spent, perhaps without even knowing it, on native title negotiations and legal advice over five years?

Mr Royston—We have had more involvement in state land claims than in native title. We have had some other minor native title issues which I have not mentioned here today, but it would have been about $40,000 to $50,000 a year for the last two or three years. It is not a big amount of money but I suppose when you look at—

CHAIR—People who live on unsealed roads might say that it was.

Mr Royston—That is one of the issues at the moment, the very thing you mentioned: we have such a large area and, because we have 49 towns and villages, we do have problems providing services to each of those areas.

CHAIR—You also have a limited amount of money that you are able to raise from rate revenue because of the areas of crown land and Defence land and other forms of government land. So there is a limited amount of rate revenue available to you.

Mr Royston—That is correct, yes. We receive some recompense for that through the grants commission, but I have been with council for the last eight years and I can see that the budget each year is getting tighter and tighter for putting facilities on the ground. A lot of it is due not only to native title but also to red tape generally and the processes that have to be gone through to achieve something on the ground. I am not saying that is not a good thing, but it is expensive.

CHAIR—I am not either, I am just trying to get a grip on it. Would most of that $40,000 or $50,000 go on legal advice, or would that be for putting on meetings and paying transport costs for people?

Mr Royston—A lot of that is absorbed by people like me rather than people within council. If you took a true perspective it would be even higher than that.

CHAIR—Could you take on notice that I would be interested to explore that as part of this case study, because I cannot recall this committee having an opportunity to have a look at the effect on a local government area of two levels of negotiation. It could even be three if you tried to strike an ILUA aside from native title, as well as the state claims and the state agreements. You could have three levels of indigenous agreements, I suppose you could call them, and that could involve some pretty complicated advice and negotiation. We would be very interested to explore that as part of our inquiry.

Mr Royston—We have been reasonably lucky that the land councils have been the basis of our negotiation and we do have very good relationships with them. There were other instances, with the Ulladulla Land Council, of sporting field issues where we worked with them, which I have not mentioned. This whole process has been very good for everyone, I think.

Senator MASON—Could I ask a broad question to follow up the chair's line of questioning? I think you heard the previous evidence from ATSIC that the summary of the law is that you can determine native title either through mediation or contractual arrangements under an ILUA, or

you can go to court. You said before in your evidence that you believed that, through negotiation, objectives of both communities could be achieved. My question to you is this: is your decision that it is best to negotiate an outcome rather than to go to court based on principle or is it based on pragmatism?

Mr Royston—I think in principle you should anyway, but we have demonstrated that you can achieve a result. These negotiations were essentially made not under the native title act or under indigenous land agreements, but it is the same process.

Senator MASON—Let me put the question in another way. You have given evidence about how expensive this process is and about the lawyers and the technical expertise you need. Let us say that the council felt that a certain area of land should not be subject to native title claim for some legal reason and that there was a native title claim over a parcel of land and you said, 'This is a farce. This should not be subject to native title claim,' or at least you believed you could win it. My question to you is: would you then go to court and fight that claim or would you seek to mediate it?

Mr Royston—We have not gone to court on any and we would seek to mediate.

Senator MASON—Even where you believed on the best legal advice that native title did not operate?

Mr Royston—I think we would still try to mediate. We have had some very good negotiations. The Nowra land council lifting the claim over the university site, without any formal compensation, was the way the people in that particular area worked with council.

Senator MASON—Your argument would be that, even in situations where native title may not operate, you are looking at the issue more broadly and you are having to deal with certain indigenous groups all the time so it is best to put the success of native title claims aside and pursue mediation in all cases?

Mr Royston—Yes because, while we may have legal advice that says native title does not exist, the community may want that mediation to occur. You are better off trying to mediate that than go to court. I am not saying that at the end of the day if those negotiations cannot be achieved you may not end up in court, but certainly you should start at that particular point.

Senator MASON—Is that a decision that council makes? Who makes that decision to negotiate?

Mr Royston—Council does. It is essentially the staff. Things do not get raised at council unless something cannot be achieved through mediation or the staff working in conjunction with council policy trying to achieve a result. At the end of the day the council has the final say. It is the ultimate body. Most of these things are being worked out, without council involvement, at the staff level.

