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Proof Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Native Title Amendment (Reform) Bill 2011

(Public)

FRIDAY, 16 SEPTEMBER 2011

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Friday, 16 September 2011

Senators in attendance: Senators Boyce, Cash, Crossin, Humphries, Pratt, Siewert and Wright

Terms of reference for the inquiry:

To inquire into and report on:

Native Title Amendment (Reform) Bill 2011

WITNESSES

SMITH, Mr Kevin James, Deputy Chairperson, National Native Title Council

TAN, Ms Carolyn Lian, In-house Legal Counsel, Yamatji Marlpa Aboriginal Corporation

Committee met at 09:31

CHAIR (Senator Crossin): I declare open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Native Title Amendment (Reform) Bill 2011. The inquiry was referred by the Senate to the committee on 12 May 2011 for inquiry and report by 20 September 2011. However, the committee has agreed to seek an extension of the reporting date to 3 November, and a formal motion to this effect will be made in the chamber next week. The committee to date has received 27 submissions for this inquiry and these submissions have been published and are available on the committee's website.

I want to remind witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. We do prefer all evidence be given in public, but of course there are opportunities for you to provide that evidence in camera if you so wish; you just need to indicate to us that that is what you want to do. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. The public hearing is being televised within Australian Parliament House and is also broadcast live via the web.

I welcome representatives from the National Native Title Council and the Yamatji Marlpa Aboriginal Corporation. The National Native Title Council has lodged a submission with us which we have numbered 14 for our purposes and the Yamatji Marlpa Aboriginal Corporation has lodged submission No. 8 with the committee. I now invite you both to make a short opening statement, then we will go to questions.

Mr Smith: Thank you for the opportunity to make submissions on behalf of the council. In the submissions that were provided by the council we agreed, in essence, with the actual amendments. However, there are two components of the bill that I would particularly like to focus on from the council's point of view, but my colleague Ms Tan will be picking up other elements—the technical elements, if you like. It is the view of the council that if there were two changes that could occur in the Native Title Act they would be changes to the presumption of continuity and disregarding historical extinguishment. The reason why we state those two amendments are critically important is that those two amendments actually could expedite the resolution of claims and they could also reduce the time of settling claims, whether by consent determination or by trial. It will reduce the money that is expended in the system, and many millions of dollars have been spent to date and many millions more will be spent in native title. There is also the human element that this process exacts from our elders. Aboriginal and Torres Strait Islander elders have for many years been seeking legal recognition of their rights and, regrettably, as we are in the 18th year of the Native Title Act, some of those aspirations still remain outstanding.

There are 440 claims still in the system as at 30 June. The tribunal statistics on that will be updated shortly. If we look at the 440 claims, the tribunal has projected that, having regard to the current practices, it will be another 30 years before that caseload will be resolved. The Federal Court, after the 2009 amendments, has undertaken a very proactive claim disposition approach. The approach of the Federal Court is that it could be between 10 and 15 years to resolve native title. The council's view is that, even if it were 15 years, the substantive issues to deal with native title on the ground still have to be dealt with. So the native title may be recognised by consent determination or by trial, but at the end of the day how native title affects people on the ground still has to be resolved, and it has to be resolved through Indigenous land use agreements. That interaction still needs to be dealt with.

The reason I say that these two amendments are critical is that I can say that, with the corporate knowledge and the system knowledge of all the rep bodies in the system, native title is factually complex; there is no doubt about that. You are dealing with a myriad of interests over many years and also how you resolve those relationships between those interests. What has happened is that the jurisprudence has made the native title space tremendously complex. The jurisprudence that came out of the Yorta Yorta judgment has made the requirements of proving connection very difficult. But it is not the substantive law that is that complex. It is actually proving the elements of that substantive law. The submission of the council is that, if you were to change the way the evidence was obtained through that process it would actually expedite the process considerably.

The reason I also highlight those two amendments is that those two amendments, I would submit, can be done reasonably quickly. We all know of the comments of Chief Justice French—Justice French, as he was when he

made the comments in 2008—that those particular amendments were modest amendments. It is our corporate experience of the system that they are modest amendments. They are amendments that essentially deal with how native title is dealt with and how it is actually argued. The reason why it can be done quickly is that, when native title commenced, there was so much confusion and misunderstanding about it. Eighteen years on the parties understand the environment that they are in, the stakeholders know the environment that they are in and the legal representatives know the environment that they are in. If you go to a negotiation on the ground, you will see the same players time in and time out. We are not dealing with the broader citizenry of Australia; we are dealing with a very select group of people who have got longstanding corporate knowledge of the system. So consultation on these particular issues should be relatively quick because you are talking to a well-informed stakeholder group. Also what has happened is that the native title jurisprudence has stayed the same since the 2002 Yorta Yorta judgment but the relationships have changed. When I talk about the factual complexity with a number of the stakeholders and parties in the system, because they have a familiarity with the system now, there are relationships that are being built. What would happen is that, if we changed the rules of engagement, it would make native title easier to prove and parties could get on with the business. I think the issue now from respondents is not—who are those Aboriginal people—because they have been negotiating with those same people for 10 or 15 years; the question is: how do we make this work on the ground. It is the jurisprudence that is causing the issues about how these things can be implemented on the ground.

The National Native Title Tribunal talks about there being some problems with overlapping claims. There are a number of claims that are not overlapped, put it that way. At least half of them are not overlapped. I think that if these amendments were to be put through, you could have those claims resolved relatively quickly. Of the claims that are overlapped by one overlap, there is another 20 per cent, so if you changed the rules of engagement in this process, 70 per cent of claims would stand a better chance of being resolved in a faster time frame without the expense and without the angst on our elders.

The second point about this regarding historical extinguishment is that, yes, it is a change to the substantive law. Once an act extinguishes native title you cannot revive it. But the example that is in the bill and which Justice French referred to, is having regard to those tenures that actually extinguish native title that are really only tenures between the applicants, the claimants and the state. We had examples in the Queensland area where there were townships that were created—or timber reserves—that could effectively extinguish native title but they have no broader application than they did 10, 50 or 60 years ago. If the act had the power of disregarding historical extinguishment, it would broaden the space for negotiation to occur. I know that these are fairly broad and long-winded introductions but if the point was to be made, Senators, it is that all the amendments proposed in the bill are very important but there are two particular elements around presumption of continuity and disregarding historical extinguishment that would have a very clear impact on native title as it now stands.

I will now ask Ms Tan to address the other issues because the procedural issue around the future act regime is also a pressing problem.

Ms Tan: As indicated in our submission, YMAC supports the intent of the bill and the amendments. Some of the drafting could be finetuned and we would be happy to work with any group that is looking at that in terms of drafting. I do need to point out that there are some words that disappeared from the draft, on the last page of the top paragraph, in relation to section 47C which is the issue of disregarding extinguishment. The second sentence says:

... disregard prior extinguishment within the scope of outlined—

I think that should have referred to outlined areas such as national parks or crown land as being specific areas where the court could disregard prior extinguishment but without needing the support or agreement of the government. That has been picked up in other submission.

CHAIR: Could you take us to that exact reference, Ms Tan?

Ms Tan: It is on the last page of the submission, the top paragraph.

CHAIR: Sorry, we are looking at the actual bill.

Ms Tan: In relation to the bill, it is 47C, which is item 11. A few words seem to be missing there. It says 'within the scope outlined', but it does not then say what is outlined.

Senator WRIGHT: Could you repeat what you said before?

Ms Tan: Yes. The bill at the moment deals with disregarding extinguishment by agreement with the government. We further submit that certain categories of land should be able to have extinguishment disregarded even without the agreement of the government—in other words, in a similar format to 47A and 47B. In those categories there is no need for agreement of the government. You just have to prove occupation. Similarly we say

that, in relation to certain areas to be outlined—such as national parks and crown land, where there are no other third-party interests—those are areas where it should not require the agreement of the government either. That has been picked up in some of the other submissions at length as well.

I agree entirely with the points Mr Smith has made on behalf of the NNTC. One area that is of major significance and immediate impact for the Yamatji Marlpa region—which is the Pilbara and the Murchison-Gascoyne region, which is highly mineral rich and where there are enormous pressures on native title claimants in relation to mining ventures—is in relation to the category dealing with good faith negotiations. In essence, our concern is with the impact of the FMG decision that has been referred to in the explanatory memorandum at item 12: FMG Pilbara Pty Ltd v Cox in 2009. That decision has really watered down the requirements of good faith negotiation. Mining companies in particular, who need to get their tenures dealt with urgently, know that the threshold is now so low that they do not need to do much by way of negotiation at all.

By way of background, in the FMG case the tribunal at first instance found that there had not been any negotiation in good faith. The satisfaction of the good faith negotiation requirement had not been passed because, although everything that had been done was entirely in good faith—there was no proof otherwise—the tribunal found that the negotiations were so embryonic that they had not actually even got into the substance of the matter. In other words, the parties had spent a lot of time negotiating a protocol as to how to negotiate. So it was really a negotiation protocol as to how they would conduct the negotiations. In that case, FMG wanted not to negotiate just one particular tenement but a claim-wide agreement. That was satisfactory to the claim group; they were happy to negotiate a claim-wide agreement, which would resolve not only that tenement but many others in future.

However, the negotiations only got to the stage of having basically signed up the negotiation protocol when the application was made to the tribunal for a hearing in relation to one mining lease. The problem there, the tribunal found, was that it was so embryonic nothing much had really happened. You could not satisfy the fact that there had been good faith negotiation at that point. However, the Full Court, looking at the literal meaning, I suppose, of section 31, said that it has got to only be negotiation in good faith with a view to reaching an agreement. Anything in good faith with a view to ultimately reaching an agreement would satisfy the test. Even though it was embryonic the Full Court basically said you did not have to look at the stage and the substance of where the negotiation had got to, which leaves native title claimants, I suppose, in an extremely poor state. The right to negotiate was trumpeted as one of the key features of the Native Title Act; that was given in exchange for any veto. But that has been undermined completely, because the effect of that decision is that sometime before the application is made for a hearing—so sometime within the six-month period from the issuing of the section 29 notice to advertise the future act—there has to be a negotiation about something in good faith. To take that to an extreme, it could even be argued that if just before the six-month period is up—maybe a few days before—there is a negotiation about how we will negotiate, about where and when the negotiation might happen or about who is going to pay for the morning tea, which is an extreme case, then theoretically, as long as that is in good faith, it passes the test, because it is ultimately negotiation towards an agreement. So we submit that that is a ridiculous situation, and the amendment is required to, I suppose, pick up the original intent of the importance of the right to negotiate. The suggestion there is that the negotiation has to be for a period of at least six months. It is not enough just to have a negotiation within the six-month period—which, as we said, could happen at the last minute. There should be a requirement to use all reasonable efforts to come to an agreement. So that goes to the substance of the negotiation that has to take place.

The amendment in item 6 then goes on to list the sorts of indicia of what would be a good-faith negotiation. Those really pick up what has been used by the tribunal in the past, but there is a lack of clarity as to whether that would all be required in the light of the FMG decision. So I think it would be far safer to actually, in a sense, codify what has been the practice in the past as to what is good faith. It is not exhaustive; these are just indicia that the tribunal and court should look at.

For us, that is the extreme situation. We have claimants who are under constant pressure to negotiate deals all the time. You need six months to really come to grips with what is happening to arrange meetings and to actually negotiate. Very often, the first of these negotiation meetings is just a 'meet and greet' type of situation, and that is necessary and useful to build the relationship. So in practice we do not think the requirement to negotiate for at least six months will be that onerous. That has been the norm in the case of most companies in the past; in most cases negotiations have gone on for far more than six months. So it is not that onerous. It simply requires six months from whenever the negotiations first start. Obviously, if companies wanted to pursue negotiations faster, they could start earlier. In my submission, that is the crucial one, because, without the right to negotiate, the chances of native title claimants having a say in protection of their country and getting some compensation at an

early stage in relation to big mining deals that are happening on their land, for instance, would be completely undermined. Thank you.

CHAIR: Thank you both. We will go to questions now.

Senator SIEWERT: Thank you for your submissions and your evidence; it is very useful. Mr Smith and Ms Tan, I take it that the three areas that you have outlined between you are the three core areas from all the different amendments in the bill. Are you proposing that those three be dealt with separately, perhaps, to proceed more quickly than the others? Is that what you are saying?

Mr Smith: What Ms Tan said about the immediacy of the future act regime and the need to sort that out is very important, because obviously, with the mining boom that is going around the country, it is alive and well now. But parallel to that is the claim process, and I highlighted the Federal Court's approach to quite appropriately resolving claims that have been in the system a long time. So you put these two parallel streams together, and often the Federal Court is not dealing with the future act regime. You are putting those two things together. If the system needed a pressure valve, it would be those three items that we would be looking at. What we would not want is a broader discussion around all the other elements in the bill that may then push those three critically important issues to the side.

Senator SIEWERT: So, without putting words in your mouth—I suppose I am, but I do not want to push you further than you are prepared to go—would you then suggest splitting the bill and having two bills, one that dealt with the three most important or urgent elements and then another that dealt with the other issues, because although there is a lot of support for some of the other amendments as well they are not as pressing as the three that you have highlighted?

Mr Smith: I think that would be a sensible approach, and that would be my evidence. They are discrete issues, and the consultation around those three pressing issues could be contained and structured in a fairly fast way. I think the issues around the declaration are that it is a fantastic amendment but there is a lot of building of understanding that needs to occur around that, and the council would not want to see those issues complicate these issues that are burning at the moment.

Senator SIEWERT: I will pass on, because I know that we have limited time and that people want to ask questions, but I want to ask a couple around the issue of agreements to disregard prior extinguishment. There have been a number of comments that this should not be subject to the agreement of states and territories, and I can understand the arguments there. What is your opinion there? Ms Tan, perhaps you—

Ms Tan: As we have said, at the moment 47C is drafted quite broadly. The width of that is, I suppose, satisfactory to require the agreement of the states, because that is an issue which may not be as controversial. There is a practical matter that could be passed straight away. One of the issues—just a very practical one—is that at the moment we have a situation, for instance, with 47B where there is vacant crown land. Section 47B says extinguishment can be ignored where the land was vacant crown land at the time when the application was made. We have a practical situation where there may be land that was not vacant crown land at the time the application was made but subsequently has become vacant crown land. The practical reality is that the only way to then get the benefit of the disregarding of extinguishment provisions is to issue another claim. So there is a practical issue there, and perhaps in situations like that the state government would be able to reach an agreement so that it would not be necessary to keep issuing claims whenever land became vacant in order to trigger the effect of the disregarding of extinguishment. So, in practical terms, we would see that that could be something that could be passed straightaway as well. If you have the agreement of the government and the native title parties, there should not be any prejudice to anyone else.

In terms of the other categories of not requiring agreement, that was a submission we made in relation to the government's proposal about national parks. There is no reason why those sorts of areas should be matters which require the government's actual agreement to disregarding historical extinguishment. We must not forget that very often with historical extinguishment people do not even know where it is. There could be an extinguishment over a building. In the case of pastoral improvements, there have been arguments that pastoral improvements extinguish native title. So there could have been a building that was there once that has since fallen down and disappeared, and in practice nobody actually knows where the boundary is anyway when they are walking over the land. So those are situations where there is no harm in disregarding extinguishment.

