THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

NATIVE TITLE BILL 1993

Report by the
Senate Standing Committee on
Legal and Constitutional Affairs

DECEMBER 1993

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Native Title Bill 1993

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Chapter 1

BACKGROUND

Introduction

1.1 On 25 November 1993 the Selection of Bills Committee recommended that the provisions of the *Native Title Bill 1993* be referred to the Committee for inquiry and report[1]. This recommendation was agreed to by the Senate. The Committee was required to report on or before 9 December 1993.

Background

1.2 The Bill was introduced into the Senate on 25 November 1993. The Bill is the first part of the Commonwealth's response to the decision of the High Court of Australia on 3 June 1992 in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. In the *Mabo (No 2)* decision the High Court stated that under the common law in Australia Aboriginal peoples and Torres Strait Islanders maintain that title to land which their ancestors held prior to the coming of the Crown, provided that since then it had not been extinguished.

The Mabo Decision

1.3 By a majority of 6 to 1 (Dawson J dissenting) the High Court declared that, apart from the Islands of Dauer and Waier and a small part of the island of Mer,

> the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands.

The Meriam people inhabit the Murray Islands, which are the most easterly of the islands of Torres Strait. The Islands were annexed by Queensland in 1879. In upholding the claims of the plaintiffs the Court

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1 *Selection of Bills Committee* Report No 7 of 1993, 20 October 1993.

held that the inhabitants of the islands had their own customs and laws, and that their 'native title' to the land survived the annexation of the islands by Queensland.

What is 'Native Title'?

1.4 The concept of native title is not a creation of the High Court of Australia. It was a recognised part of the English common law well before Australia was settled by Britain. International law recognised conquest; ceding of power by the incumbent authority; and occupation or settlement of territory over which no right of ownership is asserted (territory that was *terra nullius*) as three of the effective ways of acquiring sovereignty over territory. Once the colonising power conquered, settled or was ceded the new territory, it obtained sovereignty over that territory and had the power to make new laws for and govern the territory. In the case of British colonies this meant that the common law of Britain was extended to the territory to the degree to which it was applicable. This included, of course, the common law with respect to the acquisition of rights in property.

1.5 It was pointed out by Brennan J in *Mabo* that:

> [t]he general rule of the common law was that ownership could not be acquired by occupying land that was already occupied by another. As Blackstone pointed out:[2] "Occupancy is the thing by which the title was in fact originally gained; every man seizing such spots of ground as he found most agreeable to his own convenience, *provided he found them unoccupied by any one else*" (emphasis added).[3]

1.6 Under the common law the Crown has the ultimate title to all land with people holding subordinate interests in the land. The underlying title to land held by the Crown is known as the radical title, or the root title from which all others spring. Since the Crown holds the radical title to all land within a new colony it is able to grant any interest

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2 *Commentaries on the Laws of England* 17th ed (1830) Book II, chapter 1, p 8.

3 *The Mabo Decision* Commentary by Richard H Bartlett and the full text of the decision; Butterworths 1993 p 31.

in land, which would be held of the Crown. If the land in question was uninhabited, truly a *terra nullius*, the Crown would take an absolute title to the land because there would be no other proprietor. But if the land was occupied, for example by indigenous inhabitants, and their rights and interests in the land are recognised by the common law, then the radical title which is acquired with the commencement of sovereignty does not destroy those rights.[4]

1.7 If there was a settled society with settled laws living within the territory before it was colonised then the change in sovereignty would not automatically extinguish existing rights to property. However, the pre-existing property rights were subject to extinguishment by the new sovereign power, either expressly or by necessary implication. Indeed, during the decade long Mabo litigation, the Queensland Government endeavoured to expressly extinguish any pre-existing title to the land by enacting the *Queensland Coast Islands Declaratory Act 1985* which declared that, upon the islands being annexed, they were 'vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever.' However, in 1988, the High Court of Australia ruled that this Act was invalid as it was contrary to the *Racial Discrimination Act 1975* (*Mabo v Queensland* (1988) 166 CLR 186 - known as *Mabo (No 1)*).

1.8 The High Court, in its *Mabo (No 2)* decision, analysed the decisions of English and Australian courts dealing with questions of the title to land in the colonies acquired by Britain, such as *The Case of Tanistry* (1608) Davis 28 dealing with the conquest of Ireland, *Witrong v Blany* (1674) 3 Keb 401 dealing with the conquest of Wales, and *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 397 dealing with the property rights of the indigenous people of Papua New Guinea.

1.9 Native title is not freehold title. This is because native title is a continuation of the interests in land which applied in the traditional community before the acquisition of sovereignty by the Crown. Thus the features of native title will vary, and will depend upon the laws, customs and usages of the community.

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4 Brennan J p 34.

1.10 The six members of the High Court who found in favour of the applicants were in agreement about the proof required to establish native title. Proof of the existence of native title is relatively difficult to establish. The elements include the need to show the existence of an identifiable community or group; that there be a traditional connection with the land under the laws and customs of the Aboriginal group; and that there has been a substantial maintenance of the connection since Crown sovereignty. These elements will place strict limits upon the making of successful claims to native title.

Purpose

1.11 The main purposes of the Native Title Bill are:

- to recognise and protect native title;
- to validate existing Commonwealth land titles where they may be invalid due to the existence of native title, and to allow States and Territories to validate their own titles;
- to establish procedures for determining claims to native title; and
- to establish procedures for dealing with native title land.[5]

1.12 The Bill is structured with the definitions at the back and a table at the front of the definition sections identifying where each definition may be found.

1.13 Part 2 of the Bill recognises and protects native title. Native title may not be extinguished except in accordance with the Bill. The Mabo decision held that native title continued after the acquisition of sovereignty by the British Crown, and clearly indicated that the Crown may affect or extinguish native title. Third persons became concerned about the validity of their title. Accordingly, Division 2 of Part 2 provides for the validation of existing titles to land. The Bill enables the States

5 *Native Title Bill 1993* Explanatory Memorandum.

and Territories to validate their 'past acts' on the same terms as is done for the Commonwealth's 'past acts'.[6]

1.14 Briefly, where freehold titles or commercial, agricultural, pastoral or residential leases may be invalid the Bill enables them to be validated and all native title is extinguished (unless it is preserved in a reservation). Where a mining lease is validated, native title is not extinguished, but aspects of it which are inconsistent with the mining lease will be suspended, and revive when the lease expires. (This is what the Bill calls the 'non-extinguishment principle'.) Compensation for any extinguishment of native title will usually be payable by the Government (Federal, State or Territory) which did the act which caused its extinguishment.[7]

1.15 Division 3 of Part 2 of the Bill sets out how native title may be affected by future acts. It provides a regime for the extinguishment of native title and other processes relating to future acts.

1.16 Division 5 of Part 2 of the Bill sets out the rules for the payment of compensation, and Division 6 requires native title to be held by a body corporate.

1.17 Part 3 of the Bill sets out the procedure by which people can claim native title, and how it is to be determined.

1.18 The remainder of the Bill deals with matters including the setting up of the National Native Title Tribunal and the Registrar thereof, as well as the procedural aspects of hearings before the Tribunal and the Federal Court.

The Western Australian Legislation

1.19 The Western Australian Government has enacted the *Land (Titles and Traditional Usage) Act 1993*. This Act:

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6 *The expression 'past act' is a defined term: see clause 213 of the Bill.*

7 *Bills Digest No. B.63 - Native Title Bill 1993* Department of the Parliamentary Library p 2.

- confirms the validity of all titles already granted;
- extinguishes common law native title throughout Western Australia, and replaces it with statutory rights of traditional usage. These rights are defined in the Act by reference to the 'traditional laws and customs' criterion used by the High Court of Australia in the Mabo judgments;
- gives legal protection to rights of traditional usage without the need for any proceedings, declaration, determination or registration;
- provides that if the Crown moves to take action which would extinguish or impair rights of traditional usage those claiming to be affected will be entitled to be heard and, where the claim is made out, to be compensated; and
- separates the matter of granting the title, and that of providing compensation for extinguishment.

1.20 The Western Australian Act received the Royal Assent on 2 December 1993. It commenced operation on the same day, pursuant to section 2 of the Act.

The Committee's Inquiry

1.21 The Committee received 109 submissions. Appendix 1 lists the names of those who made submissions.

1.22 The Committee held public hearings to discuss the provisions of the Bill in Brisbane on 1 December 1993, in Darwin on 2 December 1993, in Perth on 3 December 1993 and in Canberra on 6 and 7 December 1993. Appendix 2 lists the persons and organisations who gave evidence to the Committee at the public hearings.

Consultation

1.23 The Committee acknowledges the breadth and diversity of opinion about the *Native Title Bill 1993* presented during the five days of hearings in Brisbane, Darwin, Perth and Canberra. The Committee thanks all those who contributed to its inquiry. Clearly the High Court's

decision has generated considerable interest as Australians adjust to the reality of native title within the common law.

1.24 The Committee received written and oral submissions, and suggested amendments, from a wide range of community members (see appendices 1 and 2). Despite the short timetable for reporting the Committee was able to hear from many interested parties and was assisted by detailed submissions. The views presented to the Committee included representations from the following groups:

- Aboriginal Elders;
- Aborigines who have been dispossessed of their native title;
- Aborigines and Torres Strait Islanders who have access to remnant native title in Australia;
- Land Councils;
- Aboriginal legal service groups;
- Counsel involved in the *Mabo (No 2)* litigation;
- Practising lawyers engaged in Mabo style litigation;
- Academic lawyers;
- Mining industry representatives;
- Pastoral and grazing industry spokespersons;
- Aviation industry representatives;
- Representatives of cattlemen in the Northern Territory;
- Fishing industry representatives;
- Churches;
- Members of Government and Opposition at State, Territory and Commonwealth levels, and their officials;

- Small business representatives; and
- Academics from a range of disciplines.

Chapter 2

THE MAJORITY VIEW

Information, Consultation and Negotiation

1.25 In addition to the inquiry process before the Committee a major information campaign and consultative effort preceded the introduction of the legislation into the Parliament. The Committee was told of the considerable efforts already made to inform people of the impact of the *Mabo (No 2)* decision and the Native Title Bill:[8]

- In January 1993 the Council for Aboriginal Reconciliation distributed 25,000 copies of a document entitled *Making Things Right - Reconciliation After the High Court's Decision on Native Title.* A further 200,000 copies of the document were sold through AGPS;

- In June 1993 the Commonwealth distributed a total of 6,000 copies of a document entitled *Mabo: The High Court Decision on Native Title. Discussion Paper*;

- ATSIC undertook a major publicity campaign, distributing 27,000 copies of an information package and operating a 008 contact 'phone number;

- In September 1993 the Commonwealth distributed 2,700 copies of a paper outlining its proposed legislation;

- Some 3,000 copies of the bill and explanatory material have been distributed; and

- ATSIC has distributed some 5,000 copies of a plain English guide to the Bill.

8 *Evidence (Senator The Hon Gareth Evans) pp SLY 578-579.*

1.26 The Committee is aware that wide ranging consultations have occurred with indigenous people, industry groups and with State and Territory governments.

1.27 In the later stages of the process the Prime Minister has negotiated personally with ATSIC and with representatives of Land Councils in an endeavour to reach agreement with those Aboriginal communities most likely to be affected by the Native Title Bill.

Summary of Major Debates Before the Committee

1.28 The major features of the information provided to the Committee by those appearing at public hearings and in written submissions were as follows:

The Need for Urgent Passage of the Commonwealth Bill

- The major Land Councils and some Legal Services organisations expressed strong support for passage of the Commonwealth Bill immediately. These groups expressed concern about the effect of the Western Australian legislation on native title in that State. These groups, acknowledging that the Bill is not intended to deal with the rights of the dispossessed Aboriginal people, also urged extensive consultation with Aboriginal people on the social justice package foreshadowed by the Commonwealth government for those Aborigines whose native title had been extinguished;[9]

The Need for Certainty

- Industry group representatives stressed the need to remove doubt surrounding title to property in order that investment is not deterred. These witnesses agreed on the need for a national approach to the issues raised by the Mabo decision and to the validation of titles. For example, The National Farmers' Federation informed the Committee that:

> [W]here there is disagreement between the Commonwealth and the state, the matters are likely to be resolved in the

9*Evidence (Mr Pearce, Northern Land Council) p SLC 327.*

High Court. The position taken by our council was that, for the period that those issues are before the court, there is as a result uncertainty about land tenure and resulting anxiety perhaps on the part of financial institutions in relation to that particular land tenure.[10]

Representativeness of the Aboriginal Negotiating Team

- A number of Aboriginal groups and some individuals argued that the Aboriginal negotiating team was unrepresentative of them and criticised the team for 'doing a deal' with the Prime Minister without authority and without satisfactory consultation.[11] The negotiating team made it clear that they negotiated only on behalf of the people whom they represented directly;[12]

Linkage with the Racial Discrimination Act 1975

- a number of witnesses, including Mr Ron Castan QC[13], urged that the Bill include express provision that it be subject to the provisions of the *Racial Discrimination Act 1975.* Other witnesses argued that this would prejudice the certainty of the validation provisions of the Bill and the validity of future grants;[14]

Constitutional Validity and Complexity of the Bill

- State and Territory government critics, and industry groups, focussed upon possible Constitutional invalidity and the complexity

10 *Evidence (Mr Farley) p SLC 541.*

11 *Evidence (Mr Wayne Wharton, Keooma & Birri Gubba, pp SLC 230 & 246-247); (Mr C Patten, Aboriginal Legal Service, p SLC 251-252); (Mr R Robinson, National Aboriginal & Islander Legal Services Secretariat, p SLC 278).*

12 *Evidence (Mr D Pearce) p SLC 310; (Mr Yu) p SLC 509; (Mr Pearson) pp SLC 534-535.*

13 *Evidence (Mr Castan QC) p SLC 221.*

14 *Evidence (Mr Hugh Fraser QC) p SLC 297.*

of the Bill.[15] On the other side, the Federal Government and other witnesses were confident that the Bill was constitutional and saw the Bill as a practical approach to an extremely difficult and complex issue;[16]

Need to Override the WA Legislation

- Several witnesses stressed the urgency attaching to the passage of the Native Title Bill in light of the enactment of the WA *Land (Titles and Traditional Usage) Bill 1993*. It was put to the Committee that the WA Act extinguishes existing native title with effect from 2 December 1993. This effect will be overridden by the enactment of the Commonwealth Bill. However, the longer the hiatus between the commencement of the WA Act and the Commonwealth Act, the greater will be the degree of confusion about the important question of interests in land[17];

WA Legislation may Breach International Obligations

- Sir Ronald Wilson, President of the Human Rights and Equal Opportunity Commission Commission, spoke of the urgent need for the Commonwealth Bill to be enacted in order to override the West Australian enactment because it (the WA Act) breaches Australia's international obligations[18];

Calls for a Further Inquiry

- A number of witnesses called for a further process, such as a Senate Select Committee, to further explore the matter before enactment of the Commonwealth Bill. However, this would not meet the point made by Sir Ronald Wilson, nor the urging by major Aboriginal groups and by Mr Castan QC, Mr Chaney and Father Brennan, that the Commonwealth Bill be enacted immediately. A

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15 *Evidence (Mr M Perron, p SLC 360).*

16 *Submission No. 95 (ATIA) p 1.*

17 *Evidence, Mr Castan QC p. SLC 236*

18 *Evidence, 3 December 1993 p.*

number of witnesses expressed concern that delay in passage would inflame the debate in the community and cause increased racial tension. The Australian Tourism Industry Association stated that any protracted inquiry would also undermine investor confidence;[19]

Compulsory Acquisition of Property

- Some concern was expressed at the possibility that the WA legislation providing for the compulsory acquisition of property might be used to extinguish native title land after passage of the Commonwealth Bill and that the Bill was ineffective to prevent this. Government witnesses contended that all property in WA, whether native title or otherwise, could be acquired compulsorily in this way only on the basis of being acquired on just terms, for a proper public purpose and on a non-discriminatory basis.[20] Were Government to compulsorily acquire land held under native title in bad faith native title holders may be able to obtain redress in the courts.

