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

Reference: Native title representatives bodies

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JOINT STATUTORY COMMITTEE ON

NATIVE TITLE AND THE ABORIGINAL AND TORRES STRAIT ISLANDER LAND ACCOUNT

Tuesday, 19 July 2005

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

Members in attendance: Senators Johnston and Siewert and Mr McMullan, Mr Melham and Mr Slipper

Terms of reference for the inquiry:

To inquire into and report on the capacity of Native Title Representative Bodies to discharge their responsibilities under the Act with particular reference to:

1) the structure and role of the Native Title Representative Bodies;
2) resources available to Native Title Representative Bodies, including funding and staffing; and
3) the inter-relationships with other organisations, including the strategic planning and setting priorities, claimant applications pursued outside the Native Title Representative Body structure and non-claimant applications.

WITNESSES

Committee met at 9.40 am

CHAIR (Senator Johnston)—I declare open this public hearing of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account. In its terms of reference the committee focuses on the capacity of native title rep bodies to discharge their responsibilities under the act, with particular reference to: (1) the structure and role of the native title representative bodies; (2) resources available to native title representative bodies, including funding and staffing; and (3) the interrelationships with other organisations, including strategic planning, setting priorities, claimant applications pursued outside the native title representative body structure and nonclaimant applications.

The importance of the role of representative bodies in the overall native title system became very evident during the committee's last inquiry into the effectiveness of the National Native Title Tribunal. This led the committee to recommend a follow-up inquiry into the representative bodies. The recent inquiry into the administration of Indigenous affairs recommended that this committee carefully examine the issue of conflict of interest in the funding of native title rep bodies as part of its current inquiry into native title representative bodies.

Almost all the submissions that we have received concern themselves with issues surrounding funding, its delivery, administration and adequacy. These will be carefully considered by the committee in its report. This is the fourth hearing in the committee's inquiry and will be followed by other hearings around the country over the next couple of months.

CLARKE, Mr John David, Member, Aboriginal Affairs Committee, Association of Mining and Exploration Companies

LAYTON, Mr Alan John, Research and Policy Officer, Association of Mining and Exploration Companies

CHAIR—Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to. Can you confirm that with me?

Mr Layton—Yes.

Mr Clarke—That is correct.

CHAIR—I now invite you to make an opening statement.

Mr Layton—AMEC appreciates the opportunity to make submissions and present our perspective on issues concerning the operation of native title representative bodies, or NTRBs, and the Native Title Act. AMEC was formed in 1981 to represent mineral exploration and mining companies at both state and federal level. AMEC's membership comprises over 200 mineral exploration and mining companies and industry service and supply companies, as well as individual members. AMEC has made two submissions to the inquiry. The first submission focused on the funding of NTRBs. The second submission makes recommendations to amend certain provisions of the act, which in AMEC's view would improve the act's operation and resolve some issues of concern to AMEC.

In our first submission we make the point that it is our understanding that NTRBs are not required to allocate a percentage of their funding to conduct future act negotiations for their claimant constituents. The result, it appears to us, is that NTRBs use the majority of their allocations to progress native title claims and expect proponents to provide the necessary funds for future act processes—that is, mineral exploration and mining projects. For the small to medium sized companies that make up a significant proportion of AMEC membership, funding NTRBs is often not financially possible when they are trying to get new projects up and running. Where a company or individual miner is unable or unwilling to fund the NTRB, they are likely to be put at the bottom of the pile and receive little or no assistance.

The WA government has funded a number of future act officer positions with some NTRBs in an attempt to reduce the backlog of mining and exploration titles in the system. There is, however, no evidence that the NTRBs are using these resources to assist small to medium sized companies. It appears that these officers are concentrating their efforts on major projects where the company is providing additional funding to the NTRB.

In view of this situation, AMEC recommends that NTRB funding should be split so that there is a specific amount allocated to future act processes which can only be used for that purpose. The allocation should be made on the basis of the particular workload of the NTRB, and there should be performance reporting to show that the NTRB has used its future act funding effectively to reach negotiated outcomes.

In the second part of its first submission to the inquiry, AMEC addressed the issue of funding for native title prescribed bodies corporate, or NTBCs. A major problem has emerged in respect of the resourcing of NTBCs that have been formed following determinations of native title. Our understanding is that presently NTRBs do not receive any funding to assist NTBCs to be established or to undertake their responsibilities to the native title holders on whose behalf they hold the native title. Typically, the body corporate has been unable to establish basic infrastructure such as an office and resources of its own to administer the native title land under its control. This problem will only escalate as more claims are determined.

As with the future act problems outlined above, exploration and mining companies are pressured to fund the NTBCs simply so that they can conduct negotiations with native title holders. Most groups of Aboriginal people who have had their native title recognised by way of a determination of native title want to take control of their land and deal directly with those who are seeking access to and use of their land. In this regard, AMEC recommends that Commonwealth funding be provided specifically for NTBCs, either directly to the NTBCs or through the NTRBs, to enable them to put into place the necessary organisational structures and infrastructure to manage their land and future act matters. The adequate funding of NTBCs is vital to the future of the entire native title process. It is a Commonwealth responsibility under Commonwealth legislation. It should not be left to the mining industry or any other development group to fund the future operation of bodies corporate.

In its second submission to the inquiry, AMEC made a number of recommendations which focused on the problems our members are experiencing which could be alleviated by amendments to the Native Title Act. We highlighted the problems member companies are experiencing with the service being provided by NTRBs with respect to the standard regional heritage agreements, or SRHAs, negotiated between industry and the respective NTRBs. The standard heritage agreements contain a range of heritage protection measures. In return, native title claimant groups undertake to agree to the grant of exploration tenements and to provide a clear picture of the ethnographic landscape to tenement holders.

Despite the negotiation of these SRHAs, members continue to experience difficulties with the service provided by the NTRBs with respect to organising heritage surveys and in meeting the demand to fund meetings with native title working groups. The reason cited by the NTRBs for these delays is that they are not adequately funded. Again, in an effort to improve the service level that NTRBs provide both to their constituents and to the exploration and mining industry, AMEC recommends that NTRBs be provided with the requisite funding to efficiently and effectively discharge their responsibilities. An objective process is required with funding tied to performance and accountability mechanisms set in place to ensure timely outcomes.

In respect of a future act—that is, the grant of a mining title—a notification period of four months is currently specified for native title parties to register their claim. In the case of a ‘low impact’ act—for example, the grant of an exploration licence—a notification period of four months is currently specified for native title parties to lodge an objection to the state’s contention that the proposed act should attract the expedited procedure. Given that the Native Title Act has now been in force for some 12 years, AMEC recommends that sections 29(4) and 32(3) of the act be amended to allow for a period of two months from the notification date for a native title party to register a claim or lodge an objection to the application of the expedited procedure.

Following the 1998 amendments to the act, applications for miscellaneous licences or general purpose leases in respect of infrastructure such as pipelines, haul roads or ore stockpiles are considered to be infrastructure facilities and attract the right to consult. Under section 24MD(6B)(d) of the act, a native title party has a period of two months to lodge an objection to the state's proposal for the grant of these types of tenements. Once an objection has been lodged, the applicant and the native title party are required to consult, but the act is silent as to the time frame for the consultation process. In the view of AMEC members, this silence has been used by native title parties as an effective negotiation strategy, often requiring tenement holders to compensate claimants in monetary terms for agreeing to the grant of an infrastructure title. In this regard, AMEC recommends that section 24(6B)(f) of the act be amended to allow the applicant—that is, the tenement holder—the right to have the matter referred to the independent person for determination upon expiry of a period of four months from the date of notification by the state of its intention to grant title.

A further matter of concern to our membership is that native title parties, through the NTRBs or their legal representatives, have taken to lodging formal objections in the Warden's Court, under the WA Mining Act 1978, in relation to certain procedural entitlements. These procedural rights are claimed to arise as a consequence of the native title claimants being deemed by a warden to hold equivalent ordinary title—that is, freehold status to the land—as a consequence of the tenement application being for an infrastructure facility as defined under section 253 of the act. In a recent decision handed in the Perth Warden's Court, the warden held the view that land which is the subject of a miscellaneous licence application affected by a claim for native title is private land for the purposes of the Native Title Act. In particular, the warden held that the applicant was required to obtain a permit to enter before marking out the subject land.

AMEC recommends that section 24MD(6A) of the Native Title Act be amended to define the scope of procedural rights and the entitlements that a native title party is able to exercise as a holder of equivalent ordinary title, specifically excluding the right to deny access to land and, in particular, to deny permission to mark out a mining tenement.

Section 35 of the act provides that where mediation processes prove to be unsuccessful the matter may be referred for determination. Section 36(2) of the act provides, however, that if any negotiation party satisfies the National Native Title Tribunal that any other negotiation party, other than a native title party, did not negotiate in good faith, then the tribunal must not make a section 35 determination. There have been instances where the applicant for a mining lease has been subjected to unnecessary and costly delays due to a native title party advising at a section 35 preliminary conference that the issue of good faith was not an issue and then subsequently alleging without reasonable foundation a lack of good faith on the part of the applicant. As it stands, there is no reciprocal requirement in the act for a native title party to have negotiated in good faith. In the interests of fairness and equity, AMEC recommends that all parties be required to negotiate in good faith and that a native title party must raise the issue of good faith within a specified time frame.

There is currently no basis in the act for the state to determine what level of proof claimant groups should provide in their 'connection to country' reports before the state will agree to negotiate a native title settlement. In Western Australia, the state has prepared draft guidelines that will prevent respondent parties to native title claims, including mining interests, from exercising their rights under the act. If the state chooses to negotiate a settlement, section 6 of its

guidelines prevent respondent parties from accessing these vital and fundamental connection reports. This prevents the respondent from determining whether the reports meet the appropriate level of connection and whether they need to cross examine and make submissions about these reports. As a result of this denial of natural justice, industry is prevented from taking an informed position with respect to deciding whether or not to consent to a negotiated outcome.

The state government's draft guidelines are not consistent with its responsibility to fully involve all parties and may undermine its obligation to secure the agreement of all parties to any consent determination. Under the act, and as conceded in the draft guidelines, this consent of respondents is a clear legal prerequisite for a court determination. AMEC, along with other industry bodies, has made extensive submissions to the state expressing its concerns on this issue—to no avail. AMEC recommends that the parliamentary joint committee make recommendations supportive of respondent parties obtaining access to connection reports in order that they may make informed decisions with respect to consent determinations.

CHAIR—Mr Clarke, do you want to add anything further?

Mr Clarke—Not at this stage.

CHAIR—We will now go to questions.

Mr McMULLAN—Thank you very much for your submission. I got your second submission somewhat late, and I have not had a chance to look at it. Technically, it sounds as though it might be a bit outside our terms of reference. Nevertheless, it is interesting—and it clearly overlaps, because it goes to the capacity of native title rep bodies and mining companies to work together to get outcomes. I do not want to raise that technicality; I will just flag it. The advantage of having in front of us you, the people on the ground, instead of people who know these as matters of law and technicality, is that you can give us some examples of the specific on-the-ground issues that people are running into. Can you give us some examples of the sorts of things which illustrate why you have raised the points you have raised in your second submission? If the answer to my question is in your written submission, I apologise.

Mr Layton—This information is laid out in that second submission.

Mr McMULLAN—I apologise; I only got it this morning. Can you say something briefly about it? Perhaps I will read it later; I do not want to waste the time of the committee. I will come back to it in the written document. I wanted to make sure you had the opportunity to say something about that. You talk about the problem that some of the funding is not set aside for future acts, for example. I can understand your frustration with that but in all financial matters—for companies, governments and community organisations—when you start specifying that a certain amount of the money is for a particular purpose you create inefficiencies. You get rigidity. You wind up with a bit of money in a pot set aside for a purpose for which you do not need it and it is not available for a purpose for which you do. That is my concern. Can you give me a response to that? I do understand that pressure from their members on the rep bodies is to deal with the native title applications, not the future acts, and the problem for your members is that they want the future acts dealt with. That is where they get affected. That is a perfectly understandable problem. How would you cope with the point that it builds rigidities into the funding system and makes it harder for an efficient distribution of very limited resources?

Mr Clarke—I take the point but I think it is important to recognise that the Native Title Act has two fundamental processes: one is about determinations of native title and the recognition of native title rights and interests, and the other quite major component of the act is the set of often quite complex processes for dealing with future acts. It seems to us that, at present, because the use of money provided by the Commonwealth is at the discretion of the representative bodies—and I do not blame them for it at all—they choose to use all of those resources for progressing native title claims and for that component. The consequence of that is simply that those engaged in future act processes are placed under enormous pressure to fund that aspect of the legislation. We try to point out in the submission that there are quite different approaches being taken. The very large companies are accepting that as a cost of doing business and in the context of what are now multibillion dollar projects they do not see a problem in providing significant amounts of money to facilitate the future act approvals for their projects. But for the small- to medium-sized companies that AMEC represents it is a major issue. Partly because of what the large companies are doing, the small companies are now being asked to pay very large sums indeed to facilitate negotiations which are a legislative requirement.

Mr McMULLAN—That is an interesting point. I want to come back to the question of principle. You say very large sums of money. How much?

Mr Clarke—For instance, I have a client who has engaged a small start-up goldmining company in the Kimberley. It has had to pay nearly $380,000 in actual negotiation costs simply to get to the table to negotiate an agreement to enable it to kick off a mine in the Tanami. That sum of money is equivalent to what they would spend in a whole year on their exploration program. It is a very significant cost to doing business.

Mr McMULLAN—When you are providing a lot of money for a purpose that is a public purpose it is like an arbitrary tax, isn't it?

Mr Clarke—The company really does have a lot of trouble accepting why it should have to pay that sort of money to simply comply with procedures that have been set down in law.

Mr McMULLAN—My problem with it also goes to the larger companies who, as you say, can afford it, and it is a very minor part of their cost. It has never seemed to me a very good principle that we have the same people funding both sides of cases. Sometimes the Commonwealth government or the state government finds itself in that position. That is inevitable because we provide legal aid and pay for the prosecution. That is quite different. Even that is not perfect, but there is no choice about that. That is what happens in representative governments in democracies. But for private enterprise people to be funding both sides of the negotiations does not seem to me a terrific situation for either side. What has been your experience with regard to that?

Mr Clarke—There is considerable resentment when that money is used to engage a very high profile lawyer to turn up to meetings and give you a hard time. It is very difficult to go home from something like that and to accept that that is happening.

CHAIR—That is only because the time frame allows that the delay be painful to the proponent. If the delay—the two-month requirement you have advocated—were not there, if there were strict time guidelines, the pain could only be so much. At the moment it can drag on

for three or four months or maybe longer. The examples you have given us show that, notwithstanding the grant of access, the negotiation process is where the pain lies.

Mr Layton—I would like to come back to Mr McMullan's point about the relevance of some of our material. Representative bodies require money to carry out their future act responsibilities. Some of these representative bodies have quite a large staff—I understand that Yamatji, for example, has 80 staff—and they have to be paid for. If you set up a system that is underfunded, if the money does not come out of the public purse, the rep bodies become very skilled at working out how to use the system. To put it crudely, an objection leads to a delay and, given that a proponent wants to get a project off the ground, that delay will often yield a payment. You can be critical of the NTRBs—and we are critical of them—but that is a fact of life of this system.

An underfunded system produces all sorts of unintended processes, outcomes, resentments and ill feeling. That is why in our submission we have tried to paint a picture of an underfunded system: this is what is happening; this is why we as an industry say that we are quite fed up with it. People say to us, 'You're against native title,' or 'You're against Aboriginal people obtaining their rights.' We are not. Basically, what we are saying in our submission is that we want a properly funded system that works how it should work. We do not want a system that works the way it does, with all these 'mechanisms'—to use a polite word—that certain people have developed to delay processes such that, as you say, Chair, someone at the end of the day says, 'We've got to get this project off the ground, so here are some dollars.'

I come back to the point of the expenditure by our people. I know that in the submission you got from the Minerals Council there was a reference to someone having to pay $2 million. That sounds like a lot of money. I do not know who paid it. It was probably a very large company. As has been pointed out, that is probably a fraction of the money they have available. A note sent through to me this morning by one of my members says that native title expenses for explorers now constitute between five and 30 per cent of their total annual budgets. On top of that, some native title parties are now demanding payments of five per cent of the annual minimum departmental expenditure on tenements. And, as my colleague John has pointed out, they want money to pay for their legal advice as well as the expense of carrying out heritage surveys.

CHAIR—These are capital payments, I take it?

Mr Layton—Yes.

CHAIR—So there is no deductibility in the hands of the proponent?

Mr Layton—No.

CHAIR—It is a capital payment to access land?

Mr Layton—That is right.

Mr SLIPPER—I might have missed in your opening statement exactly who you represent. I know you represent small to medium producers. I presume that is in Western Australia, or is it nationally?

Mr Layton—By and large it is Western Australia, but there are some nationally.

Mr SLIPPER—What proportion of the mining industry do you represent?

Mr Layton—It depends on how you measure it. We represent about 100 companies. I am not sure what proportion that is; it depends who you include. If you include everyone ranging from Rio Tinto to a small prospector, it would be a fairly small proportion. I think we represent enough people to put a reasonable point of view forward on this issue.

Mr SLIPPER—I am someone who is quite passionate about redressing Indigenous disadvantage in a practical way. But I must say that in 1993 I was of the view that it would have been better to look at the possibilities of extinguishing native title and paying whatever compensation was payable. I believe that whatever compensation was payable ultimately would have been cheap, particularly if it had been invested and used to assist Indigenous disadvantage. From what you tell me about the administration that your companies deal with every day of the week, it seems as though the administration of native title claims is a dog's breakfast. When you mention that some of the companies that you represent, and other companies, say that up to 30 per cent of costs relate to this native title process, that must impact adversely on your productivity on a way that does not in any way, shape or form redress Indigenous disadvantage and does not help Indigenous people.

Having said that, we do have a system that is in place now. To me it is a source of very great worry that we seem to have presumably huge levels of bureaucracy on both sides trying to sort through these particular problems. I notice in your submission that you suggested additional funding to the representative bodies. Obviously, the government would not be interested in looking at any sort of open chequebook policy. What degree of additional funding are you looking at? What is the current funding level? In an ideal situation, consistent with economic responsibility, what would you like to see funding increased to? Presumably, you are referring to government funding and not funding from your members.

Mr Clarke—That is correct. What we are suggesting is that, whatever level of funding the Commonwealth decides is appropriate, it should be split between those two fundamental functions and that, in turn, the representative bodies should receive future act funding in proportion to the future act workload that they have. That does vary quite significantly and will always change over time, depending on where particular action is, what sort of commodities are on the go and so on. The sort of model that we had in mind was one where a proportion of that funding would be set aside to be used specifically for future act processes.

Mr SLIPPER—A proportion of existing funding?

Mr Clarke—Whether it is existing funding or it is expanded funding, we are saying that there should be some expansion in funding because what we are seeing appears to be an underfunded process. I realise that governments do not have open chequebooks and someone is always going to have to make a decision as to what is the appropriate level of funding.

Mr SLIPPER—Maybe I should know this, but what is the current level of funding? What sort of level of funding does your association want to see in place of the current level of funding?

Mr Clarke—We have no idea what the current level of funding is. It is very difficult to ascertain.

CHAIR—It varies from rep body to rep body.

Mr Clarke—All we are saying is that the evidence we see every day is that the system is currently underfunded and that that difference is largely being made up by money from our industry along with other—

CHAIR—Or state governments.

Mr Clarke—State governments are making a contribution in terms of funding particular positions and trying to facilitate things.

Mr SLIPPER—Your members would get, for instance, a tax deduction for the costs that you pay as part of the cost of producing the assessable income from the project, ultimately.

CHAIR—These are capital payments. Access to land is access to capital. Land is a capital asset. The payments in assisting capital are not deductible to mining companies.

Mr SLIPPER—Maybe they should be.

Senator SIEWERT—To follow that up, do you think that mining companies should be contributing at all to negotiations over future acts?

Mr Clarke—Bear in mind that companies are required to fund their part of the process. We are talking about companies funding, if you like, the representative bodies to do their role. Companies already accept that they will have to fund their involvement. They will have to fund their own legal advice, their own negotiators or whatever it might be, and the time and effort that they put into it.

Mr Layton—It comes back to what Mr McMullan was saying, that often we are funding both sides.

Senator SIEWERT—That was going to be my next question.

Mr Layton—Our members are put into the position of someone saying, 'Yes, we'll have a meeting, but that will cost you $20,000,' or whatever figure you would like to choose. The other side says: 'We've got no money, you want to get something off the ground and we want to be represented.' This is the strange world that has been created.

Senator SIEWERT—Appreciating the issue that you are putting forward about conflict of interest, if there were some sort of fund that you put into, so the company were not directly paying the body, would that overcome some of those concerns? I am trying to think of a way of overcoming the conflict of interest issue.

Mr Clarke—Again, the argument is that companies pay taxes and they expect some service in return. I find it hard to accept, for instance, that a levy be whacked across the entire mining industry simply to fund native title processes.

CHAIR—What is the $20,000 for? You mentioned $20,000. Let us analyse practically what you are talking about. How does the system work? What do you get for your 20 grand?

Mr Clarke—Typically you have the representative bodies. They in turn set up working parties with each of the claim groups they represent. They might have membership ranging between 10 and 20 claim group members. That is the group that meets to negotiate, make decisions and so on. From the money that the bodies receive, they argue that they can only afford to conduct two working group meetings a year.

CHAIR—Two meetings for each claimant group under the umbrella of that particular rep body?

Mr Clarke—That is generally the figure now. It was four a year but they claim that they have had cutbacks and now it is only two a year. If you are not prepared to fund a special meeting, which includes the entire costs of bringing the working group together—they get paid between $300 and $500 a day each to attend—

CHAIR—That is 10 times $300 or $500?

Mr Clarke—Sometimes more; sometimes 20 times that.

CHAIR—Are travel costs over and about that?

Mr Clarke—Yes. It also includes the costs of the representative body personnel. So their costs at whatever day rate they charge.

CHAIR—Are you talking professionals, lawyers, what have you?

Mr Clarke—Lawyers, professionals, technical officers. It also includes all the accommodation costs, down to the lunch and the morning and afternoon tea. Typically a working group meeting without too much complexity very easily gets to $15,000 or $20,000. I have recently been involved in a an exercise where it was costing $35,000 for each meeting.

Mr Layton—One of our members was asked for $100,000 for one meeting.

Mr SLIPPER—It must have been a good lunch.

Mr Clarke—That is simply the dilemma. If you wait for a regular working group meeting, you then end up getting between half an hour and an hour on an agenda that is jam-packed over perhaps two days. That is simply not enough time to sensibly negotiate a mining agreement. At best you get to introduce yourself and say what you are going to be doing. If you are really serious about trying to progress the matter, you end up having to fund those meeting costs.