Senator MASON—It is fascinating talking to you, Mr Royston, because you are at the coalface. You have to do this and live with the communities down there and make these

agreements. I have been on this committee just for a few months and as someone trained in the law, sadly perhaps, I see everything very much in terms of what is a legal right and so forth. It concerns not just lawyers but also some pastoralists in my state of Queensland. Many people are reluctant to give up rights to other people who they believe have no rights over land. What you are saying is that the practical application in your area to live with those groups is that you must mediate irrespective of prima facie legal claims.

Mr Royston—I have got to say that we do not have the pressure that an individual pastoralist may have. They have tended a property for many years and it is their livelihood. None of these situations are really our livelihoods. Obviously, if we finish up with a situation in these same negotiations where we cannot obtain access to the foreshore areas for the general community through a state land claim, it would go to law—not that the Aboriginal community would deny that access. It is not the end of the world. It is not our livelihood That is a big difference.

Senator MASON—Thanks very much.

CHAIR—Thank you very much, Mr Royston. I ask you to bring those other figures to the attention of the committee and any other material that you might have that relates to the negotiations that you think might be useful to us. We are trying very hard to simplify and to find ways in which we can recommend some simplification of these procedures. It was particularly difficult when we were in central western Queensland to talk to some of the small local government areas. They are really grappling with this resource issue. It is an issue that does not only concern the larger councils such as yours; it concerns some of the small and very remote council areas that are experiencing a resource squeeze anyway because it is mostly pastoral property income that they get.

Mr Royston—I suppose we are lucky in one way: we do not have that sort of situation, where the pastoralists in the area are on one side, the Aboriginal community are on the other and the council is in the middle.

CHAIR—Often, in fact, the indigenous community and the pastoralists are together in wanting to strike an arrangement, but the problem comes from, as you said, red tape in remote areas—and, in their case, down in Brisbane. That is an issue, but what I was referring to was the difficulty that many of the pastoral families have had in recent years in an economic sense and the problem for the small councils who rely almost entirely on pastoral income for their rate revenue. They have a slightly different dimension of the same complications.

Thank you very much indeed for coming all the way up from Nowra. We appreciate it. Have a safe drive home.

Proceedings suspended from 11.40 a.m. to 12.00 noon

KILDUFF, Mr Peter, Barrister retained by New South Wales Aboriginal Land Council

CHAIR—I welcome Mr Kilduff. Thank you very much for making yourself available this afternoon. The committee does prefer all evidence to be given in public but, if you are asked a question by either me or my colleagues that you want to answer privately, please indicate and we will consider your answer being taken in camera. I should tell you that any answers given in that way could subsequently be made public by an order of the Senate. We are very keen to hear from you this morning. Would you like to make some introductory remarks, and then we will follow up with some questions. Have you had an opportunity to look at the evidence we took last Friday—I know it has been sent to the New South Wales Aboriginal Land Council—from Mr Dunn?

Mr Kilduff—I have not seen the evidence through the committee system; I have seen it in the papers.

CHAIR—You are familiar with what was said?

Mr Kilduff—Sort of.

CHAIR—It might be useful if we arrange for you to have a copy of it. I am interested to ask you for your response to it—and I am sure other people here may also be interested. As we go through, you may have the chance to have a look at it.

Mr Kilduff—In terms of introductory remarks I was going to appear today with Danny Chapman, who is the manager of the native title unit. He had to go to a meeting up on the North Coast, so he sends his apologies. We have prepared a written submission for the committee. I have handed it over for copies to be made. Basically, it is a submission which mirrors the ATSIC submission, No. 19. However, it focuses on New South Wales aspects in relation to indigenous land use agreements, which their representative body has been negotiating. There are a couple of attachments to the submission, and one is a paper which I did on behalf of the land council at a conference. It outlines some agreements in New South Wales, both pre and post amendment agreements. There is also another attachment, which is a protocol between the New South Wales Land Council and the New South Wales Minerals Council to negotiate an alternative procedure indigenous land use agreement in relation to mining in New South Wales.

CHAIR—While we are waiting for copies of that to be given to us, could you take us through the major points and make some comments so we are able to follow up with questions when we get the copies.

Mr Kilduff—First of all, the land council is a statutory corporation under the New South Wales Land Rights Act. It is also the representative body in New South Wales under the Commonwealth Native Title Act. The land council is aware of ATSIC's submission, had some input into that submission, and supports and adopts that submission. One of the issues in the ATSIC submission which NSWALC had a major input into was in relation to power and resources—the imbalance we say exists in the act in terms of representative bodies not having

enough resources to get all these indigenous land use agreements working and functioning properly.