Tourism Issues

- The Australian Tourism Industry Association asserted that tourism leases have appropriately been given equal treatment by the Bill with other commercial leases[21]. Mr Byrne of the Cape York Land Council put the view that tourist leases should be on the same footing as mining leases[22]. Mr Pearce of the Northern Land Council informed the Committee that:

> [t]here is also a concern about tourist leases over large areas. For instance, something like Starcke in Queensland is a prime example of where you have a massive lease but the actual buildings consist of a few demountables on the shore. What we argue is that native title survives in those areas and

19 *Submission no. 95 (ATIA) p 2.*

20 *Evidence (Mr Orr) pp 616 and following.*

21 *Submission 19, Australian Tourism Industry Association, p.5*

22 *Mr Byrne, Evidence, p. SLC 225*

revives, except where there are inconsistencies. Those inconsistencies are where it has been extinguished by the building of a permanent physical structure in that area.[23]

Government witnesses pointed out that such leases do not usually extend beyond the location of a resort or other tourist building to the surrounding areas where tourist activity takes place such as forest areas.[24] As a result, Government witnesses advised that these concerns could be rejected.

Fishing Issues

- Fishing industry representatives claimed that:
  - The Bill fails to specify whether coastal land subject to native title will be to the high or low water mark; and
  - If native title diminishes existing fishing rights of commercial fishermen adequate compensation should be provided.[25]

It was also said that there is some lack of clarity in the Bill caused by the way internal waters are defined across bays and estuaries. Under the *Aboriginal Land Rights (Northern Territory) Act 1976,* land is granted to the low water mark[26]. Fishing methods in this inter-tidal area were discussed at length in Darwin and it was suggested that, if fishing was being conducted by putting nets against the land, permits should be sought.[27] The question of whether native title can apply between the high and low water mark was also raised by the Western Australian Fishing Industry Council.

The Northern Territory Fishing Industry Council also said that the existence of grey areas in the bill diminished the value of fishing

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23 *Evidence (Mr Pearce, Northern Land Council, p SLC 327).*

24 *Evidence (Senator the Hon G Evans, 6 December 1993).*

25 *Evidence (Mr I Smith, NT Fishing Industry Council) p SLC 335.*

26 *Evidence (Mr I Smith, NT Fishing Industry Council) p SLC 315.*

27 *Evidence (Mr D Pearce) p SLC 317.*

licences and that these would impose significant costs on fishing businesses.[28]

Senator the Hon Gareth Evans indicated in evidence that the Government would be examining the issue of the high and low water mark because of the different regimes applying.

Mining Issues

- A number of witnesses who were representatives of the mining industry urged delay in passage of the Bill. These witnesses included Mr Ellis (BHP), Mr Armstrong (CRA), Mr Pinnock (Queensland Mining Council), Mr Munro (Mt Isa Mines) and Mr Champion de Crespigny (Normandy Poseidon). They urged delay in order to rectify what they saw as flaws in the Bill, particularly relating to mining approval procedures. Reference was made to the allegedly impractical processes for the making of future grants which may consume significant resources and deter investment.

- The Government submission pointed to the provisions in the Bill for excluding certain low impact grants from the right to negotiate, and the provisions for recognition of State land management bodies and processes, as evidence that the Bill was not unworkable and did not usurp State and Territory responsibilities.

Introduction to the Arguments

1.29 The Committee has given much consideration to the arguments put before it. The majority have reached their conclusions based on the matters raised in the following paragraphs.

Aboriginal Concerns

1.30 The Committee recognises the range of views among Aboriginal people on the *Mabo* decision and their varied responses to the *Native Title Bill.* As Mr Mansell said in evidence it is entirely natural that there should be strongly held and divergent views among Aboriginal people on issues as important as those raised by Mabo.

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28 *Evidence (Mr Smith, NT Fishing Industry Council) p SLC 316.*

1.31 Criticism was directed at the Aboriginal Negotiating Team on the basis that they had no mandate to negotiate on behalf of all Aboriginal people. The members of the team informed the Committee that they negotiated on behalf of the people whom they directly represented.

1.32 A number of Aborigines, already dispossessed of their land, expressed their alienation from the process of developing the *Native Title Bill 1993*, because the High Court decision effectively excluded them from access to native title rights.

1.33 Several witnesses emphasised the injustice they and their ancestors had suffered, and continued to suffer, as a result of their removal from traditional lands. The myth that Aborigines lose their cultural identity when that connection to their land is removed is totally rejected by international law defining the rights of indigenous peoples.

1.34 The Committee understands this sense of loss and urges the Government to fully recognise this frustration through direct negotiations with Aborigines and Torres Strait Islanders to ensure that the Land Acquisition Fund and Social Justice Package provide real opportunities and choices for their children's futures.

1.35 A number of Aboriginal and Torres Strait Islander spokespersons said that the Government should not legislate until Aboriginal and Islander people had a full understanding of the rights revived by the High Court decision. It was argued that people should be given time to fully understand the import of the decision before they could properly respond to any proposed legislation impacting on their rights.

1.36 The Committee accepts, as did all witnesses generally, that a lack of understanding of the Mabo decision is common throughout the community. The question is, however, whether any delay of the legislation would improve that understanding or in any way advantage Aboriginal and Torres Strait Islander people. In light of the legislation enacted in Western Australia and other factors, referred to in this report, the Committee believes that delay would act to the disadvantage of Aboriginal people and, ultimately, to the disadvantage of the community generally.

1.37 The Committee emphasises the imperative of ongoing communication with indigenous peoples to ensure that the implementation of the *Native Title Bill 1993* is fully detailed to communities throughout Australia and its effects closely monitored.

Industry Concerns

1.38 The Committee received a wide range of submissions from industry interests.

1.39 The Committee was told by a number of representatives of the mining industry that certainty of title was critical to ensure the continuation of exploration activity and of investment in the industry. Some representatives urged that the Committee recommend delaying of the Bill so that further debate about its provisions may occur.

1.40 The Government submission emphasised that the Bill represents a balanced and workable consensus which meets the dual objectives of justice for indigenous interests and certainty in land administration for economic and other interests. The Bill achieves the certainty essential to the well being of the nation's land based industries, particularly the mining industry.

1.41 Pastoral interests, represented by the NFF, have been closely consulted in the formulation of the Bill, and the Government has addressed most of their concerns.

1.42 The Committee endorses the view expressed by the Australian Tourism Industry Association that delay would add to uncertainty, and not be in industry's interests.

1.43 The Committee believes that some of the concerns expressed by industry can be addressed in the Committee stages of the Bill in order to improve the mechanics of the legislation. Other concerns raised are either not supported or seek to wind back principles that the Committee believes are inherent in a balanced and truly national response to the Mabo decision, and thus ought to be retained.

The Racial Discrimination Act Issue

1.44 The Committee was asked to recommend that the Bill should be amended so that it is expressly subject to the provisions of the *Racial Discrimination Act 1975* (the RDA). The RDA provides a standard for other laws and is based on the International Convention on the Elimination of all Forms of Racial Discrimination.

1.45 The preamble to the Bill states that it is intended to be a 'special measure' for the advancement and protection of Aboriginal peoples and Torres Strait Islanders. This was explained by the Commonwealth Race Discrimination Commissioner in the following terms:

> While the Native Title Bill confers benefits on non-Aboriginal Australians such as by the validation of past acts, the much greater benefit of the legislation is conferred on Aboriginals and Torres Strait Islanders. However, this apparent discrimination is permissible within article 1 of the Convention as the legislation constitutes a special measure of the recognition and protection of native title, and also for the advancement of Aboriginal and Torres Strait Islander people through the establishment of a National Land Fund.
>
> The validation of past Commonwealth Acts, possibly rendered invalid by the operation of the Racial Discrimination Act, is proper and acceptable given the advances made by the Aboriginal and Torres Strait Islander people in the legislation.[29]

1.46 The preamble to the Bill makes specific reference to the RDA. Nevertheless pertinent queries have been made about the precise nature of the relationship between that Act and the Bill.

1.47 In light of these ongoing concerns the Committee would like to see the Bill amended to make it absolutely clear that it is the intention of the Parliament that the Bill is consistent with the RDA and constitutes a special measure for the advancement of Aboriginal peoples and Torres Strait Islanders.

29Submission No 102 (Race Discrimination Commissioner) pp 2-3.

The West Australian Act

1.48 The native title rights of Western Australian Aborigines have been extinguished as a result of the passage of the *Land (Titles and Traditional Usage) Act 1993* (WA).

1.49 The Committee is convinced contrary to the assertion of the Western Australian Government that the Western Australian *Land (Titles and Traditional Usage) Act 1993* provides rights of lesser value than that provided under the Commonwealth Government's Native Title Bill.

1.50 The Commonwealth Parliament is, in our view, duty bound to immediately reinstate those rights arbitrarily extinguished, without any consultation with Western Australian Aboriginal people, by the Western Australian legislation.

1.51 Until Commonwealth Legislation is passed Western Australian Aborigines will remain severely disadvantaged.

1.52 The Committee was told that the longer the Commonwealth Bill is delayed the harder it is to have the Commonwealth law operate retrospectively in such a way that it negates the extinguishment of native title that is built into the Western Australian Act. Mr Castan QC talked about the legal complications of the Western Australian legislation and any delay in the passage of the Federal Bill:

> If I can translate the political battle into legal terms, the reality is that you are going to have a legal nightmare if the Western Australia bill is going to operate, so to speak, in defiance of the federal bill. The federal bill will override but the legal tangle will grow, as the time gap grows. It is the delay and the Western Australian law that will render things unworkable, not the operation of the federal bill.[30]

1.53 The passage of the Western Australian Act will, in effect, create a category of title issued under its provisions which will be subject to doubt because of the probability that they will be invalidated following passage of the Commonwealth Bill. As well, all titles issued to non-

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30 *Evidence (Mr R Castan QC) p SLC 237.*

Aboriginal people in disregard of native title will be invalidated upon passage of the Commonwealth Bill. The longer the hiatus period between the two enactments the greater the confusion and uncertainty which will ensue.

1.54 A further powerful argument in favour of urgent passage for the Commonwealth Bill stems from the commencement of the Western Australian legislation on 2 December 1993. The Committee was told by Sir Ronald Wilson, President of the Human Rights and Equal Opportunity Commission, that the West Australian legislation put Australia in breach of its international obligations. In particular, Sir Ronald referred to the obligations binding Australia contained in article 30 of the *Convention on the Rights of the Child*, article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, articles 2, 7 and 8 of the *Universal Declaration on Human Rights*, articles 2, 26 and 27 of the *International Covenant on Civil and Political Rights*, articles 2.2 and 15 of the *International Covenant on Economic, Social and Cultural Rights* and articles 4 and 6 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.*

1.55 The Commonwealth Bill will override the Western Australia legislation and will correct any breach of Australia's international obligations. The Committee concludes that this is, in its own right, a compelling argument for the urgent passage of the Native Title Bill.

Constitutionality of the Bill

1.56 The Committee heard evidence from the West Australian Government and some industry representatives arguing that the Bill was unconstitutional. It was suggested to the Committee that a range of Constitutional issues, including land management issues and the appointment of assessors to assist the Federal Court, were matters that gave rise to Constitutional doubts. The Committee notes the views expressed by a number of witnesses, including the Commonwealth Government, that the Bill is Constitutional. For example, Mr Castan QC said:

> I do not think there is a constitutional problem. The reality is that there is constitutional power in the Commonwealth to deal with matters arising with respect to people of any race. .... It is totally open-ended and it enables the Commonwealth to do these things.[31]

1.57 The Committee is not persuaded to the view that there is any Constitutional flaw in the Bill and believes that it is valid.

Proposal for a Select Committee

1.58 The Committee rejects the suggestion that the reference of the Bill to a Senate Select Committee will better settle the competing claims for title or in any way improve the effect of the Bill.

1.59 The evidence of Mr Fred Chaney, former Liberal Senator and Minister for Aboriginal Affairs is compelling:

> I suppose my chief concern as an ex-member of the Senate is that I do not want the Senate Committee system used as a Trojan Horse for prejudice, and I think there is every risk that that would be what would happen if we had a lengthy Senate inquiry. I also do not want to see what I think was an important symbolic gain for the whole Aboriginal community in the Mabo decision thrown away.

1.60 A Senate Select Committee if formed prior to Christmas would not, in reality, begin its inquiry prior to the second half of January.

1.61 The Senate is scheduled to sit for six of the eight weeks during February and March.

1.62 Any comprehensive consultation process with industry, governments, Aboriginal communities and interested persons would obviously take some time.

1.63 Travel to outlying communities would be enormously difficult and extremely time consuming. The Northern Territory, Queensland and

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31 *Evidence (Mr Castan QC) p SLC 244.*

Western Australia would be particularly difficult. The earliest possible time for a Select Committee to report would be May.

1.64 A referral to a Senate Select Committee would result in a minimum delay of five or more months.

1.65 The Committee is extremely concerned at the divisiveness of the debate worsening. Already quite scurrilous newspaper advertising campaigns have been initiated from competing sides of the debate. The Committee in particular was impressed by the concerns in Western Australia of Mr Riley and Mr Chaney of the potential for this matter to incite racial hatred if not resolved.

1.66 Mr Riley said that children were now being subjected to negative criticism and derisive comment and that his organisation had knowledge of instances of physical violence occurring.[32]

1.67 Mr Chaney said:

> Most importantly, the early passage of the Commonwealth legislation will bring to an end the political and industry campaigns designed to inflame public opinion and to force the federal government to abandon any defence of Aboriginal property interests because of the electoral consequences. I think that any one with a knowledge of the history of the last 10 years could not deny that that is the reality within which you are working.[33]

1.68 The Committee has received evidence from an impressive range of sources that such a delay would only work to the disadvantage of Aboriginal and Torres Strai Islander people.

1.69 The Committee was not persuaded that delay in the passage of the Bill would ultimately assist any group affected by the Mabo decision.

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32 *Evidence (Mr Riley) p SLC 499.*

33 *Evidence (Mr Chaney) p SLC 446.*

1.70 Neither this Committee nor a Select Committee is the appropriate vehicle to educate people about the High Court decision. The Committee's task is to address the Bill and the issues arising from it. We are conscious of the need to fully involve the Aboriginal and Islander people in all processes flowing from the Bill and related initiatives.

1.71 The Committee is also of the view that, because of the unique characteristics of native title and the necessary complexity of the Bill, the Parliament should establish an appropriate monitoring mechanism to review the legislation after enactment. The Committee envisages a role for a Parliamentary committee in monitoring and reviewing the impact of the legislation.

Conclusions

1.72 The majority recommends that the *Native Title Bill 1993* be passed with all due speed, certainly before the end of this Parliamentary Session. Amendments to it can and should be made in the committee stage following the second reading debate: this is in accordance with the process usually pursued by the Senate in respect of any legislation coming before it.

1.73 There is general agreement in the community that a Commonwealth Act should at a suitable time be enacted addressing the issues raised by the High Court in Mabo & Ors v. The State of Queensland & Anor (1988) 166 C.L.R. 186.

1.74 There is keen debate about the content of that legislation and the timing of its passage.

1.75 Those in the mining, pastoral and fishing industries seek legislation overcoming any defect in the titles they have which, up to Mabo, were taken to be inviolable. Those who may have native title to land seek to have that preserved. There is legitimate concern that titles different interests groups truly believe they hold or may come to hold in respect of the same land may conflict to their mutual detriment. It is right and proper therefore that Parliament resolve the problem as efficiently and as expeditiously as possible.

1.76 The Executive has now proposed to the Legislature the *Native Title Bill 1993* as the best means practicable to resolve the issues arising from the Mabo decision. Having listened to debate about those issues over a considerable period and having heard a wide range of submissions over four days this month, the majority is convinced that delay in dealing with the matter will not produce a better outcome than that offered by the present bill.

1.77 The majority believes that if consideration of the Bill is put off to next year it is highly probable that any legislation then passed would be much inferior to that now proposed. Groups dissatisfied with the present Bill will campaign against it in a way that will taint the atmosphere within which debate about it is now taking place. There are already signs of this happening: for example the advertisement on p 7 of *The Weekend Australian* of December 4-5 1993 and on page 12 of *The West Australian* of Tuesday 7 December 1993.

1.78 Those who want further parliamentary debate about the Native Title Bill put off till next year presently show no commitment to its then enactment even were it substantially amended in the meantime. What they seek is not a pause in its agreed passage towards its becoming law, but a postponement of its general consideration by the Senate. The majority find this too slight a basis for further delay in it being dealt with by the Legislature.

1.79 On the issue of the constitutionality of the Bill the majority accepts the advice of Mr. Castan QC who was Counsel for the successful parties in Mabo. He is satisfied that the present Bill fits within the terms of the Constitution.