Mr Smith: Can I just add to that. The way that native title is litigated, with the connection issue, it is very sequential; you do your connection first and then, once you get those elements sorted out, you go to extinguishment. The current tenure holders are invariably represented in the negotiation because they actually have a tenure that asserts an interest. There is an example from where I operate. We had gone through the

connection issue and dealt with the contemporary extinguishment issues, but then there was a historical extinguishment issue that had occurred many, many years before that. So the practical effect of that was that we could have gone through the connection elements and dealt with all the parties' interests contemporaneously and then there might have been a historical tenure that could have gazumped the whole thing. That is the practical effect of these things. In that particular matter, if this particular amendment had been made, it would simply have been a matter of agreement between the state and that particular claim group. So that is the practical example of this amendment.

Senator SIEWERT: Thank you.

Senator CASH: Thank you, Ms Tan and Mr Smith, for your submissions to the committee. In reviewing the submissions and the other materials that have been made available to the committee, a number of issues are raised: that the significant financial dividends from agreements made in relation to native title are not currently achieving the outcomes that the act would actually want them to achieve. I will give you an example: large amounts of money are being paid under major agreements, but this is not resulting in lasting positive social and economic change within the affected communities that is commensurate with the financial inputs. There has been a discussion paper released by the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs entitled 'Leading practice agreements: maximising outcomes from native title benefits'. I am sure you are aware of that paper, and certainly it is seeking to engage on that issue and identify through consultation means of improving the quality of agreements and particularly the governance of benefits under them. One of my concerns with the amendments proposed in this bill is that the bill does not seek to address any of those issues at all. Is it a fundamental flaw in the bill that you are actually not addressing how the financial benefits are actually flowing on to the Indigenous communities? What can we actually do in amending the Native Title Act to improve the mechanisms to assist self-governance of the agreements and the benefits provided under them?

Mr Smith: I think there are a couple of issues there. We have to disaggregate the future act regime and the compensation that I think you are referring to from the native title claim, so there needs to be a distinction there. You bring a claim for compensation for acts that have extinguished your native title, but the issues that you are referring to there are the types of compensation packages that come out of future act negotiation. A fundamental for that is that the compensation is for the impairment of the enjoyment of that native title, so it is fundamental that those people who have had the impairment of that enjoyment be compensated. That is the first thing. On the issue of how far that is then distributed to broader Aboriginal people that may live in that community, the council's argument there would be that it is a compensation issue and therefore you should be compensated for that loss and impairment. So that is the first thing.

I think that, if you sort out the native title claim, respondents get certainty as to who they are dealing with and the Aboriginal people themselves have clarity as to how they can do business, and I think that from there you develop governance models that go into the things that you are referring. So most of the things referred to in the bill are the building blocks to setting up good community governance and good structures to do economic development initiatives. But it is very important to do the fundamentals first.

Senator CASH: But you would agree that under this particular bill the effective governance et cetera of the agreements and how the compensation is distributed to the community, whilst you may have a building block, is not actually addressed. In my personal opinion, and certainly according to a number of the submissions, that is a fundamental flaw in the current system. If you are going to make changes, wouldn't that be a great way to look at making changes—looking at introducing mechanisms by way of legislation so that we can ensure that the compensation that we are talking about is effectively distributed to the communities?

Mr Smith: My view is that you have to sort out the legal regime first. I do not think you need legislation to build economic opportunities; they will come once legal certainty is ascertained. At the current moment we have 18 years of litigation. We have got 440 claims in the system with no hope of those claims being resolved. If we look at the Federal Court's estimate, it is 15 years, and if we look at the tribunal's estimate, 30 years. Sure, I accept that economic opportunities need to be availed upon and they need to be availed upon now because of the boom that is going on. But there are also the fundamentals around how the act is not actually suiting the prosecution and the resolution of claims.

Senator CASH: And you make a very good point there, and I do not think anybody denies that the process actually needs to be changed—on both sides of the argument. What you do want is certainty going forward. You just mentioned that you need to sort out the legal regime. Would you agree that the amendments proposed by this bill will have a substantial impact on both the architecture and the interpretation of the act?

Mr Smith: I do not think they are as substantive as we might be thinking. In my introductory comments I said that I believe that a number of the stakeholders in the parties are sufficiently au fait with the regime now. It just needs some modest amendments, and basically that is what the chief justice referred to. So I do not think this is a root-and-branch restructure of the act. They are process matters and I think they are the kinds of things that could actually enhance the system.

Senator CASH: One of the concerns that I have though is that the full extent of the impact of these proposed changes will not be fully understood without testing the amendments in the court. This is not saying that we do not need to see changes to the act, but this is relation to the changes that are proposed by this bill. Unfortunately, the proposed amendments would be likely to give rise to further uncertainty, litigation, delay and expense, in respect of both the resolution of native title claims and future acts. Clearly then, you have an inconsistency in looking at what the objects of the acts are actually trying to achieve.

Mr Smith: If you actually just go back to Senator Siewert's comment about disaggregating the bill, the issues around continuity, disregarding extinguishment and the issues that Ms Tan has raised, I do not think that they actually will cause the proliferation of litigation. It will actually change the negotiation space and then through conventional litigation purposes obviously people will then see the benefits of negotiating an agreement as opposed to litigating it. If you actually do have the broader bill the way it currently stands, I think there could be some issues of litigation to test the application of the declaration on the objects. I think there is some benefit in actually disaggregating in that regard.

Ms Tan: Yes, I would agree with that. Essentially, these changes are modest changes and their whole aim would be to encourage negotiation rather than litigation.

Senator CASH: If they are encouraging negotiation—and I listen to your comments in relation to all parties negotiating in good faith for at least six months, as opposed to up to six months—that is something that I am having a problem with. I understand that what you are saying is that generally people are taking longer to negotiate in any event. But if you are looking at instituting a reform to get this process moving, why would you then introduce an amendment that says that parties need to negotiate for at least six months? Aren't you taking away the opportunity for a party to finalise or to negotiate in a quicker time frame by amending the act in that way?

Ms Tan: Could I say it is at least six months. There is a period for negotiation before an application could be made for a hearing.

Senator CASH: Yes.

Ms Tan: If a party has reached an agreement earlier, that can be signed up any time. So if the parties reach an agreement after one month, they can sign a deed and that will be the end of it. So that is to encourage that process. Perhaps I could also add in relation to the compensation and governance issues, that we have been involved in negotiating agreements where there were very tight governance structures, lots of corporate structures, looking at commercial opportunities et cetera. Those agreements have taken a long time to set up, but where we have got the time to do it—

Senator CASH: Are any actually in place? Are they in place?

Ms Tan: Yes, there are some agreements that have just been signed after some years of negotiation.

Senator CASH: Are you able to provide the committee with copies of those agreements?

Ms Tan: I do not—

Senator CASH: Could you take it on notice?

Ms Tan: I think they are still confidential. There have been public releases to some extent about the Rio Tinto agreements that have been signed up and the gist of those has been released publically in the newspapers et cetera. Those are agreements where there are lots of protective provisions for heritage but also very tight governance provisions in terms of use. It took a long time to negotiate those. I suppose my submission is that the longer you take to negotiate something properly the better you sew things up for the future.

Senator CASH: But this is a mandated legislative requirement?

Ms Tan: Yes, but what I am saying is that in practice most of those agreements take far longer than six months in any event so it is not really going to impact much on most companies.

Senator CASH: But what you are actually introducing is a provision that may impact. Isn't the whole point to get this process moving?

Ms Tan: Six months is not a long period.

Senator CASH: I agree with you, but why do you need to change the current provision?

Ms Tan: Because it will actually require people to negotiate. That is the problem. At the moment they wait six months, but they do not have to do very much.

Senator CASH: Currently, the requirement is to negotiate, but it is only up to six months; it is not for six months.

Ms Tan: There is no need reach substance. There is no obligation to reach the substance.

Senator CASH: No, I know that.

Ms Tan: You could just drag things out quite easily for six months and then apply for a hearing, and that will then move it into litigation. In these amendments, nothing stops parties from reaching an agreement earlier. If people get down to it, you could intensively negotiate an agreement in a short time, and that can be done. That would be the end of the matter; there is no need to pursue it any further. So it does not stop earlier agreements. The issue is simply that they should not be allowed to push things into litigation without seriously trying to have negotiated something first.

CHAIR: I have a question about the introduction of the principle of free, prior and informed consent that is proposed to be inserted in a new paragraph 3A. Do you actually think this will make a difference in terms of what the Native Title Act is trying to achieve? I will put it to you that perhaps the basis of any substantive intent under the act is that Indigenous people come to it with a free, prior and informed consent. How will this insertion make a difference?

Ms Tan: In terms of interpretation of ambiguity, it will give an indication as to the type of processes that are expected to be followed. But it would mainly be in those situations; it is certainly not only going to amount to a veto because that would be overridden by the very specific provisions of the future acts scheme. It is more a case of interpreting the intent behind the negotiation process.

CHAIR: So again, is it a benefit or really just a clarification of the intent?

Ms Tan: I think it is more a clarification of the beneficial nature of the legislation.

CHAIR: The other thing I want to ask you about is the NNTT determining profit sharing conditions. You say on page 3 of your submission you say that the Native Title Tribunal will have to be properly resourced:

> … including access to suitable experts to advise on the latest developments and innovations in native title agreements—

for industry standards or for profit sharing arrangements. What sort of experts are you talking about?

Ms Tan: More commercial analysts. There are experts that we engage to advise claimants on the sorts of going rates and likely profits—all of those sorts of things.

CHAIR: So you are talking about more financial experts?

Ms Tan: Yes, financial and mining experts.

CHAIR: All right, I just wanted to clarify that.

Senator HUMPHRIES: Is the incorporation of the objectives of UNDRIP into the act anything more than an act of symbolism? Can you indicate with a native title negotiation that has taken place in the past, what difference you think the principles of UNDRIP in the act would have made to the outcome of that litigation?

Ms Tan: I cannot think of situations in terms of actual litigation, except that it would reinforce the idea of what negotiations should involve, that it should not be pre-emptory. In working out what is reasonable and a matter of good faith, one should take into account the fact that people need to understand what they are actually being asked to sign. It could affect—

Senator HUMPHRIES: But that is inherent in the present legislation, surely.

Ms Tan: Well, it is not that clear. It would be better if it were actually spelt out as an intent.

Senator HUMPHRIES: But we could do that though without incorporating the entirety of UNDRIP into the legislation, couldn't we?

Ms Tan: We always argue that those are principles that should be applied in any event by proper negotiating parties as best practice. But it would be nice to say that that is the clear legislative intent as well.

Senator HUMPHRIES: I just want some reassurance that this is not just a bit of symbolism. Can you offer some sort of assurance that that is not the case, Mr Smith?

Mr Smith: I think that it would be useful for interpretation. When negotiations go pear-shaped because of the range of emotions that are involved, the contracting time frames, having some objectives and principles that are objectively recognised around the work as to what is best practice, if you like, what should encourage people to

be focusing on the broader issues of what the Native Title Act is attempting to achieve, would, I think, be useful. They are not just symbolic; they are interpretative. They can be used for that purpose.

Senator HUMPHRIES: Okay. In its submission, the Native Title Tribunal makes the point at paragraph 36—and this addresses the issues that you have both raised about how litigations become bogged down at the moment, and there is a 100 year waiting list, I think you said, of matters before the tribunal. It says:

However, it appears that many of the most 'straightforward' claims have been resolved by consent determinations (or are set to be resolved in the near future). Those that remain include claims that (absent the applications of the proposed presumption) might raise complex issues in relation to continuity of connection. The Tribunal submits that, in those cases, respondent parties might be more inclined to attempt to challenge the presumptions set out in the proposed section 61AA(2).

Is it the cast that the issues that remain are mostly more complex ones for which the presumptions are actually bypassing the complexity of the cases themselves?

Mr Smith: I think that the 100-odd determinations that we have now by consent or by trial have been those claims that have been in the system a long time. The impact of colonisation has been less than the remaining claims that are in the system. To contradict myself, I think that would be a generalisation, but I think that that is true. I can talk about the area that I come from, Queensland South Native Titles Services—I am the CEO there, as well—and that is the southern half of Queensland. In that area, there will be claims that will be problematic to prove native title. Notwithstanding that, we had our first determination on the Stradbroke Island Quandamooka claim two months ago. So native title does exist; it is just that, the way the burden of proof is placed, there is a lot of money that gets put into it. To get a connection report, for instance, is $200,000. So, if you actually have a number of claims that are in the system, you multiply that by $200,000 and then you have a human resource impost, because there are only about 10 to 15 very senior anthropologists that can actually do this very complex work. You have a human resource issue and a financial resource issue, and there is a cab rank. Basically people want to enter into the system. To say that the remaining 440 claims are going to be more difficult is, I think, probably a fair comment because of the impact of colonisation. But those claims are going to be more resource intensive because of what I have just highlighted. That is not to say that they will not get native title, because, on the doorstep of Brisbane, one of my clients recently got native title. So it can be achieved and if we changed the burden of proof then it would assist.

Ms Tan: Simply because of the resources we have often only been able to run one or two connection research claims at a time, in which case it is not that the others are necessarily weaker—it is really the case that we can only do two at a time with the limited funding. Very often the pressures as to which claim to choose might be influenced by the government, for instance, being more keen on certain claims because of the significance of where they rather than others.

In terms of section 223, those amendments are important because of the definitions of tradition and continuity, because we have found that even on the strong claims one can get bogged down by arguments about whether there have been adaptations from patri-clan estates into a bigger language group holding area. So there are quite technical anthropological issues that have held things up simply because of the nature of having to prove continuity in terms of the landholding tenure. Therefore, those amendments to section 223—on claims which would really be expected to have no native title problems—should be passed far more easily if we did not actually have to prove that whole continuity back to sovereignty. Very often there is no evidence back to sovereignty simply because researchers have not arrived in the area for way back and there is simply a lack of any research that has been done.

Senator PRATT: I wanted to follow up from that and ask the extent to which claimant groups are being denied native title because of the lack of access to anthropological research and support. I suppose that impacts on—clearly there is prospective mining and other developments—whether you can, in a timely way, support a claimant group before those development pressures bear upon them or whether people are being denied access to title that otherwise would be theirs.

Ms Tan: That is a huge problem. We have seen, unfortunately, elders pass away simply because there was not the funding to do all that research at the time. There are constant pressures of that kind. With the changes to the presumption and with the changes to proving continuity, it would be so much easier if we could spend less time anthropologically on that and just look at the current situation and not have to worry about proving it back to sovereignty.

Mr Smith: I think that people's rights are not being protected and are not being asserted. It is a resource issue. In my area in Queensland where the Federal Court is wants to resolve claims in an expeditious way, our policy, from a rep body point of view, is that we must now lodge claims that almost have full-blown connection in place because as soon as they enter the claim process they are then being court managed very tightly. That is a

legitimate reason for the court to do that but we would not be bringing claims into the system prematurely without evidence for the purpose of exercising a right to negotiate because it would then force them into a litigation process prematurely.

Senator PRATT: But no miner or developer is going to wait for you to have done that.

Mr Smith: That is right.

Senator WRIGHT: Going back to the discussion about the suggested change to the period of negotiation being from six months to at least six months, I just want to clarify my understanding of what you are saying. It seems to me that you were saying that rather than having an arbitrary time frame in there it is really an acknowledgment that the negotiation process is likely to be at least six months if it is to be meaningful. I understand that you are supporting amendments to the act that would focus on meaningful negotiation as opposed to some very minor type of negotiation that fits within the definition of negotiation but does not actually go towards the principle of having the parties negotiate seriously about the issues at stake.

