Parliament of the Commonwealth of Australia

FIRST REPORT OF THE PARLIAMENTARY JOINT COMMITTEE ON NATIVE TITLE

Consultations During August 1994

October 1994

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PREFACE

While the Parliamentary Joint Committee was appointed on 24 March 1994 pursuant to the *Native Title Act 1993* (s.204), and senators were appointed to the Committee on that day, the initial appointment of members from the House of Representatives was not completed until 4 May 1994.

The Committee met on 12 May and elected Senator Chris Evans as Chair; it also adopted procedural resolutions. On 3 June and 29 June the Committee held a series of private briefings in order to become better informed about native title issues prior to the commencement of the consultations that are the subject of this report.

The success of the Committee's initial program of consultations, meetings and inspections was due to many people, in particular, those who were willing to meet with the Committee and others who assisted with the organisation of visits.

The Committee is most grateful for the interest shown, the assistance provided and the views that were expressed. While the extent and detail of those views is not presented in this report, it has either been recorded or otherwise noted and will be considered carefully as the Committee continues its role.

CHAPTER 1

Introduction

1.1 The Parliamentary Joint Committee on Native Title was appointed on 24 March 1994 pursuant to the *Native Title Act 1993* which had received Assent on 24 December 1993.

1.2 This Committee's duties are specified in s.206 of the Act and are reproduced in this report at Appendix 1. Essentially the duties are to consult extensively about the implementation and operation of the Act; to report on that from time to time; to examine the annual reports of the National Native Title Tribunal (NNTT); after two years to provide a report on a range of matters including the effectiveness of the Tribunal and the operation of the Land Fund; and to inquire into any question referred by the Parliament.

1.3 In considering its duty to consult extensively, the Committee wished to begin this process as early as possible. The 1994 winter recess allowed the Committee time to travel across Australia. This began a process of familiarisation and discussion about the operation of the Act.

1.4 Native Title is a common law concept and it has not been codified in the *Native Title Act 1993*. Further, like much Commonwealth legislation, the provisions of the Act itself are not widely known. Accordingly, in beginning the process of public consultation across Australia, the Committee took the opportunity to receive a wide range of views about native title and to explain its own role. This report may assist in increasing understanding about the Committee and its duties under the Act. And the Committee anticipates that the process begun with its meetings during August will result in regular reporting that provides Parliament with a clear understanding of the Act's implementation and advice about any recommended amendments.

CHAPTER 2

Initial Consultation Program

2.1 Over some considerable time the native title issue has placed demands on many individuals, communities and organisations. It has also imposed heavy demands on the Australian Parliament. During the Senate consideration of the Native Title Bill 1993, a total of 149 amendments was moved: 119 were agreed to, 29 not agreed and one was withdrawn. The bill was considered in the Senate for 51 hours 49 minutes, the longest consideration of any bill in the Senate's history. And this was merely the culmination of an intense process of consultation and negotiation out of which the bill was developed and drafted. In addition to its consideration in the Senate chamber, the bill had been the subject of an inquiry by the Senate Standing Committee on Legal and Constitutional Affairs. That inquiry received 109 submissions in addition to holding public hearings in four capital cities.

2.2 The Act, passed in December 1993, represented a major landmark in an expanse of concerns. They included the way in which the Commonwealth government should respond to the High Court's Mabo decision, the understanding of Aboriginals about their native title rights, the effect on national life of the acknowledgment of those rights and the significant matter of reconciliation. Importantly, the wider community has only recently begun to come to terms with the common law concept of native title.

2.3 Accordingly, there was clearly an opportunity for the Committee to consult extensively with the widest range of interested parties and for such consultations to allow the community to express concerns. The meetings also could assist the public education function concerning native title.

Familiarisation

2.4 While these opportunities were apparent, it was evident that the Committee would need to begin by achieving a better understanding of the range of issues relevant to native title. A familiarisation process was necessary so that the outcome of the extensive consultations required by the Act would both increase the understanding of the Federal Parliament and contribute to better appreciation of native title within the Australian community.

2.5 It was for these reasons that, for instance, the Committee accepted invitations from mining companies to participate in inspections of their current operations and a proposed mine site. Similarly, the Committee welcomed opportunities to meet with Aboriginal communities to learn of their concerns. The Committee will continue with this approach whenever appropriate in fulfilling its responsibilities under the Act. In fact, the Committee anticipates revisiting some communities over time if that would be welcomed by them. Ongoing consultations with all relevant persons and bodies are anticipated so that the Committee can effectively monitor the implementation and operation of the Act.