CHAIR—In practical terms, you have got a serious legal agreement to be negotiated with Indigenous people, who are represented in a setting where you have got time constraints, people have come some distance, the meter is ticking in terms of the management of that, the rep body has really distanced itself—it is now at arm's length from those expenses—and the burden is falling upon the proponent in order to progress his project.

Mr Clarke—Yes. Rightly then, of course, the issue is raised where you think, 'Are we being asked to fund another meeting for the sake of having a meeting because it has become a reasonably profitable exercise for the other side involved, or is it really necessary to conclude this matter?'

Mr MELHAM—I think it is fair to say that a lot of the submissions the committee has received are of the view that native title representative bodies are under-resourced. The Western Australian government is submitting next, and they have pointed out that native title representative bodies have not had a funding increase since 1998 despite the fact that the 1998 amendments increased the statutory responsibilities of the native title representative bodies. That is indisputable, is it not?

Mr Clarke—There is no argument about that.

Mr MELHAM—That brings me to the next point in your supplementary submission and, whilst it is outside the terms of reference, I think we need to address it. You are seeking a reduction in the notification period of the expedited processes. How is that consistent, if we say that the bodies are currently under-resourced and we then want to compress the period of notification in terms of the expedited process? Would that not put more pressure on these bodies?

Mr Clarke—No. The reason we have suggested that—and certainly it is the case in this state—is that, by and large, all of the state is now effectively subject to claim, and those claims are fairly stable. The period of overlapping claims and so on is largely behind us. We believe that it is now possible in many parts of the state to know who you are dealing with from day one because there will not be any further claims, whereas when the act was first introduced there had to be a reasonable period of time for someone who became aware of a future act notice to lodge a claim in response to that notice to get into the system. Now the claims are already there, and that is why we are suggesting that that period could be shortened, particularly here where we now have in place this process using standard heritage agreements to allow the expedited procedure to operate. We are finding that people, if you like, on day one, lodge their standard heritage agreement and then they had to sit doing nothing for four months simply to see out the notice period, when they know that there is not going to be another claim and that the parties have effectively reached agreement because the standard heritage agreement has been signed.

Mr Layton—Time frames are unnecessarily long. With the way the system works, our members can get deliberately delayed. Someone could lodge an objection and they will pull the objection on the last day as a negotiating tactic. We are very concerned about these time frames. If we can compress some of the time frames, then the opportunity to cause deliberate delay is reduced.

Mr MELHAM—You are making out a case as to why the time frame should be compressed. There was a very extensive debate about this at the time. These time frames have been set. Can you tell me where there are instances of abuse in terms of that particular time frame?

Mr Layton—We endeavoured to do that in our submission.

Mr MELHAM—Not really. You have talked about the only new applications being considered being the ones that are the result of amalgamations where overlapping claimants have agreed to the filing of a joint claim with the National Native Title Tribunal. I am talking about the expedited process, not other matters. I cannot find any examples in terms of that particular request that you are making where there have been abuses. That is why I am drawing it to your attention to flesh it out. I am reading page 7 of your supplementary submission. It is a two paragraph submission that just says, 'We think this is something that you compare back.' The case is not being made out; though, in fairness, I think you refer to two-months notification under another section to do with the state.

Mr Clarke—Let me give you a couple of examples.

Mr MELHAM—Bear in mind that this is outside our terms of reference, but I am interested as to how it is consistent.

Mr Clarke—It is about efficiency of process. There are a number of native title groups in this state that are not represented by a recognised representative body. They are routinely objecting to the use of standard heritage agreements, notwithstanding the fact that on every occasion when one of these objections has finally found its way to the Native Title Tribunal the tribunal has found in favour of the grantee party—it has accepted that standard heritage agreements afford an adequate level of heritage protection. Those groups are using that four-month delay to try to extract financial benefits from the exploration proponent. It is as simple as that.

Mr MELHAM—Mr Clarke, we do not have a right of veto here—this is not the land rights act. One of the trade-offs when the original legislation came in was periods that allowed consultation that took into account a range of things, and part of that is the resourcing of the actual groups. I cannot see how they can extract money when, at the end of the day, there is not much merit in what they are doing and there is a defined period. We are not talking here about an undefined period, we are not talking about a number of years; we are talking about a number of months.

Mr Clarke—That is accepted.

Mr MELHAM—In fairness, I think you are raising a straw man.

Mr Clarke—We have simply raised it as an issue that is frustrating developers in a number of parts of the state, where they have to sit out the four months and then they have to invoke the tribunal process. So typically you are looking at delays stretching out in the order of nine to 12 months by the time the matter is resolved.

Mr MELHAM—It seems to me that they will be frustrated whether it is a two-month period or a four-month period—the same argument applies if they are looking to extract.

Mr Layton—We would say that two months would be better than four.

Mr MELHAM—Okay. I think I have made the point.

Mr McMULLAN—I want to raise one thing. Let me go back to a thing that is quite separate and then I want to follow up on something Senator Siewert asked before. The next witness, the Western Australian government Office of Native Title, refers in its submission to a process of regional case management conferences. Have you participated in those? Have you found those useful? Is that a worthwhile initiative?

Mr Layton—They are useful in endeavouring to inform us of what the Federal Court hearing timetable is. I think that has been useful. We know what is going to follow on from Wongatha, for example.

Mr McMULLAN—Are you saying that it is not much—

Mr Layton—Apart from that it is not of great value to us, no.

Mr McMULLAN—I did not want to embarrass you; I just wanted to know the answer to the question.

Mr Layton—It does not embarrass us—we do not mind criticising the ONT.

Mr McMULLAN—I have one other thing I want to follow up on—and this is my last question. One of the problems with extra funding tied to future acts, which you correctly referred to in your own comments, is that from year to year where the future additional activity will be will vary; it is not going to be proportionate across Australia in any year or from year to year. I wonder if the idea that Senator Siewert referred to of some sort of pooling idea—a pool of funds, some of which might be triggered to go to the relevant representative body when a future act application is inaugurated—might be something we need to look at. Clearly you, the state government and others correctly say that for a Commonwealth act raising Commonwealth legislative requirements the preponderant funding responsibility would rest with the Commonwealth. But I say to you, without being a representative of the government in any way, that they are going to say, 'Some part of the money in that pool would need to come from your members in some sort of fee.' I certainly would not agree with it being all from there but, provided we were talking about genuinely additional funds from the Commonwealth going into some pool and predictable, known amounts from your members in terms of some fee that went into that pool, what is your reaction to that general line? We have a lot more submissions to hear, so it is far from a conclusion, but I think it is an option that must be considered.

Mr Layton—I have been doing this sort of work a long time, and I am smart enough not to commit my members' money in public hearings without any reference to them. All I can say to you is that any idea along those lines we would be quite happy to genuinely examine and participate in and see if it could be workable.

Mr Clarke—Can I just point out that the state government has already increased its statutory charges, and part of that increase was attributed to the costs that the state is having to bear in

engaging in the native title future act processes. So the basic rental charges on mining tenements have been increased to, in part, fund that extra commitment.

Mr McMULLAN—I understand that. That is a very fair point. I do understand that to be the case. Thank you.

CHAIR—I have some questions. Firstly, Mr Clarke, you have a long and illustrious career in the issue of native title, which has been a complex issue for all governments. You have been a consultant for the Western Australian government for some many years, as I understand it. I note that 97 ILUAs have been done in Queensland and none have been done in Western Australia. Is that relevant to representative bodies? Is it relevant to state governments? What is the issue there? What is the reason for that?

Mr Clarke—I should point out that I have been away from involvement with the state government for seven years.

CHAIR—It seems like yesterday.

Mr Clarke—Yes. Some of the faces here are familiar. It is actually seven years for which I have been working as an independent consultant. I have looked at this issue, because it is an anomaly. The correct position is that there are in fact three ILUAs now in this jurisdiction. There is a very simple explanation for the difference. Western Australia, as a result of the ill-fated attempt to have state legislation, essentially ended up operating under the native title regime from a very early stage once the High Court ruled against the state legislation. By and large it has, of all jurisdictions, the longest history now of operating under the future act regime of the Native Title Act. Queensland went through a very difficult period in which it introduced a state regime which got mauled in the Senate but made it through in a modified form and then was subject to legal challenge. At that point, Queensland had no operating regime. It could not use the Native Title Act and it could not use its state one. The only way in which you could do anything in Queensland was by way of an ILUA, because an ILUA can override all the other processes. That really is the reason that there are a large number of ILUAs in Queensland and there are very few in this state.

Mr MELHAM—Parts of the regime were subsequently repealed.

Mr Clarke—Yes, and they ended up back under the native title regime, but by then you had a fairly long history of ILUAs. A number of those are ongoing, so people can simply sign on. In other jurisdictions there are similar anomalies. The most common one relates to infrastructure, where many of the states and territories do not have compulsory acquisition powers that enable them to acquire land for third-party infrastructure, such as pipelines and so on, whereas in Western Australia very early on the legislation was amended to ensure that there were third-party acquisition powers. So, again, ILUAs in Victoria are used for that purpose. They are not necessary in Western Australia.

CHAIR—So in a nutshell, by necessity Queensland went down a negotiation path and poured resources into negotiation and achieved some outcomes because they had no alternative.

Mr Clarke—I would not give all that much credit to the Queensland government necessarily. The other parties—the mining industry and the native title parties—largely did that because they had no other way of achieving any outcomes.

CHAIR—I note that you say, for instance, that in Western Australia there have not been any claims lodged for the last two years. What do we read from that? Is it appropriate, do you think, for there to be now, after 12 years, a sunset situation with respect to native title claims?

Mr Clarke—This is a personal view, but I do not believe that sunset type provisions are appropriate. I am aware of a number of situations which there are ongoing discussions about doing things like rejigging boundaries and perhaps amalgamating claims. The consequence to actually implement it—

CHAIR—Is a new claim.

Mr Clarke—Is a new claim; so I do not see a need for a sunset provision.

CHAIR—Subject to that sort of eventuality, at the end of the day do we just—

Mr Clarke—We are not seeing lots of rogue claims. It is a very stable situation. There was a time when there were claims coming from everywhere, and the concept of a sunset provision was appealing. But I personally do not see any need for it now.

Mr MELHAM—You have got a reasonable threshold at the moment, haven't you?

Mr Clarke—It is largely a fairly stable situation, but there will be these rationalisations that occur from time to time.

CHAIR—Mr Layton, what was the name of the Warden's Court decision that upheld native title rights analogous to private rights? Are you familiar with the name of the case?

Mr Clarke—There are several cases. One involves Mineralogy and the other one is a case involving BHP.

CHAIR—That is a very interesting proposition that I would have thought would cause, in Western Australia, a degree of concern. Where are these cases going now? Are they going to be appealed? What is the story? Just update us. I have not kept up with this.

Mr Layton—I think there was some expectation by the industry that hopefully BHP would appeal that decision. I think they decided not to. I think they are relying on the minister not to accept the warden's decision in that matter. That is what I have been told; I do not know if that is true.

CHAIR—So the state minister is using his discretion inherent in the mining act to override the determination of the warden.

Mr Layton—That is right. On that issue generally, we have made some recommendations in our submissions here about how that matter might be addressed using the federal act. Also, John

has drafted some material for a ministerial committee here to have a look at the issue in terms of addressing it by making suitable amendments to the WA mining act to overcome this problem.

CHAIR—But they are going to be subject to High Court challenge, aren't they?

Mr Layton—They may be.

CHAIR—I would have thought that it would have been logical to take those cases from the Warden's Court further.

Mr Layton—I do not have any disagreement with what you are saying; as an industry body that is what we are endeavouring to do. We are not parties to those cases.

CHAIR—Has anybody approached the state with respect to that?

Mr Layton—Yes, we have put propositions to the state.

Mr Clarke—We believe that it is possible to rectify the problem by making some changes at a state level. The more important aspect in our submission is what we believe is a sort of anomaly in the provisions for dealing with infrastructure titles, in that you have the process of going through the right to consult; and if the objection cannot be resolved, the act says that the native title party can refer it to an independent person for determination. That results in a situation where you can get to an impasse. You fail to reach agreement but the native title party simply chooses not to refer the matter to the independent person. The act is unclear on what happens at that point.

What has happened in this jurisdiction is that when that point has been reached, the state has advised the native title party that it has a certain period of time in which to make an application to the independent person or the title will be granted. That has acted as a trigger for several independent person cases. We just believe that that is fundamentally wrong, and it should be the same as the right to negotiate process in that any of the parties should be entitled to refer the matter for determination after the four-month period—or whatever it is that is decided upon—so that the matter does come to some finality and it is not left in that limbo land. There is always the risk that someone would challenge the ability of the state. There is nothing that says the state can issue a notice like that and go ahead and grant and that that grant would be valid. It was an anomaly. All I can say is that I was involved fairly heavily in the discussions that led to those infrastructure provisions and I do not think it was the intention of anyone at the time that it work that way.

Mr MELHAM—The chair raised with you the question of the sunset clause, which, I think it is fair to say, you did not embrace. Is that because there is no sunset clause in terms of common law claims? If you take away the Native Title Act the industry is left with no defined time lines and the only alternative is a common law claim.

Mr Clarke—That would be one of the consequences. If someone was excluded because of something like that they would probably come at that. I just do not see the need for it; we are not seeing numbers of claims pushed through the system and there does not appear to be any reason to pursue it.

CHAIR—Let us come back to the claim of formality. In the practical example we have discussed, whereby a proponent goes to the rep body, which then distances itself from the future act negotiations, it strikes me that there is no person or group of people prepared to take binding decisions on behalf of wider claimant groups. Is there a potential for a legislative amendment to tighten that up such that an executive body can go through a process whereby a claimant group has a binding executive that participates and makes decisions for claimant groups in a formal sense? When a signature is affixed to a document—and you raised some of the agreements that are necessary here—the proponent can have confidence that there is a binding outcome on behalf of each of the parties to the agreement, as opposed to the sorts of problems that you say your members are encountering. What is the solution to that problem?

Mr Clarke—I will look at that in two parts. The first part relates to groups that have had their native title determined either by way of a court outcome or a consent determination. We have done reasonably well in this state, so we have now some very large areas subject to native title determinations—

CHAIR—And a prescribed body corporate—

Mr Clarke—and a prescribed body corporate has been formed. But those prescribed body corporates, by and large, are totally non-functional. They have no resources, the rep body has no responsibility to provide them with any assistance or funding and, in the cases I have had to deal with, the first thing that the proponent had to do was inject fairly significant amounts of money to enable the prescribed body corporate to hold annual general meetings and other things under its terms of reference so that there could be some legal negotiations.

CHAIR—To get them to a legal status from which they could progress.

Mr Clarke—It could be in appointing a negotiating committee of the type you described. Then, on top of that, it has had to fund all the subsequent negotiation meetings. The view expressed to me in all of those situations is that the people involved, the native title holders, wanted to conduct their own affairs. They felt that they had battled—for years, in many cases—to get their native title recognised and they wanted to be able to conduct the negotiations with adequate technical support and assistance. But they did not want, necessarily, to go back to the land council or the rep body to get that support; they wanted to be able to get it from other sources, in many cases.

CHAIR—Notwithstanding that the land council have several lawyers at their disposal and have hopefully built up a degree of goodwill with those claimants, and given that they represented them in the future act process and in the predetermination stuff.

Mr Clarke—I think it has more to do with their perception of where they fit in the world. They have argued successfully that they are native title holders and they want that to be recognised in terms of practical support to set up these bodies and being able to engage with the people who are on their land.

CHAIR—Do you see that as necessarily outside the responsibility and purview of rep bodies?

Mr Clarke—Yes, and the advice I have received is that that is effectively the construction of the act. Once you get to that point, the rep body has no further role. Some rep bodies have chosen to maintain the relationship out of goodwill and so on, but in all the cases I have been involved with they have immediately come to the company wanting do the negotiations for full financial support.

Mr McMULLAN—The act does not authorise the rep body to spend money beyond the initial establishment, does it?

Mr Clarke—That would be my interpretation.

CHAIR—But do you see any role for rep bodies at the inaugural stages of lodging a claim to say, 'You will need a prescribed body corporate and this is the obligation that will flow from success'? I do not think that is necessarily happening.

Mr Clarke—It is very difficult. My experience has been that the people on the ground really have difficulty understanding the concept of a prescribed body corporate. They really do. I have seen rep body personnel going to great lengths to try to make sure they understand what it is. It is a very complex situation.

CHAIR—So what is the solution?

Mr Clarke—I believe there has to be some funding in the system for at least a basic infrastructure to be established each time a prescribed body corporate is set up. Obviously they will have to generate some income from their land and the resources on it, and that is part of what happens in these negotiations. But the fundamentals of setting up an office, being able to conduct an annual general meeting each year, appointing people and that sort of thing need to be—

CHAIR—So that would enable a commercial capability that your constituents would be happy with. That was the first example. Now let us go back to the other.

Mr Clarke—That was in relation to where native title has been continued. In relation to claims and dealing with payments, some of the complexities of the act make it very difficult to create some sort of executive decision making body. At the basic legal requirement end, any document that authorises a future act to happen has to be signed by the registered applicants, who are not necessarily the people who take part in the negotiation process. Many of them are elders who were put in as applicants because of their position in society, so a whole raft of issues flow from that. What tends to happen is that you negotiate with these working groups, which are often set up with younger people who are familiar with English and negotiations and so on. You reach agreement with them. That agreement then has to be put to a broad community meeting which has as many claimant group members as you can get together to give a group authorisation for the registered applicants to sign the document, and then you go chasing the registered applicants to find them to get them to sign the document. It can take three months from the time you have reached agreement in principle to the production of a document that can be lodged with the tribunal. There are practical problems.

CHAIR—But three years is more likely to be the usual time frame, isn't it?

Mr Clarke—I am saying that in relation to getting an agreement in principle and turning it into a document with all the required signatures; the process from there can be longer. It is a long-winded way of saying that I would probably support proposals that the act be amended in some way to enable some sort of executive decision making body to be authorised to do those things. It would certainly speed up the negotiation process.

CHAIR—Given that the registrar has to be satisfied that there is an authority in the hands of the claimant group it would seem logical that, to be satisfied that there is authority to make the claim, there should be authority to make decisions about it.

Mr Clarke—Yes. That has been raised, and there have been various attempts to look at how you could do that. There is a procedure using consent determinations in relation to future acts. I have had to use them several times now in situations where registered applicants have died and not been replaced or where one or two of the registered applicants have fallen out with the rest of the group and have flatly refused to have anything to do with them. That is another issue that would be solved by having an authorised executive: if there were someone on the outer you would not have to be concerned about getting their signature.

CHAIR—Can I venture regulations to augment the act in providing authority and capability for an executive who has participated in the claim or been nominated by the claimant group? Would you see that as advantageous?

Mr Clarke—That would certainly be a very good practical way of splitting up the process.

CHAIR—Thank you for your submissions, which, from my point of view, have been very enlightening. We thank you for your time today.

[10.45 am]

HAMLEY, Mr Gary John, Executive Director, Office of Native Title, Western Australia

MEGAW, Mr Michael, Chief of Staff to Deputy Premier and Minister Responsible for Native Title, Government of Western Australia

CHAIR—I welcome the next witnesses.

Mr Megaw—As you are aware, the submission that came to you was from the Office of Native Title. In our familiarity with this committee, we are also aware that people may sometimes ask questions that the public officers may not be in a position to answer. We do not want to be seen to be ducking and diving. Within our capacity, we are quite happy to be of assistance if there are questions tangential to the submission that you may wish to ask.

CHAIR—Mr Hamley, do you have an opening statement for the committee?

Mr Hamley—I want to talk briefly to the submission that the office have presented to the committee and really focus on the role of native title representative bodies and the state government perspective of the functioning of the native title system, which does rely on efficient and well-resourced native title representative bodies for it to work effectively. From our point of view, efficient and well-resourced native title rep bodies are essential to enable us to progress the resolution of native title matters in a timely and efficient manner. That includes in areas like consent determinations, enabling our colleague agencies dealing with future act matters as well as entering into other native title agreements. The state believe that the native title rep bodies do not have sufficient resources to meet their statutory responsibilities in future acts and the resolution of native title determinations applicable in Western Australia. We feel that the underresourcing has contributed to the backlogs in both claims to be resolved and in future act matters, which is having an impact on the state's development. In our submission we drew attention to issues around the structure of native title rep bodies, turning more to the level of responsibilities that are imposed on rep bodies under the legislation and also the view that the organisation responsible for the system, which is the Commonwealth, is an area where that funding and resourcing should be derived from.

In terms of resources, again we make the point that there has been no large increase in resources since 1998, which affects the capacity of rep bodies to fulfil their statutory responsibilities. Also, there is a need for resources to be available to rep bodies to be commensurate with the work that they are undertaking—in particular, the backlogs in future act matters. There is also a need for flexibility in that funding so that rep bodies can deal with matters on a day-to day-basis that cannot be perceived through the more formal planning processes. Also, there is a need, from our point of view, for rep bodies to be adequately funded to assist the state when we are trying to resolve matters which may not result in a native title outcome.

The other area in which we see there is some need for resourcing is for rep bodies to be able to assist with the establishment of prescribed bodies corporate for a longer period of time than what

is currently available. Also, in turning to the relationships between rep bodies and stakeholders, the government, through the Office of Native Title, does engage with rep bodies, along with the National Native Title Tribunal, and endeavour to undertake more effective regional planning and setting priorities, which help to establish a sound basis for their plans to their funder and also ensure that the states' needs are being more effectively addressed. The other area which may or may not fall within the purview of the committee is the role of funding for those organisations that are unrepresented by native title rep bodies. There is a need for a more efficient mechanism to enable them to access funding to pursue their claims.

In our submission, we made a number of recommendations: the linking of Commonwealth funding to NTRB priorities, highlighted through our regional case management conferences; the need for reviewing and streamlining processes by which rep bodies approach the Commonwealth for additional and emergency funding; an increase in funding to allow rep bodies to assist effective ongoing maintenance of PBCs after they have been established; and an increase in funding to rep bodies to allow them to meet their full statutory responsibilities.

CHAIR—Mr Megaw, did you wish to make an opening statement?

Mr Megaw—Not at this stage.

Mr McMULLAN—I notice this recommendation about linking Commonwealth government funding to rep bodies to priorities highlighted in the regional case management conferences. I am not all that familiar with these regional case management conferences so you might, in answering this, give me a little bit of explanation about them. How do you balance that recommendation with the need for ongoing funding? To maintain an organisation to pay staff et cetera you cannot have funding that goes up and down each year and still have organisational continuity. How do you see that working? What do you have in mind?