Ms Tan: Yes, that is right. In the past there has often been a myth in a sense that there is a six-month negotiation period. People talk about that but in fact the act does not provide for a six-month negotiation period at the moment. It only says that you cannot apply for a hearing until you have waited the six months from the notification date—and there has to be negotiation in good faith at some point prior to the application—but there is nothing that says you have to negotiate for any period of time at all at the moment.

Senator WRIGHT: And so the existing situation, it seems to me from what you are saying, inadvertently suggests that that is the period that would be required for a negotiation whereas in fact that is just a trigger at this point at which time someone can make an application.

Ms Tan: Exactly, yes.

Senator WRIGHT: Okay, thank you. I just wanted to clarify.

CHAIR: I thank you both very much for your submission and for making yourselves available here in Canberra today. It is much appreciated. Thank you very much.

TOOHEY, Ms Justine, Policy Advisor, Kimberley Land Council

[10:26]

CHAIR: I formally welcome the representative from the Kimberley Land Council. The Kimberley Land Council has sent a submission to us which we have numbered 2 for our purposes. I am going to invite you to make a short opening statement and then we will go to questions.

Ms Toohey: Thank you. First of all, the KLC thanks the committee for the opportunity to address it today by telephone. The KLC's written submission to the committee identifies the position of the KLC and supports the bill. The KLC strongly supports the objectives of the bill, which are to apply the principles of the UN Declaration on the Rights of Indigenous Peoples and to implement reforms to improve the effectiveness of the native title system for the benefit for Aboriginal and Torres Strait Islander people.

In relation to the first objective, now that the UN declaration has been endorsed by the Australian government it is appropriate that steps begin to be taken for the principles in the declaration to be reflected in domestic law. In relation to the second objective, I think everyone would recognise that the native title system has long been seen as inexcusably slow and costly. There often seems to be some inference—particularly in popular reportage—that the greatest burden of delay and cost is borne by non-native title parties. I think this is obviously a false understanding because every delay to a determination actually holds up the legal recognition of pre-existing rights which are the entire purpose of a native title claim. In any event following a determination of native title, the rights of non-native title parties remain recognised and protected by law. So generally in terms of the broad objectives of the reform bill, KLC supports both of those objects.

The KLC would request the following minor amendments be made to its submission, along with a couple of clarifications, and we have one additional statement in relation to the bill. If it would assist, I can just go through those now—the first couple are quite minor. An amendment on page one, paragraph five, which is the last paragraph: the word 'resolution' should actually be 'amendments'.

CHAIR: Is that the only one, Ms Toohey?

Ms Toohey: There is an additional submission the KLC would like to make in relation to the repeal of subsection 263 of the native title act. The KLC would like to include its strong support for the proposed repeal of this subsection.

At present the native title act provides for recognition of native title rights and interests in land and waters; it provides a differential protection of those interests through the future act process, depending on whether they are on land and waters seaward of the high-water mark. This unfortunately can allow deliberate avoidance of engagement with native title parties. There is one example at present that I would like to draw the committee's attention to that relates to the proposal to create the Camden Sound Marine Park in Western Australia off the West Kimberley coast. It is an area that is recognised as having very high conservation value in sea, intertidal reefs and island areas, particularly in an area known as Montgomery reef, which is a spectacular intertidal reef area. The state of Western Australia is proposing to create a marine park over this area but only to the extent it does not extend above the low-water mark. It is proposing to create a Swiss cheese type marine park which excludes many fine conservational reefs, islands, intertidal areas for no reason other than to avoid engaging with native title parties, all the while making public statements about respecting traditional owners and having future intentions for joint management. The differentiation in procedural rights between areas seaward of the high-water mark and areas landward of the high-water mark facilitates this kind of mechanism which is not in the interests of engagement with traditional owners or in the interests of conservation of land and waters.

The final additional statement in relation to the written submission that the KLC would like to make relates to the proposed new section 61AA which the KLC supports as being of significant benefit to a large number of native title claims and are not affected by any kind of disputation between competing claimants, although it is noted in the KLC submission that there are some circumstances where the presumption may not practically assist the claim's resolution process. The KLC otherwise supports the bill in accordance with its written submission.

CHAIR: Thank you very much. Let us go to questions, then.

Senator SIEWERT: Can we just clarify, because we missed the amendment to that—

CHAIR: Yes, I think we did. Ms Toohey, I think we missed the changes or the corrections to your submission on page four, the second last paragraph?

Ms Toohey: Okay, sorry. It was a very minor correction. There is a reference there to section 24MD(c); it should in fact refer to 24MB(1)(c).

CHAIR: All right, thanks.

Senator SIEWERT: Thank you for taking the time to give us your oral evidence, it is really appreciated. I wanted to go to your comments firstly in your submission on page two around the shifting of burden of proof. You make a couple of comments there. If I read it correctly, your opinion is shifting the burden of proof or some of the amendments is not going to achieve the objectives that we are trying to achieve. Is that the message I should be taking?

Ms Toohey: No, in my statement this morning, I had hoped to clarify that there are some circumstances where shifting the onus of proof may not assist, but in the large number of cases where there is not any disputation it certainly would assist.

Senator SIEWERT: Thank you, I wanted to clarify that. This morning we talked to the National Native Title Council and the Yamatji Land and Sea Council and we had discussions about some of the amendments being more urgent than others—for example, the disregard prior extinguishment, the continuity and good faith and the changes to the good faith negotiations in future acts. The suggestion has been that those amendments are more urgent and that they would significantly aid moving the process forward, and that perhaps the bill should be split into two to deal with those three more urgent amendments while there is further development in the other amendments. Can I ask your opinion on that approach?

Ms Toohey: Can you clarify what other amendments would be left aside? Would that be the reference to the UN declaration in the objectives?

Senator SIEWERT: Yes, the declaration and some of the other amendments. To be honest, we put a considerable amount of effort into looking at the declaration and at how you could incorporate it into the act. I appreciate that it is a significantly new approach and the suggestion is that perhaps we need to look at that, and that there may not be as much consensus around the development of that process as there is, for example, for the urgent need for those other amendments I suggested. For example, the process could be refined but you could split it into two bills—one dealing with those three issues and the other dealing with the other issues that are dealt with in the entirety of the bill at the moment.

Ms Toohey: I would agree that that seems like a common-sense approach; however, it is very difficult to identify changes that are not urgent. Given the significant problems with the native title system, from the KLC's perspective, we would definitely want the repeal of subsection 26(3) to be dealt with as soon as possible. It is hard to identify any other amendments beyond the introduction of the UN declaration, which is a difficult task, which are not urgent. It would be possible to get some amendments through sooner rather than later, provided there is not an inference that the issues some of the amendments propose to deal with are more important than others.

I think all of the proposed amendments included in the bill are very important. They are needed to import a little bit more equity into the native title system, although we certainly would not say that it is going to address all of the issues with the system at the moment. We recognise the common-sense in the proposal to split the bill, but we would not want to see some of the proposed changes viewed as less urgent.

Senator SIEWERT: Thank you very much.

Senator PRATT: I want to ask about this extinguishment by agreement and the problems with the mechanisms for speeding up the process where the applicant and the state are willing to disregard prior extinguishment. I am trying to I understand the issue as you have put it forward in your submission.

Ms Toohey: Probably one of the easiest ways I could explain some of the difficulties is to give an example of the process that has to be gone through to demonstrate satisfying either 47A or 47B, which allows prior extinguishment to be disregarded in certain circumstances if ongoing connection in the area, physical connection to the area, at the time the claim was made can be shown. That requires some evidence that the native title claimants have used the area at the time the claim was made. This raises two main issues.

First of all there is the issue concerning 'at the time the claim was made'. Many claims are 10 or more years old by the time they are actively dealt with. There is then a process of going back to obtain evidence for someone within the claim group to have been on that area of land at that time. Unfortunately, the area of land is technically the tenure parcel. There was a determination in the north Kimberley of two claims in May this year with large areas of unallocated Crown land. Those areas were slit up into thousands and thousands of separate tenure parcels. The evidence that was required to be obtained had to be in relation to each of the separate parcels of UCL, even though it was all Crown land. That is a significant burden and it is also something of a nonsense because it means that the benefit of the subsection depends on almost an historical accident of whether your current Crown land is made up of one large parcel of land or many hundreds of them. That is definitely a practical difficulty there and there would have been circumstances in those two claims where the state would have been

more than willing to agree to native title or for prior extinguishment to be disregarded. However, technically, it was not possible for that to happen.

Senator PRATT: Thank you.

Senator HUMPHRIES: You refer to the proposed new section 47C and you say that would be a valuable mechanism for speeding up the process where the applicant and the state respondents are willing to agree to disregard prior extinguishment. In your experience, are you aware of many situations where that has occurred? Is that a relatively common point that parties reach in negotiations or is that a relatively isolated and rare occurrence?

Ms Toohey: At the moment, it is not an occurrence that happens at all. Unless the technical requirements are met in the existing 47A and B, there is no point in reaching such an agreement. However, there would be circumstances where if that provision had been in operation in relation to other claims, agreement could have been reached. In addition to the examples I have just provided and those two north Kimberley claims, there were areas of several thousand square kilometres that were Aboriginal reserve, so prior extinguishment could be disregarded under the current 47A. However, there are a couple of one-hectare parcels of separate reserve land within those thousands of square kilometres for which particular, specific connection or occupation information could not be provided. While the state was more than willing to have prior extinguishment in that area disregarded, it could not technically do that. There are definitely circumstances where, if there had been section 47, it would have allowed a much more sensible approach. Because the proposed section 47 only relates to disregarding extinguishment by agreement, it is not a compromise on any existing process; it is merely a mechanism for the parties to reach a sensible agreement without requiring this inordinate use of resources to get little bits of evidence for tenure areas that can be nothing more than historical accidents.

Senator HUMPHRIES: I suppose a state respondent could disregard the native title process altogether in that situation and simply make a grant of land to Indigenous owners—is that correct?

Ms Toohey: It could, but that is a separate process. It could also enter into an Indigenous Land Use Agreement which would give that grant of land but that is an entirely separate process and it is not something that would be ordinarily triggered. It requires additional resources and if you are dealing with mechanisms of government that are geared towards resolution of native title claims, they are completely different to the mechanisms of government that are geared towards granting of new interests. While from the perspective of the native title parties it would seem a pretty straight forward and simple solution, I think actually from the perspective of government respondents it would be more burdensome.

Senator HUMPHRIES: Thank you, very much.

CHAIR: Thanks, Ms Toohey. I have got two questions myself. One is with the insertion of the principles of the UN Declaration on the Rights of Indigenous People, you say in your submission that you note that any such requirement would need to be handled carefully as it will likely cause additional administrative burden on officials to demonstrate and record they have considered the principles. Can you just expand on what you would mean by that? When you are talking about government officials, are you talking about people from the Native Title Tribunal?

Ms Toohey: Yes, from the Native Title Tribunal but probably also administrative decision makers. The point of that submission was I guess to make a fair recognition of the burdens that it would create. If there is an additional consideration that administrative decision makers must be made aware of then there is going to be some processes that have to be put in place to inform those decision makers. That is really what that submission refers to. The principle is strongly supported but we would need to recognise that there would have to be a process of informing administrative decision makers. That becomes important when native title is so poorly understood by decision makers anyway. There is a lot of confusion. The principles and the processes in the Native Title Act can be explained and broken down very simply but there is a mythology of complexity and burden and confusion about native title. That is a very difficult thing to address so if we are requiring additional consideration by administrative decisions makers I just think we have to be prepared to provide the kind of support that would allow them to make those decisions.

CHAIR: Your submission also says though, of course, even if you include this it remains to be seen whether it will make a difference?

Ms Toohey: I think that will be the case with any reference to international principles where they might have a particular understanding of international law or within the declaration, but when they are interpreted in domestic law they do take on their own life. I mean there is a significant history of differences of opinion in the courts about the extent of taking into account principles of international law. I guess the point with that submission is

what might be considered the principles through the UN documents is not necessarily how the domestic court is going to take them into account; however, as a matter of principle it is important that the Australian government implements in domestic law declarations that it has endorsed to the international community.

CHAIR: I have two questions. One is about the insertion of the principles of the UN Declaration on the Rights of Indigenous People. You say in your submission that you note:

… that any such requirement would need to be handled carefully as it will likely cause additional administrative burden on already overworked government officials to demonstrate and record that they have considered the principles.

Can you just expand on what you would mean by that? When you are talking about government officials, are you talking about people from the Native Title Tribunal?

MsToohey: Yes, from the Native Title Tribunal, but probably also the administrative decision makers. The point of that submission was to make a fair recognition of the burden that it would create. If there is an additional consideration that administrative decision makers must be made aware of then there is going to be some processes that have to be put in place to inform those decision makers. That is really what that submission refers to. The principle is strongly supported, but we would need to recognise that there would have to be a process of informing administrative decision makers.

That is particularly important when native title is so poorly understood by decision makers anyway. There is a lot of confusion. The principles and the processes in the Native Title Act can be explained and broken down very simply, but there is a mythology of complexity, burden and confusion about native title. That is a very difficult thing to address, so if we require additional considerations by administrative decision makers I just think we have to be prepared to provide the kind of support that would allow them to make those decisions.

CHAIR: Your submission also says though of course that even if you include this it:

… remains to be seen whether such a process would make any real difference …

MsToohey: I think that would be the case with any reference to international principles where they might have a particular understanding of international law, or within the declaration. But when they are interpreted in domestic law they do take on their own life. There is a significant history of differences of opinion in the courts about the extent of taking into account principles of international law.

The point with that submission is what might be considered the principles through the UN documents are not necessarily how the domestic courts are going to take them into account. However, as a matter of principle it is important that the Australian government implement in domestic law declarations that it has endorsed to the international community.

CHAIR: I might pursue that further with the Law Council but I also want to ask you about the shifting of the burden of proof. This is about the process of proving connection. The bill is suggesting that if we change from the current legal position of customs remaining largely unchanged as opposed to being identifiable through a period of time, you also say in your submission that given that necessity—that is, that the courts be satisfied that the determination being made is the correct one in the connection with land and continuity—it is difficult to see what practical difference the proposed section 61AA would make to the process of proving connection. Why do you add that?

Ms Toohey: In my statement at the beginning of my evidence I had hoped to clarify that in those cases where there are disputational competing claims then possibly there is going to have to be a process of discharging the burden anyway. However, there are a large number of claims where there is no dispute or the areas of claims are worked out by agreement between traditional owners appropriately before claims are even put in. There is a category of claims where the shifting of the burden may not make a significant difference. However, there is a whole range of other claims where it would make a difference.

Before I gave my evidence I did hear some of the evidence from the previous witnesses. There was a question about a submission from the Native Title Tribunal, effectively that the claims that remain undetermined are unlikely to be resolved without this change of onus. I think I would just like to add in relation to that that we would not agree that is the case, particularly not in the Kimberley. There are a large number of claims that are able to be resolved—the evidence is very strong—but in terms of the shifting of the onus of proof, it would remove a significant amount of time and cost burden for claims that are not subject to any competing claims by other native title parties. However, there are some cases where the shifting of the onus would not make a significant difference. It just depends on the nature of the claim itself and the evidence that comes up. There are definitely cases where it would make a difference.

CHAIR: I thank you for the submission from the Kimberley Land Council, and also for making yourself available to appear before the committee today and give us your evidence. Thank you, very much.