Evidence

2.6 Of course, a significant element involved in the consultation process is the formal receiving of evidence. During the initial round of meetings and consultations the Committee had various presentations recorded in this way by Hansard. Recorded 'evidence' was received in Sydney, Brisbane, Cairns, Mt Isa and Perth. There is, however, an important point to note here. It concerns the nature of any evidence that the Committee could receive at this stage.

2.7 Although some nine months have elapsed since the passing of the Native Title Act, experience of its implementation is quite limited. The Act provides that through their own legislation State and Territory governments may participate in native title recognition. With the exception of the Northern Territory Act, however, no complying legislation has yet entered into force. Further, prior to the commencement of the August consultations less than 30 applications had been submitted to the Tribunal and there had not been a completed mediation process for any of these applications. Consequently, there has been little if any experience of many provisions of the Act. For example, the Act provides (s.81) a role for the Federal Court to hear contested claims for a determination of native title or for compensation; this and numerous other provisions of the Act have yet to be utilised.

2.8 Given the minimal experience of many aspects of the Native Title Act, together with the fact that the Act is the subject of a High Court challenge, the Committee was aware prior to taking evidence during the initial consultation program that the nature of any such evidence necessarily would be limited. That is, the nature of the available evidence was likely to be such as to preclude confident judgement

about the operation of many provisions of the Act and the ways in which they are being implemented.

2.9 Importantly, when evidence is presented that allows the Committee to make judgements, that evidence will be tested by seeking opinions from a range of witnesses on each issue. It was clear prior to devising the initial consultation program that the Committee would be learning about these emerging issues during the hearings and would not have adequate capacity to analyse and compare the views that were being presented.

2.10 In summary, then, the program of initial consultations was devised in order to ascertain the matters of most concern that have emanated from the establishment of the Tribunal and the lodgement of the first applications; it was also designed to provide access to the Committee by a very wide range of interests. (The consultation program is detailed at Appendix 2.) This report, however, does not seek to provide definitive comment to the Parliament about the issues raised.

CHAPTER 3

Issues Arising

3.1 While it would not be appropriate to report definitively at this stage about the issues that were raised in the initial consultations, the Committee nevertheless wishes to outline and record significant matters that were canvassed.

The Response of State Governments to the Act

3.2 The *Native Title Act 1993* provides for:

- recognition and protection of native title;
- the establishment of procedures for future dealings affecting native title;
- the establishment of a mechanism for determining native title claims; and
- the validation of past acts invalidated because of the existence of native title.

And certain provisions of the Commonwealth Act affect the States and Territories. These provisions fall into the following categories:

- those that prevent the extinguishment of native title;
- those that control future acts affecting native title;
- those relating to the recognition of State bodies as arbitral bodies; and
- those entitling people to claim compensation.

3.3 Through their own legislation State and Territory governments may participate in this national scheme of native title recognition. For example, s.14 of the Act provides for the validation of past Commonwealth acts and s.19 enables States and Territories to validate their past acts on the same terms. Further, State and Territory arbitral bodies that comply with relevant criteria and are recognised by the Commonwealth Minister will be arbitral bodies for the State or Territory under the Commonwealth Act's 'right to negotiate' procedures. Where there is not a recognised State or Territory body, the NNTT will be the relevant arbitral body.

3.4 Legislation complying with the Native Title Act has been delayed in the States. The Northern Territory has proclaimed its *Validation of Titles and Actions Act 1994* and the ACT Legislative Assembly passed its Native Title Bill 1994 on

11 October 1994. Nevertheless, no State has yet proclaimed legislation complying with the Native Title Act although legislation has been passed in New South Wales and Queensland. Negotiations concerning compensation are continuing between State governments and the Commonwealth.

3.5 At present the *Native Title Act 1993* is subject to challenge by the State government of Western Australia; South Australia has joined as a plaintiff in the action. The fact that this challenge was to begin in the High Court on 6 September was known well before the Committee's consultation program was finalised. The Western Australian government is presenting three (separate) arguments:

- The Native Title Act is unconstitutional and, therefore, of no legal effect or significance.
- Alternatively, the Native Title Act is inoperative due to its inconsistency with the Racial Discrimination Act.
- Alternatively, the Native Title Act simply does not apply in Western Australia.