1.80 It has been argued that there has been insufficient consultation regarding the Bill. The majority notes this argument but does not see it as being the key issue. The decisive issue is whether further consultation would result in an improved outcome. The Committee is convinced that in fact the opposite would occur.

1.81 Australia may now be in breach of international covenants to which it is a party. This is because of the terms of the *Land (Titles and Traditional Usage) Act 1993* of Western Australia which came into

operation there on 2 December 1993. That will continue to apply there in its present form until appropriate Commonwealth legislation is passed.

1.82 Parliament is now charged with the duty of dealing with the matters created by the historic High Court decision in Mabo. It should not evade that duty by delaying its consideration of the matter.

1.83 The responsibility for passing right and proper legislation to address this matter lies with members of the Commonwealth Legislature and with no other person or group. We ought not abdicate our obligation to legislate where legislation is needed.

1.84 The need for the Native Title Bill to be passed is fundamental and urgent. It should be met without delay.

Amendments

1.85 The Committee endorses the fundamental principles underlying the Bill. We believe there are some issues that are capable of being addressed by amendment without damaging the integrity of the Bill. These go to clarifying the Bill, removing unintended consequences and addressing issues not as yet adequately catered for in the Bill. The Committee feels that these issues can be dealt with in the Committee stage debate on the Bill.

1.86 In particular the Committee recommends that the Government give consideration to amendments in the following areas.

a) The Bill should be amended to make clear that it is the intention of the Parliament that the Bill is consistent with the RDA and constitutes a special measure for the advancement of Aboriginal peoples and Torres Strait Islanders.

   This should not provide that the Bill is subject to the RDA because of the uncertainty that would create - contrary to one of the very basic objectives of the legislation.

b) The Committee was impressed by the evidence concerning the efficacy of regional agreements in determining native title and resolving conflicting Aboriginal Land Title claims. A

greater emphasis on such agreements in the Bill without increasing the complexity or length of the process should be considered.

c) The Bill should address the concern that there may be impediments to renewals or regrants of valid leases (eg pastoral) where the renewals or regrants are in the same terms as the original lease.

d) The Bill should clarify the treatment of the fishing industry as it is affected by the distinction made in the Bill between onshore and offshore regimes.

The Committee was convinced that the concerns of the fishing industry in this respect are not adequately catered for in the Bill.

e) The Committee considers that land held under native title should not be subject to legal process as a means of satisfying debts owed by Aboriginal land owning corporations.

Amendments to clarify the protection of native title are necessary.

Recommendations

Recommendation 1: The Committee recommends that the bill be enacted before the end of the current sitting period.

Recommendation 2: The Committee recommends that the Government fully acknowledge the frustration felt by those Aborigines already dispossessed of their land by continuing direct negotiations, particularly with people in settled areas where native title has been extinguished, to ensure that the Land Acquisition Fund and the Social Justice Package provide real opportunities and choices for their children's futures.

Recommendation 3: The Committee recommends that the Bill be amended to make it clear that it is the intention of Parliament that the Bill is consistent with the *Racial Discrimination Act 1975* and constitutes a special measure for the advancement of Aboriginal peoples and Torres Strait Islanders.

Recommendation 4: The Committee recommends that the legislation should be monitored after enactment. This monitoring should be done by a Joint Parliamentary Committee which should report to Parliament on implementation and operation of the legislation. The Committee should consult extensively with Aboriginal groups, industry groups and all levels of government about the implementation and operation of the legislation.

Senator Barney Cooney
Chair

Appendix 1

Submissions Received

No.	Submitter
1	Bruce Reyburn, NSW
2	National Farmers Federation, ACT
3	Professor Nettheim, Uni of NSW
4	Ms Barbara Hocking, VIC
5	Pastoralists & Graziers Association of WA
6	Community Aid Abroad, VIC
7	Australian Mining Industry Council
8	Miriuwung Gajerrong Families Heritage and Land Council, WA
9	Australian Petroleum Exploration Assoc. Ltd
10	WA Department of Minerals & Energy, WA
11	Ken Colbung AM, MBE, JP, WA
12	Ken Winder, Aboriginal Corporation
13	Dept. Land Administration, WA Government
14	Northern Territory Government
15	The Assn. of Mining & Exploration Companies
16	Liberal Party of WA
17	Aircraft Owners & Pilots Assn. of Australia, ACT
18	Law Foundation Centre for Plain Legal Language, NSW
19	Australian Tourism Industry Association, ACT
20	Jawoyn Associates, NT
21	National Fishing Industry Council, ACT
22	Fringe Dwellers of the Swan Valley, WA
23	CRA Limited/Comalco
24	The Nomads Group of Aborigines
25	Mr Peter Foss, MLA
26	The Chamber of Mines & Energy of WA
27	C R Humphry & B Camarri, WA
28	WA Farmers Federation, WA
29	Traditional Nyungah Elders of Australia
30	Richard V Finney
31	R J Champion de Crespigny
32	WA Fishing Industry, WA
33	Bruce Dartnell & David Judd, WA

34	Chamber of Commerce & Industry, WA
35	Trades & Labour Council of WA
36	Premier of WA
37	Premier of NSW
38	S.E.K. Hulme & Colin Howard on behalf of WA Government
39	Wreck Bay Aboriginal Community Council, NT
40	Dr Dermot Smyth, James Cook University, ACT
41	Kimberley Land Council on behalf of Mamabulangin Aboriginal Corp, WA
42	Premier of Victoria
43	Northern Regional Council of Congress of Uniting Church (Aboriginal Res. & Develop. Service, N.T.
44	Pilbara Aboriginal Land Council, WA
45	T Tilmouth, Central Land Council, NT
46	T Tilmouth, Central Land Council, NT
47	Office of the Premier, WA
48	W.A. Farmers Federation, WA
49	C Isaacs, WA
50	The Hon F Chaney, WA
51	Law Society of Western Australia
52	Australian Section of the International Commission of Jurists, NSW
53	Cattlemen's Union, QLD
54	1993 B'nai B'rith Anti Defamation Commission, VIC
55	Torres Strait Islanders and Self Government
56	Aboriginal Coordinating Council
57	Mr Peter Jull, QLD
58	Ms B Hocking, QLD
59	Aboriginal Provisional Government, TAS
60	M Graham, QLD
61	T Tilmouth, NT
62	Mr Tracker Tilmouth, NT
63	NT Gas Limited, NT
64	Northern Regional Council of Congress Uniting Church, NT
65	ATSIC & the Coalitional of Aboriginal Organisations
66	Australian Mining Industry Council
67	Central Land Council, NT
68	CRA Limited, VIC
69	Aboriginal Provisional Government, TAS

70	Coalition of Aboriginal Organisations Working Party
71	Commonwealth Government, ACT
72	Department of State Aboriginal Affairs, SA
73	Aboriginal Legal Service of WA
74	Professor Blackshield, Macquarie University School of Law, NSW
75	Kimberley Land Council, WA
76	Ngaanyatjarra Council, NT
77	Department of Government & Public Administration, NSW
78	Ernie Bridge, MLA
79	Aboriginal Legal Service Ltd, NSW
80	Department of Resources Development, WA
81	Bruce Dartnell & David Judd, WA
82	Birra Gubba Land Council
83	Coalition of Aboriginal Organisations Working Party (Amendments)
84	Boe & Company Solicitors, QLD
85	George J Harvey, ACT
86	Frank Potts, TAS
87	D W McLeod, O.A.M., WA
88	National Farmers Federation, ACT
89	Chief Minister, ACT
90	Local Government Association of NSW
91	Professor G Nettheim, University of NSW
92	Bob Ware on behalf of Maralinga Tjarutja People, the Aboriginal Legal Rights Movement and the Aboriginal Lands Trust of SA
93	Kupungarri Aboriginal Corporation, WA
94	Richmond/Clarence Greens, NSW
95	Australian Tourism Association, ACT
96	Government of Norfolk Island
97	Billy Dunn, WA
98	Brian Champion, WA
99	Aboriginal & Torres Strait Islander Commission, ACT
100	Senator the Hon Gareth Evans, ACT
101	Island Co-Ordinating Council, QLD
102	Human Rights Australia, NSW

103	Longreach National Party, QLD
104	Mark D Pianta, QLD
105	A J Fluerty, QLD
106	Department of Land Administration, WA
107	Attorney-General's Department, ACT
108	Ms Margaret Friel, NT
109	Senator W O'Chee, Qld

Appendix 2

Details of Meetings

Public Hearings:

Wednesday 1 December 1993
9.15 am
Adjourn: 1.40
2.05 pm
Adjourn 6.09 pm
The Hamilton Room
Brisbane City Hall
BRISBANE

Thursday 2 December 1993
9.14 pm
Adjourn 2.45 pm
3.25 pm
Adjourn 5.21 pm
The Ballroom
The Beaufort Hotel
The Esplanade
DARWIN

Friday 3 December 1993
8.33 am
Adjourn: 7.33 pm
The Terrace Ballroom
Hyatt Regency
99 Adelaide Terrace
PERTH

Monday 6 December 1993
9.13 am
Adjourn: 1.55 pm
4.10 pm
Adjourn 8.00 pm
Senate Committee Room 2S3
Parliament House

CANBERRA

Tuesday 7 December 1993
9.05 am
Adjourn: 10.00 am
Senate Committee Room 2S3
Parliament House
CANBERRA

Attendance:

Committee Members

Senator B Cooney (Chair): all meetings
Senator A Vanstone (Deputy Chair): except 7 December
Senator C Evans: all meetings
Senator C Ellison: all meetings
Senator J McKiernan: all meetings
Senator the Hon M Reynolds: all meetings
Senator W O'Chee: all meetings
Senator S Spindler: all meetings

Other Senators

Senator G Tambling: 2 December
Senator C Chamarette: 3 & 6 December

Witnesses (1 December 1993):

Cape York Land Council
Mr David Byrne, Deputy Director
Mr Robinson Salee, Chairman

Ms Mary Graham, South Queensland Member, Reconciliation Council

Mr A Ronald Castan QC

Broken Hill Proprietary Co Ltd
Mr Jeremy Ellis, Director
(Vice-President, Australian Mining Industry Council)

Mr Richard St John, General Counsel

Mr Brett Leavy, National Indigenous Media Association
Mr Wayne Wharton, Keooma and Birra Gubba

New South Wales Aboriginal Legal Service
Mr Paul Coe, Chairman
Mr Cecil Patten, Executive Officer
Mr Simon Blackshield, Solicitor

Ms Isabell Coe, Director, NSW Aboriginal Children's Service

Mr William Lowah, Chairman, Iina TSI Corporation

Aboriginal Alliance Committee
Mr Bob Weatherall, Member
Mr Aden Ridgeway, Coordinator

Mrs Barbara Hocking

Mr Trevor Saint Baker, Council for National Interest

Mr Peter Jull

Mr Andrew Boe, Solicitor

Dr Henry Reynolds

Professor R Garth Nettheim

Mr Ray Robinson, Aboriginal & Torres Strait Islander Legal Service

Mr Richard Bell

Mr Robert Patterson, Chairman, Aboriginal Coordinating Council

Mrs Beryl Wharton

United Graziers Association of Queensland
Mr Bill Bonthrone, President
Mr Andrew Martin, Vice-President

CRA Limited
Mr George Littlewood, Vice-President
Mr James Armstrong, Vice-President and General Counsel
Mr Hugh Fraser QC, Counsel (AMIC & CRA Ltd)

Mr Michael Pinnock, Chief Executive, Queensland Mining Council

Mr David Munro, MIM Holdings Limited

Australian Council of Churches
Rev Graham Paulson, Commissioner, Aboriginal & Islander Commission
Ms Anne Pattel-Gray, Executive Secretary

(2 December 1993):

Northern Land Council
Mr Darryl Pearce, Director
Mr John Singh, Deputy Chairman

Mr Ronald Lawford, Convenor, Northern Territory Regional Airspace Advisory Committee
Mr Larry Tessman, Manager Darwin, Jayrow Helicopters

Dr Michael Back, Executive Director, Northern Territory Cattlemen's Association

Northern Territory Fishing Industry Council
Mr Nigel Scullion, Vice-Chairman
Mr Iain Smith, Executive Officer
Mr Graham McMahon, Member Executive Committee

Rt Rev Richard Appleby, Anglican Diocese of Northern Territory
Rt Rev Edmund Collins, Bishop, Catholic Church
Rev Dr Djiniyini Gondarra, Northern Regional Council of the Uniting Aboriginal and Islander Christian Congress
Rev A Gale Hall, Northern Synod, Uniting Church of Australia
Mr Stuart McMillan, Consultant, Aboriginal Resource & Development Services Inc

Ms Josephine Crawshaw, Chairperson, Top End Aboriginal Coalition

Ms Margaret Friel

Dr Deborah Rose, North Australian Research Unit

Mr Richard Trudgen, Consultant, Aboriginal Research & Development Services Inc

Mr Adrian Alchin, Member, Top End Coalition and Aboriginal Provisional Government

Mr Harold Thomas

Mr Bernard Valadian, Executive Director, Aboriginal Development Foundation

Northern Territory Government
Mr Marshall Perron, Chief Minister
Mr Peter Conran, Secretary, Department of Chief Minister
Mr Neville Jones, Director, Office of Aboriginal Development
Mr Tim Joyce, Policy Officer, Department of Chief Minister
Mr John Pinney, Senior Assistant Secretary, Department of Chief Minister

Northern Territory Opposition
Mr Brian Ede, Leader of the Opposition
Mr Wesley Lanhupuy, MLA

Central Land Council
Mr Geoff Adlide, Senior Policy Officer
Mr Neil Andrews, Lawyer
Mr Dick Liechlitner, Field Officer
Mr Leigh Tilmouth, Acting Director

Northern Territory Chamber of Mines and Petroleum
Mr Peter Freund, Executive Member
Mr Grant Watt, President
Mr Peter Walker

(3 December 1993):

Association of Mining and Exploration Companies Inc
Dr Derek Fisher, President
Mr George Savell, Chief Executive
Mr Craig Readhead, Legal Consultant
Mr Tim Clifton, Executive Councillor

Western Australian Government
The Hon Mr Richard Court MLA, Premier
The Hon Mr Peter Foss, Minister for Health, Arts, Fair Trading

Western Australian Opposition
The Hon Dr Carmen Lawrence MLA, Leader of the Opposition
The Hon Mr Ernie Bridge, MLA
Mr Tom Stephens, Parliament Secretary to Shadow Cabinet

Pastoralists & Graziers Association
Mr Anthony Boultbee, President
Mr Ben Patrick
Mr Peter van Hattem

Mr Marshall Smith, Punjima People

Western Australian Fishing Industry
Mr Guy Leyland, Executive Officer, WA Fishing Industry Council
Mr Michael Buckley, Executive Officer, Pearl Producers Association
Mr Simon Bennison, Aquaculture Council of WA
Mr Peter Van Hattem, Legal Adviser (Freehill, Hollingdale & Page)

Chamber of Mines and Energy of WA
Mr Malcolm MacPherson, President
Mr Peter Eggleston, Executive Officer

Mr Bob Ware, Aboriginal Lands Trust of SA

Mr Gregory McIntyre, Barrister

Mr Kenneth Winder

Mr Billy Dunn, Aboriginal Elder
Mr Aubrey Lynch, Secretary, Goldfields Land Council
Mr Arnold Franks, Chairman, Warunga Community

Western Australian Farmers Federation (Inc)
Mr Alexander Campbell, President
Mr Kevin McMenemy, Vice President
Mr Jack Flanigan, Legal Officer

Mr Robert Bropho, Elder, United Nyungah Circle of Elders
Mr Clarrie Isaacs (Yaluritja), President, Aboriginal Government of Australia

The Hon Fred Chaney

Legal Advisers to Western Australian Government
Mr Bruno Camarri
Mr Christopher Humphry

Mr Brian Champion, Elder, Gobrun Aboriginal Corporation
Rev Cedric Jacobs
Mr Kenneth Colbung, Bibbulmun Tribal Group
Ms Shirley McPherson

Normandy Poseidon Ltd
Mr Robert Champion De Crespigny, Chairman

Ms Kate George, Nanga Services Pty Ltd
Mr Billy King, Kupungarri Community
Mr Dickey Cox, Yungnora Association Inc
Mr Joey Killer, Looma Community

Sir Ronald Wilson AC KBE CMG, President,
Human Rights & Equal Opportunity Commission

Chamber of Commerce & Industry of Western Australia
Mr Lyndon Rowe, Chief Executive
Mr Ross McLean, Deputy Chief Executive
Ms Nicola Cusworth, Chief Economist