Ms Toohey: I would also like to thank the committee. Just on one further point on the UN declaration, which has not been raised so far: the principle within the declaration has been referred to in a process under the Environment Protection and Biodiversity Conservation Act, which requires the Federal environment minister to have regard to whether or not traditional owners have made a decision—have been given the opportunity to provide their free, prior and informed consent. There are documents that are available in relation to that process that discuss the principle of free, prior and informed consent under domestic law and international law. That is an example that is already in train of how an example under international law, also in principle under international law, will be implemented domestically on its own terms. It may assist the committee's consideration of the bill.

CHAIR: Thank you for clarifying that. That is useful, that bit. Can I thank you once again.

Ms Toohey: Thank you.

Proceedings suspended from 10:53 to 11:04

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

[11:04]

CHAIR: I formally welcome the National Native Title Tribunal. Thank you, Mr Neate, for your submission, which we have numbered 15 for our purposes. I invite you to make an opening statement and then we will have questions.

Mr Neate: I thank the committee for the invitation to appear today. The National Native Title Tribunal has provided a detailed written submission in relation to the Native Title Amendment (Reform) Bill 2011 and some supplementary documents. I have nothing to add to that submission, but make the following brief points in relation to it. The tribunal supports changes to the native title system that will provide greater opportunities for timely and effective outcomes under the Native Title Act. The tribunal considers that the bill raises important questions about the way in which the Native Title Act, if amended as proposed, would be applied, and about the impact of the proposed amendments upon established native title case law. The purpose of the tribunal's submission is not to express views about the merits of the policy contained in the bill, but to identify some of the anticipated implications if the amendments are enacted as presently drafted. Accordingly, the comments contained in the tribunal's submission focus on technical and practical matters. The tribunal considers that, at least in the short to medium term, some of the proposed amendments would be likely to give rise to further uncertainty, delay and expense in respect to both the resolution in native title claims and future act matters. I would be happy to attempt to answer questions from the committee members about the tribunal's submission.

Senator SIEWERT: You said that in the short to medium term it could result in delay and expense. As you are aware there has been considerable concern over a number of years about the process and we heard this morning that there are 440 claims in the system. In your opinion, given that we already have significant delay and that it is an unsatisfactory process at the moment—not that I am suggesting that these amendments would make it any less complex as it is still going to be complex—is some delay and further expense justified in order to improve the system?

Mr Neate: The answer to that may well be yes, if one could be confident that particular changes in the medium to long term achieve that outcome. In fact, our submission does acknowledge at paragraph 5 that:

…any such delay and expense might be considered necessary if the result is a significantly improved native title system.

The point we make in our submission perhaps can be illustrated in one historical example. When the High Court clarified some aspects of native title law in the leading judgments in 2001 and 2002, particularly the Yarmirr case, the Yorta Yorta case and the Ward case, it was our observation and experience that state governments and others took up to a year or so to review their policy guidelines, their approach to mediation and so on, in light of what the High Court had declared the law to be. Without saying that it is comparing like with like, major changes to law and practice, as contemplated in some aspects of this bill, may well lead to people saying, 'We need to consider our position here; if the goalposts have shifted in procedure or otherwise we will have to see what our response would be.' An illustration of that—clearly at this point I am speculating—state governments and so on would have to look very closely at their position if the presumption of continuity was a rebuttal or presumption, whether as a matter of course they would seek to do a lot of research, which hitherto others would have done, for them to decide whether they were going to seek to rebut the presumption and hence the claim is in that the states are taking a long time to respond while they conducted research and then decided whether in light of that they would seek to rebut the presumption.

One might say, using that example, that one is simply shifting the cost from one party to another. One might argue, as matter of policy, that is a fair shift. All I am saying is that I would anticipate in prospect, at least in the

short to medium term—I query the long term—whether these changes would mean that claims would get through the system, overall, necessarily more quickly. I think one would probably see some of these changes applied differently to different classes of claims. Indeed, the previous witness, from the Kimberley Land Council, made that point. She could see that some of these proposed amendments would be quite beneficial to some categories of claims but perhaps have little or no practical benefit for others. Out of that I am sure anybody could draw any number of conclusions about whether it is worth proceeding or not. Really, that is at the heart of our submission. What we are trying to do is flag what we see as some of the technical as well as the practical implications of these. If that assists in perhaps refining some of the proposals and then deciding whether, as a matter of policy, it is worth proceeding with the refined proposals then I think we would have discharged what I understand our role to be.

Senator SIEWERT: Just going to the example you used in terms of the rebuttal, some of us would see very strongly that shifting that burden of cost would be a positive. But, instead of the approach that some of the state governments are taking at the moment, if they had to consider the cost to themselves to delay and go through that process, would it not perhaps have the effect of speeding up their process?

Mr Neate: It might. I think that is a question you really need to ask representatives of the states. Perhaps the other observation I would make, in broad terms, is that the change as proposed would not relieve native title applicants of all need to do some research. To establish the presumption in their favour there has to be a fair bit of research, it seems to me, in reading the terms of this, in preparing the claim and supporting material in order to say, 'We are satisfied of certain things for certain reasons,' and therefore the presumption applies. There would need to be a degree of work and hence expense undertaken and incurred by applicants in order to attract that.

Senator SIEWERT: And that was one of the areas where the KLC made that point that it may not be beneficial in all cases. I want to go to the issue of the declaration, because you have made some quite detailed comments. Could you take us through your thinking on this. You make a lot of recommendations and suggestions and comments around how it would operate. In your opinion, if we took on board these comments, is it worth trying to put it into the act or not?

Mr Neate: Our submission makes the point—I think possibly not shared by some others—that we read the proposed amendments as having rather more substantive effect than I think some of the other witnesses have suggested in their written submissions, and indeed some of those who have spoken this morning already. There seems to me to be an impression that some witnesses have sought to put that the proposed sections would simply illuminate or assist in resolving any ambiguities in some sections of the act. We understand the provisions to have rather more effect—or are intended to have more effect than that.

If our assumption is correct—I acknowledge it appears not to be shared by everybody—our point is that that would lead to probably a significant change in policy, particularly in the future act provisions, though not confined to them. But there are many of the future act provisions which do not invite and indeed do not require free prior and informed consent for most things. The right to negotiate regime, which has been the subject of a lot of attention over the years, is the one area where there have to be negotiations in good faith to secure agreement, and if agreement cannot be reached then you go to the tribunal to arbitrate. But that is a very small class of the broader categories of future acts in the Native Title Act where, at most, Aboriginal people, native title parties, have an opportunity to comment or have their views considered.

I am not offering a legal opinion here, but if the purport of the proposed objects provisions is to have those other provisions read in a way that strengthens the rights of native title holders, then it seems to me that, on the one hand, there is going to be lots of argument about whether that is their actual legal effect, and somebody will want to test this in court. On the other hand, if that is meant to be their effect—to avoid that sort of uncertainty—why does the parliament not amend those sections to bring them into line with the effect of the UN declaration in order to create the certain ground rules. I obviously speak only on behalf of the tribunal, certainly not of any court, but I can imagine a lot of time in our future act arbitration being taken up initially with whether the expedited procedure is in breach of or can in some way be read in accordance with the principles set out earlier in the act. One could imagine many circumstances in which a party or parties would find it in their interests to argue the point. To the extent that we were ruling on that as an arbitral body, almost necessarily it would be taken on appeal to the Federal Court irrespective of the outcome and so on. That is really the practical outworking of the point I think you were asking me about.

Senator SIEWERT: You made that point in your submission about amending the provisions in the act. Sorry, but I have read so many submissions and points that I cannot remember which one it is.

Mr Neate: Perhaps paragraph 18, Senator.

Senator SIEWERT: Yes, that is it. I have highlighted that one. Do you think it is then worth going and looking at—I am sorry.

Mr Neate: Perhaps if I can interrupt you there.

Senator SIEWERT: Yes.

Mr Neate: The second sentence of that says if that is not the intent then some guidance as to how the proposed 3A1 is to be applied would be useful. I can think across the range of parties who are involved in native title proceedings and people will seek to either have those principles applied or to have them read down, depending on what principles of statutory interpretation you apply and so on. With respect, senator, I would assume that that is not the sort of brawling that you would want these things to give rise to. To the extent that the legislation, if it is to progress along these lines, could be refined to clarify the proposed legal effect and operation across the range of relevant provisions of the act, that would certainly assist us as administrative decision makers when we have to make those calls.

Senator SIEWERT: Thank you. I must admit, when we were looking at how we were going to do this bill, we really did struggle with how to give effect to the declaration. We would like to ask you about the concept that we have been talking about this morning. I know that you have been here for most of it.

Mr Neate: Yes.

Senator SIEWERT: Yes. You have heard us discussing perhaps splitting the bills and given your detailed comment in your submission, would you think that splitting it to deal with the three issues and the fourth issue that KLC raised, and that it would be how much we would draw the line. Do you think that would be a sensible idea?

Mr Neate: I will careful in how I answer this, because, as I said earlier, I am not going to comment on the policy. But perhaps if I can say in light of our submission and indeed reading all the other submissions, I think the proposed application of the UN declaration principles for this act, with respect, does need greater thought.

Senator SIEWERT: A bit of work, yes.

Mr Neate: If there are other provisions with some refinements, perhaps addressing some of the issues that we have raised, could be enacted separately and see how they ran, then perhaps that might be a practical way of proceeding. I did observe this morning, or did hear, that when you press some of the witnesses as to that proposal, I think that the last witnesses was saying: 'Yes, I would not want that to mean that some provisions are more important than others. And really, they are all urgent.' So I suspect that whichever party or you are or represent, the focus will be on some having some urgency and priority over others.

Senator SIEWERT: I might be going into policy here, so you can tell me I have gone too far. If you had to pick which issues you thought were most urgent for amendment, were the ones that we have articulated ones that would be towards the top of your list?

Mr Neate: I think it would be universally thought that the timely and just disposition of claims is a priority area.

Senator SIEWERT: Yes.

Mr Neate: Views will vary as to how that should happen. I was very interest to hear Kevin Smith's evidence on one aspect of this point. The Federal Court generally is taking a more robust and directive approach to the case management of native title claims that are in the system. That is clearly putting pressure on all the parties, but particularly applicants. There are only so many claims you can push through the system at any one time, and one of the other witnesses did talk about the shortage of qualified anthropologists and so on. That is the state of play. In response, I think, to Senator Pratt's question, Mr Smith made the point that his rep body at least is not lodging claims now unless they are in a well-prepared form.

Now, let me say without criticising anybody, a lot of claims that are in the system, and some of them that have been there for a long time, when originally lodged were not in a very good form for substantive negotiations. But some of them were lodged in order to secure the right to negotiate under the Native Title Act. A lot of native title claim groups have secured their procedural rights under the Native Title Act, including the right to negotiate, by having a registered native title claim in the system—which may not be resolved for many years. Nonetheless, they are treated for procedural purposes under the act as if they have native title. So the benefits that might ultimately accrue to them from a determination of native title already accrue to them by virtue of having a registered claim. Now that takes away the pressure and the incentive from at least some claim groups to move to resolution of their claim, because they have secured in a practical sense many of the benefits they would get as registered native title holders already.

That then effects the pace at which some claims are being pushed along by the applicants themselves as well as how the court and states and others and the tribunal are trying to prioritise claims and move them through the system. The fact is however the claims system is structured, be it the present scheme or something along the lines of what your bill proposes, there will still be resource issues for most, if not all, of the parties. I note not only that there is a shortage of anthropologists and others whose services are already being called upon by state governments and some respondents, as well as applicants. But if there was a presumption of continuity which then meant that those who wanted to rebut it had to do so on the basis of evidence, they would be seeking to use those resources. I know this committee has some submissions from anthropologists or people representing them saying, 'We are a bit anxious about how our resources might then be used by others.' All of which is to say there is no obvious and clear way of sorting out all these issues in a legal or structural sense, or in a straight human resource and financial resource way. I think across the system it can be said that people want to make a smoother, more expeditious resolution of claims, and anything that can assist in that should be supported.

Senator HUMPHRIES: Thanks for being here today, Mr Neate. Could I ask you what difference you think the incorporation of some of the principles of the UN Declaration on the Rights of Indigenous People into the objects clause of the Native Title Act would make to the deliberations and work of the tribunal?

Mr Neate: I have one example and I do not want to highlight it, but simply in response to your question. One possible way in which it might make a difference, subject to submissions of parties, would be the application of criteria in section 39 of the Native Title Act to determinations by the tribunal as to whether a particular mining interest should or should not be granted—and if so, whether it should be granted subject to conditions. The Native Title Act in section 39 currently sets out a whole lot of matters which the tribunal must take into account in determining whether the, let us say, mining lease should be granted or must not be granted. And whilst I have not had to make determinations in relation to this section, my colleagues have and there are a number of determinations of the tribunal which make the point that although we must have regard to all these criteria, there is no indication as to relative weighting of them. So, on the one hand you have a whole range of native title interests, then there is a broader public interest, there is a whole range of things. And not surprisingly, to cover the range of interests that are likely to come up in respect of any project

And then we are asked to, in light of the evidence and submissions, make a decision on that. It may be, and I stress may, that if the objects clause or something akin to what is proposed were to be incorporated into the act, with no other consequential amendments along the line that I have already raised with Senator Siewert, parties would seek to convince the tribunal that that imports a weighting of some of these factors over others, whereas this section does not if you have a look at that objects clause. The tribunal should give more weight to some things than others in making a determination. So that might be an example where such a clause might be sought to be used to that effect.

Senator HUMPHRIES: I note that article 32(2) of the UN declaration requires states to consult and cooperate in good faith with indigenous peoples to obtain their free and informed consent prior to the approval of any project effecting their lands or territories et cetera. Particularly in connection with the development, utilisation or exportation of mineral water or other resources. That reads very much like a right of veto over development of mineral resources on native title land. That statement, though, would by itself go beyond what is contained, as you point out, in the Native Title Act. But in the case of ambiguity, it presumably would tend towards the view that there is more of an obligation to refuse such exploitation if it is not done with the prior and informed consent of the native title owners.

Mr Neate: I agree. If the intended effect of the proposed section 3A is simply to inform the interpretation of the Native Title Act where there is an ambiguity, then there may be sections including the one that I mentioned earlier where that might occur. I note, however, that proposed subsection 1 opens by saying, as an additional object of this act, that governments in Australia take all necessary steps to implement the following principles. Whether that means some of these other provisions in practice, these other provisions in the Native Title Act, in practice are rendered nugatory, I do not know. A court would have to ultimately decide this.

But there was a decision that we refer to in prospect in our submission. The matter of Cheedy and Western Australia, which the Yindjibarndi people refer to in their submission, which is a case that has worked its way up to the full Federal Court. Where in that case, the counsel for the Native Title Party sought to convince at first instance a member of the tribunal, then Federal Court judge and then the full court that the tribunal and the court should interpret part of the future act provision by reference to this UN declaration. It was held throughout the process, including in an unanimous judgement of the full Federal Court, that the terms of the Native Title Act in the relevant sections were unambiguous. It was clear what the rights were or were not. They had been properly applied as a matter of law. There was no ambiguity. Therefore the international instrument was irrelevant.

The court went on to make the point, and I can provide the committee with the citations if need be, in any case the terms of the international instrument were inconsistent with the clear terms of the Native Title Act. Hence, one could not illuminate the other because they were directed at different purposes and so on. The decision which was handed down subsequent to us writing this submission I think just illustrates the point that I made to Senator Siewert earlier. If the intention of incorporating reference to the UN declaration is to make a substantive change to the operation of, say, the future act provisions of the act, then I think that it would be better to clearly state that by amending the other sections of the act, rather than leaving it to argument, which will wend its way through the courts. That may in the end not lead to a result any different to what is there now. The apparent benefit of having these words upfront is lost and we have gone through all this exercise to no effect.