3.6 Further, the Western Australian Act is itself subject to challenges at present in the High Court. The Wororra and Yawuru people are arguing, in part, that the WA Act is invalid because it is inconsistent with the Racial Discrimination Act. And the Martu people have submitted that the WA Act is not only invalid but is inoperative because of the Racial Discrimination Act.

3.7 The High Court is not expected to conclude these matters before early next year. When it does deliver its judgements on these challenges, among other things the High Court will be providing a useful clarification of the implications of Mabo 2.

3.8 Nevertheless, the Committee received initial advice in Western Australia from the Premier and others about the operation of the State Act; the *Land (Titles and Traditional Usage) Act 1993* became law in Western Australia on 2 December 1993, some three weeks prior to the *Native Title Act 1993* becoming law on 24 December.

3.9 Western Australia's Act provides that Aboriginal communities have traditional usage rights which may be exercised if they do not conflict with any title over the land. The Schedule to the Act makes changes to the Mining Act, the Land

Act, the Petroleum Act, the Petroleum (Submerged Lands) Act, the Petroleum Pipelines Act, the Public Works Act and the Pearling Act. These changes establish procedures for notifying Aboriginal groups of proposed grants of title of land use on Crown Land and for dealing with objections based on rights of traditional usage.

Consultation with Governments

3.10 The Committee is required by virtue of s.206(a)(iii) to consult with Commonwealth, State, Territory and local governments. The Committee decided to visit Sydney and Brisbane to commence its consultations and public hearings in part so that it would be convenient for representatives from the NSW and Queensland governments to attend. It was expected that, given the significance of the native title issue and its potential effects, State governments would welcome an opportunity to express views about the Act and their responses to it. Nevertheless, although invitations were issued to the NSW and Queensland governments for representatives to meet with the Committee in the first week of August, those invitations were declined.

3.11 It is of concern to the Committee that the NSW and Queensland governments did not accept the opportunity for consultations with the Commonwealth Parliament about native title. The parliaments of these States have passed native title legislation although in each case the acts have yet to be proclaimed. It would have contributed to a wider understanding of native title issues for those State governments to have briefed the Committee about their views on the Native Title Act and subsequent State legislation. Hon Richard Court, Premier of Western Australia, provided this level of cooperation in meeting with the Committee in Perth on 15 August. The Committee would hope that State and Territory governments would cooperate similarly in the future to enable the Committee properly and effectively to pursue its duties under the Act.

Notices, Maps and Tenure Histories

3.12 During its consultations in August 1994, the Committee was alerted to concerns regarding notice provisions, the accuracy of maps and the cost and difficulties of compiling land tenure histories.

3.13 The Committee was advised of concerns about the notification time limits in the Western Australian Act. Further, there was some criticism about the inadequacy of some maps provided with the notifications. This Committee has been unable to test these views either through submissions or recorded oral evidence. At this stage the Committee simply notes the potential for significant disadvantage to be suffered by Aboriginal communities unless there are adequate notification and response provisions and that they are followed; the Committee will continue to monitor this situation out of concern that notification does not necessarily amount to adequate consultation.

3.14 Similarly, the Committee will closely examine any difficulties that arise out of the notice and response provisions of the Commonwealth legislation. Advice was received by the Committee that the maps provided by the NNTT in notifying interested parties about claim applications sometimes have been inaccurate or otherwise deficient. The Committee was told about this difficulty in Kununurra.

3.15 It is important that the notice and response provisions of both State and Commonwealth legislation are sensitive to the needs of Aboriginal people, including their particular decisionmaking practices. Similarly, all maps relating to applications must be accurate and clear. On a related issue, it has been claimed that access to land tenure histories has been denied to Aboriginal people (Evidence, pp.315,316). These matters - notices, maps and tenure histories - need to be addressed by Commonwealth, State and Territory governments to ensure that the processing of native title applications complies with the intention of the Act.

Applications

3.16 The form of lodgement for applications to the Tribunal is determined by the National Native Title Tribunal Regulations promulgated under the Native Title Act. One view put to the Committee in Perth was that the Regulations were drafted with the Native Title Bill and were not amended to suit the Act as passed (Evidence, p.596). This is a matter that the Committee has yet to consider.