Kimberley Land Council
Mr Jock Mosquito, Vice-Chairman
Mr Peter Yu, Executive Director
Mr Eric Bedford (Jnr) Executive Member
Mr Robert Watson, Executive Member

Mr Rob Riley, Acting Chief Executive Officer,
Aboriginal Legal Service of Western Australia

Mr John McCormick, Administrator,
Kupungarri Aboriginal Corporation

Mr Bob Morland, Acting Chief Executive Officer,
WA Department of Land Administration

Mr Lee Ranford, Acting Director-General,
WA Department of Minerals and Energy

Mr Bruce Dartnall
Mr David Judd

(6 December 1993): Party

Coalition of Aboriginal Organisations Working

Mr Noel Pearson
Mr David Ross
Mr Wes Miller

Cape York Land Council
Mr Peter Costello, Council of Elders
Ms Marcia Langton

Father Frank Brennan SJ

Mr Richard Wells, Executive Director,
Australian Petroleum Exploration Association

Mr Rick Farley, National Farmers' Federation

Australian Mining Industry Council
Mr Peter Barnett, President, and Chief Executive Officer of Pasminco Ltd
Mr Geoffrey Ewing, Blake Dawson Waldron
Mr Douglas Young, Blake Dawson Waldron

Government of Western Australia
Mr S.E.K. Hulme QC
Dr Colin Howard

Dr Helen Ross, Centre for Resource & Environmental Studies, ANU
Dr Elspeth Young, Department of Geography and Oceanography, University College, UNSW

Aboriginal Alliance Committee
Mr Michael Mansell, Tasmanian Aboriginal Centre
Mr Geoffrey Clark, Aboriginal Provisional Government

Community Aid Abroad
Mr Patrick Kilby, Government Relations Officer

Inter-departmental Committee on Mabo
Senator the Hon Gareth Evans QC, Leader of the Government in the Senate

Mr Sandy Hollway, Deputy Secretary, Department of Prime Minister & Cabinet

Mr Mike Dillon, Office of Indigenous Affairs, Department of Prime Minister & Cabinet

Mr Robert Orr, Deputy General Counsel, Attorney-General's Department

Mr Barry Jones, Assistant Secretary, Department of Primary Industry & Energy

(7 December 1993): **Inter-departmental Committee on Mabo**
Mr Mike Dillon
Mr Robert Orr
Mr Barry Jones

Private Meeting: 8 December 1993
6.30 pm
Adjourn: 8.15 pm
Advisers' Waiting Area
Parliament House
CANBERRA

Attendance: Senator B Cooney (Chair)
Senator A Vanstone (Deputy Chair)
Senator C Evans
Senator C Ellison
Senator J McKiernan
Senator the Hon M Reynolds
Senator W O'Chee
Senator S Spindler

STATEMENT BY SENATOR SID SPINDLER

1.87 The Australian Democrats support the central purpose of the Native Title Bill - to recognise and protect native title - and I am in general agreement with the Committee's Report.

1.88 However, the Committee's hearings have elicited a wide range of technical concerns and the following amendments are considered necessary to ensure that the bill's objectives are met:

1. The preamble, page 3, after the words "among all Australians." add a new sentence "It is the intention of the Parliament that the Racial Discrimination Act shall prevail over the provisions of this Act."

   This amendment is designed to ensure that the provisions of this bill are not applied so as to lessen, avoid or contravene the Racial Discrimination Act. The stated intent of Parliament will assist in resolving any doubt which may arise on this aspect of the legislation.

2. Clause 11, page 8, insert a new subclause [2] -

   [2] Any law passed by a State or Territory passed after 30 June 1993 which is a law providing for the extinguishment of native title has no effect unless it conforms to the principles of this act and any act done pursuant to such a law is deemed not to have any effect.

   This amendment strengthens the Government's powers to overturn State legislation. Concerns have been raised in evidence before the Inquiry that the powers laid down in section 208 of the Bill may not alone be sufficient to override the WA legislation.

3. Clause 13, page 9, insert a new clause 13[a] -

   13[a] Where a past act which consists of the making, amendment or repeal of legislation is to be validated, only the rights and interests granted under the legislation prior to 31 December 1993 may be validated.

This limits the validation of past acts and thereby closes a loophole which may have allowed States to apply blanket validation to discriminatory laws and also to issue leases etc. with automatic renewal rights. This provision will also ensure that when leases come up for renewal, the right to negotiate remains.

4. Clause 22, page 12, delete subclause [3] and replace with the following new subclause [3] -

[3] If the whole or part of the rights or interests comprising native title is acquired under a compulsory acquisition act:
[a] native title is not extinguished until the land is used for the purpose for which it was acquired; and
[b] native title holders are entitled to compensation on just terms for the acquisition in accordance with Division 5.

This clause provides protection against the use of the compulsory acquisition provisions to extinguish native title. The amendment also provides for compensation on just terms under the Native Title Bill, thus reinforcing and complementing the provisions of existing compulsory acquisition legislation at State or Federal level.

The amendment will prevent any state from denying existing native title, a claim to native title or the right to negotiation over the land until such time as it is actually used for the prescribed public purpose for which it is acquired. If it is used for any other purpose, native title and negotiating rights are not extinguished.

5. Clause 22, page 13, delete subparagraph [4][b][iii].

6. Clause 22, pages 13 and 14, delete subclause [6] and replace with new subclause [6] -

[6] In the case of any act to which this section applies [other than a low impact future act or one to which Subdivision B applies], the native title holders have the same procedural rights as they would have in relation to the act on the assumption that they held ordinary title to any land or waters concerned.

These are consequential to amendment at clause 22 and ensure that compensation is payable.

7. Clause 25, page 15, subclause [2] after the words "an onshore place" add -
an offshore place and on-shore grants over waters.

This ensures that off-shore grants and on-shore grants over water areas are included for native title claims.

8. Clause 44, page 25, add an additional part [c] -

[c] all mining leases granted after 31 October 1975.

To avoid complex litigation, all mining leases after 1975 should be guaranteed not to extinguish native title. At present, only those which are validated will not extinguish native title.

9. Clause 41, page 24, subparagraph [2] add a new subclause [j] -

[j] Any state tribunal must make provision for the same time limits for negotiation and arbitration as are in clauses 33 and 34.

This ensures that State run tribunals must make provisions for the same time limits as the Commonwealth Tribunal.

10. Clause 45, page 26, subparagraph [2] add a new subclause [a] -

[a] Traditional connection with land may be regarded as having been maintained for the purpose of this section even if occupation or use of, or presence on, the land was not continuous, so long as it was maintained in accordance with Aboriginal tradition

It allows for Aboriginal properties which have been purchased after a period of forced absence to have native title reasserted where traditional ownership can be established.

11. Clause 45, page 26, line 15, delete subclause 3 [b] and substitute a new subclause [b] -

[b] The native title rights and interests prevail over the lease and any other prior act affecting the native title.

This provision will ensure that a pastoral lease converted into native title is not subject to onerous conditions which would render the title meaningless.

12. Clause 51, page 30, line 39, add the following sentence -

Compensation on just terms shall be payable to States as well as persons.

This is necessary to ensure that States can be paid compensation on reversal of their legislation. Without this provision reversal of State legislation would be unconstitutional.

13. Clause 53, page 31, line 28, delete the word "corporate"

14. Clause 53, page 31, line 36, delete the phrase "prescribed body corporate" and substitute "person, association, trustee or prescribed body corporate".

15. Clause 53, page 31, line 37, delete the phrase "prescribed body corporate" and substitute "person, association, trustee or prescribed body corporate".

16. Clause 53, page 32, line 1, delete the phrase "prescribed body corporate" and substitute "person, association, trustee or prescribed body corporate".

17. Clause 53, page 32, line 6, subparagraph [3] before "prescribed body corporate" add -

"person, association, trustee or"

18. Clause 53, page 32, after subclause [6] insert -

[7] If the common law holders of native title decide that a person or association is to hold the rights and interests, the common law

holders must, when the determination is made, nominate a body corporate for the purpose of:

[a] holding compensation in relation to rights and interests; and
[b] receiving notices for the purposes of this Act in relation to the rights and interests.

12-18. *These amendments enable native title holders to elect an alternative structure to a body corporate.*

19. Clause 53, page 32, after new subclause [7] insert -

[8] A native title interest held by a body corporate under this section cannot be restrained, garnisheed, seized, sold or otherwise acquired as the result of debts owed by or other liabilities incurred by the body corporate.

Protects native title from claim as an asset in case of mis-management or criminal activity on the part of individuals.

20. Clause 56, page 35, subparagraph 1[a] delete subclause [i]

21. Clause 56, page 35, delete subparagraph 1[b]

22. Clause 56, page 35, add new subclause

[d] may provide supporting evidence on request from the registrar regarding title searches undertaken.

19-22. *These amendments shift the onus for searching titles registers back onto the registrar but do not impose extra time delays and do not leave it open for vexatious claims to be made.*

23. Clause 74, page 42, add a new sentence -

Upon application of any party, a claim for a declaration of native title currently pending and in the early stages in any court of a State or Territory must be transferred to the Federal Court.

Ensures that claimants can change forums in the initial stages of the process.

24. Clause 108, page 53, delete subparagraph [2]

Deletes the age limit for non presidential members to ensure that the accumulated knowledge of older people is available to tribunals.

25. Clause 197, page 86, subclause [3] alter the phrase "subsection [2]" to read "subsections [1] and [2]"

Ensures that there is no discrimination against hunting and fishing rights.

26. Clause 208, page 95, subclause [3] after the phrase "If native title rights and interests as defined by subsection [1] are" add "or have been at any time in the past"

Subclause [3] applies the Act to any statutory rights which native title has been transformed into. For clarity we have suggested additional words to ensure that the wider definition is clearly retrospective.

27. Clause 211, page 97, delete subclause [4]

Past acts can be excluded under 213[10]. There is no need to exclude acts generally. This amendment deletes the provision to exclude acts by regulation.

28. Clause 213, page 99, subclause [9] insert a new subclause [9] [f] An act in relation to Aboriginal land that takes place on or after 1 January 1994 is a past act if

[i] the later act would be a past act under subsection [2] if that subsection were not limited in its application to acts taking place before a particular date; and
[ii] the later act takes place in an exercise of a right created before January 1994 and which is legally enforceable pursuant to the legislation under which the land was granted.

This amendment will ensure that the definition of past acts includes an appropriate reference to Aboriginal land.

29. Clause 213, page 100, add to subclause 10

[c] any act in bad faith

This provision makes certain that acts in bad faith are excluded from validation.

30. Clause 214, page 100, insert in paragraph [3][d]

[iv] in relation to land or waters which on 1 January 1994 is Aboriginal land.

31. Clause 214, page 100, subparagraph [3][a], after the phrase "a commercial lease" add "on which infrastructure has been developed."

30 -31. *These amendments refine the very loose definition of category "A" leases offered in the Bill, to exclude Aboriginal land and to offer a clearer understanding of what is meant by the term "commercial lease".*

It may be that there is a need for further revision of the definition of category "B", "C", and "D" leases as a consequence of these amendments.

32. Clause 218, page 102, in subclause [1] insert the following paragraphs after paragraph [c] -

[d] it is not done in relation to land held by or for the benefit of Aboriginal peoples or Torres Strait Islanders pursuant to

[i] The Aboriginal Land Rights [Northern Territory] Act 1976, the Aboriginal Land [Lake Condah and Framlingham Forest] Act 1987, and the Aboriginal Land Grant [Jervis Bay Territory] Act 1986 of the Commonwealth;

[ii] the Pitjantjatjara Land Rights Act 1981, the Aboriginal Lands Trust Act 1966 and the Maralinga Tjarutja Act of South Australia or

[iii] other such Acts as prescribed; and

[e] it is not a grant of land to a person or body pursuant to any other Acts mentioned in or prescribed under paragraph [d] of this section.

This amendment will ensure that no future legislation can discriminate against native title.

33. Clause 227, page 106, delete.

The deletion of this clause will ensure that the common law definition of "lease" applies. The definition offered by the Bill is too wide and creates ambiguity about some grants which do not involve exclusive possession but may be categorised as leases, such as some grazing licences.

34. Clause 238, page 111, insert the following definition before the definition of 'Aboriginal peoples' -

Aboriginal land means land held by or for the benefit of Aboriginal peoples or Torres Strait Islanders pursuant to -
(a) the Aboriginal Land Rights (Northern Territory) Act 1976, the Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987, and the Aboriginal Land Grant (Jervis Bay Territory) Act 1986 of the Commonwealth;
(b) the Pitjantjatjara Land Rights Act 1981, the Aboriginal Lands Trust Act 1966 and the Maralinga Tjarutja Act of South Australia; and
(c) such other Acts as are prescribed for the purposes of this definition.

The insertion of this definition will clarify the use of this term throughout the Bill.

35. Create a new part, Part 10A

The operation of this Bill and its effects shall be reviewed in two years by a select committee of the Parliament and a report presented to the Parliament at that time.

In particular, this review shall examine the effectiveness of the Tribunal and assess participation by the States in the Tribunal system.

It shall also examine whether the powers of delegation of the registrar are appropriate.

Further, it shall also examine the extent to which native title has been preserved and impaired under the operation of this Bill, and the effect of the compensation provisions.

It shall also examine the operations of the Land Acquisition Fund.

This amendment makes provision for a period of review of the operation of the Bill after a period of operation to ensure it is accomplishing what is expected of it and to allow for consultation concerning its future operation.

1.89 These amendments may be subject to revision and will be moved in the Senate during the Committee stages by the Australian Democrats.

1.90 We will also seek to ensure a proper consultative process begins as soon as possible to ensure wide ranging negotiations take place concerning the form and content of the Land Acquisition Fund and the promised social justice package.

1.91 The Democrats have stated consistently that support for this legislation is contingent upon extensive social justice measures being instigated by the Government to address the needs of dispossessed indigenous peoples who will not directly benefit from native title legislation.

Senator Sid Spindler

DISSENTING REPORT - OVERVIEW

Senator A Vanstone
Senator C Ellison
Senator W O'Chee

There are several key points the Coalition Senators believe should be reported to the Senate as a consequence of its reference to the Senate Standing Committee on Legal and Constitutional Affairs (S.S.C.L.C.A.) of the Native Title Bill 1993 under the procedures for the selection of Bills to Committees.

GET IT RIGHT THE FIRST TIME

1. There is overwhelming argument and reason for Parliament in responding to Mabo No.2 to "get it right the first time".

   This Committee in its 2nd Report on the Cost of Justice entitled Checks and Imbalances saw fit to determine that Parliament contributes to increasing the Cost of Justice by passing inadequately considered legislation. It seems quite inappropriate for this Committee in light of that Report to recommend passage of the Bill.

A FRAGILE CONSENSUS IS A FRAGILE FOUNDATION

2. The Government argues the Bill should be passed because of "the difficulty of holding together the necessary coalitions of interest, 'the fragile consensus'" which would fall apart if the Bill were deferred until February or March next year.

   Surely National legislation on such a vital policy issue should not stand on such fragile foundations.

GOVERNMENT AND AUSTRALIAN DEMOCRATS DETERMINED LIMIT PROPER REVIEW.

3. The Coalition, in the face of the determination of the Government and Australian Democrats to pass the Bill before Christmas, and opposition to fuller and more extensive inquiry, accepted the reference of the Native Title Bill to the Committee under the Selection of Bills to Committee procedures.

REVIEW PROCEDURE COMPLETELY INADEQUATE

4. That procedure is not designed for a broad, lengthy, consideration of the issues but rather for detailed scrutiny of particular clauses in a Bill. Time constraints put on by the insistence of the Government and the Democrats that the Bill be dealt with by Christmas means that neither the Committee,nor the Government, will be able to fully and properly address the very wide range of detailed concerns and proposed amendments.

CHALLENGE AND LITIGATION INEVITABLE

5. There are a number of compelling arguments put forward as to the constitutionality of the Bill which will no doubt be aired with the inevitable High Court challenge or challenges. Those who propose immediate passage in the name of certainty and the holding together of a "fragile consensus" have presumably not fully considered the consequences of such challenge or challenges.

EXTRAORDINARY IRONY

6. It seems an extraordinary irony that the Government and the Australian Democrats should want to push through legislation that will benefit only a small portion of the Aboriginal population when there appears to be such a strong divergence and uncertainty not only in the Aboriginal community as a whole, but particularly amongst those who would benefit from the legislation. It is regrettable that so many Aborigines feel that the Government's

process in formulating this legislation has resulted yet again in other people purporting to know best what is best for them.