Senator HUMPHRIES: Can you give us any clues as to how the tribunal might interpret the first of the objects in proposed section 3A(1a) that has the rights of all peoples, including Indigenous peoples, to self-determination? What would that mean in the context of the work of the tribunal?

Mr Neate: I think I will need to decline to answer that (a) because I would not give a legal opinion and (b) because I have not thought it through and anything would be absolutely off the top of my head. What I do know, from broad reading and indeed being involved in the early steps of this exercise as a Commonwealth officer back in 1984, the expression contained in that clause has been a matter of considerable debate and discussion, both in terms of nation states and Indigenous peoples, for a long time. All of which is to say I do not know how it would work out in practice and I guess none of us do until we see it properly incorporated into domestic law and it is worked out on a case by case basis.

Senator HUMPHRIES: I assume that it would potentially be a rich field for lawyers.

Mr Neate: It might be a field for rich lawyers.

Senator HUMPHRIES: The ones that become rich by virtue of the provisions there.

Mr Neate: I speculate no further, sir.

Senator HUMPHRIES: No, okay.

Mr Neate: Clearly that is sort of a light-hearted response, but none of that is to say that I do not take this provision very seriously. In its current form, if it was simply dropped into the act with no other guidelines as to how it was meant to operate elsewhere, I think that the consequences you have alluded to would necessarily flow.

Senator CASH: Thank you, Mr Neate, for what I think was actually a very well-reasoned submission to the committee and so for all your work that you did put into it. In relation to the tribunal's conclusion that the amendments proposed by the bill would have a substantial impact on both the architecture and the interpretation of the act and the full extent of the impact cannot be fully understood without testing the meaning of the amendments in court, but:

… those proposed amendments would be likely to give rise to further uncertainty, delay and expense in respect of both the resolution of native title claims and future act matters.

Certainly when you read this submission from the Attorney-General's Department, they would appear to be of the same opinion. I put that to our first two witnesses this morning, Mr Smith and Ms Tan, and they disagreed with that proposition. Can I ask you to elaborate on why the tribunal has come to that conclusion? In addition, the Commonwealth submits that the amendments to the act should only be undertaken if they do not unduly or substantially affect the balance of rights under the act. Would you say that if we are going to undertake such a change to the native title act, it is imperative that more detailed consideration and consultation be undertaken of a much wider group of parties so that we can understand whether or not these significant amendments should be supported?

Mr Neate: I can respond in a couple of ways. First, I have given a number of examples already of areas where I think there could be some uncertainty and hence some debate before the tribunal and potentially before the courts. I will not repeat those examples. The Native Title Act, from the preamble onwards, makes it clear that it is a compromise. It is a legislative instrument which seeks to recognise a range of different and, at times, competing interests and to give what the parliament has considered from time to time appropriate recognition to different sorts of interests and to set up procedures whereby competing interests can be, if not reconciled by agreement, resolved by some sort of arbitral decision. If, as a matter of policy, parliaments from time to time want to change some of those that is absolutely what parliament is there for. What we are saying is if the parliament is to go down some of these steps, which in our submission are likely to make some fairly significant changes to the current architecture of the scheme, then we would want those changes to be well-informed and at least some of the consequences thought through. One readily acknowledges that with any novel piece of legislation the parliament cannot be expected to anticipate every consequence and to either address it or close it off. This could be read in a

number of ways but I remind the committee that the Native Title Act as enacted in 1983 was, I think, 127 pages long. It is now something in excess of 450 pages. There is a whole range of reasons for that but one of them is to make things clearer so that everybody knows what the ground rules are and that is in response to court cases and so on. I think we are in a position now different from when the Native Title Act was first enacted. None of us really knew—I cannot obviously speak on behalf of the parliament—how this was going to work out, and as it did work out adjustments were made, some of them quite controversial but adjustments were made to try to make the system work better. I see this as another step in that process, but another step informed by experience since 1994, not starting with a blank sheet.

I think—I do not want to repeat myself—for the reasons we have given in the written submission and I have added to this morning, perhaps some further consideration and indeed perhaps some broader consultation in respect of key aspects of this might assist in improving the drafting of the—

Senator CASH: Mr Neate, just in relation to the order consultation: what do you see that entailing?

Mr Neate: I would agree with what Kevin Smith said earlier, that most of the regular participants in the native title scheme, both in terms of their institutional identity and the personalities involved have been—

Senator CASH: Well known.

Mr Neate: —involved in this for a long time and I think this committee has extended a general invitation to respond, and you have before you responses from government, from industry groups, from native title groups, from ourselves, from academics and so on. You have probably got a pretty fair range there and it might well be that if, for example, as Senator Siewert has intimated she might be thinking of perhaps dividing the bill into some parts which might be progressed more readily and expeditiously than others, but if there were an opportunity for, say, those who have made submissions here to comment on a further draft of the bill, certainly my tribunal would be happy to offer any comments that might assist. And then, clearly it is just to parliament to say: 'Well, this is good policy, well drafted for the purpose. We do or don't want to vote for it.'

Senator CASH: In your opinion, will the bill add any further time constraints to negotiations and, if so, by how much and, if not, why not?

Mr Neate: It might—as I have indicated in the submission and to Senator Siewert—lead to some delays in early stages while people reconsider their position. I do not want to get into all the technical detail here but one of the issues for example would be, if the presumption of continuity took effect and a party or parties could seek to rebut that presumption, should the act indicate at what point you had to make that call? Or is it left open ended and the process appeared to be expedited towards a resolution and somebody says: 'Hang on, hang on, we have had a look at this. We want to put you to prove.' Now, there are questions as we have said in this submission—there may be issues about whether that is negotiating in good faith, to leave it to the last minute and say: 'Actually, we do not agree with this. We want you to prove it to us.' If you are going to put it on the parties to make the call to—if I can use the colloquial—put up or shut up, no doubt respondents would say: 'Well, look, we're the first respondents to every claim in the system. You have to give us adequate time to do that.' This would be at the same time the court is wanting to push things along.

There are lots of balancing things done here and again, I am not wanting to obfuscate or to raise difficulties that may not be real but our observations would be, because we deal with parties all the time, this would be an approach that a party might reasonably seek to take. In respect of future act negotiations, it may well be that if some of these principles were to apply, mining companies and others would know that the bar has just been raised and if at some point they were to come to the tribunal, we would be obliged to apply the act in this way and that may well influence negotiations. I think, if I could segue into another point that has been raised, that as I understand it from some of the comments from Senator Siewert, and particularly and some of the responses this morning, the good faith future act is about getting people to negotiate substantively. Six months or longer than six months, with respect, probably is not the issue. You are actually engaging about the issues and if you are not, do not go to arbitration. You have to at least have a go at seeking agreement. If having a go meant having a go in light of relevant UN principles, that may prolong negotiations but it also may lead to more substantive outcomes and, who knows, perhaps even fewer matters coming to arbitration before us because people knew that that is the way the system is and you get a few decisions from us that reinforce that, which might feed back into the negotiation process. I should note, perhaps, on that point also, particularly to Senator Siewert, that in one of the documents that we provided by way of supplementary materials, we provided some statistics about when people lodge applications for us to arbitrate. I think in all the claims up to June 2009, about 66 per cent of them were 18 months or more after the relevant date, not six months after. As other witnesses have said, parties are not as a rule rushing off to the tribunal the day after the six months were up. They tended to negotiate beyond then in any case.

As to how much time, Senator Cash, these things might take, I would not care to speculate and I trust what I have just said will illustrate why.

Senator SIEWERT: I wanted to go back to the comment you made about meaningful outcomes. One of overriding issues is around making more useful and meaningful outcomes, so the comment you just made in answer to Senator Cash's comments is that if we dealt with some of these issues—and again, I might be going into policy—do you think these amendments could facilitate some better outcomes?

Mr Neate: It is hard to say and I am not wishing not to respond. One of the proposed amendments is to expand the tribunal's power in respect to the sort of determinations we might make. We have raised some issues there that we think might need to be thought through, including what the criteria are for us saying it is relevant for us to say something in order of a royalty type payment should be made. It might be that, for example, giving some indication of the weight to be given to some of those section 39 criteria relative to each other might meant that it is more predictable for all the parties to know which way the tribunal might go if the matter is arbitrated rather than having this shopping list of things that we have to look at and then decide which things are weighted more appropriately on the facts of the case.

I suppose the only other observation I would make, which perhaps is not entirely helpful on this point, is that not terribly many matters go to arbitration before the tribunal. In terms of the hundreds or thousands of agreements that are reached between mining companies and Aboriginal people, relatively few matters come to us for arbitration and in recent years a lot of the matters have come really to ask us to make a determination by consent of the parties. There are some technical issues where they have not been able to get all the applicants to sign up so by agreement the parties come and say, 'We formally ask you to determine this but these are the terms which we want you to determine it in.' From where I sit—not purporting to speak for Aboriginal people or miners or anybody else—whilst we do get a lot of work in, as a proportion of the number of negotiations that are apparently taking place and apparently reaching agreement, it is a fairly small proportion. People are not rushing to us after the six months, and a significant number of those applications are in effect for consent determinations. There is a question of whether that is a reflection that overall Australian society and sectors within Australian society have moved on and we have come to not only acknowledge the existence of native title but actually work with it to a greater or lesser extent. That might be reflected in a number of things, including, of course, the fact that almost all the determinations of native title are made by consent these days; hardly anything goes to trial. That is not to say the system cannot be improved, but the fact is that there are negotiated outcomes for most native title claims that get to determination these days in a way that was not the case 10 years ago. So the system has matured. That is not to say changes ought not to be made, but the changes that might be made are being made in a different context from those that were made in the early days of the Native Title Act.

Senator SIEWERT: I hear what you are saying. I also take into account that, I think, all of the submissions that we have received from Aboriginal and Torres Strait Islander organisations are, broadly, supportive of the changes.

Mr Neate: Yes.

Senator SIEWERT: I appreciate that some changes have been made, but the bill was drafted bearing very closely in mind all the criticisms that we have been constantly hearing around the Native Title Act. So I would put it to you that, yes, we are getting a few more outcomes but there is still a great deal of concern around the operation of the act. Would that be—

Mr Neate: I readily acknowledge that there is a great deal of concern about aspects of operation of the act, and then there is a wide divergence of views about how those things might be addressed. All I am saying—and I probably cannot take it much further than this—is that if, as a matter of policy, some of these changes are thought to be good then, if they can be refined a bit so that the practical implications can be sorted out up front, so much the better. Then the tribunal, of course, will administer the act as the parliament changes it from time to time with the enthusiasm and professionalism that I hope we have demonstrated in the past.

Senator SIEWERT: One of the purposes of an inquiry into a bill is to identify how you could improve the bill, amendments and unintended consequences, which is exactly the process that we are going through.

Mr Neate: Yes.

Senator SIEWERT: Thank you. Maybe I could ask a question on notice, because I realise we are over time.

CHAIR: You could.

Senator SIEWERT: Senator Humphries was asking you about the issues of full and informed prior consent. I notice that there have been some other bills recently before the house that in fact are trying to put effect to that concept. When we were looking at that concept there, because it is quite a tricky one, we were informed and

looked at it through the lens of some of the comments from the Aboriginal and Torres Strait Islander Social Justice Commissioner in his latest report. Maybe you could take this on notice. I am wondering whether you think that is a good lens to try to apply that particular concept.

Mr Neate: Can I just make sure I understand the question. You are asking us to comment on the social justice commissioner's approach to—

Senator SIEWERT: And whether that would be a useful way of interpreting that concept.

Mr Neate: I will take that question on notice. Perhaps, Madam Chair, you could indicate when—I realise that the committee is meant to be working—

CHAIR: This committee is intending to put to the Senate next week a motion that we now not report till 3 November, as opposed to next week. So you have a bit of time.

Mr Neate: All right. Perhaps we could liaise with your secretariat just to confirm an appropriate date. But I will take that question on notice.

CHAIR: Yes, we were due to report next week, but we are not going to make that time line. So, unofficially, you have a few weeks.

Mr Neate: Subject to the ruling of the Senate.

CHAIR: I am sure the Senate will be willing to cooperate with us. We are kind of out of time, so I think we are going to move on. Mr Neate, thanks very much once again for your submission and your availability today; it is appreciated.

Mr Neate: Thank you.

ALTMAN, Professor Jon, Private capacity

[11:49]

CHAIR: I welcome Professor Altman back; he was here yesterday and is back again today. We will need an office for you up here soon, Professor! Thank you very much. We have your submission, which we have numbered 16 for our purposes. I am going to invite you to make an opening statement, and then we will go to questions.

Prof. Altman: Thank you very much. I will say a few things, just to make clear the limits of my knowledge and also the limits of my submission. What I want to do in my submission is provide an academic perspective from the disciplines of anthropology of development and anthropology of policy. I try to bring a development perspective to important native title issues that are being considered in the Native Title Amendment (Reform) Bill 2011. I have provided the committee both with some commentary on aspects of the Native Title Act being considered for reform and with some input I have made to the wild rivers bill inquiries this year and last year and to the draft Indigenous Economic Development Strategy that is currently being implemented by the Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs—'FaHCSIA' is probably easier!

The map in my submission shows about 1,200 small communities in remote and very remote Australia that now live on land held under land rights and native title determinations. Much of the reform focus that COAG has under the Closing the Gap framework and the national partnership agreements is on the 25 per cent of the population that live in remote and very remote Australia, mainly on what I term the Indigenous estate. Looking at international development theory and practice, I am looking to explore how livelihoods might be improved in these places that, by Australian relative standards, are poverty stricken. I do not look to ambitious and in my view somewhat abstract goals of closing the gap, but, at least in the immediate term, I am looking at issues of improving livelihoods.

So I will make two broad observations. First, land of low commercial value—hence its availability for claim—now has high mineral prospectivity, but it is also of high conservation value. It has high biodiversity value, is useful for environmental tourism and has potential carbon farming value. So it is not surprising that the issues of resource rights in future acts loom large in debates over development and the forms that development might take on the Indigenous estate.

Second, despite much rhetoric about partnership and participatory bottom-up development, one actually sees very little of it. Most of the approaches to development are top-down and monolithic. I have recently been referring a lot to a term that I have coined, the 'Canberra consensus', in part because of bipartisanship in a particular approach to development shared by the major parties and in part in reference to the Washington consensus and structural adjustment programs that are now so discredited in the international political economy literature, even by former World Bank insiders like Joseph Stiglitz. It seems to me very important that we consider alternative forms of development at a time of great global uncertainty rather than just pursuing monolithic approaches that look to morally restructure remote communities to adopt neoliberal norms of individualism, entrepreneurship, mainstream employment, accumulation—particularly through private home ownership—and new forms of consumption. What does all this have to with the native title legal reform? Well, in the name of freedom and choice, there is a need, in my view, to empower those who have land and native title rights recognised to be able to use these resources for their wellbeing, however defined. This means more symmetric power relations and negotiations with the resource developers, who are often powerful multinational corporations, and with the Australian state, often conflicted because of its royalty dependence. In my view, what we need is more effective future act regimes and more clearly defined property rights in commercially valuable resources. The challenge of closing the gap in remote Australia is the greatest, so the greatest effort will be needed to adjust the playing field to allow forms of development that both close gaps and match diverse Indigenous aspirations for diverse forms of economic development.

CHAIR: Thanks very much, Professor Altman.