The land council, prior to the amendments to the Native Title Act, were involved in various agreement processes which were successful, and post the amendments the land council put together the first indigenous land use agreement which was registered under the Native Title Act. That was the Adelong mining agreement—over the hills here—where about three groups of Aboriginal people came together to form the one negotiating committee and entered into negotiations with the Adelong Mining Company. The solution to all the issues relating to that was an indigenous land use agreement which was an agreement relating to a compensation package but, on registration, further benefits flowed to the indigenous people of the area, so that was successful in it being registered.

I have also been involved in an indigenous land use agreement in the Hunter Valley with a statutory body called Powercoal. The local people have negotiated an agreement with the company and have entered into an indigenous land use agreement which is going through the actual processes of being registered.

The Minerals Council protocol which is fairly self-explanatory is an endeavour by the land council and the Minerals Council to come together and actually sort out some rules in relation to mining which may either be in the act at the present time or may require agreement in relation to processes by which it streamlines the mining notification process, if you like. What we are looking at—and it is very early days—is that, instead of section 29 notices being issued, we have come up with an alternative procedure by which the notice just goes to the representative body, who then have to go through their own authorisation and certification process which would then bring them back to the mining company for a series of negotiations in relation to the mine.

CHAIR—That would shorten that process, would it not, because they would not need to go through the advertising process?

Mr Kilduff—Yes. We are looking at that. We are not saying we can get it completely right because of the common law rights involved and that sort of thing but from the early days both pre and post amendment the section 29 notice caused the representative bodies chaos because of different groups putting in claims over that particular mining venture. A lot of work was involved prior to even getting into the negotiations to try and sort out who were the right people to negotiate. We see a better way, especially in terms of the advertising and bringing everyone into it. If we can streamline it through the representative body system, as in the Northern Territory, we might have a more workable system in terms of negotiating mining agreements.

Of the agreements that we do go through in the paper—as I said, they are pre and post amendents—the first one is the Dunghutti agreement, which is the first recognition of native title on the mainland at Crescent Head. That was done under the old act and did not require any type of indigenous land use agreement to go with it. A similar agreement that was facilitated by the land council was the Eastern Gas Pipeline agreement which ran from Sale, Victoria. It was a complicated negotiation because it dealt with seven or eight different groups along the pipeline. I think the indigenous land use agreement provisions would have assisted in that pre-

amendment negotiation because we would have been able to secure for the pipeline the rights for the pipeline to be built. Also to have certainty from the provisions in relation to authorising the indigenous land use agreement under section 251 would have been a handy thing.

Then we get into the post ones; and, as the paper says, all these agreements do not cover the field—there have been other agreements. There is presently, up on the North Coast of New South Wales, a negotiation taking place between the Arakawa people, who are being represented by the land council, and the state of New South Wales. The state have put it clearly on the table that they want to negotiate a fully comprehensive ILUA which will actually deal with the recognition of native title, compensation and future act regimes. They have already got what they call a stage 1 indigenous land use agreement completed, which is over what is now called the Arakawa National Park at Byron Bay. Various negotiations took place in relation to exchanging of freehold titles and things in that first stage. But in the second stage both parties—the land council and the state of New South Wales—wish to make it an indigenous land use agreement which covers the field so that we do not have to come back and revisit the area in terms of the way in which the state and the people coexist up there. It will be a milestone. No doubt throughout Australia there are other indigenous land use agreements which are all endeavouring in various ways to cover the field so that they settle the area once and for all.

Based on experience, and from a representative body point of view, the main problems that have beset the representative body system are the authorisation process, the cost involved in getting people to meetings and making sure that, either through native title applications or through indigenous land use agreements, the state or the proponents of mining ventures have some certainty in relation to who they are dealing with. So one aspect which you could quite confidently say most of the representative body work is focused on at the moment is making sure that those authorisation processes are complied with. Most of the areas in New South Wales require that, and obviously it cannot happen because of the limited resources that we have got. There has been, through the rep body system, a series of applications made to the Federal Court in Sydney whereby claims have been struck out—by the court, not by the land council—in relation to not being properly authorised. Because the act allows self-authorisation and does not require certification by the representative body, we are still getting claims which, in our view, are not properly authorised and should go through a proper authorisation process.

Policies and procedures are being adopted so that, instead of it just being a closed type of authorisation process, we put ads in the national papers and we make sure that people have got travelling allowances and petrol money to get to the meeting. Then we have a meeting, which is usually a preliminary meeting, to explain to everybody exactly what they are there for in terms of authorisation and so that the rep body can obtain the informed consent of the indigenous people in relation to whatever the matter is that they are dealing with.