3.17 Further, there were contrasting views presented to the Committee about the lodgement of applications with the Tribunal. Some praised the Tribunal for adopting a 'low threshold' and treating the acceptance phase of native title applications as only a screening process. The NSW Law Society pointed out

(Evidence, p.24) that the provision that a *prima facie* case needed to be established (s.63(1)) was a compromise between accepting any claim and only accepting those that appear to be fully proven.

3.18 By comparison the NSW Aboriginal Land Council, while confirming that the threshold should not be raised, was unsure about where the threshold currently was. Nevertheless, the Land Council believed that the onus of proof rested with Aboriginal people (Evidence, p.40).

3.19 The Committee is aware that the Tribunal Registrar has already acted pursuant to s.63(2) to refer an application to a Presidential member because a *prima facie* case had not been made out. While the Registrar has taken action pursuant to s.63(2), the President has indicated that the acceptance test for applications can be set at a low level. That is, the President is not bound to reject an application because no *prima facie* case has been made out. As an attachment to an address he presented on 16 May 1994, the President, Justice French, promulgated procedures for native title applications. In paragraph 11 it is confirmed that:

> An applicant is not required to establish a prima facie case in order to have an application accepted.

(This procedure was retained (as 6.3) in the revised procedures issued by the Tribunal on 12 September 1994.)

3.20 While the NSW Aboriginal Land Council expressed uncertainty about the Tribunal's threshold, the NSW Farmers' Association suggested that there was a 'discrepancy' between s.63 and 'guideline' 11 (Evidence, pp.123,124). However, it appears that while the Registrar must refer an application to a Presidential member where a *prima facie* case has not been made out, the Presidential member may determine, under Justice French's procedures, that the application be accepted. This could be the source of the confusion noted above, about the nature of the application threshold, and may resolve the 'discrepancy' noted by the NSW Farmers' Association.

3.21 Importantly, the Act provides at s.148 that the Tribunal may dismiss an application, once an inquiry into the application has commenced, if it is satisfied that the applicant is unable to make out a *prima facie* case. The Committee notes

Justice French's public views that there would be merit in a provision enabling an inquiry to be held, on a discretionary basis, at any point after acceptance of the application to determine whether there is a *prima facie* case and to allow for important points of law, which may affect the negotiation process, to be referred to the Federal Court. Under the present provisions of the Act an inquiry into an application can only be held if the application is unopposed or is the subject of agreement either with mediation or without it (s.139).

3.22 The threshold question clearly has been evolving with experience and with the assistance of the liaison committees established by the Tribunal President.

Resources

3.23 The Committee heard from several witnesses about the perceived uncertainty created by the native title legislation (*Evidence*, pp.348 and 352, pp.522 and 553). The pastoral and mining industries expressed difficulties with the option of non-claimant applications. Non-claimant applications can be made by any person with an interest (s.61) who proposes to utilise land or waters to determine whether native title exists there.

3.24 Where a native title application is accepted, the Act provides (s.66(1)) that the Registrar must give notice to all persons whose interests may be affected by a determination. Under s.66(3) such a notice must state that if it is a non-claimant application, it will be taken to be unopposed unless a native title determination application is lodged within two months of the issuing of the notice. In all other cases, persons wishing to be parties to the application must notify the Registrar within two months of the notice date.

3.25 This time limit has attracted some comment. It was pointed out (*Evidence*, p.7) that the consequences of not responding are significant and that there are no other jurisdictions where existing property interests can face such severe consequences for a failure to comply within a short time limit. This affects both Aboriginal and non-Aboriginal people. It can be difficult for isolated Aboriginal groups to prepare a response to a non-claimant application. It can also operate to the disadvantage of farmers and some miners when responding to native title applications.

3.26 Several parties, particularly Aboriginals, advised the Committee that they have significant resource needs in being able to assess applications lodged under the Act and respond to them (where appropriate) within the two month period. It will be a matter of particular interest to the Committee to monitor this question of resources. While major commercial enterprises employing adequate administrative support and legal advice may find the two month period manageable, it is possible that others such as Aboriginal groups and smaller commercial enterprises, may continue to experience difficulties.