Mr Hamley—The office, with the assistance of the Native Title Tribunal, and the rep body meet on a six-monthly basis in order to try to reach agreement on the priorities, particularly on claims to be progressed through determinations. More recently they have been trying to build into that process a better understanding of the future activities in that region to jointly develop a better picture of what is going on so that the state is able to present a case for those claims that are important for it to be progressed and so that the rep bodies are able to identify claims that they want progressed as well as getting a better understanding of the various activities that are occurring in the region.

We are still in the fairly early days of developing that process and getting better understanding and agreement between the parties. We see it as helping to inform organisations' funding requests of their funders by identifying their needs as organisations. From the rep bodies' point of view, it is a case of focusing not just on the claims but also on what are the organisational requirements to be able to meet those responsibilities. It will also allow us to get some realistic understanding from them of what their funding will enable them to progress in the time frames that we are looking at.

Mr McMULLAN—You run a publicly funded organisation and you have to be able to both keep your core activities going and respond to surges in demand. Wouldn't what you are describing inevitably lead to some sort of model based on core funding and additional amounts

for priority tasks as they emerge? The same people are not going to have priority tasks every year; by definition, it is going to move within Western Australia and, looking at it more broadly across the country, between states. Don't you have to have a capacity to distinguish in some way between core capacity and capacity to cope with priorities next week, next month or next year?

Mr Hamley—I suppose what we are looking at is how to use core capacity effectively, what priorities we jointly agree on in terms of what is going to be progressed in what time frame, and how we can report back to the Federal Court on our mediation protocols and the time frames that we have jointly established. One thing that sits on the side of that is the future act activities. As much as we might try to incorporate a better understanding of what is going on in the region, there are day-to-day activities that impact on the rep bodies quite significantly and are almost impossible to incorporate into a precise plan. We need to build flexibility into the plan and we need to look at a basis on which rep bodies can respond to the various peaks, which you have referred to, that occur from time to time. They will generally come out of the future act processes.

Mr McMULLAN—I have a different view about how we fund things arising from future acts. AMEC referred to some future act officers that are supplied by the state government to rep bodies. Does your office do that?

Mr Hamley—Yes, we provide the funding for those positions.

Mr McMULLAN—Can you tell me how that works.

Mr Hamley—When the current government came to office it made some commitments to increase the number of future act officers within the system to progress backlogs of mining tenement applications. Since then there has been a review of the requirements for the state. As a result of that, an additional four positions were funded to sit within the Department of Industry and Resources and it was then agreed that the other positions would be funded to native title rep bodies.

CHAIR—How many positions are there in rep bodies?

Mr Hamley—Seven.

CHAIR—So there is a total of 11.

Mr Hamley—There is a total of 11 positions. The role of those officers is to increase the use of the expedited procedures program processes to assist in progressing the backlog of applications.

CHAIR—Can you tell us the cost to the state of those 11 positions on an annual basis?

Mr Hamley—On an annual basis for the seven positions that the Office of Native Title funds it is $455,000. I cannot give you the figure off the top of my head for the positions within the Department of Industry and Resources.

CHAIR—Could you take that on notice. In line with that—and I am impressed by the fact that there has been an attempt to, shall I say, roll the sleeves up and get into the issue of these backlogs—how do we benchmark our success with these 11 officers? What can you tell me about that?

Mr Hamley—The state is currently examining a review of the various positions and the regional standard heritage agreements in each of the areas. It is about the use of the regional standard heritage agreements and looking at and benchmarking against the percentage of objections raised. We are currently seeking information from our Department of Industry and Resources to obtain those figures from the time prior to the introduction of the standard regional heritage agreement and the introduction of future act officers so that we can form a basis of an evaluation of the system being worked and what we might need to do to obtain some improvements in that system.

CHAIR—When do you anticipate that the results of that benchmarking process will be available?

Mr Hamley—We are still at a fairly early stage; we have not set time frames. We will be working on a region by region basis, because each of the regions we are working with around the state has different dynamics and different needs. Also the standard regional heritage agreements and the introduction of future act officers did not occur at the same time across the state. In some areas it is fairly recent, and in other areas it is—

CHAIR—You could understand why we would be interested in that. If we are all saying that there is underfunding and the state government is taking specific action to provide resources and it is working, we have a model to point to.

Mr Hamley—As I say, we are still at a fairly early stage in scoping out the evaluation process and setting some time frames. That will involve both a desktop assessment of the data as well as consultation with people on the ground. We have not set those time frames as yet.

CHAIR—All I can say is that the committee would be very interested if you can provide any further information, positive or negative, as to the perceived methodology of assessing the success or otherwise of that investment as soon as possible.

Mr McMULLAN—Are the seven officers allocated to specific rep bodies on an ongoing basis? How is that decided in terms of priorities and whatever?

Mr Hamley—The positions are within specific rep bodies. There is one in the Kimberley, one in the Pilbara with the Pilbara Native Title Service, one in the—

CHAIR—Is that under Yamatji Land and Sea Council—

Mr Hamley—It is. There are two for the Yamatji Land and Sea Council, because it operates in both the Geraldton and the Pilbara regions. There are two in the goldfields, one in the south-west and one in the central desert. More recently, because of some of the pressures presenting in the Pilbara, we have funded the Yamatji Land and Sea Council for an additional future act officer to

operate within the Pilbara region so that we are able to respond more effectively to the growing needs in that area.

CHAIR—Are these officers actually out with the rep bodies?

Mr Hamley—They are, yes. We fund the rep bodies to employ somebody to facilitate the use of the expedited procedures processes.

Mr McMULLAN—Do you have the capacity to influence the work pattern of that person, or do you just provide the money and the rep body employs them and plugs them into their operations? How do you get assurance that it is genuine additionality in capacity in the area you are funding it for?

Mr Hamley—We do not have day-to-day responsibility for that officer. We have a funding agreement between us and the rep body, and the scope of that work is embodied into the funding agreement. They produce reports and we monitor the activities of that role.

CHAIR—Would you be prepared to allow us to look at the funding agreement to see the specifics of what duty statements you expect the funded person to carry out?

Mr McMULLAN—That is interesting. Can we get a model? Of course, we do not want a specific one or anyone's name on it—some sort of model that indicates what they look like.

Mr Hamley—We would need the agreement of the parties, because it is a contract between us and the parties.

Mr McMULLAN—I was trying to assist with that. I understand that any specific one that has been filled out and agreed between you and Yamatji would need agreement, but there must be something that is a sort of standard model.

Senator SIEWERT—A model text.

Mr Hamley—We can provide the scope of the work required or the role specified for the officer.

Mr McMULLAN—As a starting point, that would be good.

CHAIR—A 'representative template' is what I would describe it as, if I might be so bold.

Mr Megaw—I would like to go back to something that the deputy chair originally raised about our regional prioritising. Where I thought he was going gives me a chance to stress something. It is broadly acknowledged that there are scare resources in rep bodies and elsewhere, so prioritising is vital in a state where there are 130 or so claims. Being able to prioritise them and have everybody on board is important. In a worst case scenario, the Federal Court would have a schedule that it wants to bring to trial. We would have a wish list, and claimants and respondents would have others. The result of that, with no-one making real efforts for regional agreement on these matters, is that people are routinely not ready for trial and are routinely engaging in various practices to see that dates are not hit for hearings. It is a bad use of

everyone's time and resources, particularly in the light of the acknowledged fact that we have scarce resources.

No government can fund the simultaneous progress of 130 claims. It is important that we do have something. It is an ongoing struggle to have respondents, the court, the state, claimants and others all on the same page as to what should be progressed, in what order. Whilst we do not have a perfect model, it is important that the state continues to pursue improvement of that model because it is only through that that we can reduce what has been an experience of some frustration by the Federal Court and the tribunal in having everybody ready to go at the same time with particular cases.

CHAIR—On that point, have you found that the rep bodies are amenable to having the state understand their priorities? In other words, do the state's priorities accord with those of rep bodies and has there been a reasonable interaction and flexibility between rep bodies in their own priorities? They represent, say, 20 or 30 claimant groups sometimes and they have a particular claim they want to put at the top of their list. The state might have a different idea. Hence we get into the Federal Court problem you have outlined. How do we resolve that, and is it working?

Mr Hamley—The state and the rep bodies from time to time naturally have different priorities. That is where we bring the tribunal in to play its role as a mediator. In the main, the work that we have been doing, particularly over the last 12 months, has been establishing agreed work programs between the state and the rep body and agreement on the claims to be progressed. I do not say that is perfect, and it is still a developing process, but it helps us set our priorities and commit our resources in the same way as it assists the rep bodies to set their priorities and resourcing.

Mr Megaw—Neither party is in control of all the variables. At the end of the day we might reach a negotiated position on priority with a rep body and then it gets down to the available time of a particular Federal Court judge and both of us are caught on the hop.

Senator SIEWERT—I may have missed the answer to this quick question. How long have the future act officers been in place?

Mr Hamley—It varies because it has been since the decision. The funding has been available since 2001. The future act officers have come on stream at various times since then. I could not say precisely which future act officers have come on stream at what point, but the funding has been available since 2001.

Senator SIEWERT—AMEC has suggested that there be a portion of funding that is actually specifically set aside for the management of future acts. Do you think that is workable?

Mr Hamley—I suppose it depends on the mechanism by which rep bodies access that money. As I say, future acts is one of those areas where as best as you can plan there are so many variables that come into play at the time. Different future acts have different priorities for the proponents. If it were a pool of funds where the mechanisms to access were commensurate with the time frames necessary to be able to progress it, then that would be a worthwhile mechanism

to enable those unknowns to be funded along the way to ensure that the rep bodies have got the money.

Senator SIEWERT—I have a cheeky question: would Western Australia consider contributing to such a fund, as WA has already recognised that future acts need to be dealt with by the provision of the officers? If a fund were established to deal with future acts would Western Australia be prepared to consider funding it or assisting to fund it?

Mr Hamley—I do not know if I am in a position to answer that question.

Mr McMULLAN—Just ask the office of the Treasurer.

Senator SIEWERT—Is it something you have considered in the past?

Mr Megaw—I think it is fair to say that we recognise the state's responsibility by entering into bilateral agreements with rep bodies to progress these matters. The government has not specifically considered other means. The Commonwealth has a very robust means of procuring resources from Western Australia to fund things, and they do that very well. I am sure a good proportion of that can be made available for these matters.

Mr MELHAM—I take you to the conclusion in your submission, which is pretty stark—it does not seem to be qualified either. On the bottom of page 5 you say:

> The WA Government believe that NTRBs do not have sufficient resources to meet their statutory responsibilities in future act management and the resolution of native title applications in WA. As a result of this under resourcing, backlogs exist in both of these areas causing significant delays to critical regional development.

I suppose this is a is question for you, Mr Megaw. Where is it at in terms of the Commonwealth with that particular view of the states? Have you communicated that to the Commonwealth and not achieved any reasonable response, or are they just awaiting the reporting of this committee? Where are we at in the process? I take it your state is not Robinson Crusoe in this regard either.

Mr Megaw—Information shared with other states would suggest that that is a fairly common problem. In the states and the Northern Territory there have been direct discussions with the Attorney-General in particular. We note it has been pleasing to the state that the Attorney-General has made himself available for direct discussions on two occasions over five years. That is not a massive amount, but they have been active discussions on this and related matters. It is also fair to say that measurable progress in further resourcing has not been achieved. I equally acknowledge that that is not something that is directly within the remit of an Attorney-General or any other minister to deliver in his own right. He has got a budget process, just as we have. Whatever the good faith involved in those discussions between Commonwealth and state, they have not resulted in measurable significant resourcing.

Mr SLIPPER—You mention insufficient resourcing. Do you have a view of the extent to which the resources are insufficient?

Mr Hamley—Not a figure. I suppose what we confront is the desire to progress matters and we find that the rep bodies do not have the resources to be able to achieve that. Representations

are made to the government or to our office by other industry partners in terms of their capacity and needs and what is being asked of them in order to progress a number of matters.

Mr SLIPPER—So you are of the view that there is actually significant financial underresourcing and that these representative bodies do not have in-built inefficiencies which, if removed, would give them the financial wherewithal to achieve what additional funding would also allow them to do?

Mr Megaw—The state, and the submission, stayed within the terms of reference that the committee gave it. No-one is suggesting that this is a solely financial thing. Many people have commented over a number of years on the scarcity of the appropriate skill sets to employ into rep bodies as being another factor as well. If the state were dealing with claimants with the determination of native title alone, that would be something where we could be relatively quickly able to establish the available resources. Future acts are largely driven by the economic cycle and, as we are seeing in the Pilbara at the moment and in increasing approaches to us from third parties seeking access to claim land because they want to get on with business, that—with the business cycle—directly leads to spikes in demand for resources in rep bodies. Without being able to quantify it, I am sure that someone like the PNTS, with Yamatji, would be currently absolutely under the hammer in trying to deal with matters, possibly to a greater extent than some other rep bodies.

Mr SLIPPER—Are you of the view these representative bodies are efficiently run? It is a relevant question in the sense that asking for additional resources for representative bodies might be a reasonable proposition as long as the bodies are operating efficiently. If they are wasting money because of inefficiencies, it is a bit unreasonable to expect the federal government to top up the funding when a more efficient use of what they already have could well achieve the same outcome.

Mr Megaw—I think the Commonwealth has some very effective mechanisms available to it which it employs to ensure good performance—

Mr SLIPPER—I thought you said ‘defective’ for a moment.

Mr Megaw—No, no.

Mr SLIPPER—That is possible too!

Mr Megaw—It is always possible, but to demand performance for particular resources, the government would not have a view that would be generalised, since no two rep bodies perform exactly the same. Of course, it changes over time, particularly with the skilled resources available to them. Do they all pursue their statutory tasks in an enthusiastic manner and in good faith? I believe they do. As governments across Australia would meet varying judgments as to how well they are doing their job, I guess the same would be said of rep bodies.

Mr SLIPPER—So you would say that some bodies might well need additional funding because of insufficient resourcing but other bodies, by a more efficient use of what they have already been given, could well improve outcomes without additional funding?

Mr Megaw—I would need a lot more specific knowledge of particular rep bodies for me to comment on that, but almost certainly in the real world both things apply. Efficiencies alone are not going to deliver the outcomes that investors want in Western Australia, in the Pilbara and in the goldfields.

Mr MELHAM—What has the turnover been like in rep bodies in recent years? Are you aware whether they are holding onto their officers, or are the officers getting burnt out and moving on?

Mr Megaw—Gary is better placed to comment than I am, but government agencies, rep bodies and others in this field all share problems in holding staff.

Mr Hamley—The skill set around native title generally is something that has been a concern to me in terms of recruiting the appropriate people within our organisation, to the extent that we are developing our own skilled people within the office, we are also contributing to a university program run by UWA on native title and cultural heritage and we are providing scholarships for people within our organisation and also within the native title industry to help build that skill set for native title so that, as an area of endeavour, we are all able to contribute effectively to progress—

Mr MELHAM—Is there a partnership arrangement with the private sector in that regard as well, or is it a varied contribution from the private sector as well?

Mr Hamley—I think it is a varied contribution. In my time, I have seen a lot of movement from people within native title to different parts of the native title arena—from rep bodies to tribunals—

Mr McMULLAN—I do not expect you to have it at your fingertips, but you are probably best placed of those who are going to come before us to get it. Could you send us the details of that course at the university, what training they are doing there and for whom and those sorts of things?

Mr Hamley—Yes, I can. The course has started just this year.

CHAIR—The problem that I think we confront is one that Western Australia confronts to some extent. In terms of public administration and the funding of bodies, it is all very well to say that it is a resource-scarce business and it is underfunded. In the scheme of things, everything potentially is underfunded. But what do we look for—and, Mr Megaw, I look to you for this answer—in order to work out what an adequate level of funding is in a very difficult environment with ongoing litigation and a future act process?

I will not speak for the Commonwealth, but I anticipate what senior Commonwealth officers would say—that is, they want some accountability and a model. What does Western Australia look for? Put yourself in the Commonwealth's shoes for a moment and tell me, if you think you can, some of the threshold issues that we want from rep bodies in terms of their funding. I note, for instance, that Yamatji Land and Sea Council tells me in its annual report that it has 68 officers. I would have thought the first thing we would want is an historical funding model broken up into litigation funding, with footnotes and explanations as in a proper budget;

historical analysis of a future act process and experience and the cost thereof; and exigencies, extraordinary expenses and things that are not budgeted for. Can you take it any further than what I have said? What would you look for in terms of good public policy for the state to invest in a body such as a rep body?

Mr Megaw—If we go back to what the state has been trying to develop in terms of agreements on priorities, I think a number of these things are measurable in terms of whether agreed timelines are being met and people are able to attend, properly briefed and prepared, at appropriate times, whether it is in mediation, in the court, at a conference or whatever. It is those sorts of things, as well as the number of bodies. In a practical sense, if there are fifty-something third parties at a given time seeking access to claimed land and each of them is seeking a hearing around matters, how many in a week can a properly-run organisation physically attend and be prepared for? I think it is a resource thing again. Setting priorities is vital. Our measurability cannot go into how many times the state gets its way or these sorts of things but, rather, it is whether agreed time lines are being met and whether we are progressing the aspirations of third parties for access to claimed land in a timely and reasonable manner. That is the sort of area we would go to—whether people are able to attend, whether they are properly briefed and whether they are prepared to carry out the business of that day's meeting.

Clearly at the moment parties are having great difficulty. I know that the chair knows many of these things very well from personal experience. If, for instance, an appropriately acceptable anthropology is simply not going to be available for 12 months, it is rather pointless to blame the rep body for lack of progress on a particular heritage matter. We are all facing resource constraints. We cannot take things until we are confident at this stage. This is why the state, despite protestations about the responsibilities of Commonwealth legislation, has been prepared to put resources in, to keep things moving. We simply observe at the moment that, on that side of the table, those people representing and working with claimants simply do not have the resources to discharge matters at the rate at which third parties particularly would like or the state would like.

CHAIR—Do you see a role for the Commonwealth in putting officers directly into rep bodies, along the lines of what you have done?

Mr Megaw—There are a range of things that we would like to see the Commonwealth do. The Commonwealth has been loath—and, possibly, states generally would be loath—to see themselves getting too involved in, if you like, land management issues, which are the core of future act matters.

CHAIR—From what we have heard, the state has actually gone to the trouble of saying there are seven officers they are going to embed into these organisations in order to try to get an outcome. Is there a role for the Commonwealth to emulate a similar sort of direct, controlled input?

Mr Megaw—Beyond a resource agreement or granting arrangement, we do not seek to control them on a day-to-day basis.

CHAIR—We would like to see the agreement so that we understand—

Mr Megaw—Better prepared for that specific question, I am sure that the state and the officer would have suggestions of areas that the Commonwealth could better resource in progressing matters. That would not be limited to future act matters; it may go particularly to a landscape that is emerging in potentially inconsistent Federal Court decisions and how we are going to deal with that because of the impact on our ability to proceed with consent determinations.

CHAIR—Mr Hamley, we would be obliged if you could give that some consideration, maybe with Mr Megaw's assistance.

Mr MELHAM—Page 2, paragraph 5 of your submission says:

It is apparent that the funding provided to NTRBs has not seen any large increase since 1998 even though the amendments to the NTA in 1998 led to an increase in the number of statutory responsibilities for NTRBs. This situation is in marked contrast to the funding for both the Federal Court and the NNTT—

the National Native Title Tribunal—

which has continually risen despite the fact that the 1998 amendments to the NTA actually reduced the role of these two bodies. We note specifically the table entitled "Raw Data" included in the Annexure to the submission to this inquiry by the Aboriginal and Torres Strait Islander Social Justice Commissioner (page 17) that encapsulates the disparate levels of funding in the native title system for the last six years.

I basically take it from that submission that part of the problem is that the Commonwealth seems to have frozen levels from 1998 and there has not been any increase since that time.

Mr Hamley—That is the perception from the state's position.

Mr MELHAM—From your point of view, I take it that you would like to see some growth levels incorporated into funding.

Mr Hamley—Yes, that would assist rep bodies in maintaining the pace, as Mr Megaw mentioned, at which the state, as well as third parties, would like to progress matters.

CHAIR—Thank you, gentleman for coming along, particularly Mr Megaw—I know that your time must be very busy; as is yours, Mr Hamley. You have greatly assisted the committee and my understanding of the issues that you have raised. I look forward to presenting a report and possibly receiving some further information on the nature of the contract—without naming names; in broad template form—and some suggestions as to how you perceive, in terms of public administration and policy, direct injections could be made to rep bodies.

Proceedings suspended from 11.28 am to 11.45 am

CHAIR—Before I welcome witnesses from the Yamatji Land and Sea Council, I restate that the committee's terms of reference focus on the capacity of native title representative bodies to discharge their responsibilities under the act with particular reference to: (1) the structure and role of representative bodies; (2) resources available to those representative bodies, including funding and staffing; and (3) the interrelationships with other organisations, including strategic planning, setting priorities, claimant applications pursued outside the native title representative body structure and non-claimant applications. The importance of the role of representative bodies in the overall native title system became very evident during the committee's last inquiry into the effectiveness of the National Native Title Tribunal. Indeed, the Yamatji Land and Sea Council made submissions to that inquiry. This led the committee to recommend a follow-up inquiry into rep bodies. The recent inquiry into the administration of Indigenous affairs recommended that this committee carefully examine the issue of conflict of interest in the funding of native title rep bodies as part of its current inquiry into those representative bodies.

Almost all the submissions the committee has received thus far have concerned themselves with issues surrounding funding, its delivery, administration and adequacy. These will be carefully considered by the committee in our report, which we anticipate being handed down later this year. This is the fourth hearing in the committee's inquiry and will be followed by other hearings around the country over the next couple of months.

[11.47 am]

RITTER, Mr David Lawrence, Principal Legal Officer, Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation

HAWKINS, Mr Simon, Executive Director, Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation

DANN, Mr Anthony, Chairperson, Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation

CHAIR—Do you have any comments to make on the capacity in which you appear?

Mr Hawkins—I also represent the Pilbara Native Title Service.

Mr Dann—I have an apology for Neil Finlay, my co-chair, who could not make it today.

CHAIR—It is customary to make an opening statement. Mr Hawkins, do you propose to make a statement?

Mr Hawkins—Mr Dann will.

CHAIR—Thank you, Mr Dann.

Mr Dann—I will start off by pronouncing the name of our organisation. It is the Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation. Throughout my comments, I will refer to it as just Yamatji. The Yamatji Land and Sea Council is a native title representative body. Membership is open to all adult people who hold or claim to hold native title rights and interests within the Geraldton or Pilbara regions. It is also open to Aboriginal people who have traditional homelands in these areas. The corporation represents an area covering almost one million square kilometres across Western Australia, with an Aboriginal population of between 18,000 and 24,000. Outside Perth, there are two operational divisions: Yamatji Land and Sea Council, which is in the Geraldton-Midwest Murchison-Gascoyne region and the Pilbara Native Title Service, which is in the Port Hedland-Roebourne-Karratha area. Currently, there area 31 native title claims at various stages of the claim process. We have proudly not placed a single claim in trial. Over time, these claims should be rationalised to approximately 25, each representing a discrete and inclusive Aboriginal society.