CHAIR—I have quickly scanned through the paper that you presented a week or two back at the conference. On page 5 and 6 you talk about the Adelong agreement. We have had some evidence about this from Mr Dunn and this morning we heard from Miss Grant, who is a member of the Wiradjuri Council of Elders. I want to explore with you a couple of the issues they raised. What Miss Grant referred to, and Mr Dunn perhaps more forcefully, was the difficulty that they now find themselves in because they were advised back when the agreement was negotiated—and, as you say here, it was the first registered indigenous land use agreement

in Australia—that they did not need to make a native title claim. They believed that the agreement, when it was registered, would be binding. They now find themselves in a situation where the New South Wales Land Council has assisted another group, the Ngunnawals, to put in a claim over the area of the agreement. There is nothing wrong with doing that; it is the land council's role to assist.

Mr Kilduff—I do not think that is correct.

CHAIR—Can I just tell you what they have said, and then you can respond to it. They say that this has complicated the agreement, which has passed through a number of parties now because the original owners of the goldmine have on-sold and there has been another on-selling and I think another one is imminent, and they find themselves in a situation now with very few resources, having to lodge a claim, prepare for the claim and so on, when the Ngunnawal claim has already been registered over their area. That is one of the issues that they raised last week and this week. How would you respond to that?

Mr Kilduff—No assistance was given by the rep body in relation to the Ngunnawal claim that was registered over the area. The claim, along with others in New South Wales, would be a claim which we would say does not demonstrate on its face the proper authorisation process. It should be properly authorised. The claim itself would not even affect the indigenous land use agreement because of its registration.

CHAIR—Yes, but you know what it means about country. They believe that that is Wiradjuri country, and this would recognise that it is Ngunnawal country.

Mr Kilduff—If I am right, this is a claim by Don Bell. I do not know too much about that claim itself but, as I said before, there are a lot of claims in New South Wales which have not come through the certification process. To come through the certification process they have to show proper authorisation. We are fairly busy in the Federal Court at the moment going through those applications. In some cases, we have to say to the court, 'Procedurally, they are flawed because they do not, on their face, show proper authorisation; therefore they should be struck out.' I would have thought that, in that matter, we would be going along a similar sort of route.

CHAIR—Thank you for that. When you have a chance to look at this morning's evidence from Miss Grant and last week's evidence from Mr Dunn you might want to respond in more detail, or perhaps Mr Chapman might. But doesn't this demonstrate one of the critical nuts of the problem that is arising? There is still confusion on the ground; resources are being spent perhaps unwisely and unwittingly to put in claims which are not correctly structured or authorised or whatever you like to call it, so they wait in the Federal Court. The Federal Court is taking up its time and then it is rejected for a technical reason. You are a very significant player in this because your land council is in New South Wales, so how do you deal with this in a strategic sense?

Mr Kilduff—First of all, we do not put any resources into the initial application.

CHAIR—But it does not stop them going in.

Mr Kilduff—It does not stop them going in, but this comes back to the common law right infringement. I think we would prefer, ultimately, to have the certification power to say, 'This is a proper claim. This is the one that is going to proceed through the courts.' We have an in-house prioritisation policy about where people's claims are at in terms of evidentiary material and the like, and there are a lot of claims which are all being properly resourced in relation to either going to trial or entering into agreements. But the culling process, if you like, of the claims which are not properly authorised is an issue which at the present time is really dogging us. We are busy on that. In lots of ways, we do not see it as our role either—

CHAIR—But it would be useful if you could take a step back from that process so that you could put in place some mechanism whereby the communities do not go through this process of expectation and then division within claim groups and between various elders. This particular piece of evidence that we have received today and last week probably illustrates better than any that I can recall over the last couple of years the nub of this problem. Recognising the resource problem, as we do, how can you work out a communication structure to try to contact people and direct them in ways where they have a greater chance of a successful outcome?

Mr Kilduff—We see that purely as being resolved by the authorisation process itself, so that whether it is defined by their country or by the agreement—whether it be a mining or an other agreement—we go in there properly advertising to make sure everyone is there, instead of it just being—

CHAIR—Ad hoc.