OTHER SERIOUS ISSUES

7. In addition to the constitutional questions a number of other serious issues were raised as to the application of the Racial Discrimination Act and the effect of the Bill in its current form on mining, pastoral, fishing, tourism and forestry industries.

ALTERNATIVE RESPONSES TO MABO NO 2

8. We strongly recommend that the Bill be subject to further proper and full consideration by a Senate Select Committee.

   The Government has improperly suggested that its Native Title Bill is the only appropriate response to Mabo No 2. Any full inquiry should be asked to consider the various State responses and the Coalition response.

DISSENTING REPORT

1.0 INTRODUCTION

In June 1992 the High Court in its historic decision, now commonly known as the Mabo decision, recognised the existence of native title which hitherto had not been recognised in this country. Native title is a shorthand term for a variety of rights to be enjoyed by the indigenous peoples of Australia over land with which they have had an ongoing association in accordance with their traditional laws and customs since white settlement.

The Mabo decision has been one of the most important post war decisions delivered by the High Court and in its *Native Title Bill 1993* ("the Bill"), the Federal Government has purported to provide a legislative response to that decision.

2.0 THE REFERENCE TO THE COMMITTEE

Reference to the Committee was made from the Selection of Bills Committee which requires a detailed analysis of the clauses of the Bill. The terms of reference were therefore not spelt out. The Committee's reference was to review the Bill and no other legislation. During the course of the hearing, the Western Australian legislation and the land rights legislation in the Northern Territory were mentioned.

At the outset, it is of primary importance to note that this Committee has had only four rushed days of hearings to consider the Bill which is complex and novel.

There has effectively been only two days to consider the huge volume of evidence and submissions from witnesses. Despite having heard evidence from over 120 witnesses from across the country and across the political spectrum, it is impossible to provide an earnest and comprehensive analysis of this piece of legislation. Anyone who could pretend to have a comprehensive understanding of the minutiae of this Bill in such a short time is either gifted with

great powers of comprehension or they are simply deluding themselves and others.

3.0 MAJOR ISSUES ON THE EVIDENCE

A number of major issues were raised during the hearing of evidence. These were advanced by groups of different persuasions and in some cases were shared by witnesses across the political spectrum. The following is a brief summary of these issues.

3.1 CONSTITUTIONALITY

The *Native Title Bill* has taken the Commonwealth into the area of land management which previously has been the exclusive domain of the States. If this Bill is to achieve its purpose, it must abide by the Constitution. To fail in this regard would render the legislation either invalid or ineffective and similarly invalidate any Government action in relation thereto. In that event the implications for land management in Australia would be disastrous. It has been submitted that the Bill might be ruled unconstitutional for the following reasons:

(a) It was stated that the Bill involved undue interference with the proper functioning of the States. This is raised by those provisions of the Bill which provide that the State must comply with Commonwealth direction in order for State bodies to function within the terms of the Bill (see Clause 236(2)).

As stated at page 11 of the Commonwealth submission:

"The Commonwealth requirements need not add another layer to the approval processes in a State. The integration of existing processes with those required by the Commonwealth Bill is envisaged in the provisions for Commonwealth recognition of approved State bodies and processes. In this way the Commonwealth Bill can adapt national standards to the particular laws and procedures in a State".

This could be viewed as an intrusion into the whole system of land management by the State.

(b) The Bill purports to, retrospectively, impose the common law as to native title on the States (see Clause 11). This imposes an uncertain body of law on the States as opposed to a statute law which is both final and certain. Both the retrospective and uncertain aspects of this are subject to query.

(c) Purports to impose financial obligations on the States to pay compensation in respect of past grants, throughout the period of white settlement, and future acts. This is so even if the State has not elected to validate any act (see clause 19(2)).

(d) By virtue of clause 203, assessors with a judicial role are appointed. This could contravene the law as contained in the *Boilermakers Case (1956) 94 CLR. 254* which stated that a judicial power of the Commonwealth can only be exercised by a court appointed pursuant to Chapter III of the Constitution or a court created by a State. In this instance the assessor has the power to decide who may be present at a conference and to decide whether a witness may be cross-examined or re-examined. These are no less judicial functions than deciding question on the admissibility of evidence and as such the principle in the *Boilermaker's case* could be infringed.

At the end of the day the High Court will have to decide whether section 51(xxvi) (the special laws for a race) and section 51(xxix) (external affairs powers) enable the Commonwealth to intrude into the area of land management which was not ceded to the Commonwealth by the States at the time of federation.

3.2 ABORIGINAL CONCERNS

The views expressed on behalf of the Aboriginal people ranged from those of tribal elders to those living in urban Australia practising law. In some quarters there was support for the Bill whilst in other cases the Bill was opposed. Many Aboriginal witnesses were of the opinion that the Bill should be deferred for further consideration. Appendix Two details those witnesses who sought this.

It became abundantly clear that although there had been some consultation on behalf of the Government, there still was a need for further effort in this regard. Of major concern is the need for greater understanding of the Mabo decision and the *Native Title Bill* by Aboriginal people.

In addition to issues going to the substance of the Bill, there was considerable concern expressed by many Aborigines as to the process by which the Government formulated this Bill.

Much of that concern focussed on the role of the so called Aboriginal negotiating team and the perception created by the Government and the media that that team spoke on behalf of all Aboriginal people. This was despite the fact that the negotiating team did not see its role in that way.

Many Aboriginal witnesses expressed deep resentment that that perception had been created.

Indeed, the Committee was reminded of the decisions at Eva Valley and in Canberra by representatives of a large number of Aboriginal groups not to form a negotiating team that would speak on behalf of all Aborigines.

Numerous issues were raised and amendments put forward by Aboriginal representatives. Those concerns and amendments are to be found in Appendix One.

There are three issues, relating to Aborigines, we believe are worth mentioning at this point -

First, that the Bill be stated to be subject to the *Racial Discrimination Act.*

Secondly, instead of confirming the right of Aboriginal people to immediately exercise native title rights which may exist, the Bill requires claims to be proved in the Tribunal or Federal Court. If native title is proved, the tribunal immediately divests the traditional owners of their rights and vests them in a statutory corporation.

Thirdly, instead of land being controlled by its traditional owners in accordance with Aboriginal tradition and custom, the land will be controlled by corporations in accordance with corporate rules and by-laws. These aspects are not in accordance with the Mabo decision and are not popular with Aboriginal groups. This provision goes beyond the Mabo decision and is not one that is popular with many Aborigines. The remaining numerous other concerns which were raised by Aboriginal witnesses are included in Appendix One by way of information for the reader.

3.3 RACIAL DISCRIMINATION ACT

Concern was expressed by numerous witnesses from a variety of backgrounds that the Bill is, in part, inconsistent with the Racial Discrimination Act. If so, the Bill may override that Act because it is later in time (see Pareroultja v Tickner - Federal Court 20 September 1993). A couple of examples were cited as follows:

(a) The preamble to the Bill states that it will be a "special measure" in accordance with section 8 of the *Racial Discrimination Act.*

Section 10(3) of the *Racial Discrimination Act* provides that any law which authorises the property of an Aboriginal or Torres Strait Islander to be managed by another person without their consent is deemed to be discriminatory and not capable of being a "special measure".

Clause 53 of the Bill provides that once determination of native title has been made, it shall vest in a "prescribed corporate body". This is so, despite the fact that the individual native title holders may not consent to such action. Clearly this is a transfer of the native

title right to another entity without the consent of the native title holders and therefore in contravention of section 10(3) of the Racial Discrimination Act.

(b) Clause 203 of the Bill provides that "as far as practicable persons appointed as assessors are to be selected from Aboriginal peoples or Torres Strait Islanders". Whilst the motives for this are understandable, unless this is a special measure, this would contravene the *Racial Discrimination Act.* A special measure can only exist until its object has been fulfilled. In other words, it can only be a temporary measure. In this case there is no limit in time on the operation of this provision and no certainty of the fulfilment of the object. As such this measure could only be permanent.

3.4 CONCERNS OF INDUSTRIAL GROUPS

The following is a brief summary of the concerns of the mining, pastoral, agricultural and fishing industries:

(a) MINING

The representatives of the mining industry were generally of the view that the complexity of the Bill would lead to litigation and involve the parties in a great deal of cost incurred by complying with the legislation.

Furthermore, the industry stated that the legislation extended the Mabo decision's definition of native title by equating native title with freehold/leasehold whereas the High Court had held that the incidents of native title could vary from case to case.

The High Court held that native title was not capable of revival, however, the Bill by virtue of its "non-extinguishment" principle went further and allowed native title to be revived.

The view was also put that unnecessary delay would result in the approval of projects. Not only would the State processes of environmental impact statements, Aboriginal heritage surveys and the like have to be undertaken, but in the process of approving "future permissible acts" native title would have to firstly be determined and then compensation (if applicable) assessed. If an objection was lodged, this process could take an additional 18 months. Such delays and uncertainty would act as a major disincentive for investors and financiers in a highly competitive international market and could result in some projects not proceeding.

A number of the amendments proposed by sectors of the mining industry are contained in Appendix One.

In the Northern Territory it was pointed out that land rights legislation introduced in 1976 had resulted in only one mining project being approved in the last 17 years. In 1976 the expectation had been than 28% of the land was claimable. In 1993, 49% of the Northern Territory is now granted or claimed as inalienable Aboriginal freehold.

Concerns were expressed that the Bill might result in such unexpected outcomes.

As the Chief Minister for the Northern Territory stated (p.368):

"Just to give a small example of the sort of reason why scrutiny is so important, in the *Aboriginal Land Rights (NT) Act* we believe the difference between a capital "A" and a small "a" as a result of a court ruling, has meant the difference between land set aside for the public of the Northern Territory - that is national parks, dams, police stations, schools, electricity easements - is claimable as Aboriginal land ...."

This example perhaps the need for greater attention to the detail of proposed legislation.

Whilst not opposing native title, the mining industry indicated that it was important to ensure that the Bill was workable and therefore further enquiry and review was needed.

(b) PASTORAL AND AGRICULTURAL

The question of pastoral leases is germain to Western Australia, Northern Territory, New South Wales, South Australia and Queensland. Of all such leases in the country, 76% are in Western Australia.

Although the National Farmers Federation supports the Bill, the Western Australian body did not.

The Western Australian body believed that only the State could validate those pastoral leases, however, to do so the State had to comply with the Commonwealth requirements. This was believed, due to legal advice obtained, to be unconstitutional.

It was of the opinion that in any event, the Commonwealth was not equipped to deal with the necessary volume of land administration involved.

In evidence given to the Committee by senior governmental advisers on 6 December 1993, it is apparent that the interests of lessees in what are idiomatically known as forestry leases may not be protected by the Bill.

Forestry leases are commonly expressed to be subject to conditions such as:-

"The lessees shall hold the leased land so that the same may be used without undue interruption or obstruction

for the public purpose (State Forest) for which it was reserved by Order in Council published in the Government Gazette of [DATE] and, without limiting the generality of this condition, so that all the relevant duties and functions of the Department of Forestry as laid down in "The Forestry Act of 1959" or any other Act in amendment thereof or in substitute therefor may be performed or carried out."

More recent forestry leases have been expressed to be subject to conditions such as:-

"The lessee shall hold the leased Land so that the same may be used for the public purpose (State Forests) for which it was reserved by Order in Council published in the Government Gazette of [DATE] without interruption or obstruction.

"The lessee shall use the land for grazing purposes only."

The government's advisers were of the belief that, to the extent grants of forestry leases are "past acts", they are category D past acts. The reasons for this are:-

(a) They are not pastoral leases because the sole or primary purpose for which they are issued is not grazing, but public purpose (state forest);

(b) They are not agricultural leases because although they are intended for the growing of trees, the lessee has no right to same; and,

(c) Therefore they are category D past acts.

The extinguishment principle contained in the Bill does not apply to category D past acts, but rather the native title survives. Queries then arise when the lessee seeks to extend the lease.

Although the National Farmers Federation had received advice that the extension, exercise of option and renewal of a pastoral lease constituted a "past act" the situation in Western Australia and Queensland appears to be different.

Forestry leases (like pastoral leases in Queensland and Western Augstralia generally) do not contain any legal right of renewal. The lessee of a forestry lease must in fact surrender the lease and apply for the issuing of a new lease if he wishes to have his current term extended. This would be a "future act" if it occurred after 1 January 1994.

The re-issuing of an existing forestry lease would appear to be precluded however as it is not a "permissible future act" under the Bill. This is because clause 220(5)(b) equates the rights of native title holders with those of freeholders for the purposes of considering what are "permissible future acts."

"Permissible future acts" are those acts which are not inconsistent with the deemed interests of native title holders under that clause. It is, of course, a matter of law that one cannot grant a leasehold interest over the top of a freehold interest in land, which is a superior title, and therefore the renewal of these leasehold interests may fail.

Similar provisions regarding re-issuing also apply to other forms of lease including pastoral leases. The manner in which they are to be dealt with in Queensland is described in the "Work and Procedure Instruction" issued to the Department of Land Administration in Queensland. This document states:-

"The Land Act *provides under Section 155(1)*

"'A lessee of any holding, the lease whereof has not more than 10 years to run, may apply to the Minister for consideration under, subject to and in accordance

with the provisions of this Division of the matter of the grant to him of a new lease of the whole or part of the holding in question in substitution for the then subsisting lease thereof.'

"It also provides for dealing with leases surrendered by the way of arrangement under Section 169.

"'When any holding is surrendered to the Crown in pursuance of an arrangement made between the lessee and the Minister on the recommendation of the Commission in order that the land comprised therein or any part thereof may be again made available for leasing to the same lessee, such holding (notwithstanding that it was held under perpetual lease tenure) shall be deemed to be an expired lease for the purposes of Division 2 of this Part."'

Essentially then, the re-issuing of other forms of lease in Queensland and Western Australia may be subject to the same apparent difficulties as face forestry leases under clause 220(5)(b) of the Bill. The only difference is that if the grant of the lease was at any time a "past act" for the purposes of the Bill then it may be a category A past act which extinguished native title.

In Western Australia, all pastoral leases will have expired by 2015 and would therefore have to have been renewed or replaced by then.

At any of these stages, native title questions would have to be determined before the request for renewal or the re-issue could take effect. Such a process could involve a delay of up to 18 months.

The Committee has not received any advice on the possibility of revival of native title upon the surrender of a lease that, by virtue of being a past act, had previously extinguished native title.

A related point is whether native title can survive the grant of a leasehold interest that is not a past act, or can subsequently be revived. It should be noted that Senator Gareth Evans said in evidence before the Committee on 6 December 1993 that; "For all valid grants of land, the effect of native title is a matter for the common law of Australia."

It was also asserted that pursuant to Clause 22 of the Bill, the individual pastoralist requesting the act to be done could be liable personally for compensation.

In view of the foregoing, Coalition Senators are of the view that forestry leases and perhaps other leasehold interests in Queensland and Western Australia are not necessarily validated or safeguarded under the Bill.

(c) FISHING

The main concerns cited by representatives of the fishing industry were:

(i) The Bill fails to specify whether coastal land subject to native title will be to the high or low water mark.

(ii) If the existing rights of commercial fishermen are to be diminished by native title, will they be compensated?

(iii) The Bill in its definition creeates the artificial distinction between offshore and onshore areas with the latter including estuaries, bays and inlets along the coast of a State. Any fishing in the onshore areas would be subject to the more rigorous provisions of the Bill; it was thought that these areas should be categorised as "offshore" which would result in less exposure to native title claims.

It was evident that fishing in Western Australia and the Northern Territory sustains a thriving industry and it was thought that the introduction of the Bill could impair the industry. The Bill would obviously affect the fishing industry in other States in a similar way. Accordingly, it was thought that the Bill should not be passed and it should be reviewed further.

3.5 EFFICACY

Of major importance is whether the Bill will do what it sets out to achieve. It is apparent that a great majority of people do not understand the Bill. Furthermore, those who have conducted a detailed analysis have found numerous areas of concern.