We have a multilayered representative structure: a governing committee and two regional committees. Members of the Pilbara regional committee are nominated from each of the Pilbara native title claim groups represented by the Yamatji Land and Sea Council. Representatives of the Yamatji regional committee are elected from the eligible Yamatji Land and Sea Council membership, most of whom come from claims represented by the organisation. The 12-member committee comprises six representatives from each of the regional committees, ensuring effective and balanced input from both regions. As I have said previously, there are two chairs of

our organisation. I am the chair for the mid-west Gascoyne region; Neil Finlay is from the Pilbara region.

The Yamatji Land and Sea Council is highly regarded and considered the benchmark of good performance in the field. Yamatji works to a high standard in activities and directions determined by a strategic plan. The organisation is committed to mainstreaming and improving the operation standards in the promotion of its clients' best interests and it strives to uphold a transparent, professional manner in its operations. Our list of achievements is long. The headlines are: negotiations on one of the biggest native title agreements in Australia, in the Burrup; ongoing negotiations with major resource companies regarding the significant expansion of iron ore operations in the Pilbara, in response to the unprecedented demand driven by the productivity growth in China; successful applications to strike out provisions and remove 11 overlapping provisions at once; a host of medium-scale future act agreements; and native title determination in Ngarluma Yindjibarndi country.

The Yamatji Land and Sea Council does business with its clients through working groups. Working groups provide a means of speaking directly with traditional owners and function as a window or entry point into the existing system of Indigenous decision making based on traditional Aboriginal law and customs. They comprise 12 to 16 people who are authorised by the community to make decisions in accordance with its law and customs. The use of the working groups has set Yamatji apart because of its ability to operate effectively and efficiently with support from its membership and its ability to produce successful, lasting agreements. The working group structure is not only used for native title claims but also has a number of other purposes, including land management. It provides a viable means for government agencies and stakeholders to communicate with traditional owners through an authorised decision-making process.

As part of our emphasis on negotiation and mediation, building solid relationships with stakeholders is a key tenet of our operations. The new approach involves balancing attention to relations with pursuing legal rights. The Yamatji Land and Sea Council's mediatory approach to native title issues engages communities, mining companies and government. Its commitment to mediation in the context of complicated future act issues has resulted in outcomes which have redefined the boundaries of native title agreements, addressed the distinctive needs of particular Indigenous communities and engaged all stakeholders within a partnership approach to native title. The Yamatji Land and Sea Council seeks to resolve native title matters through agreement in accordance with the wishes of our clients. Compared with adversarial dispute resolution, mediation is private, quicker and cheaper; more accessible and flexible; and produces solutions that are more durable and that preserve continuing relationships.

But making native title agreements is a complex process. Despite issues associated with resolving native title through agreements, mediation and negotiation have a greater capacity than litigation to effect the recognition of native title and the resolution of native title issues. Effective negotiation enables us to identify and protect a broad range of claimants' interests and non-native title outcomes. While collaborative approaches to resolve native title issues are comparatively cost-efficient, they are complex and demanding, which means they are resource intensive for native title rep bodies. Native title mediations are also complex because of magnitude. They are often time consuming and involve large numbers of parties.

Unless native title rep bodies are resourced to approach mediations or negotiations in a manner which is responsive to the needs of Indigenous communities, sustainable outcomes cannot be assured. Funding constraints restrict the capacity of native title rep bodies to fulfil their statutory functions and strategic objectives in a complicated and challenging operating environment. As a consequence, the effective and efficient operation of the native title process is impeded. Lack of adequate funding can make it difficult for native title rep bodies to take a proactive approach to native title claims. If native title rep bodies are forced, through lack of funding, to take a responsive rather than proactive approach to their workload, the interests of native title claimants must suffer.

Inadequate funding of native title rep bodies frustrates the native title rep bodies, the native title claimants and other stakeholders—including local governments, state governments and industry—in the native title process. For all areas where native title is an issue to be considered, government needs to recognise that native title rep body funding levels must match the resource demand placed on organisations like ours so that economic and social development in this country is not hampered.

CHAIR—Thank you very much, Mr Dann. Mr Hawkins, do you wish to add anything to that?

Mr Hawkins—Not at this point, no.

CHAIR—Mr Ritter?

Mr Ritter—No, thank you.

CHAIR—I will throw it open for senators and members to ask questions. Who would like to lead off?

Mr McMULLAN—Thank you for that opening statement and for the submission. It is a very comprehensive and detailed submission and very helpful. I have to confess that it is so detailed and comprehensive that I may from time to time ask a question that is answered on page 50 and I missed it, so excuse me if that occurs. I have had a long look at it and want to pursue a few things out of it. First is a very general question regarding your funding from the Commonwealth in the period since the 1998 amendments, which we are looking at. What has been the pattern of your funding from the Commonwealth since that time?

Mr Hawkins—I have been CEO of the organisation for the last two years and there has not been an increase in the base level of funding. Prior to that, I think it was consistent as well. I will let David answer that. We had received additional from the Commonwealth for special projects when we have gone and lobbied for that separately to our base funding.

Mr McMULLAN—I would like to come to that special project thing, but we will talk about base funding for a start. Perhaps, Mr Ritter, you can give me some more information.

Mr Ritter—I am actually not able to be that helpful to you. My job with the organisation has happily never involved—

Mr McMULLAN—It is to spend the money.

Mr Ritter—That is right, it is to spend the money rather than to keep the ledger. There will, of course, be a significant increase in the funding of this organisation when it achieves representative status over the Pilbara, in addition to the Yamatji region. We can certainly provide those figures.

Mr McMULLAN—I wonder if you could. Particularly, the continuity will come if you can do it in a way that is separate from the Geraldton area. The Pilbara area changed its representation over that period, so what you could do there would be valuable.

I then want to go to the point that Mr Hawkins was referring to, which is the availability over the last four years, I think—it was certainly a four-year package—of some extra money for both capacity building and priority claims resolution, the extra Commonwealth package, which I think they brought down in the 2001 budget or thereabouts. Have you had access to some of that, or is that what you mean when you talk about some particular extra funding?

Mr Hawkins—Yes, that has come out of the capacity building funding. We have accessed additional funds for what we call the mining framework agreement for the Pilbara and we made a submission to the Commonwealth approximately two years ago to have funding to assist in the iron ore boom that is occurring in the Pilbara. I think that on that issue people on the eastern seaboard may not be aware of the size and scale of what is happening in the Pilbara. We certainly lobbied very hard to get additional funding to deal with the future act matters relating to negotiating with the major iron ore companies. That has been on a 12-month basis and each year we have had to go back and argue the case for ongoing funding. It has been approximately $400,000 per year.

Mr McMULLAN—What have you done with that money? How have you used it?

Mr Hawkins—That has paid for project officers to assist in coordinating the claimants, also a legal officer and an environmental officer to assist in the actual process.

Mr McMULLAN—This is a little bit of an aside but it arises from an issue the Western Australian government raised with us and which, of course, we are all familiar with from previous experience. Did you have trouble finding the skilled people to do the job? I mean the people with experience and knowledge in the specialised areas you were looking at. When you get funding for an extra bit of work, can you find the people to do the work?

Mr Hawkins—I know David will make some comments on this in a moment—but as a rep body we have strived hard to find the best people we could. We have had a system in place of having graduates coming through the organisation to work in their vacations and some of them have gone on to become longer term employees of the organisation.

Mr Ritter—I think it is fair to make the structural assessment that across the representative body system people who know what they are doing are in short supply and people who are prepared to work in rural and regional Australia are also in fairly short supply. One of the trends that was discerned in the report written by Richard Potok and commissioned by the Castan Centre—you may well have been referred to it in other submissions—shows that the trend across the country is towards a declining number of professional staff employed by representative

bodies working in regional locations. Happily, we have not shared in that trend and the number of staff we have on the ground has increased. But generally yes, it is a problem.

Mr McMULLAN—That was actually a bit of an aside but it is an issue that we are going to have to pursue, so I wanted to get your view on it. So, you have got money from the capacity building funds. There is another aspect of it called priorities claim resolution, or something, that was a part of that fund as well. Have you have access to money from that?

Mr Hawkins—We inherited the Ngarluma Yindjibarndi claim from the Aboriginal legal service following its demise after the re-recognition process was completed. That claim was already in trial before the Federal Court, and obviously you cannot stop a trial halfway through, so my understanding is that the money that was provided to see that through to its conclusion came from that fund. Again, it might be one of those things where we need to double-check the records because not every project that gets money from those sorts of funds is a headliner and immediately comes to mind.

Mr McMULLAN—Okay, I would appreciate if you did that. Related to that question of budget and a surge in the Pilbara which at least some of us who, even if we now reside on the east coast, know is happening, what has been the volume of work that has generated? I am not sure what the best way to measure it is—the number of future act applications or whatever—I am sure you have some benchmark that you use. I wonder how you can describe to us the increase in the volume of work in recent times.

Mr Hawkins—I think there are a couple of ways. It is fair to say that the claimants in the Pilbara have been run ragged going from meeting to meeting across, at one point, four large iron ore mining companies to deal with their future act matters. We estimated at one point that potentially 37 separate agreements relating to future act matters would come out of the Pilbara. From record, I think we planned to have a meeting almost every couple of weeks involving different claim groups with different mining companies. Those meetings involved organising between 14 and 16 individuals to attend over two days, preparing agendas and what have you. That was happening every two to three weeks.

Mr Ritter—From memory, all bar one of the registered claimants that we act for in the Pilbara—17 out of 18 claims—were engaged in negotiations with big iron ore companies. The 35 or 37 agreements that Simon referred to are just in relation to the big iron ore companies. There is obviously a whole raft of smaller companies and other projects as well as agreements about exploration, prospecting and so on that are also continuing. In terms of the number of meetings, it has literally reached the stage with iron ore negotiations where we are just talking about what claimants can physically stand and what staff are physically able to achieve in given periods of time. Another way of measuring the pressure is in terms of the heritage clearance work that necessarily accompanies any major project expansion. It essentially draws on the same pool of traditional owners who have authority and knowledge to attend meetings, make decisions and participate in heritage clearance work. So the pressure on people is considerable.

Mr McMULLAN—Earlier today we saw representatives of some of the smaller mining companies, who, and this is my phrasing, not theirs—and they were not in this instance referring particularly to you, although they did in another context which you might want to deal with—talked about the problem across the board for smaller companies that rep bodies tend to give

priority to work with the bigger companies because, quite frankly, the bigger companies can afford to pick up the tab and the smaller ones cannot. Do you want to respond to that?

Mr Hawkins—We have had discussions with AMEC where they have raised with us that exact issue. We basically stated to them that we have no preferential treatment on that matter. It is an obvious conclusion to draw when a mining company might pay some process funding over a matter that might go for an 18-month period of negotiation as compared to more minor matters that occur spasmodically. Some of the smaller companies say that they find it difficult to resource matters, which I agree is an issue, but we certainly do not have any preferential treatment.

Mr Ritter—There is obviously pressure from a variety of government sources as well. I am not referring to anything overt or inappropriate, but simply to a natural emphasis on big projects. Big projects are more significant to the economy and produce more jobs. I guess there is what you would perhaps characterise as an institutional bias towards big projects, but I do not think it is anything sinister. The availability of process funding obviously does make a difference in finding a faster way through the process; there is no doubt about that. A lot of it comes down to dollars. There are only so many meetings you can fit in. Being able to afford to have on more Aboriginal liaison officers, more project officers and more people to do the work in the back rooms certainly makes a difference. But I would agree with Simon's comments—there is certainly no intention to treat different proponents differently.

Mr McMULLAN—Can you assess how much extra it costs you respond to these future act applications? Let me explain that question; on the face of it it sounds very general. As the body of evidence comes before us, we are looking at two particular issues—there are more than two, but I will use two for the purposes of this question—adequacy of core funding and capacity to respond to peaks of activity. While, of course, it is all money and therefore in some ways it is the same question, there are different aspects. I am trying to get a sense of the cost to you of, for example, the Pilbara peak at the moment. Representing, as you do, other areas that Mr Dann is responsible for, undoubtedly from time to time, knowing some of that area, there would be some peaks there too. There are rises and falls in different areas. Is there some way you can assess the extra cost to you of the current surge or of future act applications when they are triggered?

Mr Hawkins—It is something we could go back and look at to see whether we could do some sort of financial projections on it. The thing that comes to my mind is that the state government currently partly funds three future act officers in the organisation. If we did not have that funding, we would be able to deal only with very limited future act matters across the region, because primarily our lawyer is involved in the claim work. Without giving any more specifics than that, it clearly is critical to us that we receive that. Obviously if we had further funding we would be able to progress matters more quickly.

Mr Ritter—To perhaps add to it anecdotally: whenever there is a peak in future act activity, even if you allocate people and resources, there is still a flow-on effect. For example, it is the same pool of people who are involved in the production of a connection report or the giving of early evidence towards establishing a native title claim. They are the same people as those required to do heritage clearances or participate in negotiations over mine expansions. It is not just the financial peaks or troughs, or whichever way one wants to characterise it; it has an effect simply in human terms.

Mr Hawkins—There is also a mini boom in the Yamatji area in iron ore and other interests as well. It has also taken a lot of resources to deal with those issues. There have been some recent media statements by Midwest Metals, who are doing some work in the Weld Range.

Mr McMULLAN—While we are talking about managing this flow of work, the state government and AMEC have both expressed some views about these regional case management conferences. How useful are they?

Mr Ritter—Are you referring to the Federal Court?

Mr McMULLAN—It is the Federal Court, the tribunal, the state government and rep bodies trying to get some sort of coordination in what their priorities are.

Mr Ritter—We regionally have single call-overs of all claims before Justice French, the judge who has all our matters before him. Sometimes there is a regional future act discussion with the National Native Title Tribunal. I do not believe that we have yet progressed to any other kind of regional management conference of business in our area. The Native Title Tribunal obviously has a fairly central statutory role, but in practical terms it has a fairly peripheral role in what actually occurs. We have functional discussions on a regional level with the state of Western Australia, but unless there is something to which I have not been invited, I do not think we have a regional case management event.

Mr Hawkins—I will add another point there. We recently instigated having quarterly meetings to talk about future act and heritage related matters. That is something we have instigated with AMEC in response to some of their concerns. It involves Yamatji staff meeting with AMEC staff to deal with some of the issues around it. We look at opportunities with industry to try to coordinate these matters.

Mr McMULLAN—Have some of those quarterly meetings happened?

Mr Hawkins—Yes, they have. The first one occurred most probably about a month ago.

Mr McMULLAN—The last thing I want to raise is about prescribed bodies corporate and your relationship with them. What is your experience in that regard?

Mr Ritter—There is one in existence in our region. It is the Jidi Jidi Aboriginal Corporation, which is the corporation set up for the Nharnuwangga Wajarri and Ngarlawangga native title holders. It is out past Meekatharra, around the now non-existent mining town of Peak Hill. We have a relationship with that corporation but do not represent it. In fact, the unique circumstances surrounding the establishment of that corporation to some extent preclude our involvement. This was a deal that was done before we represented that group; they were still represented by the ALS.

I would certainly invite the committee to read the very eloquent description of life post native title by Michelle Riley, *Winning native title: the experience of the Nharnuwangga, Wajarri and Ngarla people*, about the experience of being a native title holder, and we could provide a reference to that. My understanding is that that prescribed body corporate still has no funding

from anywhere but I cannot absolutely swear to that because we do not provide them with representation.

In the Pilbara, there are two corporations to be established to represent the Ngarluma and the Injibandi peoples who were successful in their claim. Neither of those is up and running yet. On the periphery, it extends into our representative body region but it has always been acted for by Ngaanyatjarra, which is the prescribed body corporate established to represent the Martu native title holders. My understanding is that there is no funding available to that corporation but we do not represent them so I cannot vouch for the accuracy of that view.

Mr McMULLAN—Can we take the example of the two that are in process in the Pilbara. What does that involve for you at the moment, in terms of assistance to them to establish and make effective their claim? You pursued their claim for them and it has been successful. What is involved for you in now making it effective?

Mr Ritter—We identify in our operational plan the need to prioritise the establishment of a prescribed body corporate, taking instructions on its form and so on. Whilst the Ngarluma and Injibandi are an extraordinary group of people, I think that, for reasons entirely outside of their control, the likelihood of their prescribed bodies corporate succeeding is fairly minimal. Prescribed bodies corporate have an invidious role under the act. They receive no funding. They are not really in the position of obtaining any mentoring from any other organisation. Representative bodies are not really, if at all, provided funding to assist them. They are, I think, by any assessment, really set up to fail. Evidence around the country is that these bodies are simply not compliant. It is very difficult to comply when your obligations are, on one reading of the law anyway, onerous and you do not have any money or any experience to do it. So, while it is difficult to not be hopeful, given the strength and optimism that has been shown by the Ngarluma and Injibandi people over many years, I am not terribly optimistic for those corporations.

Mr McMULLAN—Do you have a view from your experience about how we might create successful prescribed bodies corporate and whether there is a role for rep bodies in that?

Mr Ritter—I want to make clear that this is not a policy view of the land council; this is a professional view, if you like. I am not sure that prescribed bodies corporate will ever be made effective, in the sense that there are a lot of them and they are all located outside capital cities where it is very difficult to get access to even basic secretariat assistance, let alone professional advice. My suspicion is that the optimum way forward is something along the lines of a Northern Territory model, where you give representative bodies a central, ongoing role in relation to representing native title holders. But I need to emphasise that that is my professional view rather than necessarily a policy position of the land council.

Mr Hawkins—I would like to add a comment to that. The unique relationship between a land council and the claimant group they represent, which evolves while taking them through to the point where they have a PBC, is something that I think is worth investing in. It is worth taking to the next level, because you have got relationships between the claimants, a lawyer, an ALO, an anthropologist—whatever has been built up over several years. There is an opportunity for government to piggy-back on that, in terms of setting up a governance structure that is going to be long lasting. The other thing that we do look at is the agreements. Certainly in the Pilbara we

have been looking at agreements with companies to try and get them, as part of the negotiated outcome, to support appropriate governance structures for those groups so it is ongoing, not only in the establishment of the trust in a sustainable way but also supporting the group further beyond that. So we are looking at ways to try and make sure that these groups are sustainable.

I think it is a classic problem. The Murchison local government shires have all the different local government council accountants, engineers and what have you spread across those shires. You could come together and have a sort of co-op that represents groups that share those types of resources. I think those issues need to be addressed at some point because currently the focus is very much on getting the PBC. Once people have got that they do not really know what to do with it because there is not the capacity to take it to the next level. Some strategic decision making across a whole range of groups so they could share resources would be part of the long-term solution, I would think.

Senator SIEWERT—AMEC put a series of recommendations to us and some of them include amending the act. One of them is section 29, which is to amend the allowable period to register a claim or an objection to an expedited procedure to a future act. They want to reduce it from four months to two months. What is your opinion on that?

Mr Ritter—In short, we think it is not necessary and is an excessive recommendation. My recollection is that in the AMEC submission on that point they suggested that there had been no new claims lodged within the last two years. With the greatest of respect, that is simply wrong. Our land council alone has lodged four new claims in the last two years, some of which are over unclaimed area, so that is simply wrong as a matter of fact.

CHAIR—Were they new claims or were they amalgamated claims that constitute new claims?

Mr Ritter—No, they are new claims. I am sorry, I need to correct myself: three new claims lodged by us and one new claim lodged within our region but not by us within the last two years. They are all new claims not amalgamated claims, so I think that is not necessary and do not agree with that proposal.

Mr SLIPPER—At the outset, allow me to congratulate you on the quality of your presentation. I agree with Mr McMullan: it is a tome, I suppose. It is very impressive. You have put a lot of time into it, and I would like to thank you for it. I apologise if this question has already been answered, but there has been a lot of discussion this morning in relation to inadequate funding of representative bodies. I see that you have mentioned this in your submission as well. I queried earlier witnesses about whether it would be possible to find efficiencies in representative bodies and, if those efficiencies were found, whether that might obviate the need for additional funding or, should we say, reduce the additional funding which would be necessary. Do you have a view on whether there are efficiencies to be found in your organisation? Also, what level of additional funding would you be looking at and if you got it what could you achieve that you are now not achieving?

Mr Hawkins—I will talk about the efficiencies to start with. Every organisation would have an opportunity for efficiencies. I do not think you can ever stop looking for efficiencies. One of the proposals that we put to DIMIA in a letter that we sent a few month ago is for a centre of

excellence. You look at different rep bodies across the state, nationally or whatever, that might provide excellence in particular areas that could be utilised. They could be leaders in those areas and be utilised by other rep bodies. That is an issue we would like to see looked into further. Certainly, we have an opinion about what we consider we are excellent at and, obviously, someone would need to adjudge that.

CHAIR—Are you saying that, for instance, the expedited procedure would be handled by people who have experience and specialist skills—say, Goldfields Land Council—and you would deal with the sea rights and other things because you are on the coast? Is that the sort of perspective?

Mr Hawkins—Yes, in the sense that if you highlight a particular area of expertise then a land council would take leadership on that and would perhaps cover that work for that area.

Mr MELHAM—Specialists, in other words.

Mr Hawkins—Yes.

CHAIR—So economies of scale across the Kimberley right through specialising in each different area such that you would have specialist anthropologists in one location but they would be exchangeable across the state. Would you use a state boundary?

Mr Hawkins—I do not think we have looked into that closely. What we have looked at is that, for example, we do future act matters. We think we do them very well. If you have got another rep body that is not so proficient at that perhaps there could be some sort of sharing of those resources or skills across another rep body. So it does not necessarily mean that we are going to take over their future act matters. It might be that our expertise can be shared.

CHAIR—Would you want charge those services out, bearing in mind that each rep body is an individually constituted entity?

Mr Hawkins—There would have to be cost recovery on those matters.

Mr SLIPPER—That would not be unreasonable, because the other representative body presumably would not be utilising the same level of in-house resources as is currently happening.

Mr Hawkins—The other way of looking at it is that the cost recovery could involve us exchanging a staff member who is extremely skilled in, say, future act matters for one of their staff members who is more skilled in another area. That is one way of dealing with it.

Mr MELHAM—Is this something you have workshopped through with other organisations, or has this just come out of left field from your organisation?

Mr Hawkins—No. We did try and have an example of this with the Gurang Land Council in Queensland. They wanted some support in a future act matter. There was another matter—I cannot recall; it goes back a couple of years. We went to the Commonwealth to see how they could support us in doing this exchange. Unfortunately, it became too difficult for lots of

reasons. So we have approached the subject previously, and I have suggested it at a national level.

CHAIR—Who to?

Mr Hawkins—To DIMIA in a letter.