Senator PRATT: I have questions on the burden of proof, as you have outlined it in your submission, in terms of the body of international common law on native title and how narrow that is. I am not sure if you were here for the earlier evidence, where there were some arguments about, I suppose, the access of claimants to anthropology and the considerable onus on claimants to be the ones that have to establish their native title. What is the extent to which you think the bill before us actually resolves some of those issues?

Prof. Altman: I think that the bill before you will shift some of the burden of proof of claimants for them to prove their connection to country and their continuity of custom and tradition, if only because the bill reminds us

that the High Court made it quite clear in the Mabo judgment that culture is not frozen in time. It seems to me that subsequent case law and jurisprudence may have overlooked that observation, and we have tended to, in some renowned cases, not accept the fact that cultures, including ours, are quite dynamic. So I think that any shift from looking at continuity in traditions and customs observed back to first colonial contact would be very welcome.

Senator PRATT: I am happy to defer to other members of the committee.

Senator HUMPHRIES: Thanks for this submission, Professor Altman. Perhaps you have seen what the Native Title Tribunal had to say about the process of considering native title claims. They make the observation in the submission—I am oversimplifying—that there have been a number of claims that have been dealt with and a large number of native title claims have been recognised but much of what remains will be difficult because of evidentiary problems and so forth. Do you feel that the onus today—this is perhaps as much a political question as a legal question—of driving forward appropriate grants of native title or recognition of native title ought to be a process for politicians rather than courts, or for governments to negotiate with Indigenous people rather than courts? Are we placing too many eggs in the native title basket?

Prof. Altman: Of course, the native title system is expensive. I think that in the report of the Department of Finance and Deregulation on Indigenous expenditure the total cost of the native title system looked like $100 million per annum. At some point a judgment has to be made about the commercial value of the land over which you may have claims and determinations versus the cost of the tribunal and legal system that has been put in place to, if you like, test the connection of groups and their customary continuities. I think there is plenty of room for political settlement over land where there are not other interests other than the state interests. But that does not preclude the fact that you would want to have the right people having their claim properly determined. So you would not want to get into that very difficult area where there is not clarity over the proper traditional owners of the land and you would want to avoid future contestation between competing groups, because clearly that is in nobody's interests. I guess what I am saying is that I think there is plenty of room for settlement, but if you had settlement you would still need to invest in very thorough research, much of which would be anthropological, to ensure that the right traditional owners are getting determination to the right bits of land.

Senator HUMPHRIES: You may be aware that some years ago the ACT government, the one that that I led, negotiated a grant of a kind of native title over Namadji National Park in acknowledgement in part of the reality that a native title claim over much of the ACT was highly problematic and, frankly, I think likely to fail. If the focus shifts onto government saying, 'Let's grapple with these issues,' particularly areas that are not subject to commercial interests, and, 'Let's have a renewed resolve to deal with these as political questions,' would that be a proposition that would attract many native title claimants or potential claimants around Australia?

Prof. Altman: I think obviously groups would have to make strategic decisions about whether a claim under the current system would be more likely to succeed than a negotiated agreement under a politically determined decision like you are suggesting. I frankly believe that the opt in or opt out option should be there. So I do not think we necessarily want to foreclose the possibility that some groups may want to test their connection to a piece of land through the legal system, because I think that that also can lead to considerable disaffection and possible future legal contestation.

We have of course historically had negotiated settlements over vast areas, not just in the ACT but clearly in South Australia, with the Pitjantjatjara Land Rights Act and the Maralinga Tjarutja Land Rights Act under South Australian law. We have had vast areas of the north-west of the South Australian state settled through agreement with Aboriginal traditional owners rather than through any claims process.

One of the interesting things is that we have got so many models in Australia that surely out of all those models we can pick up some cost-effective best practice to settle land claims. I do think that for some groups, just how slowly the legal system works through the Native Title Act regime is quite frustrating. Clearly in terms of their wellbeing that can be quite onerous. Some groups, as we know, have been through that system for literally years. Again, somewhat paradoxically in terms of current policy settings, after they have maybe struggled to get back their land for a decade, there is an expectation that their future might not be on that land, particularly if it is in a very remote areas. I find it a little bit paradoxical but I think it is also in some ways a little bit naive, I think that if groups have really struggled to get back their land they probably see their future on that land irrespective of how remote it might be.

Senator HUMPHRIES: You make reference to the Native Title Act's relationship with UNDRIP and you say it is appropriate for the NTA to be updated to comply as closely as possible to key property and procedural rights principles in UNDRIP. Do you think that the objects clause that has been drafted in this bill achieves that objective?

Prof. Altman: I think they do to a large degree. This has a little bit of history obviously, because some of the issues that have been debated in relation to Wild Rivers and the opposition leader's Wild River bill certainly have some commonalities with some of the issues that have arisen in relation to the property rights of land owners on land that has a determination. I think that one of the very strong elements of this bill that I would support very strongly is that it looks to firstly give forms of free, prior and informed consent rights to land owners but equally importantly it looks to give them rights on commercially valuable resources on their land. What those rights would encompass would clearly be open to elements of negotiation and whether it goes as far as mineral rights I think is something that will obviously be very politically contested. Although, I have to say that again, in Australia it is often overlooked that in New South Wales Aboriginal traditional owners do have some mineral rights. So there is nothing in Australian law that precludes Indigenous land owners holding mineral rights, but I guess I am more interested in other resources like water, fisheries, wildlife and future property rights in areas like carbon or biodiversity where it seems to me that giving people a viable and sustainable livelihood could be greatly improved with property rights from commercially valuable resources.

At the moment it just seems to me that the Native Title Act is extremely unresolved on this because it does guarantee customary rights. An example I often use is that if you have customary rights, for instance, to fresh surface water, which is probably a better example than ground water, on your land, you basically have no incentive if you like to use that water efficiently, but those who have commercial rights have them often to the same surface water. So there is a lot of room there for conflict and legal disputation about the impact of, for instance, commercial licensing of water on customary use rights and vice versa, the impact of customary use rights on commercial use rights. I think some of those things could well be resolved with some of the proposals in this bill.

Senator HUMPHRIES: I would have thought that some elements of UNDRIP appear to be fairly clear and could arguably be inconsistent with Australian law. I think I quoted section 32.2 of UNDRIP before which talks effectively about a right of veto. With respect, the sort of vague way in which the objects' clause here refers to NDRIP and refers to the right to prior consent and so on, merely creates a level of uncertainty, I would argue, about exactly what it is that the tribunal needs to do when determining what rights people would exercise over a piece of native title. Wouldn't it be better to come back and look at these issues comprehensively in the Native Title Act as a question of defining more precisely what those rights mean? You have made vague references to UNDRIP without clarifying what bits of UNDRIP are consistent with Australian law, the bits that are not consistent and which ought to be incorporated into Australian law or the work of the tribunals.

Prof. Altman: To some extent, historically some of the principles of UNDRIP have been included in the Aboriginal Land Rights Act in the Northern Territory with right of consent provisions. It just seems to me that we need to have more national consistency in the rights that we confer on Indigenous land holders. While the high-water mark of the Northern Territory Land Rights Act is there, and that of course was passed in 1976, native title groups are going to be consistently frustrated by the lower value of their property rights. This is going to be an area for political contestation into the future until it is resolved. Whether one deals with this issue through reference to UNDRIP or other international human rights conventions, which may in fact have more strength than the declaration, or whether one deals with it with reference to Australian domestic law which is already in place, I think it can be debated but the bottom line is that the land rights system in the Northern Territory seems highly workable. It has been there for a long time and I think that traditional owners make decisions in an informed manner about whether they want commercial development on their land or not. Of course they are greatly helped by the fact that they do have statutory land councils with statutory functions, which again is a more powerful institutional form than rep bodies and PBCs, if only because they are probably more realistically resourced and that is partly because they are resourced from mining royalty equivalents rather than from allocations from the government of the day.

Senator SIEWERT: I wanted to go back to declaration and we have heard comments from Mr Neate from the tribunal, and in quite a detailed submission, looking at whether the declaration should be included in the act—the way the bill proposes, which is in the objects—or whether we should amend specific areas of the act to accommodate it? Have you thought about that or have an opinion on that?

Prof. Altman: I think if your aim is to reform the Native Title Act, and if you like to make it consistent with what are principles in UNDRIP, then I think you should amend the act. I think that does provide greater certainty. I realise that you have had considerable submissions and you are going to get evidence on the workability of the wording of the act as currently constituted, and if there are concerns about workability, then clearly they should be addressed but I see no problems in locking in statute changes. Because, of course, the sorts of amendments that you are looking to bring into the Native Title Act are ones that are, in some ways, broadly beneficial to the

Indigenous interest and it just seems to me that there have been far too few amendments to the native Title Act and reforms to the Native Title Act that are of that nature. Most of the reforms, from my point of view, would be in a restrictive way to native title interests rather than opening them up. And again, I would emphasise, with reference to my opening remarks, that we do have this very ambitious national policy framework of Closing the Gap. We are putting most of the resources into places where there have been native title determinations, as well as other forms of land ownership, but basically remote and very remote Australia. These are the most difficult places. While the Native Title Act remains problematic for Indigenous groups, for native title groups, I think that will curtail our goal of ensuring appropriate development. Again though, I should emphasise that I am trying to move away from this terminology of 'Closing the Gap'. It has become such a sort of rhetoric that is everywhere, and it accompanies any discussion on Indigenous issues. But when it actually comes to actually measuring whether it is happening, how difficult it will be or how expensive it might be, we seem to have far less discussion at the moment.

Senator SIEWERT: I want to ask just one more question around the declaration. You make a comment in an earlier part of your submission under the declaration part. You make a comment that there is legislation which in fact sought to implement elements of the declaration—I usually call it 'DRIP', but that sounds terrible. You make a comment that the acts picked it up. I gather from that that you think it is actually a good use of the declaration. My question then is: is it appropriate therefore to have it apply to one section of Australia rather than having a broader application that can be applied across the rest of Australia.

Prof. Altman: I was very surprised in the Wild Rivers bill to see wording taken almost directly from articles in UNDRIP in relation to the rights that land owners should be able to exercise over their traditional rights and resources in the interests of development. I guess I made it quite clear in my submission that it struck me from an academic perspective, not of course that academics are necessarily apolitical but we are not party partisan, that what was included in this bill and what was in Tony Abbott's bill had some similarity. It was never clear to me with the Wild Rivers bill, if it was in fact passed through the Australian parliament, how it would not set a benchmark for the Native Title Act Australia wide. I guess it was not clear to me how, if it passed, that could be regionally limited to Cape York, because it would just open up the possibility for legal challenge. If they have got that, why have we not under the same regime? Nevertheless, in one of the inquiries I made several recommendations, and one was, rather than having Cape York exceptionalism, to apply this principle Australia wide and incorporate this change into the Native Title Act rather than focusing on issues of concern to Cape York Indigenous people?

Senator SIEWERT: I have one more question, and it is actually following up on area of questioning that Senator Humphries was asking about—that is, working outside the Native Title Act and the sorts of discussion you are having. It seems to me that what we are talking about is agreement making. So how would you see agreement making? Do you think it needs to be given legislative effect and how would you do that?

Prof. Altman: My understanding is that agreement making is already, of course, possible under the Native Title Act—

Senator SIEWERT: In fact there is a large process going on in WA for the south-west at the moment.

Prof. Altman: When you look at a map of Australia and overlay current ILUAs—and I think I did that with the map I provided you—you can clearly see that they cover large chunks of the continent now. I am not quite sure what the percentage is, but when you look at the map you can see how much the coverage extends. So I think that ILUAs are a possibility within the Native Title Act. I guess what Senator Humphries may be suggesting is that the government just becomes more proactive in this process.

Senator SIEWERT: Sorry, I probably should have asked the question a little differently. The question should be: do you think there is a need for further legislative amendment to enable that? Or do you think we have enough legislative triggers and it is the proactiveness that you were talking about that is needed?

Prof. Altman: My concern with ILUAs, and I know that they are agreements that can have any conditions in them, is that in general they are negotiated where there is a low probability of a successful claim. So the sort of leverage that native title parties have with ILUAs is generally much lower. In terms of my notions of development and property rights, it seems to me that ILUAs are a possibility. But maybe one needs to have some sort of bottom line in ILUAs as well in terms of the sorts of rights that Indigenous parties will have in negotiations. I am just saying that off the top of my head, but I am a bit concerned that we do not press ahead with forms of agreement making that give Indigenous interests very limited leverage in negotiation with outside interests. Again, I say that because I do think that we need some Indigenous specific developmental levers to assist in closing gaps in very difficult circumstance. I have not said it but almost all the land on the Indigenous estate is in very remote Australia—I think it is something like 98 per cent. So these are the places where development is going to be the

hardest. If we are going to make the playing field a bit more level, we just need to give people property rights, otherwise we will not see development.

Senator SIEWERT: Thank you.

Senator WRIGHT: Professor Altman, I would like to seek your views in relation to a question or a suggestion that I think my colleague Senator Cash made a but earlier, and I hope I do not misrepresent you, Senator Cash; you might need to clarify if I misunderstood what you were saying. It was a question asked earlier of Mr Smith, Deputy Chair of the National Native Title Council. I do not think you were here to hear it. It was essentially to the effect that economic analysis has suggested that there have been difficulties with flow on financial benefits to communities as a result of the native title system as we have it. I do not know about amendments to the act itself, but I think Senator Cash might have been suggesting, and I might be misrepresenting her, that perhaps it would be more appropriate to have some other body overseeing the financial payments that are made under the system as opposed to the compensation regime which Mr Smith addressed. I would be interested in your views on that.

Prof. Altman: Again of course we have some historical precedent there with the Aboriginal Benefits Account in the Northern Territory, under the Aboriginal Land Rights Act. It is a benefit account where all the statutory mining royalty equivalents flow and then they are divided between areas affected, Aboriginal people in the Northern Territory generally and the administrative costs of land councils. When the Native Title Act was actually being debated and passed, I was actually advocating for some sort of system that replicated the ABA—in other words, having some institutional form where statutory mining royalty equivalents or a hypothecated share of them could flow to fund the native title rep body system and to provide compensation payments to affected communities. Now, of course the ABA has not necessarily covered itself with glory in the last 35 years—actually it only became operational on 1 July 1978—in part because, from my point of view, the Indigenous influence on the ABA has been far too low. It has really been very much, particularly in relation to the grants to Aboriginal people in the Northern Territory section 64(4) grants, under the control of the minister rather than the advisory committee. But I do think that, as an institutional form, it has got a lot to offer. And if something was structured that actually empowered Aboriginal people to make decisions, again, as with the ABA, with the requisite conditions—like, for instance, that traditional owners in affected communities got a share of the returns from commercial development on their land—then I think that could be very useful.

What worries me at the moment is that the nature of payments that are made to native title groups is very ambiguous. It is very unclear if these payments are compensatory or if they are a negotiated form of the mineral rent that is raised off people's land. I think this opens up opportunity for a lot of contestation, but it also provides an opportunity for the state to be able to have much more say in how these resources might be utilised and for the state to withdraw the provision of normal citizenship entitlements when a group gets a compensatory payment.

I think we do need to remember that insofar as payments are compensatory, they are only meant to return groups to where they were. So compensation is to offset a negative impact, and if you like to bring you back to where you were. But development will require additional resources. I think we lose sight of that and there is a lot in my view that is quite paternalistic and patronising in the way that we view these payments to native title groups, notwithstanding the fact that some of them do require a lot of support to establish workable, effective organisations to get the best out of those payments both for current and future generations. I think there is some merit in that idea—again, as long as native title groups who are directly impacted are not in any way disempowered.