Mr Kilduff—the group that is trying to assert it. If there are mediation issues, we try and mediate them and even involve the tribunal in relation to those. But once a series of meetings has been held and everyone has been provided with natural justice—in the sense of being able to get there and put their case—then it is a matter for the people to authorise that claim either through the traditional or some other method. When we had certified that those people are properly authorised, then we would say to the outside world: 'That is it. That is the claim,' or 'That is the agreement.' We have had many meetings with miners and other people who say, 'This is the same problem, who do we deal with?' and we say, 'If you let us go through, and if we have got the resources to do these things, we will hold meetings out in the country and have big authorisation meetings.' From the start—or from really early in the piece—I was involved in Hope Vale. We had huge meetings up there where all the issues were thrashed out, so they got on and got their determination without too many problems; whereas, I think New South Wales and other states have this competing claim process where we are starting to cull them, if you like.

Mr McMULLAN—I do not want to pursue that point too far because it is not central to my concern, but did I understand you correctly to say that the constraint on your capacity to cull is people's fundamental right to take either their own common law action or an action against you if they consider that you have culled them without giving them the chance to be heard?

Mr Kilduff—Certainly.

Mr McMULLAN—That is going to make it harder, is it not—

Mr Kilduff—Yes. 'Culling' is probably the wrong word.

Mr McMULLAN—irrespective of the Native Title Act?

Mr Kilduff—We have been pretty strong in saying we are not going to strike them out—they are Aboriginal people and they are asserting some sort of right—

Mr McMULLAN—Yes, of course.

Mr Kilduff—but procedurally we have been able to go to the court and say, 'If you look at this authorisation process, it does not have notice involved with it and it does not bring all of the native title claim group to the table, and the fact that it is procedurally flawed and should be struck out only on that basis does not preclude them from coming back to the court with a properly structured application.' With the ATSIC submission, there is a negotiation protocol that I was briefed on by ATSIC at the time for negotiating with the Victorian government, and that set out a way forward, if you like, by locking all the players into a framework in which the representative body would have a strict administrative role to get the authorisation meetings happening. That meant that, whatever the issue was that was going to be authorised—whether it was a claim or an agreement—there would be a properly authorised group that could go to whomever they were going to negotiate with. Then they could set up a structure by which that group could actually say: 'We are properly authorised. The representative body's role now is to get our connection report material together, and then we can go in to negotiate the things that are there.'

Mr McMULLAN—Does the act need to be changed to articulate that process more clearly—not to interfere with peoples' rights to assert their claim but to create a requirement that they have a process which at least gives the court, tribunal or you in the rep body some chance to assess whether it is a claim with broad support?

Mr Kilduff—It is not so much the act changing. All native title rep bodies throughout Australia have got their own policies and procedures that have been developed in relation to this. There has been an internal set of rules developed which, if complied with, would be supported by the representative body. I have thought about this long and hard and we have discussed it in terms of just having the certification power and a claim not getting up through the system unless it was certified by the representative body. But that runs into that common law right issue. In the Northern Territory the powers that the land councils had to make sure they delivered up, if you like, the right people to deal with whatever the issue was were very good and workable, whereas here there is still a loophole in the sense that people are able to drive it through.

The resources are being spent on dealing with the damage caused or the right people issue. It is not certain so the rep bodies have to go back and revisit it. Out in Barkindji country in western New South Wales there are lots of claims. There just have not been enough resources put into holding meetings. We have endeavoured over the last six to 12 months to do so and applications have been made to the court to replace applicants to try to get it into a functional type situation. The miners that we deal with are put on notice that, even though some claims are registered, the representative body has a view that they do not necessarily cover the field in

terms of the whole claim group and that, therefore, we would like to hold bigger and larger and more open and transparent authorisation meetings to say, 'Here is the area and these are the right people.' Even though there might still be simmering disputes within there, it is a clearly identifiable group of people that can be dealt with.

Mr McMULLAN—I want to go on to three other things and then I will make way for my colleagues. Was the protocol with the Minerals Council, which I have not read before although I was aware of it, the genesis of that?

Mr Kilduff—The unworkability of the act.

Mr McMULLAN—That is a very good answer. Who, having recognised that problem, took the initiative to initiate the process of protocol negotiation?