CHAIR—How long ago?

Mr Hawkins—About two months ago.

CHAIR—And you have not got a response?

Mr Hawkins—We have had a verbal response—they were interested—but not a written response.

CHAIR—We hope to have the department before us at some future point, so we might note that to raise with them. It seems logical.

Mr SLIPPER—Maybe the witness is prepared to provide the committee with a copy of the response if and when it is received.

CHAIR—And indeed the letter indicating what you proposed.

Mr Hawkins—I will provide the committee with a copy of the letter. We will get that to you later today.

Mr Ritter—I will make some comments in relation to finding efficiencies. Firstly, I remind Simon that he gave a paper on resource sharing to all representative bodies at the national conference recently. So he has put the idea out there.

Mr Hawkins—We basically talked about a few different options, and one was a centre of excellence, which people in the audience showed a lot of interest in.

Mr Ritter—In other words, it has gone to both government and our colleagues at other land councils.

CHAIR—The committee would be very interested if you could see your way clear to provide that. I am not suggesting that you have to, but it would be helpful. It might lead us to make a positive recommendation.

Mr Ritter—I will now make some comments in relation to efficiencies and resource sharing. One of the difficulties is that we all come from a very low base. Looking for efficiencies is difficult where organisations have very limited, if any, fat on them. When the ribs are sticking out, which I think they are on some representative bodies, there is no-one who can even do the analysis of where the efficiencies are because people are too busy replying to correspondence, rushing down to court and getting into cars to go to wherever it happens to be. So you have to have a certain level of capacity to even evaluate whether you are being efficient.

Improving the skills base is one area where efficiencies can be improved. Simon mentioned the student intern system that we have run for some time. That may seem like a trivial thing, but we have now been running it for five years, and we have found that students who have come through find out that they can make a job in this sort of area and they come back a few years later with some years of postadmission experience or they pop up at other land councils, creating a corpus of people who know what they are doing—and knowing what you are doing is a way of improving efficiencies. We have mentioned the report written by Richard Potok of the Castan centre at Monash. A course is also run by the anthropology department at the University of Western Australia. That is done in cooperation with the Office of Native Title here. It is just designed to increase the number of anthropologists who know what they are doing in the area. Again, we have provided support to that course—not materially but in one way or another.

CHAIR—We asked for some advice on that course from the state government representatives who are here this morning.

Mr Ritter—I commend you on that request. It is worth mentioning that there is, I think, still an open question about the balance of funding within the system. It may be that what the system requires is a redistribution. We and, I think, most representative bodies would say that the National Native Title Tribunal and non-government third party respondents simply do not require the levels of funding that they get. That is not for one moment to say that we—or, I imagine, anyone else on our side of the world—believe that non-government third party respondents should not have adequate representation. It is simply that, with the way the law stands, I am not sure what, if anything, a non-government third party respondent can actually lose in native title proceedings. Their rights are protected. Given the development of case law, their rights are reasonably certain. When one thinks about proceedings in Canada and New Zealand, the extent to which non-government third party respondents simply are not involved is striking. It is not that non-government third party respondents should not be adequately represented or should not have a seat at the table when their rights are threatened, but I cannot think of any other area of the law where the test for party status is so low and the invitation for anyone and everyone to get involved is so broadly painted.

Mr MELHAM—It is called politics, Mr Ritter.

Mr Ritter—I will make no comment on that.

CHAIR—What do you mean by that? Are saying that a person with a tenuous connection to land which is the subject of a claim can be a respondent?

Mr Ritter—I stand to be corrected, but I can refer you, for example, to a Federal Court decision in Queensland. My recollection of the facts is that the judge found that a person who fished in an estuary illegally but regularly had enough interest in the claim area to be regarded as having sufficient interest to have party status. It is difficult to reconcile that—

CHAIR—When you say he had party status, do you mean he was an Indigenous party?

Mr Ritter—No.

CHAIR—He was just an ordinary person?

Mr Ritter—Yes.

Mr MELHAM—Was he funded under the Federal Attorney-General's scheme?

Mr Ritter—I do not know whether or not that person received funding.

CHAIR—But even a trespasser has rights, hasn't he?

Mr Ritter—I might decline to offer a lengthy response to that question.

Mr MELHAM—The question is whether their legal costs are underwritten by the state.

CHAIR—And whether or not we err on the side of it being better to let him have the rights. Is it not one of the fundamental principles underlying the future act process for native title that we err on the side of acceding to the risk and the fact that there may well be a successful determination down the track, so that you have a right to negotiate?

Mr Ritter—With respect, I think that is a conflation of two ideas: firstly, what criteria should one apply in allowing party status; and, secondly, what criteria should be applied to fund the person who has party status?

CHAIR—Certainty is a wonderful thing, and the act would be good if it provided certainty across the board. Is that what you are saying?

Mr Ritter—I think the act does provide a degree of certainty and workability, which is why it would be a grave mistake if anyone were to seek to amend the act in any way and to destabilise what is now a stable system.

CHAIR—Haven't you asked for some amendments? Earlier you were suggesting that there were some problems. I cannot remember the subject matter in your submission, but it seemed to me that you were advocating that there might be some amendment that assisted the efficiencies of rep bodies in, for instance, the nature of the requirements for people with prescribed bodies corporate—regulation as to how they are to function and what funding they are to get.

Mr Ritter—The principles of how third parties are to be treated and how PBCs are to be regulated are obviously very different. I would like to return to your jump-off point, though, which was that the right to negotiate was in some way analogous to non-government third party interests. I do not think the comparison is there, because third-party interests are those who become involved because they consider their rights to be at risk. It is clear that no valid interest can be deposed by a native title claim or by a native title determination. That is entirely in contrast to the right to negotiate that accrues to those who may hold native title but whose rights may be depleted by acts that happen in the interim. So, with respect, I do not think the two are comparable.

Mr MELHAM—It is also a right that was introduced into the act to give it constitutionality under the race power. Indeed, there was a question as to whether it conformed to a special measure at the time, given that what we were talking about was native title and its protection. An

alternative system, as against a common law based system, was being called for not by Indigenous people but by non-Indigenous people to provide certainty in the arena.

Mr Ritter—I think there are many reasons why the right to negotiate is one of the great success stories of the Native Title Act and why it merits a defence. That leads me back to the subject of efficiencies, which was the original jump-off point of this. One of the inefficiencies in the system is that there are no government lock-in mechanisms to deal with and integrate future act agreements when reached. With the best will of industry and the best will of a claimant group, you can reach a super-duper agreement that contains provisions about protection and monitoring, the environment, jobs, training and business development. There is a poor fit, at this point, with government agencies dealing with those kinds of things in the native title process. I suspect, again, that there is nothing sinister in that and that it is simply a matter of the creation of bureaucratic silos—a dreadful term. We have spoken fairly commonly with government about how to improve the system by creating greater fit.

Mr MELHAM—Are you able to provide the committee with any examples of that?

Mr Hawkins—Yes, we can. We made a submission to COAG about 18 months ago about the need to get involved in the Pilbara in sustainable economic development, employment related issues and what have you. They cancelled three or four meetings to come across and meet us and then obviously the ATSIC issue took over. We have also submitted a paper to government on how we see shared responsibility agreements and regional partnership agreements working with claimant groups, particularly in relation to future act matters.

CHAIR—State or federal?

Mr Hawkins—State and federal. Again, we are finding that three or four months goes by and, while certain agreements have been reached, there is no support from government. Take one of the issues, employment. An agreement might have a certain percentage of employment opportunities—10 per cent, 20 per cent—coming from the community. Of course, it is rare that any of those people ever work at the mining companies, and there are a lot of support related matters that need to be dealt with, ideally by government, to try to get these guys into the work force for the long term. They relate to being back home in their own community and how they interrelate working away and being at home in the community. We have actually raised all those issues and received positive responses from government verbally, but there has been no take up on it.

CHAIR—Let me clarify what Mr Ritter is saying. He is saying that, where there is a legal commercial relationship between a proponent and a claimant group, the state has been unwilling to endorse the effectiveness of that agreement in some circumstances.

Mr Ritter—That is not quite the point I am seeking to make. Where there is an agreement—and let us assume it is a legal and enforceable agreement—there is no state or Commonwealth agency that seems to have as its mandate the job to sniff these things out or to be invited to become involved. There is no-one to talk to about how one might turn an agreement about $1 into an agreement that produces $4 from the community through money being properly invested and businesses being properly developed. Where a community has a commitment from a company to getting eight per cent or 25 per cent or whatever it happens to be into the work force,

there is no-one to talk to about how that fits in with various initiatives of state and federal governments. It is not that anyone is unwilling to recognise these agreements. It is just that it is not actually anyone's job to see these things—

CHAIR—To optimise the benefits that flow from the agreement by the creation of infrastructure in the nature of training institutions so that you can actually fulfil the objective of the agreement.

Mr Ritter—I think that is well put.

Mr Hawkins—Can I give an example. We have a particular claimant group up north. About three months I contacted one of the major iron ore companies. They agreed verbally to come to the party. I contacted government at the same time and said: 'This money is going to appear in the trust account in three months time. Let's get together, do some community planning and establish a proper framework. There is leadership amongst the group that want to get involved in that, so it is a really good fit.' Nothing has happened, and we do not have any funding to do it. We can only make requests. The leaders of the group are under pressure because people know the money is in the bank and very poor people want money now. The leaders are getting really frustrated with the whole process. It was such a good opportunity. There was a sense of cohesion at that point. Industry was willing to come to the table, and we tried to get government. We are going to have more of those situations occur, and we would really like that issue addressed.

Mr Ritter—As Simon emphasised, these are situations where the local leadership of that particular group is standing up and saying, 'We want this to be sustainable. We understand there are problems in Aboriginal society and we want this to be sustainable but we need a partner. It is a dreadful shame to not maximise on those events when they occur, because if one does not seize the opportunities then people get cynical.

CHAIR—So what is the solution and how do rep bodies fit into that future picture?

Mr Ritter—The beauty about the rep body is that, throughout this agreement, we have had a very intimate relationship with the group; there is a sense of trust there. We do not have the resources or necessarily the expertise to take it further, to the next level. However, we are the conduit to the group. So, if government and industry fit in behind us with their relevant skills and the group's capacity is built upon whether they are able to manage their own affairs and negotiate, to me that is a long-term solution. It is more of a process. What currently happens at the moment is that everyone focuses on developing the trust or the PBC and then the trouble starts because there is no sense of continuity leading up to that point, there is no planning and there is no business planning—there are none of those types of things.

CHAIR—What is the solution to that? Is it in the nature of legislation? Is it regulation? You have to have some sort of practical framework that we can all work from.

Mr Ritter—I think it is principally bureaucratic rather than necessarily legislation or regulation.

CHAIR—So it is a policy matter.

Mr Ritter—It is a policy matter. But you can give representative bodies greater capacity to do agreement after-care by simply funding monitoring and implementation of agreements. I would be depressed to think about the number of agreements that have not delivered what they might have both to mining companies and to claimant groups simply because representative bodies are not funded for monitoring and implementation. At a government level, there is just the finetuning of bureaucratic instruments so that government becomes interested in joining with the fruits of the future act system. That does not require legislation or regulation.

CHAIR—I take it that nobody else has any questions. I have a few. Mr Ritter, you have some considerable experience in this area. Where do you think Yamatji Land and Sea fits in terms of its position with other rep bodies? I would have thought that it was one of the bigger ones, had one of the largest staffs and has probably more expertise than most. Is that a fair and accurate appraisal?

Mr Ritter—There are certainly things that this organisation has done and I think done well but probably the best thing I can do is to refer you to the Potok report, which provides an up-to-date snapshot of who is where, how many people there are and what offices exist.

CHAIR—Give me a snapshot of where you think you fit into the league table, as it were, of rep bodies. You must be close to being the biggest and most active.

Mr Ritter—It is kind of you to say so. I think it is difficult to measure in that there is not a league table in the sense that we are not all playing the same game. The goldfields are beset by litigation. Ngaanyatjarra have a situation where there has never been any serious risk of their claims going off to trial. I am surmising here, and I apologise to my colleagues from these rep bodies if I am wrong. In South West they obviously have very significant extinguishment issues as well as very limited future act activities.

CHAIR—And of course they have the authority issue that the court has thrown at their feet.

Mr Ritter—I am not up to date on that.

CHAIR—I will have to go back, for the second time, and check with all of the claimant groups that the people who speak on behalf of them can actually do that, as the court required, which is a huge impost.

Mr Ritter—It certainly sounds like a significant undertaking. The point I am trying to make is that, while I am proud of a lot of the work that we do—we have a good corpus of experience within our staff body and we are blessed with a very good executive committee—each region has its own game, if you like, rather than a single league.

CHAIR—I count 33 claims that your organisation is managing at the moment. Is that about right?

Mr Ritter—That sounds about right, yes.

CHAIR—They are under both Pilbara and Yamatji representation. I am looking at your annual report. I note from your submission to us and your annual report for the year ending 2004

that your organisational structure is a bit difficult. I count that you have, according to the annual report, 13 lawyers. Would that be right?

Mr Ritter—If it is in the annual report, I assume that that was right at the time.

CHAIR—I will put it to you properly—

Mr Ritter—It sounds about right.

CHAIR—You are the principal legal officer.

Mr Ritter—Yes.

CHAIR—There are two senior regional legal officers. Underneath one of those senior regional legal officers is another legal officer. There are then two further legal officers, an articled clerk and, on the other side of the ledger, two legal officers. Then there is the strategic operations team, which is special counsel for all your on-going court stuff—and I think that is not unreasonable. But it seems to me that you have a lot of lawyers; they must cost a lot. I cannot find what your wages bill is but, obviously, it must be substantial. You are running four offices—

Mr Ritter—Five offices.

CHAIR—Geraldton, Perth, Karratha, South Hedland and Tom Price. Correct me if I am wrong: you get about $5-plus million a year.

Mr Hawkins—No, $4.8 million.

CHAIR—I am looking at what you have here but, okay, $4.8 million—

Mr Hawkins—That is base funding, sorry.

CHAIR—And in addition to that you have applied for some special funding. What is the model for funding? You are the experts. Tell me how you cost out, on an annual basis, in a way that provides us with the confidence that there is good public policy in funding you, because you keep telling us that you are underresourced. How does the government measure how much to give you? What is the solution to that problem?

Mr Ritter—If I can first come back to the point about the number of lawyers. A decision was made by the—

CHAIR—I meant no comment about the number of lawyers, by the way. I hope you are not defensive about that. I do not want to insinuate that they are all sitting around making a big quid. I just noticed that you have a big staff and, obviously, with 33 claims and QCs and everything on the go—that is why I asked the original question—you are obviously up there on the front line.

Mr Ritter—I appreciate your sensitivity on the point, but I do not feel defensive of it at all. In fact, I feel quite happy; I am not sure if 'happy' is ever a word associated with a lot of lawyers in one place at one time. But the decision was made by the governing committee some years ago

that they would rather invest in building an internal team because that was more cost-effective, would provide a greater sense of continuity for claimants and so on, and that was simply a better option than investing in consultants. I suspect that if one looked over time, one would find that Yamatji has always had more staff but has probably had a less significant bill for consultants. That was the committee's decision. It was some years ago and it has been followed through.

CHAIR—I accept that. So what you are saying is that there is an in-house capability that is spread over a very large area and you think that that is efficient. I have nothing to suggest that you are not correct, given the experience that you have. Sixty-eight personnel, I think, is the number you had back at the end of 2004, according your annual report. The question that I come back to is that you tell the government that you are underresourced. Everybody, I think, is underresourced; I would like to be more resourced. How do we measure this issue, and where do we benchmark it from? You must take some responsibility here and say to government, 'Here is the formula that we understand is capable of delivering performance to a reasonable standard such that we can fulfil our statutory obligations.' Point me towards what you are doing in that regard, or do you just put your hand up every year and say, 'We will have the same as we had last year'?

Mr Hawkins—We submit an operational plan to the Commonwealth for funding, which determines our funding levels.

CHAIR—Would it be possible for us to see the operational plans for the last couple of years—because I think your land council is a pretty good working model—so that we can see where the money goes and what issues you confront in that? You do not have to do that, but I think it would be helpful. I am sorry, I interrupted you. You were speaking about your operational plan.

Mr Hawkins—Basically, we submit a plan and it breaks up the 32 claims into key output areas. With that plan, we have obviously requested funding across those areas. Just as a general comment, we produce a certain number of connection reports across the region, because we have a certain number of staff that can produce that level—

CHAIR—What do you mean by 'connection reports'?

Mr Hawkins—Submitting to the state to have a negotiated outcome, to avoid litigation. A connection report has all the ethnographic material that relates to people's connection to country.

CHAIR—Is there a cost factor built into each of those?

Mr Hawkins—Yes, there is, because it takes a fair degree of research. The main costs in native title are obviously your staff costs and your meeting costs. Having people come together to provide information and staff going out on field trips with people to research their country and what have you are the main costs in producing a connection report. Obviously, it is a thorough document, so it takes a long time to put together and to complete the process. If we had more resources, we could most probably employ more people to produce more connection reports. While we do have 13 lawyers, if you look at our anthropological staff, we have basically five anthropologists in the Pilbara that—

CHAIR—There are a lot of anthropologists.

Mr Hawkins—To build upon the comment that David made earlier, other rep bodies might have a smaller contingent of staff, but they actually outsource some of the legal and anthropological work. Obviously their budget would show that they spend X amount of dollars on that. So I think you need to compare an in-house system such as the one we have, and what we produce, with that of someone who outsources, and see what they produce and the costs that relate to that. I do not know the answer to that, because obviously I am not privy to what other people do, other than that I know some outsource it. I do not know to what extent or how many reports they produce. You need to make that sort of assessment.

Mr Ritter—It may also be that it is not one of those things where one model fits every region.

CHAIR—Let us talk about meeting costs for a moment. I think meeting costs are across the board in each rep body's problematic areas. In order to get the authority to proceed, you have to have a meeting of the claimant group. You have to identify them. You have to get them in by hook or by crook—you bus them in; you fly them in; you do whatever you do. You spend a substantial amount of money. What would be the average—and I am not asking you for a definitive, auditable figure—that you spend on meeting costs per annum, roughly?

Mr Hawkins—I do not have that figure with me, but I can—

CHAIR—Can you take it on notice?

Mr Hawkins—Yes.

CHAIR—Would it be helpful if there were regulations that enabled claimant groups to appoint and to be bound by an executive that was able to proceed and communicate by newsletter or whatever means to the broad claimant group, such that there were not so many meetings?

Mr Hawkins—That works at the moment, where each claimant group nominates its own working group, which is like an executive that represents the claimants. They vary in number from about 10 to 14 people that represent the broader claimants. Each claimant group has its own working group, so that is already in place.

CHAIR—But how binding is that, and how much vicarious authority do those executives—if we can call them that—have? They would be nervous, I suspect, about signing things and making agreements without bringing the broader group back together again. That is the nature of the politics.

Mr Ritter—I will jump in there. The act already has the mechanism of applicants: applicants, I think, already have the kind of plenipotentiary power that you are talking about.

CHAIR—You know and I know that applicants are usually the principal source of the evidence, and they are possibly old and frail, whereas underneath the applicants there is inclined to be a group of quite articulate younger members of the claimant group. What I am suggesting to you is: is there a window of opportunity for some sort of regulation that allows for the

empowering of a group of trusted executives of say, six—just off the top of my head; and it would vary from claimant group to claimant group depending on their size—such that business could be conducted without the necessity to bring all of the group back together again?

Mr Ritter—My experience of who the applicants are does not actually conform to them always being principal elders.

CHAIR—That is right.

Mr Ritter—I think that is quite often not the case, though in a fair proportion of cases it is. It would be difficult to see how an additional executive would do anything other than increase the amount of process and, in a sense, the complexity.

CHAIR—They would be able to give you good and reliable instructions.

Mr Ritter—The hybrid model that Simon talks about, the working group model, is I think a very good one. That allows you, without the imposition of regulation or legislation, to actually throw the question back to each group and say: 'Okay. Who needs to be here under the rules of your society? Who needs to be here so that decisions that have some effect can be made?' The membership of that working group will chop and change from time to time. It seems to us that that system very largely does work. The problem with it is that people cannot meet as often as the outside world would like.

CHAIR—But it is very expensive.

Mr Ritter—It is expensive, but a system that is cheap but ineffective is ultimately also expensive.

CHAIR—I am looking for the happy medium.

Mr Hawkins—On the expense issue, the claimants that attend the working group meeting get their travel costs paid to attend—that is, mileage and accommodation. So when people talk about expenses, they are not on the payroll. They are not getting city fees to attend a claimant meeting.

Mr Dann—The answer to your question would be no, as far as I am concerned as a traditional owner. It is expensive, I agree, but necessary, purely because I would not like to be an elected person coming here, going to any representative body or anywhere and speaking on behalf of someone else or giving approval on behalf of someone else's country.

CHAIR—Notwithstanding it is all your country, you just would not feel right about speaking on behalf of one of your other claimant members.

Mr Dann—That is what we have with our working group structure. Our structure is elected at a group meeting of our claim group—let us say, my group, the Wajarri people.

CHAIR—How many working group members are there? Six?

Mr Dann—Thirteen people.

CHAIR—What do you say that they can do on behalf of the wider group?

Mr Dann—We negotiate with the mining companies that want to do mining activity within our area and then we give instructions to our staff to carry out whatever needs to happen. In answer to your question on reducing that, I do not think it can be reduced, purely because there are that many different families within our claim group that six people will not represent—

CHAIR—I accept that. I was using six as an example. I said it would vary. Let us say it is 13. If the 13 make a deal with Bloggs Mining, can they sign the document?

Mr Dann—Yes.

CHAIR—Right.

Mr Dann—That is what happens at the moment.

Mr Ritter—I will add something to that. The Wajarri claim—and I hate to go into specifics—is a little different because when that claim was set up the Wajarri actually decided that their applicants and the working group would be the same people. That shifted a bit, so Mr Dann's group is in a bit of a different situation to that of others. There are others where the working group and the applicants are not the same mob, so you will have applicants needing to execute any documentation and there is an issue there.

CHAIR—Yes. Mr Dann's claim sounds as if it functions very efficiently. Is that reasonable?

Mr Dann—I would suggest that is the case.

CHAIR—You are one of the 13, Mr Dann.

Mr Dann—I am one of the 13, but I am not an applicant; I am a working group member. I am a claimant from that area. But the majority of our working group is made up of our applicants. Those people make the decisions; they sign off on the documentation.

CHAIR—So they are comfortable in speaking for and committing the broad claimant group of some several hundred people to the deal they do.

Mr Dann—Yes.

CHAIR—Do you think that is representative of what happens in most claims or is it a bit rare to Wajarri?

Mr Dann—I have attended a few other working group meetings and there are a lot of similarities. As far as how they go about making their final decision, I could not really comment.