Senator WRIGHT: So, just to clarify, I think what I am hearing is that a fundamental principle to that would be the determination of the group or the people that were going to be benefiting to have the power to work out how that was to be implemented?

Prof. Altman: Yes, they should. And if we actually had a system where these groups had a larger body to go to, again as long as it was Aboriginal controlled, where they could get financial advice, legal advice, organisational advice, that could be very welcome. I think we would need to give some thought about whether we want to make that some sort of monopolistic system, where they could only go to this one place, or whether they could have a choice about going elsewhere.

Senator WRIGHT: Thank you.

CHAIR: Professor Altman, thank you for your submission and thank you for making yourself available today to appear before the committee.

Prof. Altman: Thank you very much.

Proceedings suspended from 12:29 to 13:31

McAVOY, Mr Anthony, Member, Indigenous Legal Issues Committee, Law Council of Australia

PARMETER, Mr Nicholas, Director, Civil Justice Division, Law Council of Australia

Evidence was taken via teleconference—

[13:32]

CHAIR: Good afternoon. Welcome to our public hearing and inquiry into the Native Title Amendment (Reform) Bill 2011. I formally welcome you both as representatives from the Law Council of Australia. Do you have anything to add on the capacity in which you appear?

Mr McAvoy: I am a barrister of the New South Wales Supreme Court.

CHAIR: We have received the submission from the Law Council, which for our purposes we have numbered 21. We all have that. I invite you to provide us with some opening comments and then we will go to questions.

Mr McAvoy: Just by way of opening comment, I will say that the Law Council of Australia's submission was drafted with the intent of addressing each of the issues contained in the bill. The obvious point to which a lot of the debate regarding the bill is directed is the provisions relating to the introduction of a presumption of continuity. This is a matter which has been before the Indigenous Legal Issues Committee before. Indeed, I gave evidence, I think to this committee, about two or three years ago on a similar bill on behalf of the National Native Title Council, and you heard from Mr Smith this morning about that. The issue has been around for a number of years. The Aboriginal and Torres Strait Islander Social Justice Commissioner wrote about the need for it in his 2008 report. The Chief Justice spoke about it in a paper that he wrote for the Australian Law Reform Commission journal *Reform*, I think, which was published in 2009. There was a previous bill with which most of the parties who have made submissions to this bill were involved, and we are here again discussing the same issue. It would be nice to see some further movement on the issue rather than continually arguing over the minutiae. With respect to the UN Declaration on the Rights of Indigenous People, the Law Council's position is that efforts should be made to ensure that this international instrument is brought into domestic legislation if possible. One of the ways in which that could be done is by referencing it in the Native Title Act. Clearly there are areas of the Declaration on the Rights of Indigenous People which interact with the principles and provisions of the Native Title Act. In the Law Council's written submissions you will see that there are some concerns that have been raised as to the way in which the principles have been extracted and set out in the proposed bill. But the underlying principle of aligning beneficial legislation to bring about land justice for Indigenous people in Australia with the principles of an international instrument designed to recognise the rights of Indigenous people is clearly desirable. Mr Parmeter and I would be happy to answer any questions that the committee has with respect to our submission.

Senator HUMPHRIES: Thank you for your very comprehensive submission. I want to ask you about your comments on the objects clause, clause 3A of the bill. You talk about some of the problems with the drafting of the clause and I take those points well. I think there are some significant problems with the distinction between rights and principles and the way in which the very long document, the UN declaration, has been abbreviated into seven brief paragraphs. I particularly want to work out what you meant by your comments on subclause (2). You talk about the judgment in Western Australia v Ward in the High Court and you point out that the point of view put by HREOC essentially was that the court should strain to adopt the construction which is consistent with the principles entailed in the international obligations we sign up to, in this case UNDRIP. You then point out that Justice Callinan rejected that and said that it is better for the court not to do so unless the legislation is genuinely ambiguous. Your comments are that subclause (2) addresses that conflict between HREOC and Justice Callinan's view, but you do not say in which direction. Do you think if subclause (2) were passed this would effectively elevate the position that HREOC had taken before the High Court in that case?

Mr McAvoy: I think the references in paragraph 17 of the Law Council's written submissions, in particular paragraph 17(d) where there are references to subclauses (2) and (3) of the bill, are references which are in the wrong order. The intention was to reference subclause (3) where it is referred to as subclause (2) and vice versa with respect to the reference to subclause (3) where it appears two lines later. That said, the proposition is put in relation to the notion that the Native Title Act be interpreted and applied in a manner that is consistent with the declaration. It is put as being an appropriate way forward in that it pays some regard to the submissions of HREOC whilst dealing with the concerns raised by Justice Callinan in Ward. It is not a direct lift from either position as far as I am concerned.

Senator HUMPHRIES: What would be the position, then, if this subclause were passed and you had the situation where there was a section in an act which was not ambiguous but which was capable of being strained—

to use the words of HREOC—to accommodate the international obligation? Would that leave us, essentially, in HREOC's position or in the more constrained position of Justice Callinan?

Mr McAvoy: I think that it would lead to the position put by HREOC. If the legislation is capable of being interpreted or applied in a manner that is consistent with the Declaration on the Rights of Indigenous Peoples then that is how it should be interpreted. I would not think that that is a position of principle that the members of the committee would struggle with.

Senator HUMPHRIES: I have to tell you that some of us would—very much so. For example, the declaration in part, in one article—I am referring to article 32(2)—sets out an obligation on member states or signatory states to obtain free, informed consent prior to the approval of any project affecting the lands of Indigenous people, 'particularly in connection with the development, utilisation or exploitation of mineral, water or other resources'. That is not consistent, I would argue, with the present terms of the Native Title Act. In the event of there being some conflict between these two approaches, you are suggesting, I think, that the HREOC interpretation is the better one and that it would be incumbent on a court to try to take on board, as strongly as possible, the clear intention of the international obligation—the UNDRIP in this case—rather than what might be seen as the more limited interpretation available in my reading, as I have just indicated it, of the Native Title Act.

Mr McAvoy: I think there may be other examples—without being able to point to any—that illustrate your point better than the one that you have just raised. I do not want to argue with you about the minutiae of the Native Title Act, but the Native Title Act is very clear that there is no right of veto. You cannot read a right of veto into the Native Title Act. There is a right to negotiate and there are procedures by which the future acts are allowed to proceed, and there is no capacity to stop any future act. There is no capacity to strain that legislation to reach a position where a native title claimant or holder might have a right of veto. But if you want to take me to another example then we can discuss it.

Senator HUMPHRIES: I think I have made my point that you might say that the provisions relating to right of veto are quite clear but that, as with any piece of legislation, there will be areas where there is, if not ambiguity, at least a capacity to push the interpretation of the legislation in a particular direction. Would you not agree that much of the UN Declaration on the Rights of Indigenous Peoples is, on face value, inconsistent with the present understanding of Australian law with respect to native title?

Mr McAvoy: Not at all. This is between the Declaration on the Rights of Indigenous Peoples and the Native Title Act. It is the extent to which governments in Australia have sought to introduce and apply to domestic legislation principles of land justice. So it comes down to a matter of degree rather than some major change of underlying legal principle. It is a matter of degree in my opinion.

Senator HUMPHRIES: I will give you an example where I think it is not a matter of degree. Article 28 of the declaration says:

> Indigenous peoples have the right to redress, by means that can include restitution or … compensation, for the lands … and resources which … have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

There does not appear to be any limitation in those provisions there with respect to the access to that restitution or compensation. That is not the position, generally, of the Native Title Act, is it? Generally land that has been alienated and for which there is no continuing connection is land for which there is no restitution or compensation, generally speaking, under our native title legislation, is there?

Mr McAvoy: I think the point of comparison between article 28 and the Native Title Act is the extent to which the compensation provisions in the Native Title Act can be applied to acts which have affected an extinguishment of native title. So there is a limitation on it, but that is still a matter of degree. It is not that there is not a system of compensation; it is just that it is limited in form, whereas the declaration does not provide for limitation. Going back to the original discussion that we were having, there does not seem to me to be a capacity to strain the compensation provisions under the Native Title Act to achieve some wholesale right to compensation for every parcel of land that has been alienated.

Senator HUMPHRIES: I am not suggesting that, but it does seem to me—and I am a lawyer myself—that article 28 is a very broadly stated right which is not subject to any limitation in the UN declarations themselves and which is not consistent with the regime in Australia, where there are very distinct limitations on restitution or compensation which can be provided for land which has been confiscated, occupied, taken or used, in the words of the declaration. To import some of those notions of an unlimited right to restitution or compensation into the legal regime in Australia would not be consistent with at least our present understanding of the way that the Native Title Act works and would surely be a source of confusion and perhaps even direct conflict between what

we generally understand to be the case with the law in Australia now and what the UN declaration clearly envisages, which is a right to restitution or compensation.

Mr McAvoy: I think we might have to differ on that point. The courts are required to interpret legislation and international instruments all the time, as we all know from the recent decision of the High Court in relation to the Malaysia refugee matter. That is the daily fare of the courts: to undertake those assessments. I am not sure that there is not some—

Senator HUMPHRIES: Wouldn't you agree, though, that, because we are adopting the HREOC view from Ward's case, we are now giving more weight to the international obligations in interpreting Australian law than was the case before? We would agree on that much, wouldn't we—if this legislation is passed?

Mr McAvoy: I would agree that the proposal by HREOC that the courts, where required to interpret the legislation, ought to look for consistency with international instruments is being stated more clearly as a result of the proposed amendment, yes.

Senator HUMPHRIES: I think actually what HREOC said goes beyond that, but we have to agree to differ about that.

Senator SIEWERT: You talked a bit about declarations, and I just wanted to continue on there and move on to some of your other comments. You have outlined a number of concerns with the approach, and I take your comments on board. Do you still support the concept of trying to include reference to the declaration in the act or do you think it just should not be there at all?

Mr McAvoy: The Law Council position is that there should be an attempt to include reference to the declaration in the act.

Senator SIEWERT: Okay, it is just that the way it has been done in the bill you do not think works, and so we need to have another go?

Mr McAvoy: Subclause 1 is problematic in that it tries to distil into principles a range of different aspects of the declaration, but the intent is clear. Yes, there should be a further attempt to recognise those aspects of the declaration in domestic legislation and then appropriate domestic legislation of which the Native Title Act is one.

Senator SIEWERT: Okay, thank you. I want to come back to that issue in a minute, but I need to ask about some other things first, if that is okay. I want to go onto the presumption of continuity. You say in your submission that you strongly support that concept in principle.

Mr McAvoy: Yes.

Senator SIEWERT: You talk about Justice French's proposals and then at paragraph 32 you say that it should significantly reduce the time and cost of reaching determination of native title claims. Is there a reason why you say 'in principle'? Do you think the current clauses in the bill are adequate or do you think there need to be some amendments?

Mr McAvoy: I think the reservation was expressed in the written submissions because there are some issues which arise in relation to 61AB(1) and they are expressed in the written submissions.

Senator SIEWERT: Sorry, I am having a bit of trouble interpreting what you said. I think that is probably the bottom line. Could you just outline how you think the proposal should be fixed?

Mr McAvoy: The problems with section 61AB(1) are really not substantive problems. They could be substantive problems if the way in which the bill is drafted is intended to create some distinction between the use of the various terms such as 'proof to the contrary' or the use of the term 'set aside'. I have approached on the basis that there was not an intention to create a range of different scenarios but rather that the language was a bit loose and it could be tightened up so that there was consistency between the provisions and consistency internally within the language.

Senator SIEWERT: Okay.

Mr McAvoy: That would relate to the use of the expression 'with respect to the presumption' and to clarify what was meant by the reference to 'findings to that effect' and also with 'proof to the contrary' and 'setting aside by evidence of substantial interruption'.

Senator SIEWERT: Okay, thank you. In items 5 to 9, negotiating good faith, in 23B you make the point that item 7 has the potential for abuse, particularly against native title claimants, for example, the simple matter of a commercial party to allege lack of faith in negotiations by native title party failing to respond to a request in a timely fashion. Have you got some suggestions how we could fix that?

Mr McAvoy: It is a difficult issue because the underlying problem is, of course, that the proponents are usually far more substantially resourced to undertake the negotiations and to participate in the process than the applicant or the native title claimant and that, in turn, results in difficulties in responding within short time frames.

Senator SIEWERT: Yes.

Mr McAvoy: The Law Council has tried to pick that up in other parts of the submission in relation to perhaps including provisions for the commercial party to meet the reasonable cost of the native title parties in the negotiation. That is at 23A.

Senator SIEWERT: Yes, I noticed that—and I appreciate the comments. The issue of resources has come up time and time again. Is there anything that you could see as a way to address that through amendments to the bill or in the legislation? That has been an ongoing problem though, hasn't it—issues around whether people have been acting in good faith in the past? Part of this was to address the current problems—

Mr McAvoy: One way may be to add a consideration of reasonableness to the timeliness so the responses are made in a timely and reasonable fashion.

Senator SIEWERT: Okay, thank you. I know we are going to run out of time so my final question is one that I have been following up with all the witnesses. We heard from the National Native Title Council this morning and also Yamatji Marlpa who were talking about some of the provisions or items being more urgent than others such as the issues around prior extinguishment, the presumption of continuity, and the negotiation in good faith. I put the proposition that perhaps, given some of the other issues—particularly the declaration—are more problematic and need substantially more work, we could split the bill and deal with those areas that are easy to deal with where there is a lot of consensus certainly amongst the Aboriginal and Torres Strait Islander organisations that have made either oral or written submissions that those issues do need addressing. Do you think that that would be effective?

Mr McAvoy: It is not an issue that is being canvassed at the Law Council committee in the preparation of this submission, but I repeat my observations from my opening comments that the discussion around the presumption of continuity has been going on for some time and it would seem to me that it is something that could be moved on without further delay. The issues that you have raised in relation to the Yamatji submissions today do raise a proper point in that those other amendments result from decisions of the court and the need for urgent remedy. Without having canvassed that issue with the rest of the committee, it would seem that there are some provisions that could be dealt with expeditiously.

Senator PRATT: There has been some debate in the committee about the nature of commercial interests as it relates to native title. It appears that the Law Council argues that the law does not need clarifying in relation to rights and interests being of a commercial nature. Can you explain the logic behind that argument?

Mr McAvoy: The submission from the Law Council is contained at paragraphs 46 and 47 of the submission.

Senator PRATT: Yes, that is right.

Mr McAvoy: The underlying position is one that relied upon the Native Title Act and common law and it is basically this: the Native Title Act does not exclude determinations recognising commercial interests. The chief decision on the matter by the High Court, obviously, is the decision in Yamirr v the Commonwealth. That was a matter in which there were findings of fact and it does not seem that that ruled out commercial interests. It seems as though the court might be asked to deal with it again in the Torres Strait Island sea claim in Akiba, if it goes to the High Court, which it looks as if it probably will. At present, whilst the point that has been made in the written submissions is that whilst it may be useful to clarify the position, it is not strictly necessary. The law as it stands does not stop the court from making any determinations as to the existence of commercial interests.

Senator WRIGHT: Thank you very much for a very thorough submission. I am just interested in the last paragraph of your submission, paragraph 49, where you note that the bill does not address the possibility of allowing, once amendments were passed, previous unsuccessful claimants being able to make a claim again. You mentioned the Yorta Yorta and Larrakia claim groups, for example, and that fail to do so would amount to a grave injustice. Could you just elaborate on that a little please?