Mr Kilduff—Both parties. Section 26A, low impact, brought the parties together. They came to us and said this was what they wanted to do. There were fairly heated negotiations about the way in which they wanted to originally go about it. Eventually agreement was reached as to land-holders being defined as being registered native title claimants and having periods within which to lodge a claim so that they could negotiate over that low impact exploration. As a result of that, both parties have been throwing ideas on the table in terms of trying to streamline it. That is going to be signed on 26 June but we have already moved through some of it. We are working on it even though it is not signed. We are getting standardised access agreements across the states so that people can pull them off the shelf and say, 'Here it is.' We have said to them that it is a resource issue and could facilitate the identification of the group and the authorisation of it but they would have to stand in the queue because there are 100 groups seeking the same thing and we cannot deal with them all at once. There is provision within the protocol for the mining side to pay for those sorts of things. I am doing a negotiation at the moment where they are assisting in relation to authorisation meetings because the representative body has not got enough funds or personnel to do it.

Mr McMULLAN—That makes sense. Although at some stage I would be interested in pursuing that, I will not take the time now. With regard to the role of the state government, firstly, I am interested in the extent to which they were involved in that protocol. I know that they had a role in what came before the Attorney-General and that was agreed between the Minerals Council, the state government and yourselves. Were they otherwise involved? Also, just for the sake of brevity, I will put two points in the one question. With regard to what I will call the Byron Bay negotiations for the purpose of simplicity, the council is negotiating with the state government. In an analogy with Cape York, the state government was involved and there were other parties, for example, the local government. In that instance, of course, there was one particular commercial player because of the area and the commercial involvement. Are there other participants in that other negotiation? They are two quite distinct questions about the role of the state government. I thought I would ram them together and speed things up a bit.

Mr Kilduff—There is provision in the protocol. We quite clearly see that, once the Minerals Council and the land council can actually get to a set of agreed procedures by which it can happen, we would have to go to the state to push it through. There is provision within the protocol to make sure that the state, and any other relevant party, can become a party to the

framework, or whatever, of the agreement that will be struck. I think that the state government in New South Wales has always indicated its willingness to try to settle matters. Local shires are involved in the Byron Bay case and fully support the process. The indigenous land use agreement process, I suppose, is a little bit different from the application process because that process pulls in a lot of parties, whereas if you structure your indigenous land use agreement properly you should be able to limit the number of parties so that there are not, as with the application process expressly, other parties putting their hand up saying no for whatever reason.

Mr McMULLAN—When ATSIC was before us, they expanded upon the point that is in their submission, flowing from the resource issue, about the competing pressures of attempting to prioritise their resources towards agreement negotiation and the conflict with the pressure on them for litigation, which burns up resources. How is that affecting the New South Wales Aboriginal Land Council, and how is the land council responding to that challenge?

Mr Kilduff—It would be in a similar way. This is where the process itself falls down a bit in the sense that there is the ILUA process and the application process, and when you are dealing with some state governments, such as New South Wales and in Queensland, they now say, ‘We can blend the two together.’ So instead of ending up in trial, we can finish up with either recognition of title or indigenous land use agreements which allow people to have the right to have a say over cultural heritage in the area. There is a tension there between those two sets of things. The resources that we are spending at the moment in terms of Federal Court applications are enormous because a lot of the claims are, if you like, procedurally flawed. They have gone in under the old act, have been transferred under the amendments to be registered and have gone through procedural things, but there are still some fundamental flaws in terms of the size of claims.

A sad aspect of the whole process is that we have had to learn all the way through the best way to manage it. We are starting now to pinpoint how best to run a native title application in terms of trying to structure the application in such a way that you do not attract all these parties, because that is the slowing up process. Once it is notified there might be 300 or 400 people putting their hands up. But if you can structure the claim now and say just pure crown land with either a heartland claim or with a properly identified group around that area, then the only people we really have to deal with are the state or the local council, and if they have policies in place, which New South Wales and Queensland do, it is a lot easier and a lot less costly as well.

Mr McMULLAN—Thank you.

Senator MASON—I have a couple of questions—one general one and one perhaps more rather more specific. In the introduction to your submission—and I think your submission in general is more positive in terms of indigenous land use agreements than, for example, ATSIC’s—you say that in an agreement setting as opposed to a court setting the native title holders’ bargaining position is substantially increased and the benefits secured are far greater than those that have been secured in any litigation to date, whereas ATSIC’s submission spoke a lot about power and resource imbalances. They cited the Cape York Land Council’s submission to this inquiry, which they said outlined how the delays in the negotiating process and the continual pressure to compromise had a wearying effect on native title holders. You are more positive. Why do you think that is?

Mr Kilduff—Much of it is because of different experiences.

Senator MASON—What do you think are the ingredients for success?