3.27 In regard to the lodgement of claims, the NSW Aboriginal Land Council advised the Committee (Evidence, p.30) that there is confusion about the Act and how to lodge a claim, what is required of a claimant after an application is accepted and which Aboriginal people will benefit from a successful determination process. Clearly, equitable access to the native title mediation, adjudication and determination processes is important if the aims of the native title legislation are to be realised. By disseminating written material, conducting seminars and holding meetings with interested parties, the National Native Title Tribunal, in conjunction with the Federal Court of Australia, has attempted to increase the level of access to native title decisionmaking forums. The Tribunal Registrar provided briefing to the Committee on 15 August confirming that the NNTT is developing a comprehensive access and equity plan with an emphasis on formulating strategies for remote communication and information exchange.

3.28 It is possible that the liaison committees that have met with Justice French also may help to ameliorate the resources problem. Importantly, Justice French has suggested that liaison committees will have administrative support from the Tribunal. They may be asked to review existing procedures or to comment on drafts of proposed procedures. In this way some procedures to assist parties who lack adequate resources may be developed.

3.29 Further, the Act provides (s.202) for the designation of Aboriginal and Torres Strait Islander organisations as representative organisations to assist native title claimants to make applications and to assist in negotiations and proceedings. They may be eligible for financial assistance from the Commonwealth Minister or ATSIC (s.203). The appointment of more representative bodies and, over time, experience of their contribution may further assist in meeting the problem of resources, at least for

Aboriginal people. In addition, s.78 of the Act provides that the Registrar may give such assistance as is considered reasonable to help in the preparation of applications and accompanying material.

3.30 Another way in which the problem of resources may be affected is through the arrangements for the mounting of test cases. A test case committee has been formed by the Office of Legal Aid and Family Services, Attorney-General's Department. This committee has the responsibility to advise on what constitute appropriate precedent setting cases. In such cases the Commonwealth has agreed that the costs of all parties will be met, and the normal hardship provisions of legal aid will not necessarily apply. Representatives on this committee include the National Farmers' Federation, ATSIC, the Australian Mining Industry Council and the Attorney-General's Department (that Chairs the committee but has no voting rights).

3.31 From the outset the Parliamentary Joint Committee on Native Title has been concerned about the issue of resources for all parties who may be affected by native title. The Committee notes the action taken by the Attorney-General's Department to issue information about financial assistance that may be provided by the Attorney-General. In that this information still may not be known widely, it is reproduced at Appendix 3 of this report.

3.32 The Committee would encourage any persons experiencing resource difficulties concerning native title matters to seek the assistance now available. Any further problems of a resource nature should be advised to the Committee promptly.

Native Title: Education

3.33 Some Aboriginal representatives, particularly those located in remote areas, emphasised that their needs include education about the Act itself and the procedures under which the Tribunal operates (Evidence, p.359). While the ATSIC *Information Kit on Native Title* is an impressive educational initiative, the Committee notes the concern of regional ATSIC officials for adequate resources so that Aboriginal communities and others can respond effectively under the Act.

3.34 Further, in December 1993, in a submission to the Senate Standing Committee on Legal and Constitutional Affairs which was then considering the Native

Title Bill 1993, the Aboriginal Legal Service of Western Australia expressed concerns about the attitude of non-Aboriginal Australians towards the concept of native title. Accordingly, it recommended that a broadly based community education strategy targeted at 'middle Australia' be devised to improve non-Aboriginal Australians' knowledge of Aboriginal history, beliefs and aspirations within the context of the native title debate (Evidence, p.1238).

3.35 As with other complex legislation, the Act's purposes and implications still are not widely understood (*Evidence*, p.555). Among others, areas of misunderstanding include the status of title, particularly the meaning of "coexistence" (*Evidence*, pp.116 and 548); the machinery and processes created by the Act for native title claim adjudication and decisionmaking (*Evidence*, p.287); perceptions that the legislation is creating uncertainty (*Evidence*, pp.524 and 553); expectations that involvement in the native title claim process could be costly (*Evidence*, p.524); and fears that financial negotiations with banks could be disadvantaged by native title claims (Evidence, pp.261,264).

3.36 Some efforts have been made to address these concerns. ATSIC has adopted an educative role by disseminating information about native title in institutions of secondary and tertiary education (*Evidence*, p.151). Material such as the ATSIC *Information Kit on Native Title* requires wide dissemination to enable bodies like the ATSIC regional councils to expand their education and information role (*Evidence*, pp.360-361 and p.377). Organisations like the Local Government Association of Australia (which circulates information to its members on the ramifications of native title in the local government sphere) could also focus on formulating ways in which local authorities might assist in improving knowledge about native title (*Evidence*, p.355).