CHAIR—Without naming any names, you have done an agreement with a mining company. Think of any particular one that you have done that was a good deal for Wajarri. How many big meetings did you have for that agreement?

Mr Hawkins—Maybe I can use an example here. One of the excellent agreements that was reached with a particular claim group was with a mining company, Gunson Resources. The agreement was reached over consecutive meetings. The reason that was a successful agreement was that the company came with full information to the forum.

CHAIR—What do you mean by 'full information'?

Mr Hawkins—They did not try to keep information away from the group which made the group sceptical about their true initiatives.

CHAIR—So their drill results, forward cash flow, anticipated mine structure, feasibility study—

Mr Hawkins—They put everything on the table.

CHAIR—And they came along.

Mr Hawkins—They came along with full information. They said to the group: 'This is what our intention is. This is what it is going to look like over the next 10-year period.' The group was fully satisfied with the information that was being provided. The deal was done pretty quickly. So I think the important point to be made here is that it depends on how the company goes about its business, and this is something—

CHAIR—The proponent's conduct is important.

Mr Hawkins—It is very important. We have raised this with AMEC and said, 'If a company comes with full information and wants to cut a deal appropriately, you will find there will not be any concerns because naturally people are fully aware of what is going on and they don't have those concerns that it takes time to resolve.'

Mr Dann—Can I add to that as well. To back up what Simon is saying about having the correct information, probably about a week ago I attended a working group meeting in Yalgoo, which mining companies attended. One group came along and had information which we basically could not understand. The full information did not seem to be there. On advice from our professional people in the room, it was decided that we would put that off until the correct information came back in order to make a decision on it. The next person who came in brought along all the information that was required, and a decision was made there on the day. He was happy, we were happy and there were no issues.

CHAIR—When you say 'a decision', do you say that somebody signed an agreement?

Mr Dann—We made an agreement. Documentation needed to be prepared for signing. Also, talking about working groups, when we go to a working group meeting to negotiate with a mining company, in any one or two days we can deal with 10 to 15 mining companies. So it is not calling a special meeting to deal with any specific mining company; it is dealing with a whole range of mining companies. So it is cost efficient in that way as well. We are not saying, 'We'll meet with you this week; we'll meet with you next week.'

CHAIR—I have a couple of further questions. In your financial statements for the year ending 2004, you get a special purpose grant for native title of $5,082,000. Forget about the accuracy of the figures. You also have $3 million of heritage and negotiation activities as income. Where do you get the income from? How do you derive that $3 million?

Mr Hawkins—Basically, that is income. Also, expenditure is most probably going to be about $2.9 million or thereabouts.

CHAIR—It probably is, yes.

Mr Hawkins—Basically, the organisation coordinates heritage surveys across the Yamatji and Pilbara regions. A lot of that money relates to the Pilbara, particularly through the iron ore boom and the amount of heritage works undertaken by mining companies. So you understand, the costing of a survey is primarily made up of heritage consultants, vehicles, accommodation, travel—all those types of matters—and also Aboriginal consultants who attend on behalf of the survey.

CHAIR—But they are paid separately.

Mr Hawkins—No, that is basically invoiced from the organisation that the mining company pays. It is an invoice going out. We receive the money back from them.

CHAIR—So the $2 million goes out to the individuals who attended on behalf of the company.

Mr Hawkins—No. It goes on heritage consultants, vehicles and a whole range of other costs. The actual figure that goes to the various Aboriginal consultants is only a portion. I think it is about 30 per cent of the overall bill.

CHAIR—They are on a set rate?

Mr Hawkins—Yes, that is right.

CHAIR—But you charge a fee over the top to administer the whole process.

Mr Hawkins—The fee is for cost recovery; it does not actually generate a profit. The organisation does not make a profit out of heritage surveys.

CHAIR—Why not?

Mr Hawkins—Because we do them purely on a cost recovery basis.

CHAIR—Why do you do that?

Mr Hawkins—Mining companies would not want to pay more for the survey than—

CHAIR—They are already paying $3 million.

Mr Hawkins—That is a lot of mining activity.

CHAIR—I would have thought there was a capacity for you to charge a margin.

Mr Hawkins—One of the issues is the Aboriginal consultants. It is their heritage that they are conducting the survey for, so we do not necessarily see it as being profit that we should make.

CHAIR—In the scheme of saying that you are underresourced, I see that as a sizeable proportion of revenue.

Mr Hawkins—We have constant arguments with the mining industry about the admin fee. We charge an admin fee on top which covers our costs. It is a very difficult process to keep all parties satisfied.

CHAIR—I think that is interesting.

Mr Hawkins—The other issue is that, as a public benevolent institution, we cannot actually make a profit. That would compromise our PBI status and our tax status accordingly.

CHAIR—I note that in 2004 you had cash at bank—and there are a number of different figures—of approximately $700,000; it is close to $800,000. But there is a term deposit of $1.1 million, and that is carried over on some of these accounts for a period. How is it that you have the capacity to have a term deposit? Just explain that to me. Is that the remnants of the annual grant to you that you put into a cash interest-bearing account?

Mr Hawkins—That was basically surpluses carried across from two periods.

CHAIR—I am interested in your having a surplus, given the nature of the business and the general theme of what we have discussed. How can you have a surplus if you are underfunded?

Mr Hawkins—There is one reason for the large surplus. The $700,000 primarily related to a long-term debt list, caused by mining companies that had not paid invoices for heritage work relating to negotiations. It appeared as a surplus in the accounts but it was actually an outstanding debt, which was then recovered.

CHAIR—Is some of that still outstanding?

Mr Hawkins—Yes. So basically that was the largest proportion of that. There was an operating surplus of about $200,000 that related to unspent grants for staff vacancies. We had vacant staff positions and those salary overheads then transferred to the next year.

CHAIR—Does the Commonwealth require you to declare your annual acquittal of the previous grant?

Mr Hawkins—We provide the annual report to be signed off by Senator Vanstone's office. We are required to do that by 15 October each year.

CHAIR—Is it fair for me to say that the minister or the department has allowed you to carry over the surplus?

Mr Hawkins—We seek approval each year. Every rep body has to seek approval to use the previous year's surplus, and we have sought approval for that.

Mr SLIPPER—I want to pick up on one question that the chair asked. He seemed to be saying that, by charging purely for cost recovery and then claiming that you are underfunded, your underfunding is maybe a voluntary situation.

Mr Hawkins—Not exactly. Because we are a public benevolent institution, our tax status does not allow us to make any profit. We can receive additional funding from the Commonwealth—our primary source—and that will not affect our tax status.

CHAIR—You are a public benevolent institution, are you? I would have thought you were just a non-profit organisation.

Mr Hawkins—No, we have PBI status. All rep bodies do.

CHAIR—So, if I make a donation to you, that is tax deductible—is that what you are saying?

Mr Hawkins—I do not know the tax law on whether you can do that with a rep body. I assume that makes sense.

Mr Ritter—It is certainly a kind thought, though.

CHAIR—I am sorry to interrupt.

Mr SLIPPER—I suspect that if you are going to make a donation, the rep body would have to be accepted.

CHAIR—I am sure they would.

Mr Hawkins—But it is a critical issue, because we operate on the premise that our PBI status provides us with tax opportunities and therefore we cannot be seen to be making a profit, and we do not. My earlier point was that it is very difficult to recover a profitable margin in these types of areas because of what mining companies and the claimants are willing to pay.

Mr SLIPPER—They have to deal with you, though, don't they?

Mr Hawkins—They do.

CHAIR—And it depends on how much fat is in your costs.

Mr Hawkins—The state government introduced a states standard heritage agreement, in which they limited the recoverable cost at $1,200 for a heritage survey. They have done that through, I suppose, the lobbying of all interested parties to try to cap costs. Certainly, if one of

our heritage surveys goes on for a long period of time and becomes a four- or five-week job, that $1,200 does not really cover our fees. So, in some instances, it is out of our control.

Mr SLIPPER—It seems to me that, because of your public benevolent institution status, you cannot make commercial decisions, which means you have to come cap-in-hand to the government. I am just wondering whether you might like to reflect on that and maybe let us have something in a supplementary way on some changed situation that would enable you to obtain true cost recovery, which means that you would then not be underfunded.

Mr Hawkins—Yes, we could do that. You can actually measure the money that is saved to all concerned by having a PBI status, and that reflects primarily in the area of salaries.

Mr Ritter—It has also given us access to the Commonwealth's national pro bono scheme. We participated in dealing with a number of larger law firms providing us with pro bono assistance in relation to matters which it is necessary for us to look at but which are outside our expertise: corporations and tax matters—those sorts of things. I know you are keen to close the session, but I wonder whether I might just come back to something that was mentioned some time ago, which is the centres for excellence debate. One of the things that perhaps we have not made altogether clear but which, I think, has been clear in other presentations Simon has made on the point is that it is important to emphasise that in order for these things to be functional they would have to be established on an opt-in basis. If one tried to introduce a system that was designed to break down the autonomy of regionally based organisations then I think you would breed a system that was rife with inefficiencies and resentment. So it would necessarily need to be on an opt-in basis.

CHAIR—An opt-in basis that had some financial incentives, potentially.

Mr Ritter—Perhaps.

CHAIR—Thank you, Mr Dann, Mr Hawkins and Mr Ritter, for your time. The committee is very pleased to have heard from you. I think we will be reporting towards the end of this year. If there is anything further you wish to raise, do not hesitate to make a further submission. I think we have discussed with you—and Hansard will bear this out—the sort of documentation we have touched on that will assist us. We have given you some of the questions on notice, so we look forward to receiving those in due course—30 days is what we say for those. Thanks very much for coming along.

Proceedings suspended from 1.13 pm to 2.04 pm

MEEGAN, Mr Michael John (Claims Manager), Solicitor, Goldfields Land and Sea Council

VINCENT, Mr Philip James, Principal Retained Counsel, Goldfields Land and Sea Council

WYATT, Mr Brian John, Executive Director, Goldfields Land and Sea Council

CHAIR—Welcome. I will go through the formalities that we went through this morning, just to bring you up to speed as to what the committee is doing. The committee's terms of reference focus on the capacity of native title representative bodies to discharge their responsibilities under the act, with particular reference to: (1) the structure and role of those rep bodies; (2) the resources available to the representative bodies, including funding and staffing; and (3) the interrelationships with other organisations, including strategic planning, setting priorities, claimant applications pursued outside the native title rep structure and nonclaimant applications.

The importance of the role of rep bodies in the overall native title system became very evident to the committee during its last inquiry into the effectiveness of the National Native Title Tribunal. This led the committee to recommend a follow-up inquiry into representative bodies. The recent inquiry into the administration of Indigenous affairs recommended that this committee carefully examine the issue of conflict of interest in the funding of native title representative bodies as part of its current inquiry into those bodies.

Almost all the submissions that we have received concern themselves with issues surrounding funding, its delivery, administration and adequacy. These will be carefully considered by the committee in its report. This is the fourth hearing in the committee's inquiry and will be followed by other hearings around the country over the next couple of months.

I now invite you to make an opening statement, after which senators and members will ask questions on your submission and generally on the terms of reference.

Mr Vincent—We put in a written submission in July 2004. We have no desire to amend that. In light of some of the other submissions made to the inquiry—in particular, the OIPC submission—we would like to table a few documents to give the committee a bit of the flavour of the activities of a rep body such as the Goldfields Land and Sea Council. I will make some opening comments and table the documents, and then Mr Wyatt will make some comments.

I think it is important to sketch a bit of the history of the Goldfields Land and Sea Council. It was incorporated in 1984 as a land council. Thence, under the Aboriginal corporations act, it was made a representative body. We have some maps here. The first one shows the representative body area in 1998. Kalgoorlie is smack-bang in the middle of it. It goes up as far as Wiluna—Senator Johnston will know this area very well—down to Esperance and over to the South Australian border. We now have some sea area. It is bigger than Victoria and bigger than Texas. In 1998, before the Wik amendments, there were, I think, 84 claims. The land council was in difficulty then. It was trying to gain control of the situation. There were feral lawyers running around promoting claims and it was quite a bit of a mess. The next map, which I will also table,

shows the situation now. The representative body area now is not so much 'Spaghettiville'. The claims are much more rationalised.

Mr SLIPPER—And rational?

Mr Vincent—And considerably more rational. There are still some overlaps, but most of them have been resolved by MOUs recognising shared country. There has been a big claim here, the Wongatha claim, before the Federal Court. Most of those claimants were able to use the same set of lawyers and approach it on a basis of common ground. In 1998 there was a lot of encouragement to amalgamate claims. Twenty claims were amalgamated by the land council into the one claim, the Wongatha claim.

CHAIR—When did you achieve that?

Mr Vincent—That was in 1998 going on 1999, just after the Wik amendment. We acknowledge that that provided some force towards the claim, but we also say there was a lot of work done by the land council on achieving some sort of useful amalgamation. That is the situation now. We are waiting for the judgment from His Honour Justice Lindgren on Wongatha. We are also at the same time, even as we speak, trying to negotiate with the state to get a settlement out of court, but it is pretty hard yakka.

CHAIR—How many claims were there prior to the Wik changes?

Mr Vincent—There were in the vicinity of 84.

CHAIR—What is that down to now?

Mr Vincent—Now there are approximately 13 claims.

CHAIR—Do you want to table the two maps you are showing us?

Mr Vincent—I would like to table them.

CHAIR—They are so tabled.

Mr Vincent—I mentioned the size of the area. It has an Indigenous population of approximately 3,100. It is the most mineralised area in Australia. The next map I am showing you is a little bit hard to see, but an examination will show the mineralisation and the extant mineral claims—prospecting, mining and exploration. There are huge areas which already have tenements on them. What this means in effect is that there is a continuing process and the land council is required to deal with them as and by way of future acts. It has 60 per cent of all of WA's future acts to deal with. I will tender the map, if I may.

CHAIR—We will accept all of the documents that you want to tender unless we say otherwise.

Mr Vincent—I have the 2003-04 annual report, which I would like to tender. We have multiple copies of that.

CHAIR—I think the committee would like to see those annual reports.

Mr Vincent—I will draw your attention to a couple of aspects.

Mr SLIPPER—Is there anything adverse in the annual report?

Mr Vincent—The adverse material that has been highlighted is the difficulty that we have had with the state and Commonwealth governments in trying to settle matters. We are as keen as mustard to settle. The land council believes that settlement can achieve benefits each way and that the reality of native title is not as horrendous as other stakeholders have thought in the past. That perception is gradually getting across but it is still difficult. Unfortunately the perception seems to reside now residually in the state Office of Native Title and the Commonwealth.

Mr SLIPPER—I see you are a principal retained counsel. Does that mean that you are a barrister in private practice and you are retained for certain purposes by the Goldfields Land and Sea Council? What proportion of your time would be with them versus in general practice?

Mr Vincent—Probably about three-quarters of my time is taken up in work for the land council.

Mr SLIPPER—For this land council or for others as well?

Mr Vincent—I have done some work for other land councils, but mostly for this one. I do other matters as well. I am based in Kalgoorlie.

Mr SLIPPER—Is there much of a bar at Kalgoorlie?

Mr Vincent—There is me and we have an amalgam profession in this state.

Mr SLIPPER—So you can be in a solicitor's practice?

Mr Vincent—Barrister and solicitor. It is not the strict division that they have in New South Wales, but there is a de facto bar as well, where people only practice on instructions.

CHAIR—Thank you.

Mr Vincent—Page 24 of the annual report refers to the statistics, claimant applications and outcomes. 'Outcomes' is a popular word, and you can see that it says 'claimant applications filed this year, zero.' We say that is a positive outcome, because all the claims have been filed. In a sense, if you are trying to show OIPC an outcome, zero is a good figure.

CHAIR—Do you expect it to be zero each year? When you say that they have all been filed, are there going to be more?

Mr Vincent—Only if there are unusual circumstances. I think the land council is seeking to maintain the status quo in terms of claims—amalgamate where necessary and maybe finetune some boundaries, but that would be about it.

CHAIR—Is all the land under the bailiwick of the land council under claim?

Mr Vincent—We found some that was not, but it is nondescript and I do not think anybody would really make an effort about it.

CHAIR—Rurally speaking, all of the land is under claim.

Mr Vincent—Yes. Can I say that the land council's clients have very readily withdrawn any claim over town areas, even before that was clarified by the finetuning of the High Court in Miriuwung Gajerrong and so forth. They did that voluntarily as, if you like, a legal gesture to the community. Continuing with the statistics on page 24, 120 agreements were reached and there were 510 responses to future acts—that is more than one a day; every day of the year somebody is having to respond and do something.

Mr McMULLAN—Could I seek technical clarification: does that also mean responses to 510 future act applications?

Mr Vincent—Yes, each of those would be an application made. There is a large database.

Mr McMULLAN—I assumed that is what the words mean. When you summarise things, sometimes it is not as clear.

Mr MELHAM—How are running in the first six months of the year, in both agreements and responses to future acts?

Mr Vincent—There has been a useful agreement which I want to refer to, which is a template agreement where mining companies can enter into an agreement to do heritage surveys for exploration and prospecting. Then the formal responses are not necessary. So that has dropped off, but the agreement is still necessary to be struck. So it is about the same, according to my understanding. I did make an inquiry of the future acts officer before I came.

The rest of the documents the committee will be familiar with, because these types of documents are tabled in parliament as a requirement of the act. The land council has tabled, prepared and delivered these annual reports on time ever since that requirement was made. There are details about the committee in the report. There are Indigenous people from the region. The region is largely Western Desert type people, although the southern part of the representative body has Esperance Nyungar people as well, around the Esperance area. But generally speaking, they are of a particular type, namely people who are members of the Western Desert cultural block. The committee is fairly representative of the region. There is a staff structure chart which I will hand out to the committee, and that shows the structure of the governing committee: an executive committee, which comprises the chairperson, the vice-chair, the treasurer and the executive director; then the executive director and the officers are in blocks—finance, future acts, native title claims, land unit, research and heritage, anthropologists, lawyers and so forth. It is a fairly modest outfit for the work.

I want to announce to the committee that the Goldfields Land and Sea Council is one of the eight finalists for the top Indigenous governance award, which is being considered by the reconciliation council.

CHAIR—Can you tell us some more about that? I am interested in that.

Mr Vincent—Perhaps Mr Wyatt can tell you some more about that. It is something the land council is very proud of.

Mr Wyatt—Mr Vincent has stolen my thunder; it was going to be part of by opening address. It is part of Reconciliation Australia's attempt to highlight the positive aspects of Aboriginal organisations, their achievements in governance and their performance generally in terms of the requirements of their various formal processes. We nominated ourselves. Mr Vincent pointed out the many applications we had way back 1984 when we went into administration at one point because of how we were structured and because our processes were not in any good order. That was in 1998. We said that someone needs to be told about our restructure and our story because we have progressed a long way since then. We nominated. It is interesting that we are the only NTRB—native title rep body—selected in the final eight, which we are quite proud of. We had to go through a rigorous process to be assessed. We were told that we were still in the final wash up. We finished that last week. We were interviewed, our staff were interviewed, our committee members were interviewed and the public were interviewed about us in terms of our relationships with industry and other government agencies. It was a fairly open and extensive assessment process, and one we are looking forward to winning. Certainly it is something that we are quite proud of in our operations.

Mr Vincent—The Goldfields Land and Sea Council suggest to you, and you will see from the information we will provide you, that it is moving forward but with its own individual Indigenous character and ability, which give it the ability to relate to its constituency and lead them in various initiatives, some of which are difficult politically and emotionally, quite apart from any technical legal aspects. We say that because we note in the OIPC submission of August 2004 to this committee, in particular about page 18, that they suggest that proper service delivery needs some sort of alternative model. They are looking at some sort of corporation limited by guarantee and involving a much smaller group of people and fewer rep bodies, presumably one in each state, with so-called responsible Indigenous people on them—whatever that means—and experts. To be fair, the OIPC talks about the need for flexibility and one size does not fit all. That may be so, but sometimes—and certainly in the land council's case—the size does fit and fits very well. Whilst flexibility can be condoned, that does not mean to say that good models that have been established need to be trashed and set aside and another model regarded.

Native title is a difficult area and each step is a new one—a struggle and an accommodation of aspirations, with deliverable rights to be accorded and recognised. It needs leadership, and encouragement to the Indigenous constituency—and to the rest of the community, for that matter. It is not just a bevy of lawyers in some tall tower somewhere who can deliver this. It is not just legal aid. To show that, I want to produce some further documents. Here is the 'Goldfields Regional Heritage Protection Protocol', which has been entered in to by the land council, signed by Mr Wyatt; the Hon. Eric Ripper; Peter Lawlor, President of the Chamber of Minerals and Energy; Scott Wilson, President of the Amalgamated Prospectors and Leaseholders Association; and David Harley, President of the Association of Mining and Exploration Companies Ltd. The protocol is dated 15 August, 2001. Later I will produce substantive agreements with mining companies based on this protocol. To get to this step, the land council needed to get the concurrence of its constituents and the confidence of the government and the other stakeholders I mentioned. It needed to explain to its Western Desert constituency in their

language and cultural terms what this means, why it is a good thing and why they can trust the process.

Another protocol is the 'Goldfields Pastoral Access Principles'. These are principles as to how Aboriginal people and pastoralists in the goldfields can get along together. It identifies rights that pastoralists have as pastoral lessees. Aboriginal people claim native title, and they have native title rights and interests. They have certain rights under the Land Administration Act and traditional responsibilities to look after country. This document is signed by Ian Tucker, the Chairman of the Land Council; Barry Court, the President of the Pastoralists and Graziers Association of WA; and Eric Ripper, the minister. Members will probably know that Eric Ripper, as well as being Deputy Premier, also has specific responsibility for native title in this state. They have exercised this right, establishing broad principles to assist pastoralists and Aboriginal people to develop agreements. From this there has been the opportunity for these stakeholders to get on better.

The document needed significant encouragement on the part of the land council to its constituents to say: 'These are the interests that pastoralists have. They have certain rights and responsibilities. Commercial imperatives need to be addressed. You may need to give notice to them when you are coming on to their properties in some situations. It may well be that you cannot go to certain areas where they have a particular commercial aspect going—bull paddocks or whatever.' On the other hand, they need encouragement as an Indigenous organisation to sell to the Pastoralists and Graziers Association the need for Aboriginal people to go and hunt. We all know now that Indigenous food is terribly important to the health of Aboriginal people.

Another important agreement has been a memorandum of understanding between the Goldfields Land and Sea Council and CALM, the Conservation and Land Management department, and its minister, in relation to working together for the effective and meaningful participation of Aboriginal people in the planning, the decision making process and the management of national parks—CALM lands. These are the subject of native title in varying forms, usually in a form where the recognition of the government's interest is made as well.