Mr Kilduff—When we were talking about bargaining positions, what we found was a positive to flow out of it was that native title did not necessarily have to be dealt with in relation to it. The particular issues of the group might have been to do with a bridge, or wanting to protect a waterhole or whatever. Instead of getting wrapped up in applications, like with Adelong, an application never hit the tribunal. We were just about to prepare one, but they said, ‘Don’t put one in. This is the way to resolve it,’ and we bargained our way into getting benefits for the group in the sense of equity in the company. They wanted to explore that vast area of not only Adelong but also around this region, and they wanted to secure those exploration rights through the ILUA process without ever having to go into an application setting. So both parties got exactly what they wanted out of it, and there was no recognition of native title or anything like that. It was just a setting up of an Aboriginal corporation which held the benefits, and I think Miss Grant was a director on one of those.

CHAIR—In retrospect do you think that was the best way of doing it? Look at what has happened now. There is a native title claim over the area and, even though you say it will probably be knocked out, it is causing enormous tensions around there.

Mr Kilduff—That may be so, but it does not affect the indigenous land use agreement. It does not affect the rights of either party under that indigenous land use agreement.

CHAIR—Perhaps they need to be reassured on that.

Mr Kilduff—I think that is a resources issue. In an ideal world, we would like a post-agreement section within the land councils to service those clients, because we find that we get the agreement done and then we are all off at the next agreement and they are not getting serviced properly. But that again is a resource issue.

CHAIR—At the bottom of page 287, Mr Dunn says:

There is a registered ILUA over our land, but they cannot negotiate with us anymore or get the registered ILUA signed over because the Ngunnawal have put a claim over our land—they are the native title claimants now—and because it is a registered claim they—

and I presume that means the mining company—

have to deal with them. So they have to start from scratch.

If your view is that in fact that is not the case, perhaps somebody needs to tell the Wiradjuri Council of Elders so that they are clearer on what their rights are.

Mr Kilduff—What it does is highlight that, prior to native title, there were a heap of Aboriginal organisations already out there functioning, and so when it came to trying to mediate our way through the different groups and organisations various people were very set in their ways of saying, ‘This is the body which we should deal with.’ With groups like the Wiradjuri Council of Elders, which are highly respected within New South Wales, et cetera, there is still

nothing there—in the sense of the authorisation process—for us to say that this is the appropriate body to deal with. We are dealing with common law rights, not just a group of people coming together for whatever purpose there may have been. So you have this confusion and dispute arising, because we turn up and say, ‘It doesn’t matter whether you call yourself this corporation or that corporation; it is all about whether you are a person who holds or may hold native title.’

That is the key legal issue that besets it. Other various other practitioners have dealt with it in WA and other places, where you go to a town and there are nine different Aboriginal organisations that have been set up through history, and they all have their vested interests. The meetings that we are calling are in a way adverse to them because we are saying that it does not matter what your organisation is, the people who hold or may hold native title in the area are the only ones who can authorise or who are able to speak on behalf of the native title holders in that area. That is an enormous adjustment for the Aboriginal communities and I think chaos has been pretty well prevalent since.

CHAIR—And painful.

Mr Kilduff—Very painful. My advice generally has been that the only way to get over that pain is to set up a series of meetings by which we inform the communities of what native title is and how the act works, and what the issues are around it, whether they be an unauthorised native title application to be dealt with or a negotiation that is just about to take place on a section 29, or whether some of the more cohesive groups are moving along the native title path to prove their title. There are all different shades of it, if you like.

Senator MASON—I do not think you got to the first part of my question. I really gave you licence to boast about your optimism and the ingredients that you had placed in the process that were perhaps better than elsewhere. Let me move on. Perhaps as the flip side of what Mr McMullan and the chair were asking you about, you mentioned—you did not like the word yourself—‘culling’ applications. Can I look at the other side of that? Let us say I was a mining company in New South Wales, I wanted to mine and native title was an issue. If I came to the New South Wales land council, as you are the rep body would you put me in touch with what you considered to be the appropriate local body? In doing so, aren’t you culling?

Mr Kilduff—No, we would say that there is a process which could be put in place to deliver the certainty that is required. What has happened is that miners just go directly to people and then come back say, ‘We have negotiated this agreement.’ We go, ‘What is it all about? Have all the potential native title holders been identified?’

Senator MASON—If I were Adelong Mines and I had to come to you and asked ‘Who do I negotiate with?’ you would have said—

Mr Kilduff—That is what they did.