4.0 CONCLUSION

Having regard to the following:

(a) Doubt as to constitutional validity of the Bill

(b) Concerns of Aboriginal groups and individuals

(c) Lack of consultation with Aboriginal and industry groups

(d) Doubtful application of the *Racial Discrimination Act*

(e) Concerns of industry and rural groups and associations

(f) Perceived flaws in the efficacy of the Bill.

we are of the opinion that it is in the interests of all Australians to get the legislation right in the first instance. Arguments that the Bill should be passed quickly in order to assert the Commonwealth's primary in native title are unjustified. The Western Australian legislation has already been passed. If the Western Australian

legislation is in breach of either the Constitution or the *Racial Discrimination Act*, it will be found to be so by the High Court. The Commonwealth's responsibility is to ensure that its own legislation is constitutionally valid and in accordance with the principles laid down in the *Racial Discrimination Act.*

Furthermore, the argument that the Western Australian Government would proceed to act on its legislation by making numerous Crown grants is not sufficient to require the passing of legislation of doubtful constitutional validity and even more doubtful effect.

A reference to a Senate Select Committee will allow a more thorough scrutiny of the Bill and a further opportunity for there to be input from Australians of all description. As Mr Ron Castan QC conceded, an inquiry along the lines of the Woodward Royal Commission immediately following the High Court's decision would have been more appropriate than the Government's subsequent courtse of action. Nonetheless, we believe that, as nearly a year and a half has elapsed since the Mabo decision, a reference to a Senate Select Committee is now the only appropriate course of action.

.....	.....	.....
Senator A Vanstone	Senator C Ellison	Senator W O'Chee

APPENDIX ONE

Clause 5 - After clause 5, page 7, insert the following new clause:
Inconsistency between this Act and the Racial Discrimination Act
"5A. Subject to section 9A, if any provision of this Act is inconsistent with the operation of the *Racial Discrimination Act 1975*, the operation of that Act prevails." (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 7 - All actions authorised by this Act to be consistent with the *Racial Discrimination Act* (Prof. Garth Netheim)

Clause 7 - Effect of the *Racial Discrimination Act:*
7A. Nothing in this Act authorises any conduct whether by any executive, legislative or judicial authority that is inconsistent with the Racial Discrimination Act. (John Pinney, Executive branch, Department of chief Minister, Darwin)

Clause 7A - **Effect of the Racial Discrimination Act**
7A. Nothing in this Act authorises any conduct whether by any executive, legislative or judicial authority that is inconsistent with the *Racial Discrimination Act* (Coalition of Aboriginal Organisations Working Party).

Clause 7A - new Clause 7A - This Act is not intended to affect the operation of any law of a State or of the Commonwealth dealing with the protection of Aboriginal heritage. (Coalition of Aboriginal Organisations Working Party)

Clause 9 - After clause 9, page 7, insert the following new clause:
Legality of validations
"9A. In order to avoid any doubt, it is declared that section 5A does not invalidate the validations of past acts proposed by this Part". (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 11 - Already mentioned under "Constitutionality"

Clause 11 - We suggest additional amendments to clause 11 to further strengthen the retrospective operation of the Bill: We suggest an additional subsection (2) in clause 11 -

(2) *Any law passed by the Commonwealth, a State or Territory passed after 30 June 1993 which has the purpose or effect of extinguishing native title otherwise than in accordance with the provisions and principles of this Act has no effect and is deemed not to have had any effect, and any act done pursuant to such a law is deemed not to have had any effect.* (Coalition of Aboriginal Organisations Working Party)

Clause 13A - **Validation of legislation**
13A. Where a past act which consists of the making, amendment or repeal of legislation is validated, the validation operates only so far as to validate the rights and interests granted under the legislation prior to 31 December 1993. (Coalition of Aboriginal Organisations Working Party)

Clause 15(a) - Omit Clause 15(a), or provide that the effect of Clause 15(a) is not to permit or preserve the existence of Native Title over land subject to any category "A" past Act. (Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 16 - Clause 16, page 10, omit subclause (2), substitute:
Non-extinguishment case
"(2) If it is any other past act, the native title holders are entitled to compensation for the act if the similar compensable interest test is satisfied in relation to the act".
(NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 16 - Clause 16, page 11, omit subclause (3) (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 18 - Amend clause 18 to clearly, and unarguably ensure validity of all Australian's titles. If express amendment of RDA is not achieved, adopt the enclosed amendments drafted by AMIC's Senior Counsel (Attachment 1).
(Australian Mining Industry Council prepared by High Fraser QC)

Clauses 18-19 - States must conform to this Bill. States have to compensate for acts which they have not validated - this places an undue burden on the States - this is mentioned under paragraph 3.2 Constitutionality.

Clause 18 - Amend Clause 18 by:
Renumber 18 as 18(1).
Add:
"18(2) If a law of a State or Territory contains provisions to the same effect as clauses 14 and 15, and provides that past acts attributable to the State or Territory are valid and are taken always to have been valid, then after the commencement both of this section and of that law:

(a) the validity of those past acts shall be taken always not to have been adversely affected by the existence of native title, or by the operation of any law which operated in relation to Native Title; and

(b) all persons apparently entitled to, or to the benefit of, such of those past acts which were made before 1 June 1993 shall be taken always not to have been under any liability relating to Native Title.

(3) This section has full effect notwithstanding any other provision of this Act."(CRA Ltd - J L Armstrong)

Clause 22 - Clause 22, page 12 and 13, omit subclause (3), substitute:
Extinguishment of native title by compulsory acquisition
"(3) If the whole or a part of the rights or interests comprising native title is acquired under a Compulsory Acquisition Act:
(a) the non-extinguishment principle applies under the land is used for a purpose for which it was acquired; and
(b) if the Compulsory Acquisition Act does not provide for compensation on just terms to the native title holders for the acquisition, they are entitled to compensation for the acquisition in accordance with Division 5." (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 22 - Clause 22, page 13, omit subparagraph (4)(b)(iii) (NSW Aboriginal Land Council, Land Claims and Property Services).

Clause 22 - Clause 22, pages 13 and 14, omit subclause (6) substitute:
Procedural rights
"(6) In the case of any act to which this section applies (other than a low impact future act or one to which Subdivision B applies), the native title holders have the same procedural rights as they would have in relation to the act on the assumption that they instead held ordinary title to any land or waters concerned.". (NSW Aboriginal Land Council, Land Claims and Property Services).

Clause 22(5) - Individuals can be liable to pay compensation for future acts.

Clause 22 - Subclause (3) insert at the beginning of the subclause:
'Subject to Subdivision B,' (Coalition of Aboriginal Organisations Working Party)

Clause 22 - Clause 22 should provide that those procedural rights under other legislation set the minimum standard for negotiation rights (Coalition of Aboriginal Organisations Working Party)

Clause 23 - Priorities for developers to make an application to clear any question of N.T. Even if this is unopposed the N.N.T.T. can still determine N.T. adversely to the developer.

Clause 23(1) - An impermissible act is defined as being an act that is not a permissible act. The effect of this is that there is no express provision for acts in circumstances where native title has not been determined and there are no registered claimants or any group or individual expressing an intention to claim. The result is that land managers will have to make an assessment in each case as to whether an act may affect native title and run the risk of the act being invalid. The only alternative under the Bill is, in every case, to lodge a "non-claimant application for determination of native title" under Clause 60 of the Bill. This will be slow and expensive. The permissible future act test in Clause 220 is of little assistance because of the status, for that purpose, of native title as freehold. Most Crown tenures and permits are only able to be issued over Crown land and therefore have no application to freehold or ordinary title.

The Bill should address this situation by providing that acts can proceed in such circumstances but with provision for the payment of compensation if at some future time native title is proven. New South Wales supports the Victorian submission that clause 23(1) might be amended to include an additional sub-clause to provide:

"(ba) there is no registered native title claimant or registered native title holder and no notification has been given of any intention to lodge a claim;" (John Fahey, Premier, NSW)

Clause 24 - For, existing valid grants, these rights are not clearly expressed. Clause 24 only provides that where there is a 'legally enforceable right', that a renewal can occur. Amend Clause 24 by including the provisions contained in Clause 213(4) for invalid grants. (Australian Petroleum Exploration Association Limited).

Clause 24 - amend Clause 24 to make it explicit that Governments would be liable for any compensation payable in relation to valid past acts. It makes no sense and is inconsistent to have the Government paying the compensation in respect of the extension of existing invalid grants, but not valid grants (Australian Petroleum Exploration Association Limited)

Clause 24(1) - Amend Clause 24(1) by altering the introductory part:

"24(1) if a future Act consists of the renewal of any interest in relation to land or waters which interest was created before 1 January 1994:...."

and insert in Clause 238 a new definition:

"Renewal" includes"

"(a) a renewal in the exercise of a legally enforceable right; and

(b) an act (other than the making, amendment or repeal of legislation) in relation to land or waters where:

(i) an act taking place before 1 January 1994 ("the earlier act") created interests in a person and an act taking place on or after 1 January 1994 ("the later act") creates interests in:

A. the same person; or

B. another person who has become the holder of the interests originally held by the first person (by assignment, succession or otherwise);

in relation to the whole or part of the land or waters to which the earlier act relates; and

(ii) the interests created by the later act take effect before or immediately after the interests created by the earlier act ceased to have effect; and

(iii) the interests created by the later act permit activities of a similar kind to those permitted by the earlier act." (CRA Ltd - J L Armstrong)

Clause 25(3)(b) - Private pipelines are normally permitted by virtue of pipeline licences, which are provided for in legislation. Frequently, if no agreement can be reached with the private land holders over whose land it is desired to run the pipeline, the legislation provides for compulsory acquisition of the interests necessary to permit the pipeline licence to be granted. With Native Title Land, this can mean anywhere from the low water mark inland.

If the legislation, pursuant to which the compulsory acquisition can occur, falls within the definition of "compulsory acquisition legislation" contained in clause 238 of the Bill (on page 112) then the compulsory acquisition is subject to the "right to negotiate" (clause 25(2)(d).

This means the Tribunal will consider whether the compulsory acquisition can occur or not, and the spectre is therefore raised of a petroleum producer acquiring all necessary rights offshore to permit petroleum production to occur, including the right to convey it to the low water mark of the nearest State and Territory, but then find it impossible to get the petroleum ashore. The only hope might be if the relevant Commonwealth Minister determines the granting of a pipeline to be excluded pursuant to clause 25(3)(b).
(Australian Petroleum Exploration Association Limited)

Clause 25 - Clause 25, page 15, line 35, omit "in relation to an onshore place". (NSW Aboriginal Land Council, Land Claims and Property Services).

Clause 25-57 ***National standards for State negotiation regimes***

These should be strengthened in the following ways:

- include off-shore grants and grants over on-shore places that are waters in requirements for negotiation (Clause 25)
- require State regimes to apply the same time limits as in the Commonwealth Bill for negotiation and arbitration (Clause 41);
- require State regimes to allow objection by non-registered native title claimant (Clause 41);
- time limits to be stayed pending appeal against refusal to register a claim (Clause 41, in respect of State regimes, and Clause 27 and 29 in relation to Commonwealth regime. Both need to cross-refer to applications refused under Clause 57 or equivalent, together with any subsequent appeal period) (Coalition of Aboriginal Organisations Working Party)

Clause 33 - Clause 33, page 20, line 2, omit "Any" substitute "Provided the government party has negotiated in good faith under section 30, any". (NSW Aboriginal Land Council, Land Claims and Property Services).

Clause 33 - The right to negotiate regime contained in Sub-division B, Division 3, Part 2 will adversely impact on land administration and use. The regime:

- will add up to 2 years, and probably more, to the process of obtaining native title holders as to other title holders. the conferral of special rights to negotiate in clause 25 is inconsistent with the philosophy of clause 22.

One amendment which may reduce delay in the regime imposed by the Bill would be to allow parties to approach the arbitral body before the expiration of the relevant time periods if all parties agreed to do so (clause 33). (John Fahey, Premier, NSW)

Clause 34(2) - Clause 34(2) leaves the option of an open ended process with the NNTT just advising Ministers of the

reasons for delay. This does not give any certainty of progress in the Tribunal process.

Proposal: Consideration of a more specific timetable within the periods to ensure that the NNTT is provided with timely advice upon which to base any determinations.
(Australian Petroleum Exploration Association Limited)

Clause 36 - Clause 36, pages 20 and 21, omit subclause (2).
(NSW Aboriginal Land Council, Land Claims and Property Services).

Clause 36(2) - Delete *"must not"* and insert *"may"*. [Also see 49(5)]
(John Pinney, Executive Branch, Department of Chief Minister, Darwin)

Clause 37(1) - In determining N.T. the N.N.T.T. takes into account economic and environmental matters which are irrelevant and in which the tribunal has no expertise.

Clause 37(1)(d) - Delete Clause 37(1)(d) and replace it:

"(d)(i) The employment, economic or other significance of the proposed act to the particular locality concerned or, in the case of major development, to the particular locality and to other parts of Australia;

(ii) The interests, proposals, opinions or wishes of any persons (including prospective employees) wishing to obtain the benefit of an act, and of the government or body involved in the proposed act;

(iii) The findings of any other body that has made an assessment of the effect of the proposed act on employment or the economy of the particular locality concerned, or, in the case of major development, or the particular locality and other parts of Australia;

(iv) The effect of a refusal to permit the proposed act upon employment and the economy of the State or Territory concerned, or Australia, upon the assumption that all proposed acts of a similar kind which affected the same or other native Title rights or interests to a similar degree were also refused. (Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 38 - Consistent with the objects of clause 38 it should be amended to provide:

- a compulsion (perhaps in regulations) on parties to put submissions on all matters in relation to clause 37;
- any matters that could have been raised at the exploration stage cannot subsequently be put at the production stage of proceedings;
- only matters where there has been a substantial change in circumstances would warrant re-opening.

(Australian Petroleum Exploration Association Limited)

Clause 38 - amend Clause 38 by renumbering it as Clause 38(1), and adding the following:

"(2) If:

(a) The arbitral body is making a determination in relation to an act consisting of the creating of a right to mine in relation to an area; and

(b) The Government had previously done an act pursuant to section 31(2), and that act consisted of the creating of a right to mine in relation to that area; and

(c) As a result of that act, one of the negotiation parties had obtained a right to mine in relation to that area; no other negotiation party may, without leave of the arbitral body that is making the determination, seek a determination that the act may not be done, or that the act may only be done subject to conditions to be complied with by any of the parties.

(3) If:

(a) the arbitral body is making a determination in relation to an act consisting of the creation of a right to mine in relation to an area;

(b) an agreement or a determination by an arbitral body was previously made in relation to a permissible future act consisting of a right to mine in relation to the same area;

(c) an issue was not decided in the agreement or during the inquiry; and

(d) that issue, had it been decided, might have led to a determination under Clause 36(1)(a);

the negotiation parties must not, without leave of the arbitral body that is making the determination, seek to raise that issue for decision or determination.

(4) The arbitral body shall not give leave under subsections (1), (2) or (3) except:-

(a) where the interests of justice require it; and

(b) there are extraordinary circumstances, which are not contributed to by any failure or act by the applicant for leave; and

(c) any party adversely affected by the grant of leave will be compensated for any expenditure or loss occasioned in reliance upon the earlier agreement, determination, or act done under Clause 31(2)." (Department of Land Administration)

Clause 40 - Federal Minister has the right to overturn a decision of a State or Federal Tribunal. This discretion has to be exercised on the basis that it is within the interest of the State or Commonwealth respectively. This could prejudice either side.

Clause 40 - Clause 40, page 23, line 3, omit "considers it to be", substitute "decides, on grounds that are consistent with the preamble, that it is". (NSW Aboriginal Land Council, Land Claims and Property Services).

Clause 40 - Clause 40, page 23, line 9, omit "considers it to be", substitute "decides, on grounds that are consistent with the preamble, that it is". (NSW Aboriginal Land Council, Land Claims and Property Services).