Here, again, is an Indigenous organisation doing the hard legal work, because it also has a significant implementation plan. It is not just words but work as well. It is also the selling of it, the explanation of it and so forth, which goes along with significant achievement.

I did mention that following from the regional heritage protocol—the one pager—we have agreements that are now struck with mining companies for all exploration and prospecting licences. When I say 'all', that is the aim; most of them are coming over to this regime. What it means is that when this is signed the parties do not need to worry about going through future act processes or Native Title Tribunal processes and bogging things down, because there is a set procedure there for heritage protection. All that the Aboriginal people seek in relation to exploration and prospecting under this agreement is that there is a proper site survey—indeed, not a site survey in every case but only where there is significant ground-disturbing action.

Mr MELHAM—When did that protocol start—December 2003?

Mr Vincent—Yes, that was the initial protocol.

Mr MELHAM—Is that why the agreements in the table that you have pointed us to have gone to the level they have or is that something separate?

Mr Vincent—These are agreements that have been able to be effected to do away with the native title process. They would be included in those figures.

Mr SLIPPER—To what extent do you interact with other councils and other representative bodies? You have an impressive array of documentation here. Is this documentation which has been created just for Goldfields or is there some sense of shared expertise—when you have a good idea you share it with someone else? Or do we, with each of the individual councils, just reinvent the wheel?

Mr Vincent—There is a bit of both really in that this was definitely an agreement which the Goldfields Land and Sea Council generated, with the assistance, I might add, of the Native Title Tribunal and the stakeholders. Other land councils have built their own in similar terms but with regional imperatives. There are some regional differences but in general the rep bodies know of one other's experience and have been able to exchange information and say, 'We like that idea but perhaps not that—our constituency would do it a different way,' and so forth.

Mr SLIPPER—There seems to be coming through the various submissions we have received a commonality of desire for more Australian government funding. Do you think that it might be possible to make savings by, when you really get a good idea, you sharing it with someone else? Maybe you could reflect on some formalised procedure so that the wheel is not reinvented over and over again in slightly different manifestations. Maybe you could come up with some proposal for sharing ideas which would reduce costs all round. Maybe you achieve a level of expertise in an area and maybe another council might do the same in another area. Instead of essentially having a full brace of staff in relation to both areas in all councils, you could allow a particular council to be the lead agency for some part of what you do.

Mr Vincent—There used to be an umbrella organisation called the West Australian Aboriginal Native Title Working Group which facilitated that very idea which you have. Mr Wyatt will be able to explain a bit more about that perhaps. My understanding was that it had a central secretariat and the funding for that was then withdrawn, so it has fallen into desuetude. Informally, there is still, as much as possible, cross-fertilisation of ideas. For example, I know recently the Goldfields Land and Sea Council obtained some useful advice from the Yamatji Land and Sea Council about registration test procedures in a particularly difficult area—a very technical test it is, too, these days. So there is that sort of swapping of ideas.

Mr McMULLAN—I would like to follow up one of Mr Melham's previous questions, but before I do can I say that when WANTWG, as it was known, existed it might have been helpful to you, but it was certainly very helpful for people trying to liaise with rep bodies to have a central place to go and talk. It was terrific and it is a pity that it is not there anymore. When you spoke earlier and pointed us to the table and showed how the number of agreements had gone up and Mr Melham asked consequentially whether the number of future acts was going to fall, you said that perhaps it would not. Yet from the way you described the agreement you entered into, one of its strengths, which sounded very persuasive, was that it should mean a reduced number of future act applications to which you will need to respond. Is that not happening? Did I misunderstand it? Or do you think it will take longer to happen?

Mr Vincent—Perhaps I did not explain it quite clearly. There are two aspects: (1) when there is a future act the agreement is simply put in place, and so there is no need for recourse to the tribunal process; and (2) these agreements can also capture numerous tenements. So a mining company can enter into an agreement for a large number of tenements and that also reduces the future act process.

Mr McMULLAN—That would make it one application instead of multiple applications.

Mr Vincent—Yes.

Mr McMULLAN—Do you expect that to be reflected in a falling number of responses to future acts?

Mr Vincent—Mr Wyatt has his finger on the pulse of that one.

Mr Wyatt—No, we do not expect the number to fall. The state agreement originally targeted the backlog of tenement applications, which was quite significant—I think the number is something like 11,000 in Western Australia, and 55 per cent of those relate to the goldfields. We had to develop something because they had to be addressed. Politically there was a furore around it as well, and our ability and capacity to cope with the huge number of applications was always an issue. So we developed with the government the state heritage agreement process to address specifically the backlog initially, but the flow-on is that things now automatically enter into the expedited procedures—that is, if companies reach an agreement, if they sign a single agreement now, those applications automatically fall into the expedited procedures process straightaway. That can be a small number of tenements and it can also be a significant number, so our numbers will fluctuate. However, we have even progressed on that. We have developed our own database now to track them. We have also looked at a process of compliance with these agreement to make sure that we really track most of those applications.

Mr McMULLAN—So it should make many of them easier because they will be dealt with in a more structure mannered now.

Mr Wyatt—Absolutely. One of the problems we have now is that we have to make sure that everyone is complying with the agreement, so to us that indicates a much more easily flowing process.

Mr McMULLAN—Thank you. I am sorry to have distracted you but I did want to follow that up.

CHAIR—Mr Vincent, I would like to take this matter a little further. If I have mining tenements in Wiluna, this is the stock-standard agreement you, your clients and the land council would expect me to sign. If my tenements extend across to Meekatharra, I am expected to sign something completely different.

Mr Vincent—You will know from the map that Wiluna does not actually come into the rep body area, but the theory is correct.

CHAIR—Near Wiluna but in your area.

Mr Vincent—Those tenements that are in this area are dealt with by this agreement. If they are on the border, no doubt there would be a sensible arrangement with the next door neighbour rep body about dealing with them.

CHAIR—Correct me if I am wrong on this: we have the same legislation and we have the same mining legislation, yet we have a template agreement for your area and something different next door. It would seem to me that we should be saying to the state government that this should be an annexure to the mining legislation, with agreement. That would be the objective, wouldn't it?

Mr Vincent—There were submissions made, as I understand it, to the state government to have these sorts of agreements made as a condition of tenement, but they have not done that.

Mr MELHAM—Perhaps there are different requirements for different regions. Is it a situation where one size does not fit all—this can be a pro forma but it needs to be added to or subtracted from?

Mr Vincent—You might be aware that you are getting from the Western Desert into the Yamatji area. They have different ways of doing business.

CHAIR—I do not think there are any numbers, so the differences could be accommodated by the different rates and the different sizes of tenements and the per-hectare charges. What are we doing about that? From your point of view, in the administration of these things, it would strike me that you would want some uniformity across the state as a matter of logic, for a start.

Mr Vincent—The land council is trying to keep up with its own patch and doing the best that it can. Of course, the larger picture needs to be considered. There were requests, at least from the land council area, that, if the state government were serious about this agreement, they made them conditions of tenements. There may be an argument that some sort of an agreement could be struck which had acceptance from all groups, but I know that some of the other land councils' constituents want to do sites in a different way. There are differences between site clearance, site identification models and goodness only knows what.

Mr MELHAM—One size does not fit all.

Mr Vincent—One size might not fit all. If you were going to have such an agreement, you would need to be able to distinguish between negotiated types of clearance, I guess.

CHAIR—I come back to the point: it is the same native title act, it is the same Aboriginal Heritage Act in Western Australia and it is the same Mining Act, isn't it?

Mr Wyatt—Can I add that there are cultural differences in terms of surveys and how they are done. In our region, because of the number of tenements and because our claims are across them, we are more site orientated in terms of surveys. In other areas, they do not have as many lease applications as we do. In those areas, they do a broader area survey type thing in terms of people not accessing certain areas of land. They just say, 'Don't go to that area, but you can go to this area.' That is how surveys are conducted. That is one of the significant differences between our neighbours. We have three rep bodies as neighbours. We have Ngaanyatjarra, Yamatji and South

West. The relationship between us and South West is very similar. There is no problem in terms of the point you are making. The agreements are fairly standard. The heritage processes are standard. However, there is a little difference between the other two because of cultural differences in terms of how surveys are conducted in some areas in most places. That is the real of core in it. But you are right: the acts are the same and the process should be the same. But that is the way surveys are conducted in those areas.

CHAIR—Sorry, we have been taking liberties with your opening statement, Mr Vincent. We have drifted on to a discussion. If you are happy, I think we are happy.

Mr Vincent—I am happy, but I do not want to take up too much of the committee's time.

CHAIR—I will come back to you when the questions dry up and you can continue.

Mr Vincent—Regarding these mega protocols and agreements, if I can call them that, across the region, the point that we are making is that it has involved the land councils' leadership—and that means the Indigenous leadership. Most of those agreements—in fact all of them—come up to the governing committee first. Committee members have gained an understanding of them and their utility and they, as Indigenous people of standing, have been able to sell them to the wider constituency in the goldfields. The protocol might then go to a claim group meeting and they might say, 'What's all that about?' One of the members of the governing committee will say: 'No, it's okay; I've heard all about that. We have had it explained at the governing committee. This is what it is.'

CHAIR—Are these the people in note 14 on page 46?

Mr Vincent—Yes, Mr Tucker and his crew.

CHAIR—Mrs Gordon, et cetera?

Mr Vincent—Yes. They play a crucial role because they very often have a shared language. The Aboriginal language is still spoken in that region to a lesser or greater extent. They have a shared history of dispossession. There is an understanding of the fears of Aboriginal people in the region about development and caution. But they are also mature people who have gained a good governance grounding in the organisation and can say: 'This is your situation. Now we have to move forward. These have been explained. We can balance the interests.' It is a crucial role in our submission that the local governing committee—and when I use the word 'local' I mean the goldfields region—plays in these matters. Of course, the staff are also important. Many of those on the staff chart are Indigenous people. Unfortunately, they are not the lawyers or the anthropologists, but there are Indigenous people in areas such as finance and administration. The project officers are extremely senior Aboriginal people who play an absolutely crucial role. I can say that the lawyers would not be able to do their work without them. They basically work as paralegals and in mediation roles. The land council plays a real role in leadership in governance by example. I suggest that, when we get the prescribed bodies, corporations and other Indigenous organisations, that experience will flow on to them.

CHAIR—What assistance have you had to build that capability?

Mr Vincent—Very limited assistance.

CHAIR—How have you attained it? Are we lucky that we have good people?

Mr Vincent—I think we are extremely lucky. I also think that, relatively speaking, there is a low turnover of staff, particularly Indigenous staff, at the Goldfields Land and Sea Council. Some of those Indigenous people have come from other backgrounds. They include nursing sisters and people who were in Coastwatch up in Broome. One is a married to a Kimberley person. People who have worked in other areas have come in and gained an added dimension to their experience. However, the training is limited to a couple of conferences a year. We run in-house training.

CHAIR—Can you take that a little further? We would be pleased if you could show us a synopsis or an outline of what training happens with respect to your governing committee so we can get a feel for how they get their skills and how the success has come from their ability.

Mr Vincent—I was really addressing the staff then. However, over at least the last couple of governing committees a very good introductory course has been run—I think funded by the Commonwealth—where the governing committee have been really taken through their paces about their role, the need not to interfere in the operational matters and the need to address the question of conflict of interest severely and properly. That has kicked off their tenure.

CHAIR—What is that course called? Does it have a name?

Mr Wyatt—They call it capacity building in governance. It is clearly governance. It is run by the Office of Indigenous Policy Coordination. They have put together this package which is run by a consultant. They take all our members through the relevant acts that they are responsible to under the rep body status. In that, they clearly identify their roles and what they can or cannot do. The outcome to that is—and I think we need to add this—that we have had to develop very clear protocols for the conduct of meetings and the management of conflicts of interest, because many of our committee members are claimants.

CHAIR—They are probably all claimants, aren't they?

Mr Wyatt—They all are. We have a standard process of declaring interests in terms of any committees, companies or shares et cetera that they deal with in terms of their personal roles out in the community. We also want to know very clearly from them the positions they hold in other bodies in their claim area, because they could be in conflict with a local Aboriginal organisation that is opposed to their claim needs. They are taken through the requirements of the CAC Act, the Aboriginal communities association act and the Native Title Act and their responsibilities there. That is a two-day workshop; it is quite specific. The result of that has been enormous from our perspective at a staff level. Most of the people are hell fired when they are elected to these committees and they say, 'We need to do this; we want to do this; we want to change the world.' But then they get in there and find out there is a process for doing that—they become a lot more accepting of the processes.

CHAIR—Does your constitution allow your governing committee to be elected biannually or over what period?

Mr Wyatt—Biannually, yes.

CHAIR—So every two years you have an election of your 3,000 eligible personnel out there in your bailiwick?

Mr Wyatt—Yes.

CHAIR—Is your constitution identical to the constitution over at Yamatji?

Mr Wyatt—I have not seen theirs.

CHAIR—So there is no uniformity.

Mr Wyatt—Yes, that is right. I cannot answer that because I do not know; I have not seen their constitution.

CHAIR—So the governance issues confronting your committee in terms of your constitution will obviously be different from the governance issues that are dictated to and mandated by the constitution over at Yamatji.

Mr Wyatt—Perhaps so, but I think also it is the responsibility of the organisation to develop its own processes as well as, and that is what we have done. We have taken it on ourselves to say, 'We want to run as best we possibly can, taking into account all the responsibilities that everybody has in this process.' That is clearly what we have done.

CHAIR—Who drafted your constitution; do you know?

Mr Vincent—It was in 1984.

Mr Wyatt—In 1984, quite some time ago.

Mr Vincent—It was before time began, really, in terms of modern native title. We have talked about the mega arrangements that have been able to be entered into. But the role of a rep body and the need for it to be regionalised or localised is just in the very day-to-day way of things. Anybody who has been out bush knows that a rep body officer sometimes needs to drive 300 or 400 kilometres with just an old man whose English is bad, and you have to pick up somebody who can translate for him to go out and see one site. First you have to negotiate that you are allowed to see the site and that it can be put into evidence, because there might be some funny aspects to it. That will take one to two days, and you get one piece of evidence. You will probably get bogged on the way. At the same time there is probably a project officer somewhere, driving a round trip down to Norseman, down to Esperance and over to Hexter's farm or somewhere to get one of those agreements signed, because he knows that the person who needs to sign it is likely to be out at Hexter's farm. So that is going on.

At the same time the director and the chair might be in Leonora trying to convince a couple of Aboriginal people, who might—let us face it—have a bit of a difference of opinion, to settle their dispute about the distribution of a mining agreement or something. At the same time, a mapping officer might be talking to a consultant anthropologist as to whether a place on a map

of a similar name is the one that he saw and whether he really knows how to read a GPS. Then you might have a lawyer in Perth—probably Mr Meegan—trying to convince a Federal Court judge to put off a hearing because we do not know yet whether we will get funding for it—the OIPC has not come to the party to tell the land council whether funding will be forthcoming. So all of those things are going on all at once, and many of them are in extreme need of local knowledge. It is pie in the sky to expect that sort of rough and tumble, essential work to be done from a tall tower in Perth with a couple of lawyers. They may be Rhodes scholars or something, but it is just pie in the sky.

CHAIR—What sort of model do you recommend? We have an obligation as a matter of public policy to see that the best outcome is obtained for the dollar invested by way of the grant into the representative body. I will not speak for the members of the committee, but I think we all accept that there are difficulties. What is the solution in terms of accessing more funds? What benchmark can the government look at to say, 'The Goldfields Lands and Sea Council is achieving outcomes, but it is having difficulty in these areas and therefore needs more money'? How do we quantify that? How do we achieve a definition of the appropriate sum?

Mr Vincent—I have a table that shows the funding sought and given, which I will table later. Unfortunately, it is not terribly illuminating, because the land council is actually told what it is allowed to apply for. They are told, 'You're not going to get any more money than last year.' They try to add on $100,000 or $200,000 for essentials, but that does not really tell us anything.

CHAIR—But you are not really surprised about that.

Mr Vincent—I am disappointed, and Mr Wyatt will be explaining all this to you later. It means that the government, the executive, does not get a sense of what is needed there. There are umpteen submissions before the committee from various parties saying that there has been no increase in funding since 1995. That seems to be the case. If the government bureaucrats smother the reasonable articulation of need, they are never going to be enlightened. One thing the committee might suggest is that there be a proper investigation of what amounts are required. The Love-Rashid report several years ago said that heaps more money—I think they said $84 million—was required for rep bodies. That was quite a few years ago, and there is nowhere near that much money even today. I think there is half of that. There needs to be better inquiry into that aspect.

CHAIR—But the problem is, I think, that you have achieved an awful lot with what you have had, have you not?

Mr Vincent—We have, but there could be heaps more. For example, we have had to go through tortuous proceedings in Wongatha—I say 'tortuous' because of the quite horrible effects on Indigenous witnesses of a court process where each witness was cross-examined by 10 lawyers—albeit, just doing their job.

CHAIR—But that is a legislative problem. That is not a funding problem.

Mr Vincent—It is a funding problem. The land council simply had to focus on getting claims up for hearing. It did not have the resources to have the added ability to properly mediate claims. That is the situation with all of them, unfortunately. We are only at the stage with the state of

getting mediation programs set—not even substantive issues addressed—and we are 10 years down the track. That is largely a resource issue.

Mr McMULLAN—Perhaps I can follow that up with Mr Wyatt. I see from the financial statements in the annual report that you have received special purpose grants of $3.5 million in one year, $3.6 million in the next year and roughly in that order each year. How much of that, in the jargon of finance, is a 'block grant'—that is, for your basic administration—and how much of it is special amounts for training your committee and for running particular court cases? How does it break down, and has that changed? I ask that not just out of idle curiosity. Everyone says that there has been no increase—we have our views on that, and we will track down the facts about all that when the OIPC appears before us—but the government announced four years an extra package for funding for native title to do with capacity building and priority case resolution, so I am trying to work out where that money is. I assume it is part of the $3.6 million. Can you explain to me how that comes about?

Mr Wyatt—The capacity building one is not in there. That is available on application. We get funding for the areas of staff, operations, and legal and research. They are the three major categories, and there is a small capital component attached to that. Most of it is operations in those three categories. Then you can adjust the figures to where the need is at the specific time. Most of those are around claim preparation basically, particularly in the legal and research section.

Mr McMULLAN—That was my understanding. Maybe I put two and two together and got an answer that did not justify that. Mr Vincent said the problem with Wongatha was that you were not sure that the money was going to come through to fund the case.

Mr Wyatt—Yes.

Mr McMULLAN—That is clearly over and above a core grant for staff and things—what I call the block grant. It is just my way of talking about it and we all know what I mean—that basic fund. Then you get extra amounts for specific and special cases on a case-by-case basis. How much of your money comes in that capacity and is that part of that $3.6 million?

Mr Wyatt—No, it is not. The actual Wongatha hearing costs, for example, are a specific litigation allocation that we have to apply for. That is assessed and reviewed in terms of how we have prepared our claim. There is an independent assessment done prior to any release of money. The danger in that is that the processes are very slow and we get caught up because we have to spend money in the meantime to meet court deadlines. That is what Mr Vincent is talking about when he says we get caught out.

Mr McMULLAN—With respect, I am using you to mop up questions I have not asked pervious witnesses because of time limits. You are not the first, and I do not mean just today; you are just the last to have said that you incurred costs in a case before you knew you were going to get compensated for them, and sometimes you do not. That is the point I am trying to clarify, and you are just the last and most recent example and the best opportunity I have had to ask the questions.

Mr Vincent—We call it 'drip feeding'. We do not know whether we are able to brief our senior counsel for a particular part of the case until the day before.

CHAIR—There is no correlation between the evaluation of the funding for the claim and the court process?

Mr Vincent—You have two processes going. You have the regional case conferencing process, which the Federal Court has brought in—and I respect them for doing it. They have all the judges by video link from Sydney and whoever has the docket judge for a particular claim in the region. Justice French presides. They try to work out a logical way of approaching the hearing of these cases so that they are not all coming on at once and we, the Commonwealth and the state have to address three claims at once instead of one. Notwithstanding them going through that exercise, the land council is constrained in two ways: one, the new funding agreement says it cannot actually consent to any programming unless OIPC concurs—

CHAIR—A bit of coordination needed there.

Mr Vincent—That is the first point. Secondly, every step then needs a special litigation application. You cannot be bold enough to say that you will have, if you like, a hearing of preservation evidence—evidence from old people who may pass on and you need to get their evidence urgently. Usually you need to get about two or three people together. You cannot suggest that to the court if there is some vacation there that a judge wants to fill because you are not allowed to promote that idea under the funding agreement terms and conditions without the consent of OIPC. Even if you did you would not know whether you were going to get funded for it because the control is not in your hands. You have not had the block funding for the general responsibilities that are going to confront you—the knowledge of preservation evidence, certain claims, et cetera.

Mr McMULLAN—There is the problem not only of the amount of money but of the process of how you get access to it. It is not just predictability but also process. Even if the amount of money were adequate—and from what you have had to say I understand the inadequacy of that—if you were getting it through this process it would still cause problems for you.

Mr Vincent—Yes, there is a procedural problem in terms of the new funding agreement rules.

Mr McMULLAN—That is something we need to ask OIPC about. Thank you.

Mr Vincent—I will try to draw to a close if you are anxious about time but I would like to hand up the relevant clauses of those rules.

CHAIR—We would be very much obliged if we could see those.

Mr Vincent—Yes, I have them here. Senator Johnston, you asked how the community can know that it is getting value for money from the land council. We have faced the considerable and increasingly rigorous requirements of the Commonwealth, and they are not all resented. There have been numerous inquiries, of course, into rep bodies: by Miller, Parker—not necessarily in this order—Love-Rashid and so forth. There are considerable requirements on rep bodies in terms of governance. There is the annual report, which we have tendered and which we

have to file in parliament. There is a strategic plan under the act. That is approved by the minister. Now there is a thing called an 'operational plan' that, under the grants agreement, needs to be approved by OIPC. That is the minutiae of operational matters of the workings of the land council, which are, after all, statutory functions. The interesting thing is that the rep bodies are, according to the will of parliament, vested with statutory functions yet OIPC is seeking to control those functions directly through the grant conditions.

CHAIR—Controlled or inhibited?

Mr Vincent—One would hope it is controlled and not inhibited. If they were to be inhibited, that would be a political decision on the part of OIPC, inimical to native title aspirations.

CHAIR—So you are saying 'control'.

Mr MELHAM—That is a lot of red tape for a government that professes to abhor red tape.

Mr Vincent—It is red tape which the land council has borne manfully and, can I say, dutifully and in accordance with the requirements. But, nevertheless, this is what I would call 'meta-work': work about work, rather than work about getting out and trying to win claims—

Mr MELHAM—It takes up resources, Mr Vincent.

Mr Vincent—It takes up considerable resources and energy, and can be quite distressing.