Senator MASON—They did and you would not have included the other lot, the Ngunnawals—Mr Bell, is it?

Mr Kilduff—We included everybody. We made sure there were properly advertised meetings at Tumut.

Senator MASON—It is more about, 'How long is a piece of string?' The potential groups become broader and broader and broader. I am trying to work out where you, as the land council, draw the line. How do you draw the line?

Mr Kilduff—We do not ever make definitive decisions in the sense of saying, 'These are the right people.' When the miners like Adelong came along and said, 'We want to mine,' we said, 'We will hold a series of meetings in Tumut and we will ask everyone who has an interest to come along.' We cannot definitively say, 'This is Wiradjuri country, this is Walgalu country.' We say 'This is what the proposal is; does it affect your native title, if you have any native title there?' The three groups came together, because there could have been a dispute initially, to say 'No, that is our country; get out of here.' Mediating our way through it, we said, 'You should all come together. This is the result that may happen in terms of agreement. You elect your reps'—which they did; they had three from each different group. They became a negotiating team and negotiations were held. In fact, in this one a negotiation protocol was put across to the company pretty quickly. It was signed and it has been published. I think it is in the submissions from both ATSIC and me. The protocol has been reported in the *Indigenous law reporter*. This is one of the things that we are pretty strong on: once protocols are signed, the agreement virtually happens within two or three weeks, or a month, thereafter, because a lot of the preliminary issues are thrashed out like who we are dealing with, who is going to sign off on it and whether the mining company is going to put some resources in to pay for it.

Senator MASON—So you do not actively identify the parties, rather you facilitate the identification.

Mr Kilduff—Yes. There is no way we could sit in the rep body and say, 'They are the right people for the country at the present time.' We would have to go through a series of meetings. Under the act it is the reasonable efforts of the rep body, and provided we have made reasonable efforts in trying to identify them then we would certify. I think that gives the process strength under the indigenous land use agreement and does not particularly require any amendment. But the application process itself is the one which allows it to happen without certification. If it is not certified by the rep body in terms of the native title application, then when people come to us and say, 'Are we dealing with the right group?' we say, 'We don't know because we have not been involved in the application process.' If they request us to we will see, in terms of priority and resources, whether we can get out there to do it. It is as simple as that.

Senator MASON—It is interesting to hear your evidence that you believe this process actually has benefited indigenous people, because that has not always been the evidence, certainly from other groups. Thank you for that.

Mr Kilduff—I think it is very hard to define what a benefit is.

Senator MASON—It is interesting that you as a lawyer say that greater rights have been secured for indigenous people—greater than would have been secured by litigation. That is quite a statement.

Mr Kilduff—But that is qualified in a sense too in that indigenous land use agreements allow us to put other issues on the table which are not particularly legal or native tittle issues. That flexibility suits us. It is not money; it is recognition or the right to have a say.

CHAIR—Environment or jobs or training or whatever.

Mr Kilduff—Yes.

CHAIR—We understand.

Mr Kilduff—So there is flexibility in the agreement process but in the application process you are strictly tied to legal judgements which define or restrict native title rights. It is all particularly down to native title rights or interests whereas, say, the joint management of a national park does not have to go through an application process; it can be sorted out through negotiation. There can be an ILUA over the park which secures not only state's rights in the park but also the indigenous people's role in management and those types of things.

Senator MASON—The law's sort of ruthless handiwork is not always very pleasant, but in the end you need an outcome I suppose.

CHAIR—Perhaps only one barrister can say that to another. Thank you, Senator Mason. Mr Kilduff, when you have had an opportunity to have a look at the *Hansard* of this morning and also last week, if there is anything else that you want to add—because there are a number of comments made there about the New South Wales land council—either you or Mr Chapman may wish to address those in a further note to the committee.

Mr Kilduff—I can just address them very quickly. In the submission put to NSWALC you can actually see the resources that NSWALC have had over the years being used to facilitate major agreements in relation to native tittle. We would say that some of those agreements speak for themselves. If a lot of the community members who have been involved—other than Mr Dunn and Miss Grant—were spoken to about it you might get different views about the way in which the Adelong agreement has come about.

CHAIR—If you wanted to express those views in writing to us subsequently we would be glad to have them.

Mr Kilduff—Certainly.

CO-CHAIRMAN—You are the last witness today, Mr Kilduff, so I thank you for making your journey in from Gundaroo. We will let you go back to continue your work.

Committee adjourned at 12.50 p.m.