Clause 40(9) -
"9. If:
(a) a recognised State/Territory body; or
(b) the NNTT
does not make a determination within 2 weeks after the expiry of the applicable period specified in section 34(1), then:
(c) the Minister concerned may declare that the act may be done, or may be done subject to specified conditions.
(d) if such a declaration is made, the arbitral body must not make a determination under Clause 36(1)(a) or (c)."
(Australian Mining Industry Council prepared by Hugh Fraser QC))

Clause 42 - Import into clause 24 (which now deals only with legally enforceable renewals) similar provisions as appear in section 213(4) as per the enclosed amendment drafted by AMIC's Senior Counsel. (Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 44 - This has cast a doubt over the McCarthy River project in the N.T.
Clause 44A - ***Non-extinguishment principle applies to post-1975 mining leases***
44A *The non-extinguishment principle applies to all mining leases granted after 31 October 1975.* (Coalition of Aboriginal Organisations Working Party)

Clause 45 - We suggest the following subclause be added to clause 45:
(4) If subsection (3) applies to a pastoral lease the pastoral lease may be surrendered to the State or Territory which issues the lease and the State or Territory must accept surrender of the lease. On the surrender of the lease all other interests apart from the native title interest are

extinguished. (Coalition of Aboriginal Organisations Working Party)

Clause 45 - Additional concerns related to the effect of alienation from the pastoral lease on ability to prove native title. This will be assisted by inserting the following clause: *(2a) The court, person or body must, in making a determination, disregard the effect of exclusion of the native title holders from access to the land by reason of their exclusion from the pastoral lease.* (Coalition of Aboriginal Organisations Working Party)

Clause 45 - In subsection (2), add the words *'or any conduct pursuant to such a lease or other interest'* after the word *area.* (Coalition of Aboriginal Organisations Working Party)

Clause 45(1) - Pastoral Leases, whether or not originally granted to persons not entitled to native title but now held by such persons, are made subject to native title rights. Those rights are revived even if they had been extinguished but they are subject to the lease. Those persons could assign the lease but still have native title rights. It is suggested that this is inequitable and inappropriate that the rights should revive after having been extinguished. It is suggested that this was not contemplated under the Mabo decision. (Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 45(1)(b)(ii) - Amend Clause 45(1)(b)(ii) so it reads:
"(ii) A trustee on trust where the only beneficiaries of the trust are all applicants." (Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 45(2) - Insert *"or any conduct pursuant to such lease or other interest"* after *"area"*. (John Pinney, Executive Branch, Department of Chief Minister, Darwin)

Clause 45(3) - Amend Clause 45(3) by deleting "and any other prior act".

Clause 47 - Clause 47, page 26, lines 29 and 30, omit paragraph (a), substitute:

"(a) compensation is only payable under this Act for damage or loss caused by an act if the damage or loss has not otherwise been compensation; and". (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 47 - Clause 47 provides that compensation is only payable under the Bill once for acts which are "essentially the same". It is not clear what is meant by acts which are essentially the same. It may mean acts of essentially the same class, or of the same nature both in effect and time. For example, a renewal of a mining lease will be an act of essentially the same class as the original lease. Does Clause 47 mean that compensation is paid only for the original lease? Alternatively, the renewal is not essentially the same because it affects native title at a different time to the original lease, even though its terms may be the same. The Bill should give certainty as to liability for compensation payments. (John Fahey, Premier, NSW)

Clause 49(2) - (4) - amend 49(3) by deleting "apply any principles interest test" and inserting *have regard to the effects of the act upon the native title holders*". Similar amendments to 49(2)&(4). 72 may also require amendment. (John Pinney, Executive Branch, Department of chief Minister, Darwin)

Clause 49(5) - (8) - *Delete 49(5)-(8) Compensation may consist of -*

(a) the payment of money
(b) the transfer of property by the Crown
(c) the provision of services
(d) the provision of employment, training or business opportunities,
(e) any other form the court, person or body making the determination of compensation thinks fit.
[Also see 36(2)]

[NB. The arbitrator cannot require a grantee party to transfer property to native title holders]

(John Pinney, Executive Branch, Department of chief Minister, Darwin)

Clause 49 - Clause 49, page 27, line 23, omit "Subject to subsection (3), the", substitute "The". (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 49 - Clause 49, pages 27 and 28, omit subclause (3). (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 49 - Clause 49, page 28, line 8, omit paragraph (4)(a), substitute:

"(a) subsection (2) does not apply; and". (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 49 - We suggest that in clause 49(3) the words *'apply any principles or criteria for determining compensation (whether or not on just terms) set out in the law mentioned in section 225 (which defines similar compensable interest test)'* and substitute *'have regard to the effects of the act upon the native title holders'.*

Non-monetary compensation should be able to be ordered by the Tribunal. We suggest deleting clauses 49(5) - 49(8) and substituting

Compensation may consist of

(a) the payment of money,
(b) the transfer of property (excluding equity),
(c) the provision of goods or services,
(d) the provision of employment, training or business opportunities,
(e) any other form the court, person or body making the determination of compensation thinks fit.

(Coalition of Aboriginal Organisations Working Party)

Clause 50 - Clause 50, page 29, line 18, omit "body corporate holding the native title under Division 6", substitute "native title body corporate". (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 51 - Insert the words 'or a State' after the word 'person' wherever it appears. (Coalition of Aboriginal Organisations Working Party)

Clause 53 - N.T. can only vest in a prescribed corporate body, despite the N.T. being a right attaching personally to the native title holder.

Clause 53 - Clause 53, page 31, line 28, insert "person, group or" before "prescribed body corporate". (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 53 - Clause 53, page 31, line 28, omit ", in accordance with subsection (3),". (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 53 - pages 31 and 32, omit subclause 53(2), substitute: "(1A) In deciding whether a person, a group or a prescribed body corporate is to hold the rights and interests from time to time comprising the native title, the NNTT or the Federal Court is to act in accordance with the wishes of the persons it proposes to include in the determination of native title as the native title holders (the **'common law holders'**). (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 53 - Clause 53, page 32, line 6, insert "person, group or" before "prescribed body corporate". (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 53 - Clause 53, page 32, after subclause (6), insert: "(7) If the common law holders decide that a person (other than a prescribed body corporate) or group is to hold the rights and interests, the common law holders must, when the determination is made, nominate a body corporate for the purpose of:

(a) holding compensation in relation to the rights and interests; and
(b) receiving notices for the purposes of this Act in relation to the rights and interests". (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 53(3) - Provides that despite opposition from the individual Aboriginals, the tribunal can still nominate a Corporation.

Clause 53 - We suggest an additional subclause added to clause 53:
(7) A native title interest held by a body corporate under this section cannot be restrained, garnished, seized, sold or otherwise acquired as a result of debts owed by, or other liabilities incurred by, the body corporate holding title to it, including liabilities owed to the Crown or any statutory authority. (Coalition of Aboriginal Organisations Working Party)

Clause 54 - Provides that compensation is payable to a prescribed corporation in full satisfaction of any claim by individuals. This was a subject of concern for some witnesses.

Clause 54 - Clause 54, page 33, omit subclause (1), substitute:
Determined compensation
"54.(1) If a determination of an entitlement to compensation is made in accordance with Division 5 in relation to native title rights and interests:

(a) if the compensation is monetary - it must be paid to the native title body corporate, which must hold or deal with it in accordance with the regulations; and
(b) if the compensation is not monetary - the native title body corporate must perform such functions (if any) in relation to the compensation as are required by the regulations.". (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 56 - Clause 56, page 35, lines 14 to 22, omit paragraphs (1)(a)(b) and (c), substitute:

"(a) contain the name the address of the person who is making the claim or of a representative of the group that is making the claim; and
(b) contain the name of any nominated representative Aboriginal/Torres Strait Islander body; and

(c) contain a description of the area over which native title is asserted". (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 57 - Clause 57, pages 35 and 36, omit the clause, substitute:
Action to be taken in relation to applications
"57. If an application complies with section 55 and is accompanied by the things required by section 56, the Registrar must accept the application.". (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 58 - Clause 58, page 36, 22 and 25 omit "147 to 151", substitute "147 and 151". (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 59 - Under clause 59 the Registrar has to give notice to "all persons whose interests may be affected by a determination" in relation to native title. the deeming provision which follows in 59(2) is of concern as it provides that the Registrar "is taken to have given notice to all persons whose interest may be affected" if he notifies a range of people, which do not include the land holders. This appears to be unfair (any may simply be an oversight) but if there were, for example, a mining lease within the claimed area and the claim was to that mining lease, then the consequences for the miner could be quite significant. That is, if it transpires that the mining lease is valid, the grant of the lease would probably have extinguished native title whereas if it transpires his mining lease was invalid and is to be validated, it will be done on the basis that native title not be extinguished.

Given that an applicant, to have a claim registered, must have conducted searches of all official title registers (clause 51(a)(i), all details of the land holders must already be to hand. It would therefore simply be a case of writing to addressees whose particulars were contained within the application in any event. (Australian Petroleum Exploration Association Limited)

Clause 59(2)(a) - Amend Clause 59(2)(a) by adding:

"(vi) To each person who is registered on any Commonwealth, State or Territory register as holding any interest (including an interest under a grant creating rights of exploration or mining) in relation to the area covered by the application; and"

(Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 60 - Applications for exploration and prospecting interests can often cover tens of thousands of square kilometres, and the way this provision is framed, even if an Aborigine successfully registers a claim to only one square kilometre, the whole of the application for determination by the non-native title holder is dismissed automatically. There should be some severance provision inserted so that the claim is only dismissed in respect of the land, the subject of the Aboriginal claimants application. (Australian Petroleum Exploration Association Limited)

Clause 61(2) - Notice of an accepted application must be given to all persons whose interests may be affected by the determination (clause 59(1)(a)). Notice is taken to be given to all interested persons if it is given to the persons referred to in clause 59(2). there is no reference to a person who may have a registered interest in the land. While clause 61(2) provides for any person whose interests may be affected by a determination of an application to be a party, those with interest registered in State and Territory land registers will not be notified of the application. Those persons should be notified. (John Fahey, Premier, NSW)

Clause 66 - In paragraph (c); delete the words, 'within the powers of the Tribunal and would be'

Delete paragraph (d). (Coalition of Aboriginal Organisations Working Party)

Clause 71 - Omit Clause 71. (Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 73 - There should be provision in Clause 73 for existing matters to be transferred into the Federal Court. The jurisdiction of the Federal Court should be expanded accordingly. (Coalition of Aboriginal Organisations Working Party)

Clauses 75(2), 102(1), 146(4), 180(3), 187(2) - Delete *"cultural and customary concerns"* and substitute *"law and customs"*. (John Pinney, Executive Branch, Dept of Chief Minister, Darwin, NT)

Clause 75(3) - Omit Clause 75(3). (Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 86(5) - Omit Clause 86(5), so the Court retains the same power to stop unnecessary or inappropriate cross-examinations for all races, which it now possesses.

Alternatively, amend Clause 86(5):

"(5) The assessor may dispense with cross-examination or re-examination where that is appropriate.

(Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 116 - Clause 116, page 56, lines 30 and 31, omit paragraph (1)(b). (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 130 -

(1) Where an Aboriginal or Torres Strait Islander person or group claims that he or she or that group is prejudicially affected by operation of this law he or she or they may submit a claim to the NNTT.

(2) The NNTT shall inquire into any claim submitted to it under this section, but not one which is trivial, frivolous, vexatious or not made in good faith.

(3) If the NNTT finds that any claim is well founded it may recommend to the Crown that action be taken to compensate for or to remove the prejudice or to

prevent other persons being similarly affected in the future

(4) The Crown shall consider that recommendation and, acting reasonably and in good faith, consider the recommendation, and if it rejects any of the recommendation or recommendations it shall give reasons for that rejection.

(John Pinney, Executive Branch, Department of chief Minister, Darwin)

Clause 150 - Delete *"shall"* and substitute *"may"*. (John Pinney, Executive Branch, Department of Chief Minister, Darwin)

Clauses 176 to 183 - There should be provision for the Registrar to notify land titles offices of claims, as well as determinations under clause 191. It is just as important in dealings with land to know if claims affecting the land have been lodged as it is to know of established rights.

In any event, the land titles offices will need to institute procedures to record those claims or determinations against their records for individual parcels of land. (Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 178 - It is suggested that the requirement in clause 178(1)(e) for the Register to contain information on the "area" of land or waters covered by the claim is of little value. It may be that 'area" is being used in a general sense. This is not clear. It is essential that the Register contain an adequate description of the
boundaries of the area claimed to be the subject of the native title. Persons dealing with the land in the area should be able to easily ascertain if they area that they are dealing with is the subject of a claim or a registered right.
The same comment applies to the National Native Title Register, Clause 185(2)(c).
Clause 210, in relation to a determination of native title, should also require the determination of boundaries of the area the subject of the determination.

(Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 179(1) - It is essential that the plans of the boundaries of native title claims and determinations be accessible in Western Australia rather than be retained in Canberra. If they are not, it will be difficult for persons operating in Western Australia to conduct searches of the areas claimed. (Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 180 - Amend Clause 180 to add:

"(4) The person whose name and address for service appears in the Register shall be deemed for all purposes to represent all of the persons claiming to hold the Native Title claimed in the name of that person."

(Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 185 - Clause 185, page 81, lines 7 to 9, omit "body corporate that, under section 53, is to hold the native title rights and interests', substitute "native title body corporate". (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 193 - This needs to be amended so as to allow organisations to apply for the status of a "representative" organisation with a right of review should a Minister reject the same (Aboriginal Legal Service)

Clause 196 - Insert after subclause (1):

(2) Any extinguishment of the native title rights and interests by any other interest in the land which previously existed the grant of the land by the Crown to a body holding title to land under the Acts listed in sub-section (1) or any conduct pursuant to such lease or other interest must be disregarded for all purposes under this Act. (John Pinney, Executive Branch, Department of Chief Minister, Darwin)

Clause 196 - After clause 196, insert the following new clause:
Preservation of right to carry on activities
"196A.(1) If:

(a) a law of the Commonwealth or a State or Territory relating to management or use of a natural resource prohibits or restricts the carrying on of an activity on land or waters, but allows some persons to carry on the activity under licences or similar instruments; and

(b) carrying on the activity is part of native title rights and interests;

the law does not operate to impair or restrict the native title rights and interests.
(2) Subsection (1) does not apply to a law that creates rights or interests only to, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.".(NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 197 - Insert after subclause (3):
(4) This section does not confer additional legislative powers on the Legislation Assembly of the Northern Territory. (John Pinney, Executive Branch, Department of chief Minister, Darwin)

Clause 197 - "We agreed with the Government that there should not be any discrimination against native title fishing and hunting rights. Clause 197 is very unclear. It appears to authorise State legislation which may have the effect of being discriminatory". Subsection (3) should apply to both subsections (1) and (2). The words *'or impair'* should be added after *extinguish'*. (Coalition of Aboriginal Organisations Working Party)

Clause 197 - Clause 197, page 86, line 2, omit "subsection (2) does not extinguish", substitute "this section does not extinguish or impair". (NSW Land Council, Land Claims and Property Services)

Clause 197(1) - Amend Clause 197(1) as follows:
"197(1) A law of the Commonwealth, a State or Territory may confirm:

(a) that the Crown in right of the Commonwealth, the State or the Territory, as the case may be, owned such natural resources as were purportedly appropriated to it, or claimed to be owned by it in legislation enacted before 1 July 1993;
(b) any existing right or purported right, of the Crown in that capacity to use, control or regulate the flow of water;
(c) that any existing fishing or access rights, or purported rights, prevail of any other public or private fishing rights."

Clause 197(1) - Generally, clause 197(1) appears to require compliance with the future acts regime in the Bill and the payment of compensation, even though State law may operate in a non-discriminatory manner. The provisions should not be "subject to the Act". (John Fahey, Premier, NSW)

Insert a new Clause 197(2):
"(2) If a law of the Commonwealth, a State or Territory contains provisions to the effect of sub-paragraph (a), or (b), or (c) of subsection 1, then after the commencement both of this section and of that law, the Crown's ownership, the Crown's right and the fishing or access rights, as the case may be, shall be taken always to have been not subject to nor adversely affected by the existence of Native Title, or by the operation of any law which operated in relation to Native Title."

Renumber the existing Clause 197(2) as Clause 197(3), and amend subclause (c) so that it reads:
"(c) areas to which the public had access, including areas that were public places at the end of 31 December 1993."

(This amendment is merely intended to remove the ambiguity about what are "public places", and to confirm that there is no loss of the public's existing access to national parks, State forests etc.)
(CRA Ltd - J L Armstrong)

Clause 197(2) - A law for the Commonwealth, a State or a Territory may confirm that the rights comprised in Native Title to land or waters were and are exercisable subject to the right of all members of the public to have access to and enjoyment of:

(i) waterways;
(ii) beds and banks or foreshores of waterways;
(iii) coastal waters;
(iv) beaches;
(v) areas to which they had access, including public places at any time up to the end of 31 December 1993."

(Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 208(1) - Define "native title according to Aboriginal expressions before seeking to adopt it into domestic legislation. At least replace each "and" in section 208(1) with "or". (Quandamooka people)

Clause 208 - Clause 208, page 95, omit subclause (1), substitute:

Definition of native title

"(1) The expression **'native title'** or **'native title rights and interests'** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where the rights and interests are recognised by the common law of Australia". (NSW Land Council, Land Claims and Property Services)

Clause 208(3) - For clarity, we suggest the words *'or have been at any time in the past"* are added to subclause 208(3) after the words *'If native title rights and interests as defined by subsection (1) are....'*. ((Coalition of Aboriginal Organisations Working Party)

Clause 208(3) - Omit Clause 208(3), or confine it to compulsory conversions made after 1/7/93 (ie to cover the WA Act); (Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 209 - Clause 209, page 96, insert in paragraph (b) "the group that holds or" before "the person". (NSW Land Council, Land Claims and Property Services)

Clause 210 - Clause 210, page 96, omit subparagraphs (b)(ii) and (iii). (NSW Land Council, Land Claims and Property Services)

Clause 211 - Clause 211, page 96, omit paragraph (2)(a). (NSW Land Council, Land Claims and Property Services)

Clause 211(4) - Provision to exclude acts by regulation should be omitted. (clause 211(4)). Provision to exclude past acts is sufficient. There should be no provision to disapply the future regime other than by an amendment to the act.

A mechanism for review of bad faith grants should be provided. We suggest clause 213(10) be amended to add additional para (c):
(c) any act in bad faith.
(Coalition of Aboriginal Organisations Working Party)

Clause 211 - Clause 211, page 96, add at the end of subclause (2) "but does not include the making, amendment or repeal of any legislation." (NSW Land Council, Land Claims and Property Services)

Clause 213 - Clause 213, pages 97 and 98, omit subclauses (2) and (3), substitute:
Acts before 1 January 1994
"(2) Subject to subsection (10), if:
(a) at any time before 1 January 1994 when native title existed in relation to particular land or waters, an act took place; and
(b) the act was invalid in whole or in part, but it would have been valid if the native title did not exist;
the act is, to the extent that it was invalid, a **'past act'** in relation to the land or waters."

Options etc.

"(3) Subject to subsection (10), an act that takes place on or after 1 January 1994 is a **'past act'** if:

(a) it would be a past act under subsection (2) if that subsection were not limited in its application to acts taking place before a particular day; and

(b) it takes place:

(i) In exercise of a legally enforceable right created by an act done before 1 January 1994; or

(ii) in giving effect to, or otherwise because of, an offer, commitment, arrangement or undertaking made or given in good faith before 1 July 1993, and of which there is written evidence created at or about the time the offer, commitment, arrangement or undertaking was made.". (NSW Aboriginal Land Council, Land Claims and Property Services).

Clause 213 - In subclauses (3), (4) and (9) insert at the beginning of each subclause -
Subject to subsection 23(9a)

Insert the following subclause after subclause (9)

(9a) An act ("the later act") in relation to Aboriginal land that takes place on or after 1 January 1994 is a "past act" if -

(a) the later act would be a past act under subsection (2) if that subsection were not limited in its application to acts taking place before a particular date; and

(b) the later act takes place in exercise of a right created before 1 January 1994 and which is legally enforceable pursuant to the legislation under which the land was granted.

(Coalition of Aboriginal Organisations Working Party)

Clause 213 - Clause 213, page 99, omit subclause (9). (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 213 - Clause 213, page 100, omit paragraph (10)(a). (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 213(4) - Amend Clause 213(4)(c)(ii) consistently with (b)(ii)B above. This is just to ensure - as was no doubt intended - that it covers assignments, not only by the first person, but by assignees of the first person.

Clause 213(4)(c) should be amended to read:

"(c) the earlier act created interests in a person and the later act creates interests in:

(i) the same person; or

(ii) another person who has become the holder of the interests originally held by the first person (by assignment, succession or otherwise);...".

(CRA Ltd - J L Armstrong)

Clause 213(9) - It is not clear how those State authorities which have the care, control and management of land can continue to exercise functions such as hazard reduction burning, feral animal control etc on land in which there is or may be native title (ie because these are not things that could be done on freehold land without consent) unless such acts are covered by clause 213(9) or are low impact acts. If the acts do not fall within those categories (and activities such as hazard reduction burning may not) those authorities will be prevented from exercising important responsibilities relating to public health and safety over the land. (John Fahey, Premier, NSW)

Clause 213(10) - insert -

(c) any grant made to the Conservation Commission of the NT of the NT Development Corporation.

(John Pinney, Executive Branch, Department of Chief Minister, Darwin)

Clause 213(10) - National parts in the NT should be in the same position as elsewhere in the country. Leases granted specifically to avoid the operation of the Land Rights Act

should not be validated. Add to 213(10) *'(d) any grant to the Conservation Commission of the NT or the NT Development Corporation'.* (Coalition of Aboriginal Organisations Working Party)

Clause 213(10)(b) - Any particular "excluded act" should be specified in the Act, not left to this and future governments to determine. (Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 214 - In subclause (3)(d) insert the following subparagraph after subparagraph *(iii)* -

(iv) the grant was not in relation to land or waters which on 1 January 1994 is Aboriginal land.

Clause 214 - Category A, Subclause (2)(b)(i) and Subclause (3)(d)(i), delete 'in the same capacity' in each case. (Coalition of Aboriginal Organisations Working Party)

Clause 215 - Category B, Paragraph (d)(i), delete 'in the same capacity'. (Coalition of Aboriginal organisations Working Party)

Clause 215 - In paragraph (d) insert the following subparagraph after subparagraph -

(iv) the lease is not in relation to land or waters which on 1 January 1994 is Aboriginal land.

(Coalition of Aboriginal Organisations Working Party)

Clause 218 - In subclause (1) insert the following paragraphs after paragraph (c) -

(d) it is not done in relation to land held by or for the benefit of Aboriginal peoples or Torres Strait Islanders pursuant to

(i) the Aboriginal Land Rights (Northern Territory) Act 1976, *the* Aboriginal Land (Lake Condah and

Framlingham Forest) Act 1987, *and the* Aboriginal Land Grant (Jervis Bay Territory) Act 1986 *of the Commonwealth;*

(ii) *the* Pitjantjatjara Land Rights Act 1981, *the* Aboriginal Lands Trust Act 1966 *and the* Maralinga Tjarutja Act *of South Australia; or*

(iii) *such other Acts as are prescribed; and*

(e) *it is not a grant of land to a person or body pursuant to any other Acts mentioned in or prescribed under paragraph (d) of this section.*

(Coalition of Aboriginal Organisations Working Party)

Clause 218 - Clause 218, page 102, omit paragraph (1)(c), substitute:
"(c) apart from this Act, it validly affects native title in relation to the land or waters to any extent; and
(d) it is not inconsistent with the *Racing Discrimination Act 1975.* (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 220 - Clause 220, page 103, insert in subclause (2) "consistent with the *Racing discrimination Act 1975* and is" after "if it is". (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 220 - Clause 220, page 104, insert in subclause (5) "it is consistent with the *Racing Discrimination Act 1975* and" after "**'permissible future act'** if". (NSW Aboriginal Land Council, Land Claims and Property Services

Clause 222 - Clause 222, page 104, insert "or waters" after "land" (wherever occurring). (NSW Aboriginal Land Council, Land Claims and Property Services)

Clause 222(a) - In Clause 222(a), after "directly" in line 1 add "and permanently". (Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 222(b) - In Clause 222(b) replace "interfere" with "adversely interfere". (Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 222 - Amend Clause 222 by renumbering it at Clause 222(1) and adding the following:

(2) An act consisting of the creation of a right to prospect or explore for things that may be mined shall be deemed to be an "act attracting the expedited procedure" unless the contrary is proved.

(Australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 223 - Add Clause 223(9)

"(9) Where the non-extinguishment principle applies, while rights continue to exist under the act, the person entitled to the benefit or enjoyment of such rights is entitled to exercise and enjoy those rights as if the native title had been extinguished". (australian Mining Industry Council prepared by Hugh Fraser QC)

Clause 225 - Clause 225, page 106, omit the clause, substitute;

Similar compensable interest test

"225. The **'similar compensable interest test'** is satisfied in relation to a past act or a future act if:

(a) to the extent that the native title concerned is in relation to land - compensation would, apart from this Act, be payable under any law for the act on the assumption that the native title holders instead held ordinary title to the land concerned; and

(b) to the extent that the native title concerned is in relation to waters - compensation would, apart from this

Act, be payable for the act on the assumption that a law provided for the payment of compensation on just terms for any effect that the act has on native title rights and interests.". (NSW Land Council, Land Claims and Property Services)

Clause 231 - We suggest a definition of tourist lease, the exclusion of tourist leases from the definition of clause 231, and the definition of tourist lease in similar terms to clause 230 (mining leases).

Alternatively, the definition of commercial lease can be narrowed to exclude agricultural, pastoral and residential leases, and commercial leases as a whole category can be dissected. (Coalition of Aboriginal Organisations Working Party)

Clause 227 - The wide definition of "lease" (clause 227) may incorporate some types of grants which do not involve exclusive possession and which would not therefore extinguish at common law. These may include grazing licences. We suggest the definition of lease is omitted. (Coalition of Aboriginal Organisations Working Party)

Clause 236 - Clause 236, page 110, omit ", when the body becomes a recognised State/Territory body under this Act". (NSW Land Council, Land Claims and Property Services)

Clause 236 - The scheme for alternative State systems contained in clause 41 of the Bill will not accommodate current State systems; for instance, in New South Wales, no person has a right to negotiate about the grant of a mining lease. However, any person may object and make submissions. The alternative system referred to in Clause 41 of the Bill requires a new set of procedures to be implemented solely for native title holders and claimants.

The scope for recognising State bodies is highly prescriptive. This is neither necessary nor desirable if the Bill is to work

efficiently and effectively without the development of a totally new and expensive bureaucratic structure at the Commonwealth level.
It is also not possible to ascertain from the Bill the likelihood of the recognition of State processes because Clause 236(2)(j) provides that, in addition to the Matters specifically described, the Commonwealth Minister may require the State to comply with "any other requirement that the Commonwealth Minister considers relevant". There is no guidance as to what those matters might be.

Moreover, while a determination made by the Commonwealth Minister under Clause 236(1) to recognise a State body is a disallowable instrument under clause 199, a decision of the same Minister to de-recognise that body under clause 236(4) is not. This is inconsistent and the Bill should be amended. (John Fahey, Premier, NSW)

Clause 238 - Clause 238, page 112, omit paragraph (c) of the definition of "interest". (NSW Land Council, Land Claims and Property Services)

Clause 238, page 114, insert the following definition: "**'native title body corporate'**, in relation to native title, means the body corporate holding native title as mentioned in section 53 or as nominated under subsection 53(7);" (NSW Land Council, Land Claims and Property Services)

Clause 238, page 114, definition of "public work", omit paragraph (b), substitute: "(b) a road or railway; or". (NSW Land Council, Land Claims and Property Services)

Clause 238, page 114, definition of "registered native title claimant", insert "or group" after "person". (NSW Land Council, Land Claims and Property Services)

Clause 238, page 114, definition of "registered native title holder", omit "a body corporate", substitute "a person, a group

or a body corporate". (NSW Land Council, Land Claims and Property Services).

Clause 238 - Tourist leases should be dissected in the same way as mining leases. Those portions on which there is permanent infrastructure should fall into Category A, the remainder into Category B (extinguishment to the extent of the inconsistency). (Coalition of Aboriginal Organisations Working Party)

Clause 238 - Insert the following definition before the definition of "aboriginal peoples' -
Aboriginal land *means land held by or for the benefit of Aboriginal peoples or Torres Strait Islanders pursuant to* -

(a) *the* aboriginal Land Rights (Northern Territory) Act 1976, *the* Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987, *and the* Aboriginal Land Grant (Jervis Bay Territory) Act 1986 *of the Commonwealth;*

(b) *the* Pitjantjatjara Land Rights Act 1981, *the* aboriginal Lands Trust Act 1966 *and the* Maralinga Tjarutja Act of *South Australia; and*

(c) *such other Acts as are prescribed for the purposes of this definition.*

(Coalition of Aboriginal Organisations Working Party)

Clause 238 - In the definition of 'Compulsory Acquisition Act' insert after the words 'other than', 'a law that permits acquisition other than for public purposes or'(Coalition of Aboriginal Organisations Working Party)

Forum Shopping - It appears possible that more than one application for determination of native title in respect of the same area of land could be occurring at the same time in an accredited State body and the National Native Title Tribunal. There should be some provision indicating that once an application for determination is instituted in a particular body, then it is only that body that can hear any applications for determination for that area. (Australian Petroleum Exploration Association Limited)

It was also argued that an application could be made in one State in relation to a piece of land straddling a State boundary. If unsuccessful another application could then be brought in the adjoining State in relation to the same tract of land.

Sunset Clause - It was suggested that there should be a sunset clause on native title claims. A suggested time was 5 years. It was agreed that this would provide sufficient time for native titles to be determined and thereafter the question of land management could continue with certainty. (Parker & Parker (WA) Solicitors for AMEC)

Common Law - By making the common law as it relates to native title a "law of the Commonwealth" (see Clause 11) the common law is retrospectively made a law of the States (this has been dealt with to some extent in paragraph 4.0). This is unprecedented and will produce some unexpected consequences. Apart from the effect upon land management laws, general State laws which are inconsistent with native title rights will not apply to native title land. This could preclude laws which

(a) permit entry by State officers (police, health, community officers etc) onto the land

(b) authorise public works on the land

(c) authorise public works maintenance on the land

(d) the provision of services to inhabitants of the land

(e) provide for the protection of the environment.

Natural Justice - A variety of concerns were expressed in relation to the structure and procedures of the Native Title Tribunal. It was suggested that the role of assessor could compromise fundamental rules of natural justice, and

particularly the perception of fairness and impartiality. In particular the following provisions were mentioned:

(a) Clause 75(3) provides that the Court is not bound by the rules of evidence. Accordingly hearsay, recent inventive and other forms of evidence normally not acceptable, could be allowed.

(b) Although Clause 76(3) provides that an assessor is not to exercise any judicial power, Clauses 84(3) and 86(5) provide respectively that an assessor may direct who may attend a conference and whether a witness may be cross-examined or re-examined.

These measures could conceivably work against a native title claimant or any other party involved in the process.

APPENDIX TWO

The following witnesses were of the view that further time was needed for consultation and consideration of the Bill, ie the Bill in its present form was deficient:

Mr ELLIS (BHP - Qld)
Mr GRAHAM (Aboriginal spokesman - Qld)
Mr WHARTON (Koomie people: Rockhampton, Townsville etc - Qld)
Mr COE (A.L.S. - Qld)
Mr PATTEN (Burgalong Tribe - North Coast NSW)
Ms COE (Aboriginal Child Welfare - Qld)
Mr LOWAH (Torres Strait Islander)
Mr WEATHERALL (Foundation for Aboriginal and Islander Research Action - Qld)
Mr ST BAKER (Council for Civil Interests - Qld)
Mr BOE (Solicitor for Quandamooka Land Council - Qld)
Mr ROBINSON (Aboriginal spokesman - Qld)
Mr BELL (Aboriginal artist - Qld)
Ms WHARTON (Aboriginal Elder - Qld)
Mr LITTLEWOOD (Corralus)
Mr ARMSTRONG (CRA - Qld)
Mr PINNOCK (Qld Mining Council)
MR MUNRO (Mt Isa Mines)
Mr LYNCH (Goldfields Aboriginal Land Council - WA)
Mr DUNN (Aboriginal Elder - Goldfields WA)
Mr FRANKS (Aboriginal spokesman - Goldfields WA)
Mr WINDER (C.S.A.A.C. - Family Groups)
Mr SMITH (Roebourne - Padjira Tribe - WA)
WESTERN AUSTRALIAN FARMERS FEDERATION
FISHING INDUSTRY COUNCIL OF WA
CHAMBER OF MINES OF WA
Mr BROPHO (Aboriginal Elder - WA)
Mr ISAACS (Aboriginal Provisional Govt - WA)
Mr DE CRESPIGNY (Poseiden Mining - WA)
Mr KING (Kupungarri Community - WA)
Mr KILLER (Looma Community - Kimberley)
Mr COX (Nookenbah Community - WA)
Ms GEORGE (NANGA Community - WA)

WA Chamber of Commerce
AMEC (WA)
Mr DARTNALL (Small Business WA)
Mr MANSELL (Tasmanian Aboriginal Centre)
Mr CLARK (Tasmanian Aboriginal Centre)
Mr BARNETT (AMEC - Canberra)
Mr EWING (AMEC - Canberra)
Dr HOWARD (Constitutional lawyer and adviser to WA Government)
Mr HULME QC (Constitutional lawyer and adviser to WA Government)