Mr Melham—Is there a better way of doing it? Is it not time we looked at trying to get an area where we can have transparency and accountability but which is less burdensome, while still ensuring that the public purse has value for money and that money is not squandered?

Mr Wyatt—Yes, but one of the things—

Mr MELHAM—Or would you rather the devil you know?

Mr Wyatt—It is a bit of both, I must say, because one of the difficulties we find is that we are forever putting up the merit of the case before it is even heard. That is the real problem we have. The bureaucracy seems to have taken it upon itself to make assessments to that point: 'Are you going to get a successful outcome? If you are, then we will support you.' However, if there is some likely problem or something in it that says you may not have the outcome they prefer, then there seems to be this argy-bargy about 'shall we fund some?' and 'when will it be released?' and so on. So I think there is quite a bit of that in terms of that evaluation that needs to be looked at in the context of streamlining the process a bit more. I do not have any problem with streamlining it to make it standard, but it has got to be done for the right reasons, basically.

Mr Vincent—I am seeking to table the strategic plan of the land council from 2004 to 2007 and the operational plan for this year. Can I say that we had to file this with the budget but the land council does not know yet whether it has been accorded funding for this year.

CHAIR—Do you mean 1 July 2005 to 1 July 2006?

Mr Vincent—Yes. The situation is that it still has not been advised.

CHAIR—Is that in accordance with previous years? Has there been a commencement of a financial year without knowing what resources you have at your disposal?

Mr Vincent—Yes.

Mr SLIPPER—A bit like our federal budgets used to be.

Mr Vincent—I am not going to take you through these documents. The strategic plan is the one that needs under the act, as I recall it, to be the subject of consultation with OIPC. The operational plan is the minutiae of what people are going to be doing, what is going to be pursued, what is going to be finalised, what witnesses are going to continue to be proofed and so forth.

CHAIR—Do you think other land councils are doing what you are doing with this?

Mr Vincent—I would expect that they are obliged to.

CHAIR—We have not heard them say that. The last witness was Yamatji Land and Sea Council and it did not mention it to the degree that you have. I asked the question very similarly. You do not know. Obviously, we need to look at some more communication across the board with land councils. Is there potential for a different sort of approach to each land council by OIPC?

Mr Vincent—I will say two things, and then Mr Wyatt may be able to answer that last question. The operational plan that has been required by OIPC has a further requirement that it be updated, in a sense, by way of a report every six months. That is, if you like, a precondition to funding—that is my understanding. The funding agreement clauses which I will table will show that. As far as tick-tacking, I think there has been some grumbling about the situation among land councils at various forums, but Mr Wyatt goes to those so he can tell you.

CHAIR—What is your experience? How many years have you been involved, Mr Vincent, in putting forward your operational and strategic plans? The operational plan is the more relevant one. I want to know what the annual sort of loss rate is, if you like, or the adjustment rate. You put in a request for X number of dollars, you justify that and you get given X minus a percentage number of dollars. What is the result at the end of the day?

Mr Vincent—I will now table the GLSC funding shortfall analysis prepared by their finance manager.

CHAIR—I did not even know you had that.

Mr MELHAM—It is Dorothy Dixer.

CHAIR—It has turned out to be that way.

Mr MELHAM—You have been waiting for that for an hour and 10 minutes.

Mr McMULLAN—At least the Western Australians are sending the rest of us up.

Mr MELHAM—That is what I like.

Mr Vincent—Because they are figures and they are done by an accountant I do not purport to understand this document too well. If members have questions the land council would be happy to—

CHAIR—We will put them on notice.

Mr Vincent—Put them on notice and I think under your standing orders we can provide you with further information. We would be happy to do that.

Mr SLIPPER——Regrettably I have to go shortly but I want to ask a question in relation to the shortfall and the most efficient means of doing things. I have asked other witnesses. Would there be savings within their operation which would mean that they would not have the need that they claim they have for additional funding? I will put the same question to you. I am not for a moment denying your expertise, you are obviously well across this, but I see that you are a retained counsel. I am not asking you what salary you are on but you told me before that three-quarters of your time was invested with this client. Is that, for instance, the most efficient means of obtaining legal advice for the council? Maybe you are the wrong person to as. Does the council have other instances of professional people being retained—independent contractors or private professional people—who give or are paid for a huge chunk of their professional week working for Goldfields as a single client? For instance, Mr Meegan, are you on the same agreement or are you on a salary?

Mr Meegan—I am on a salary.

Mr Vincent—Thanks for the question. The situation is that the lawyers in the land council are largely salaried. I am not, but there are other counsels who work for the land council from time to time in particular when there is a claim and they would spend a considerable amount of their time on that. It depends on what is going on.

Then there are various researchers. For example, anthropologists have to come and do very technical reports now. They would from time to time work quite closely and continuously with the land council on special projects. But I will just mention a couple of things in relation to this document I handed up. As I indicated earlier, it does not really tell us a lot, because I am instructed that the land council are advised by OIPC—formerly ATSIC et cetera—as to the amount to expect. They have said: ‘Don’t expect any more money this year than you got last year. Tailor your requirements to that.’ They do. You will see that even when doing that they have tended to seek some more money, and there have been shortfalls. The proof of what I say, if I can suggest it, is that in 2002-03 you can see that the actual budget was for exactly the same amount as they were given, so there was even closer collaboration that year.

Mr SLIPPER—That was a remarkable coincidence.

Mr Vincent—Exactly. There was much closer collaboration with the finance manager that year than in other years. You will see a note at the bottom that says:

2004/5 formal Budget Submission was $2,720,500 as instruction from ATSIS to restrict Budget to Base established in 2003/4.

These words were written by an accountant, not me. It continues:

GLSC informally submitted a “needs based” budget of $3,772,953 ...

So they went into the exercise and said, ‘This is what we truly want and need for our proper operations.’ It was only submitted informally. Happily, there was some increase from that exercise. So it may well be that, if a more transparent needs based analysis were made and rep bodies were enabled to do that in association with OIPC, the funding picture might be clearer.

Mr MELHAM—I see with that last one it turned out that there was a substantial increase in staff. Your grant went from $1.2 million in 2003-04 to $1.7 million in 2004-05. Is that as a result of the agreement stuff kicking in, so that basically you were able to establish to their satisfaction that there were some outcomes that were coming through, or what? I am interested, as that is a substantial increase.

Mr Wyatt—Yes, it is. There are also areas where they are able to pick up on what came out. Certainly in terms of the future acts, there were extra resources provided. We had to go on a fairly extensive campaign about that to highlight the need and they were quite forward in coming with assistance and allowing us to increase the money there. The point about it is that we may spend more money in that area because people are doing more work, as opposed to the bottom line not changing.

Senator SIEWERT—Where you have the budget and the grant and you have identified the shortfall, is it possible to get some documentation of what the budget was based on so we have an idea of what you were trying to do as opposed to what you could do because you did not get what you asked for?

Mr Wyatt—Yes.

Senator SIEWERT —That will give us an idea of what you cannot do because you have not got the funding for it.

Mr Vincent—We would like to do that, and thank you for the invitation to submit that material. I hand up now a couple of pages from the General Terms and Conditions Relating to Native Title Program Funding Agreements of the Commonwealth. As I understand it, these are the general terms and conditions of all rep body funding arrangements. These are pages 14, 15, 16, 19 and 20. In particular, they show the constraints referred to. For example, clause 5.4, which starts on page 14, says:

The Funding must be spent by you only for the Activity—

which is defined as fairly specific activity. It says that you must not use the funds for various things, including, interestingly, on page 15, part (d):

to seek judicial review of any ... administrative decisions, or a Ministerial decision ...

Then (j) includes:

to support or contribute to the operating costs of Prescribed Bodies Corporate ...

That is an issue which I am sure the committee is well aware of. We say that prescribed bodies corporate will need an incubation period of assistance from rep bodies, and this does not allow for that.

Mr McMULLAN—I do not want to pursue prescribed bodies corporate, because we have asked a lot of questions about them elsewhere and it would be a duplication, but I would like to know how many are there in your area.

Mr Wyatt—There are none at the moment.

Mr McMULLAN—But there are some in evolution?

Mr Wyatt—Yes.

Mr McMULLAN—That does involve you but, once they get set up, you are not allowed to be involved. That is roughly it, isn't it?

Mr Vincent—That is right.

Mr McMULLAN—I do not want to take up any more time. We have discussed it with other people and we would just be wasting your time and duplicating things.

Mr Vincent—Paragraph (k) on page 15 is the matter that I was specifically referring to. It says that you cannot:

... seek or support the referral of, the setting down or the making of programming orders for, any Contested Litigation ... without prior agreement ...

That really constrains the land council and makes it very difficult. Paragraph 5.5 on page 16 is interesting, and I want to make a contrast there. It talks about conducting business. It says that directors can have no more than the cost of the cheapest available method of transport. I will come back to that because it is relevant later. On page 19 it says that you must give strategic plans, and paragraph 7.1 says:

You must prepare an Operational Plan for our approval ...

That is where the chains come in of a statutory function that rep bodies must fulfil themselves under the Native Title Act. It is not up to OIPC to constrain or control it through the purse strings. Paragraph 7.4 on page 20 says:

At our absolute discretion, we may direct you to amend and submit for approval a revised Operational Plan ...

The old funding terms and conditions were general terms and conditions relating to grants. This was before this agreement form was struck. In contrast, on page 8—and I will hand up the relevant extract so that you can compare it if you wish to—clause 5.1 states merely:

You must apply in writing to us if you wish to vary:

a. the Objective of an Approved Activity—

not the activity itself, but the objective. In other words, the old funding arrangements were much more generalised and not as tight or controlling.

Mr MELHAM—What was the purpose of this then? What was the rationale behind the change?

Mr Vincent—I do not know the mind of the OIPC, but presumably it was seeking greater control over day-to-day matters, including litigation. It is an arm of government. The Commonwealth opposes many of the native title claims that are being run by the Goldfields Land and Sea Council.

Mr MELHAM—Do you see it as a conflict that, in effect, the funding body or an arm of the funding body is in many respects always opposed to you?

Mr Vincent—It is a conflict.

CHAIR—Do you view the Commonwealth as an adverse respondent of all claims or of only some claims?

Mr Vincent—They are an adverse respondent to all of them. In some we are seeing whether they are not going to continue, but at the moment they are adverse respondents in all claims.

CHAIR—In what capacity?

Mr Vincent—They vigorously opposed the Wongatha claim in all aspects, yet the only pieces of Commonwealth land that were in issue were conceded as having native title extinguished over them by the Wongatha native title claimants.

CHAIR—What have they said is the basis for their respondency?

Mr Vincent—Simply that they have a statutory right to do so on behalf of the community. Unfortunately I forget the section—it is something like 84.

CHAIR—Is it a Yorta Yorta type approach? In other words, history has washed away the—

Mr Vincent—Yes. They would say that native title no longer exists or should not exist, or they may oppose it, or a witness's credibility might be impugned because that person's father had got a citizenship certificate and, therefore, why should that person now regard themselves as having an historic legacy of Aboriginality. Increasing control and increasing the amount of work that the land council has to do, diverting it from its real role and without extra funding. I am just

about to finish up and I thank you for your graciousness in hearing this. It is section 84A, so I was nearly right.

CHAIR—That is the section of the act that allows the Commonwealth to be a respondent, notwithstanding that it might not have a direct interest in the claim.

Mr Vincent—That is so.

CHAIR—I was just paraphrasing.

Mr Vincent—That is exactly right.

CHAIR—But you can understand the logic in that. There needs to be a contradictor, doesn't there?

Mr Vincent—One can understand the logic. The difficulty from the point of view of the court and the parties, I suppose, is the duplication of that role in that the state is also an adverse respondent in most of the cases. There is very careful scrutiny of all matters, having what they say—and I think the Commonwealth also regards it in this way—is a constitutional responsibility for land management matters.

Mr MELHAM—There is also another role that the Commonwealth could play which is like a friend of the court role, so they only submit if and when required, if there is a principle that requires the Commonwealth's view, rather than take a negative view.

CHAIR—But they would need to be a respondent to do that.

Mr Vincent—They would need to be a respondent but they do not need to do so.

Mr MELHAM—But they do not have to be as active in the roles they take.

Mr Vincent—May I make a contrast. The local government people in the goldfields region were respondents.

Mr MELHAM—But did not take an active role.

Mr Vincent—Indeed, Sir, they did not. They simply said, 'We're not going to cross-examine witnesses but we'll keep our ear out.' They then made a couple of submissions that impacted specifically on their area of interest in the closing.

CHAIR—It is probably more a matter of expense rather than anything else.

Mr Vincent—It may well be.

Mr McMULLAN—The Commonwealth's attitude to what is an expense varies between its own representation and the council's representation.

Mr Vincent—I want to take you to the terms and conditions of the Attorney-General's ability to finance.

CHAIR—We are aware of those terms and conditions, but feel free to forward that on to us.

Mr Vincent—Yes. It is 100 per cent of solicitor's fees, virtually full stop, 100 per cent of council rates and, I think, lawyers have to travel with equivalence to those in the senior executive service, compared with the harsh sound at least of those terms and conditions, which is cheapest fare, and if that means doing this or doing that, then you have to do it as far as directors of the land council are concerned.

Mr MELHAM—So what you are saying is that there is a double standard in the way that the Commonwealth's purse strings are applied.

Mr Vincent—That does appear to be the case. There is much more flexibility—just send us the bill if you are a non-Aboriginal person being funded by the Attorney-General. Whereas with the rep bodies, it is 'terms and conditions and cheapest fares, and we won't tell you that your senior counsel can turn up until the day before'. That example, which is a Goldfields Land and Sea Council example, is actually quoted for some reason in the OIPC submission to you.

So I will finish by handing to you these brochures. I have only one set, but they are colourful brochures and they go right back. It is now called the Goldfields Land and Sea Council but it was the Goldfields Land Council. It is a service charter, which the OIPC in its submission to you suggested that land councils do not have. This service charter has been with the land council virtually since its inception. There are pamphlets on the role of the Aboriginal people in the economy; the new responsibilities of the land council; the responsibilities of applicants, parts 1 and 2; the future act regime and how it works—

Mr MELHAM—Have these been in existence for some time, Mr Vincent?

Mr Vincent—They have come through the years. There are also pamphlets on how bodies corporate work; native title, progress through cooperation; and the Goldfields land council—so that is an old one as well—and various newsletters which I will not bore you with. There is a pamphlet on what the Ward case—the Miriuwung Gajerrong case—means for claimants. Now, these are from a native title rep body said by the OIPC to be unprofessional. I would suggest that it just does not stack up.

CHAIR—Do you want to make any comment about why they would say such a thing?

Mr Vincent—Perhaps I will leave that now to Mr Wyatt, because it is—

Mr MELHAM—You are not on their Christmas card list—is that it in a nutshell?

Mr Vincent—That's it.

Mr MELHAM—If we can be diplomatic.

Mr Vincent—I think so, yes.

Mr MELHAM—Sorry, Mr Wyatt; do you want to say something?

CHAIR—Before Mr Wyatt does say something, we want to congratulate him on his Churchill Fellowship. I note that you have that in the annual report, so please accept our congratulations on that. That is an achievement of merit and of note.

Mr Wyatt—Thank you very much, Mr Chair. I think it is time for us to stop cracking each other over the head. We ascertained very clearly that the OIPC have not been kind to us in the past. In a lot of cases, I think the reputation of the Goldfields preceded us, because of what transpired six or seven years ago and the conditions we were in, and that is a little unfair. We do get angry about it because, despite all that, we have come this way, with all these sorts of agreements and these sorts of processes. This is what we have always reiterated to the state and the Commonwealth government: clearly, this is what we have tried to achieve in that period of time. One of the things I find with the OIPC is that they really do not know us on the ground. They are managed and handled from a central point in Canberra. They very rarely visit us. I think we have only had one visit from their senior people in Canberra coming out, and that was after much dragging and pulling and tugging. It is one of those things where we think we have been unfairly dealt with over the past few years now, because we think we have made significant changes and significant shifts.

CHAIR—How many overlaps do you have now?

Mr Wyatt—There are still quite a few up in the northern parts of our claim area.

CHAIR—Ten, 15, 20?

Mr Wyatt—Nine, roughly.

CHAIR—As opposed to 1996 or 1997, when you would have had maybe three dozen?

Mr Wyatt—Easily. But the point is that you have to show you have won before you can even get down to discussing the game. That has been the approach from the bureaucracy. My concern about the OIPC is that we always thought—and I am glad you mentioned my Churchill Fellowship, because one of the things I noticed in Canada is that they have a public sector that facilitates between government and community. We find that that is not the case with us. We find that we have to not only combat state and—

Mr MELHAM—So it is an extra hurdle?

Mr Wyatt—Absolutely. Not only do we have to combat state and Commonwealth governments, as well as legitimate respondents; we have to fight the public sector as well. We do not know why, but we have to, so that we can survive and get things moving. That is a real concern. If we stay in the litigation of native title—and I do not want to jump away from what Mr Vincent was doing in terms of clearly mapping out our submission—there will be this ongoing process. Our view now is that we have to become clever and we have to start looking at other ways to settle these claims. Obviously, we argue that negotiated outcomes are the way to do it, through agreements. And that is the only way we are going to be decent about it as people.

If we stay where we are, it is going to be poor bugger me, winner takes all and the loser, again, is the Aboriginal people. So a little bit of that sort of soul-searching has to take place.

We were quite happy with some of the comments that the Prime Minister made in his reconciliation speech about the demand for changes to the act. I do not know the exact words, but the gist of what he said was that there would be no fundamental changes to the act.

NTRBs are a fundamental part of the act, as far as we see it. So we have to be afforded that support and respectability. In our region, people have taken quite some time to come to the table about this. They say a lot of things; in our submission we are again critical of the state government. We say there is a lot of rhetoric. But that is what has been put to us. We will get an outcome through agreements, but five or six years later we are still in court.

CHAIR—Have you got state funding for one embedded person in your—

Mr Wyatt—No, there are a couple.

CHAIR—Two?

Mr Wyatt—Yes.

CHAIR—And how are they working out?

Mr Wyatt—Very well, because the demand is there. We have to meet the commitment that we entered into under the state heritage agreement and that is the process with that.

CHAIR—You chose the people?

Mr Wyatt—Yes.

CHAIR—And the state gives you the money for them?

Mr Wyatt—Yes, they do. So—without going over old war wounds—it has been a real battle up to now to get the recognition that we needed.

CHAIR—What are the fundamentals of what you observed in Canada? Your made an interesting comment about facilitation. Surely it is not a blank cheque?

Mr Wyatt—No, I was not suggesting that it was. In most of the legislation that Australians can interact with, there is an agreement of some sort between state and Commonwealth to deliver on a lot of the legislation. Native title is one area where there is no agreement between state and Commonwealth to facilitate the citizenship rights of Aboriginal people to get what they need from the native title act. There should have been some arrangement between Commonwealth and the states to facilitate that process.

We were given a bag of money to go out there and fight the world about a piece of legislation there was designed, after Mabo, to fix up a few things. That is the kind of notice that I have seen overseas: where there is already a process in place and where governments are prepared to

facilitate things—in addition to people establishing their legal rights. I am not suggesting we do away with that; I am saying that, as a citizen, an Aboriginal person is still entitled to the services of government: state, Commonwealth and local. In hindsight, there should have been some arrangement in the early stages to sit down and say what could be or what should be. In this case there should have been an agreement of some sort to settle native title. Instead we are now in this long process of litigation.

CHAIR—We have mentioned that one size does not fit all and on cultural differences and grounds the boundaries can be quite significant between land councils. Given your mineralised ground, and given the large number of people involved out there in the eastern goldfields, I take it that it is impractical to look at ILUAs to be any form of solution.

Mr Wyatt—No; in the six years that I have been there as the head of the GLC, there has been no application by a mining or exploration company—that I am aware of—that has not been agreed to. Where the processes could allow for it to proceed, it did so. There has been no drawn out fight or debate about land access for mineralisation in the region.

CHAIR—But on a broader basis—

Mr Wyatt—On a broader basis, I am saying that in a claim area, yes, it can be settled. In terms of reviewing the system, a fair amount of credit has got to go our people. They have learned the processes and the demands that have come with them. So, they have developed, as well. They are quite ready to enter into arrangements and agreements with people.

It is not a strongarm or, as many people put it on a lot of occasions, a rort or a blackmail process. There has been none of that. People have been quite restrained in their agreements, quite frankly. If you have a look at some of our agreements you will find that they are quite modest in comparison to some of the mega deals that everybody throws up in the Pilbara and in parts of the Territory. Again, I come back to this point of people having perceptions about our area. They should come out and really have a good look and get an understanding of what we do out there.

CHAIR—The point I was making is about the regional land use agreements. We have heard that Queensland has 97 and we have three, as I was corrected this morning. That requires a manageable piece of land with relatively few respondents and people to participate in the agreement. You have, say, Wongatha. That is a couple of thousand square kilometres and there are lots of land users inside that boundary.

Mr Wyatt—It is interesting that Wongatha is one of the first claims to go into the broader heritage clearance process with industry out there. In areas where they did not have overlaps, they have settled on a test pilot project to get an agreement about a huge area of land. I cannot give you the exact figure, but it is a significant part of their claim. The overlaps are in the north and there are a couple of minor ones in the south.

CHAIR—Those overlaps are preventing the registration of a broader agreement with the Federal Court?

Mr Wyatt—Yes, but it is not unworkable. This is the point that we have been trying to make all the way through the process. We have reached an agreement on many of those overlaps, but the process has taken a long time to settle. That fluctuates. If we could nip them in the bud at the time when people do reach agreements, they could be settled. It is as simple as that.

CHAIR—Is there anything else you wish to raise with us, Mr Vincent or Mr Wyatt?

Mr Vincent—I was anxious to get this policy and procedures manual—just as another tool of professionalism that is utilised by the land council.

CHAIR—We would be very pleased to receive it.

Mr Vincent—It addresses such things as conflict of interest. Basically conflict of interest has been put up by OIPC as some reason for Aboriginal people not to be able to govern themselves. There is a large core of matters which are noncontentious and there is no conflict at all. There are some conflicts about how you distribute moneys from a mining agreement perhaps or other areas. It is workable, they have rules about what to do and they are fairly mainstream corporate rules. This has also got Goldfields Land Council on it, not Goldfields Land and Sea Council, so it is an old document.

Mr MELHAM—When was that brought into being?

Mr Vincent—This would have been brought in when the land and sea council had to get its re-recognition as a rep body, which I think was in 1999. It has been upgraded and so forth. It is a loose-leaf document.

CHAIR—If we have any further questions we will be in touch. On behalf of the committee, gentlemen, thank you for travelling down from Kalgoorlie, for the assistance you have given the committee in its inquiry and for your submission. Thank you very much indeed.

Committee adjourned at 3.44 pm