Mr McAvoy: Paragraph 49 was inserted in the written submissions just to make clear that the introduction of a presumption of continuity may very well have brought about a different result had it been applied in previous cases and that there may be the need for some transitional provisions which allow for reassessment of those matters.

CHAIR: On behalf of the committee, I thank you both for submission from the Law Council. On behalf of this committee can you thank the Law Council on our behalf for their submission again, and for making yourselves available for us this afternoon?

DENLEY, Ms Kathleen, Assistant Secretary, Native Title Unit, Attorney-General's Department

GRACIK, Ms Lavinia Michelle, Acting Principal Legal Officer, Native Title Unit, Attorney-General's Department

[14:04]

CHAIR: I welcome representatives from the Attorney-General's Department. I just want to remind the senators, the Senate resolved that an officers of the department of the Commonwealth shall not be asked to give opinions on matters of policy, and should be given reasonable opportunity to refer questions asked of the officer to a superior officer or to a minister. This resolution prohibits only asking questions on opinions, matters of policy and does not preclude questions asking for explanations of policy or factual questions about when and how policies were adopted. Just a reminder, that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis of the claim. Ms Denley, I invite you to give us an opening statement and then we will go to questions.

Ms Denley: Thank you, Senator. The Australian government is focused on improving the native title system through practical, considered and targeted reforms. The government has had a focus on achieving faster and better outcomes in the native title system. As the committee members are aware, the government has made a number of reforms to the act. In 2009, the government implemented reforms that have contributed to broader, flexible and faster negotiated settlements. These reforms gave the federal court a greater role in the management of native title claims, and more flexibility about how to manage them.

Since those amendments came into effect, there has been a dramatic increase in the number of claims settled by consent determination. In the 16-year period between when the act came into force and the end of the 2009-10 financial year, 81 consent determinations have been made. And in the 2010-11 financial year alone, an additional 27 consent determinations were made. Also in recognition of the need for appropriately qualified anthropologists in the system, which I am aware has been raised by a few of the witnesses earlier today, the department launched a grants program to attract a new generation of junior anthropologists to native title work and to encourage senior anthropologists to remain within the system. Some $1.4 million in funding for that program was granted for the first three years, and that funding will be ongoing. That was in recognition of the fact that anthropologists are central to native title, as claimants often rely on experienced anthropologists to provide expert evidence to establish their connection to land. I might also add that a one-off grant of funding of $400,000 was provided both to the University of Adelaide and then to 14 of the native title representative bodies and the native title service providers in June this year.

The government undertakes continual reviews of the native title system and considers options for reform through a range through a range of consultative stakeholder forums. To avoid uncertainty and divisive debate about the impact of major changes to the operation of the Native Title Act, the view of the government is that consultation is essential. The government has progressed and is progressing a range of reforms that seek to improve the native title system and promote its vision. The department notes that two of the items included in this bill are under consideration by the government; these being the provisions relating to historical extinguishment and also an amendment of the meaning of good faith, of negotiating good faith under the right to negotiate provisions of the act.

In 2010, as has been mentioned earlier today, the government released a draft discussion paper about the leading practice agreements, maximising outcomes from native title benefits. This discussion paper canvassed a number of reforms with the aim of promoting flexible and sustainable native title agreements and to improve the governance of agreements. The paper also sought views on how to best implement amendments and to clarify the meaning of in good faith under the right to negotiate provisions. And to be clear, the Attorney-General has provided to amend the good faith provisions and the consultations were about what forms those amendments should take. Also in 2010, the Attorney-General released draft legislation detailing a proposed amendment to the act, which would allow parties to agree to disregard the historical extinguishment of native title in areas of land set aside for the purpose of preserving the natural environment in certain circumstances. And those reforms would not affect any existing interest in those areas. The government invited public comment on the draft legislation, and the Attorney-General's Department received 17 written submissions that were broadly supportive of that amendment.

The government always welcomes views on reform to the native title system and the government's view is that proposals for significant change require proper consultation and full consultation with effective parties to ensure that the amendments do not unduly or substantially effect the balance of rights under the act. The department has considered the submissions that have been received in this process and have read them with interests, as we will

do for the report that will be handed down in November. I would just like to thank the committee for the opportunity to appear today and we hope that we will be able to assist you with your inquiry.

CHAIR: Thanks very much. Ms Gracik, do you have anything you wanted to add to that?

Ms Gracik: No, nothing.

CHAIR: Just before I go to questions, can I just clarify something you said, Ms Denley. You had the leading practice agreements discussion paper. And then you had also the proposals to change the act. Is that right? Two separate documents?

Ms Denley: Yes, the historical extinguishment—some draft legislation was released and that was earlier last year. People commented on that and that is currently with government for consideration. Then the second was the agreements discussion paper, and the consultations on that finished. Was it earlier this year?

Ms Gracik: No, late last year.

Ms Denley: Late last year. And that is currently also with the government for consideration.

CHAIR: So when you say a report is due to be handed down in November, we are talking about this November?

Ms Denley: Sorry, I meant this committee's report.

CHAIR: Sorry. Okay.

Ms Denley: The inquiry report.

CHAIR: Right. I thought you might have been suggesting the government was going to respond to those processes in November.

Ms Denley: I do not have details of that, a time frame.

CHAIR: Is there a timeline for that?

Ms Denley: I do not have any details about a timeframe at this point.

CHAIR: So you will not know if there will be one response to the discussion paper and one response to the legislation, or whether it will just be one response to both? You do not know?

Ms Denley: I am not sure as this stage.

CHAIR: All right, thanks.

Senator PRATT: The submission from the Attorney-General's Department in a number of areas that this bill puts forward simply concludes that further consultation and detailed consideration would be required in order to look at the implications of proposed amendments, without putting forward any substantive argument as to what the department's opinion of those amendments might be. I am interested to know why that is. Clearly the department does have a reform agenda in a couple of areas that it is considering. It would appear to me that there must be some grounds in which these other areas that this bill is considering has not been debated. So, I am unclear really why you would not be proffering reasons as to why some of the areas that have been put forward in this bill would not be considered.

Ms Denley: The government has not reached a decision on a range of the proposals that were put forward. To the extent that there is a government position, we responded in the submission. As mentioned, there are two that have been out for consultation. I think your other point was about many of the comments being that the department would recommend that there be further consultation. It is a longstanding government position that for any significant amendments to the act, consultation is requirement.

Senator PRATT: No, I have not—clearly, the consultation would be required. It is just that you have not put forward any arguments for why, for example, areas of reform in those areas which are not currently being considered by the government have not been considered for a form in the way that this bill proposes.

Ms Denley: I understand that it is general practice for private members' bills. The department does not give detailed consideration of all of proposals that are in there. What I can say is that as I think has been raised earlier today, a number of the proposals have been talked about for some time and certainly we do attend a number of stakeholder forums where issues like this are raised. And we will have a discussion in that context.

Senator PRATT: I do not know that it is true that private senator's bills would not have substantive argument offered on the grounds within them but clearly the practice between departments might vary. But clearly, for example, in dot point one it said detailed consideration of the full implications of amendments and consultation with affected parties is required. To me that does not really indicate whether there is any view about the merits of what is put forward in those proposed amendments.

Ms Denley: With respect, I think that is correct. It was a deliberate decision not to be putting forward a view because the department would not be in a position to do that without first seeking the approval of government and the government position at this stage is that there would need to be further consultation.

Senator PRATT: So clearly that is why you have offered views in relation to the areas in which the government is consulting and has considered reform, but I suppose the general scope broader than that does not really outline why the government has considered those areas of reform and not others. Now that might be going to broader advice than you are able to provide the committee but I was really just seeking what extent the department had considered those broader issues.

Ms Denley: I think that is right. I think that it is a matter for government. All I could really say, again, is that many of the issues that have been raised are not new and so, in an informal context if you like, they are under consideration by a number of people in the system and I think, as was highlighted in the submissions as well, they have been raised in various forums for some time.

Senator PRATT: So in that sense you have simply put on record those areas where it is clear that the government does have a substantive reform agenda that it is consulting on?

Ms Denley: That is correct.

Senator SIEWERT: Senator Pratt has covered some of the initial questions I was going to ask so I will concentrate on a bit more detail—not that I think we are going to get very far, to be quite honest! I suppose I am disappointed that the government chose not to look at some of these more substantive issues because you will be as well aware as I am that the two issues that you do give substantive comment on have been on the agenda for a long time. I will come back to the issue in a minute, but more broadly, surely the department is aware that the other issues that are canvassed in this bill other than the declaration—I will acknowledge that is a substantively new element in terms of discussion of the Native Title Act and its proposed amendments—but the other suggestions for amendments and need for change have been on the agenda for a substantial period of time. The issues around heritage and the issues around offshore issues have been there for a long time, so I am disappointed that the government—or the department—cannot give us some further information on what has been the thinking around the need for amendments to native title to address those issues. It is not the first time that you would have seen those.

Ms Denley: I agree. As I just said, some of these proposals have been around for a while. I think the purpose of the submission—as I said, we are not in a position to offer an opinion without first having a clearance by government about an agenda that they want to pursue at this stage, but I would say that many of the items in here the Attorney has looked at. As you would know, he is on the record back in 2009 as noting that the presumption of continuity is something he would be interested in looking at, so our submission certainly does not reflect the fact that no thinking has gone into these issues. It does reflect the fact that, at this point in time, the government has not made a decision on proposals other than the two that we flagged.

Senator SIEWERT: So the presumption of continuity is one of the areas that you do not address—if I have read it right—in terms of the two issues. The two issues are extinguishment and good faith. You do not really address the issue of continuity here.

Ms Denley: That is right. What I am saying is that the Attorney has flagged that he is always interested in hearing options for reforming the system and he certainly made a comment on the record in 2009 specifically about the presumption.

Senator SIEWERT: With all due respect, and I know I can only take this so far with you so I do appreciate that, but the Attorney-General commenting on it does not get us very far other than on just the issue. There are a couple of the issues—the two that you have commented on and continuity—and I am sure you are aware that we have been having discussions quite extensively today about those three in particular.

Ms Denley: That is right.

Senator SIEWERT: But they have been on the agenda, as you said, for a very long time. The continuity issue in particular—we have also had substantive comment from Justice French on it—I suppose I get frustrated when I hear the government say, 'Oh, we have to do more consultation with stakeholders.' How much more do we need on the record and for people to talk about, in particular those three issues, before we get some change?

I think it is every single submission that we have had from Aboriginal and Torres Strait Islander organisations—and there is a variety—have been saying yes, they support those changes and this is not the first time that we have been through a round of consultation on native title since I have been in this place with exactly the same three issues on the agenda.

Ms Denley: I think what I can say, I certainly mentioned two of those issues we have done consultation on and those are with government. I think when the submission refers to further consultation, when it comes to the specifics of legislative reform and what that looks like, the advantages of doing a consultation road show, having the face to face discussions about not just the principles but the actual specifics of what the legislation then looks like has been one of the government priorities before they would put something into legislation.

Senator SIEWERT: Thank you for that. Is that the process the government is now up to with those two areas that you have canvassed in here—

Ms Denley: No, the consultation has occurred already on those two areas.

Senator SIEWERT: Yes, okay, the consultations occurred. One was draft legislation but the other wasn't—the extinguishment issue did not go as far as draft legislation per se, did it?

Ms Gracik: No, it did.

Ms Denley: It did. The historical extinguishment did and then the consultation about the good faith negotiation—

Senator SIEWERT: Sorry, I swapped it around a bit. I swapped it around, sorry.

Ms Denley: The consultation about the good faith negotiations—we, in that context, in the discussion paper and in the face to face consultations, certainly flagged section 228 of the Fair Work Act, which many of the main aspects of that are reflected in the bill, as the model. So to the extent that we can, that was the legislative option that was put forward when we were discussing it with parties.

Senator SIEWERT: Thank you. Any other questions I have would be on policy and I know that I am not allowed to go there so thank you.

Ms Gracik: Sorry, I just wanted to clarify that last point: the section 228 proposal came from stakeholder submissions. We did not actually flag it specifically in the paper, we just sought views about how good faith could be clarified.

Senator SIEWERT: Okay, thank you for that clarification, it is appreciated.

Senator HUMPHRIES: I note your comment in the submission in reference to the UN declaration that the government's statement of support for the declaration made it clear that Australia's laws concerning land rights and native title are not altered by its support of the declaration. Would you agree that the rights contained in the declaration would, on face value, go well beyond the rights currently conferred on Indigenous people in the Native Title Act or under Australian domestic law generally?

Ms Denley: I am not sure I could offer a legal opinion on that. I suppose what I could say is that many of the submissions have made that point. But you are right to say that Australia's support was aspirational so it is not binding in international law.

Senator HUMPHRIES: Indeed, and I am just trying to tease that out. It is my reading that there are some significant differences between Australian and domestic law with respect to native title and consequences of conferring native title and what appears to be in the declaration. Would that be your understanding of the situation?

Ms Denley: Broadly, yes.

Senator HUMPHRIES: Okay. You say that by adopting the declaration we have not changed the law. We have not had an alteration to Australia's domestic law with respect to land rights and native title by virtue of our support for the declaration.

Ms Denley: That is correct.

Senator HUMPHRIES: I note the decision in the High Court in Teoh's case where, essentially, it was found that a convention ratified by Australia does not become part of Australian law unless its provisions have been validly incorporated into municipal law by statute, but that ratification is an adequate foundation for a legitimate expectation unless evidence to the contrary appears that the administrative decision-making would act comfortably with the convention. Is there not an argument that under the common law outlined in Teoh's case some of the interpretation of our native title legislation—if this legislation was passed—would be influenced by the provisions of the UN declaration?

Ms Denley: In terms of the Native Title Act, an example would be—and I know through Mr Neate's evidence earlier today—a recent court case which found there was no ambiguity to allow a reference to be made—

Senator HUMPHRIES: In respect of one particular aspect of the Native Title Act, not the whole of the act.

Ms Denley: That is right. So is your question more broadly whether it could be used?

Senator HUMPHRIES: You would have heard the exchange I had with the Law Council representative earlier on where we debated whether an international convention that Australia had signed up to could be influential in the case of ambiguity in Australian domestic law or whether, on the submission of the Human Rights Commission, a court ought to strain to incorporate the provisions of an international convention where it is possible to interpret the convention consistently with an obligation under international law. So under either of those scenarios we have some influence by an international obligation Australia signed up to. Would you agree with that?

Ms Denley: Senator, at this point I should note I am not an expert in international law and how the conventions might be applied through domestic legislation. With your permission, it would probably be better if I took that question on notice and spoke to the international law area within the department.

Senator HUMPHRIES: Yes, all right. Specifically I am trying to ascertain what influence the High Court's decision in Teoh would have on Australia's domestic law, particularly the Native Title Act if this legislation, the legislation before us today, were to be enacted,. And could I also ask you for the view of the department on what the enactment of this law, as presently drafted, would have on this question of interpretation that was raised in Ward's case that we talked about earlier on in the High Court. You will see in the submission the dichotomy between those two views about how to interpret international convention. I would appreciate your view about what this legislation would mean with respect to that particular dichotomy.

Ms Denley: I will take that on notice, thank you, Senator.

Senator HUMPHRIES: All right, okay. Thank you. That is all I have got.

CHAIR: All right. Okay, thank you both for your time this afternoon, and I thank the department for the submission that you have provided. The hearings for this bill stands adjourned. Thanks everyone.

Committee adjourned at 14:30