3.37 The National Native Title Tribunal has produced documentation to increase public understanding of native title mediation and adjudication processes in relation to claimant, non-claimant and compensation applications. The Committee notes that the Tribunal has also specified areas in which there is scope for development. They include:

- provision of information concerning the Tribunal's procedures in notification to individuals

- liaison with local councils and use of other community resources to facilitate public access to information in areas where access to the Tribunal registries may not be readily available

- consultation and discussion with Land Titles Offices and Registrars to provide an efficient means of enabling the public to obtain information on the area affected by an application

- ensuring staff are trained to respond promptly and efficiently to enquiries.

The Committee will continue to take a strong interest in initiatives aimed at raising the level of public knowledge about native title. It would hope that a campaign be undertaken to educate peak bodies about native title and the Act. The Tribunal also should be resourced to enable it to maintain an active role in explaining to communities affected by claims the implications of any application once it was lodged.

Pastoral Leases

3.38 Ever since the Native Title Act was passed, there has been concern about the acceptance of applications over freehold and leasehold land. Extensive discussion took place on this issue during the Committee's consultations.

3.39 In the period following the August consultations, the Tribunal has made particularly clear that the Registrar will not accept an application over freehold land unless it is land that may have been granted to an Aboriginal group under land rights legislation and where there was native title in existence beforehand; procedure 2 of Appendix A to the Revised Procedures issued on 12 September 1994 refers to this matter.

3.40 In relation to pastoral leases, if it is a lease the terms of which do not contain a 'reservation' in favour of Aboriginal people, then the Registrar will not usually accept it but refer it to a Presidential member of the Tribunal. In those circumstances, and if the Presidential member agrees with the Registrar, the applicants are invited to make submissions about the matter prior to its finalisation.

3.41 Pastoral leases containing 'statutory reservations' in favour of Aboriginal people do exist in South Australia, Western Australia and the Northern Territory. If the application seeks native title rights wider than the reservation, then the application will be referred by the Registrar as already described. If the claim does not go wider than the terms of the reservation itself, then the Registrar may accept it if it complies with the Regulations.

3.42 With regard to native title claims over pastoral leases, the Federal Court consideration of the Wik claim will settle some uncertainties. This matter, at present before the Federal Court, will provide a test case for native title applications over pastoral leases in Queensland. Whatever the outcome of claims over pastoral leases, the Committee notes an unfortunate tendency for some pastoral leaseholders since the passage of the *Native Title Act 1993* to deny access by Aboriginals.

CHAPTER 4

Future Consultations

4.1 In Australia, native title remains at a developing stage. The President, Registrar and staff of the Tribunal have been appointed and the Tribunal has held mediation conferences pursuant to s.72 of the Act. By 30 September 1994 some 67 applications had been received by the Tribunal, some of which were not accepted and several remain in the process of assessment for acceptance. Nevertheless, the native title process is still new, the Tribunal having been established only last January, and the President and Registrar began their terms of office in May. Further, the President has only recently promulgated alterations to procedures for conducting the Tribunal's affairs. Although the President has already engaged in a series of meetings with liaison committees in each State and has had discussions with a wide range of interested parties, the fact remains that the process is under development and, as a consequence, there is some uncertainty about it in the community.

4.2 This uncertainty is compounded by the High Court challenge by the Western Australian government to the *Native Title Act 1993*. The challenge, which began on 6 September, is not expected to be determined by the High Court until about April 1995. In the interim the government of Western Australia is continuing to operate under its *Land (Titles and Traditional Usage) Act 1993*.

4.3 While under s.206 of the Native Title Act the Parliamentary Joint Committee on Native Title is not required until 1996 to conduct a major inquiry into various aspects of the operation of the Act, including the effectiveness of the NNTT, the Committee considers that it has a role to play in keeping Parliament informed of developments. Section 206(a) provides that the Committee's duties are to consult extensively about the implementation and operation of the Act. In order to report adequately in two years' time in compliance with s.206(d), the Committee needs to consult extensively now in compliance with s.206(a).

4.4 Further, the fact that the present period is one of some uncertainty about native title, and that this period will extend into 1995, provides the Committee with both an opportunity and a responsibility to contribute to overcoming that uncertainty where appropriate.

4.5 Accordingly, the Committee will continue in the immediate future to hold public hearings and seek consultations in various ways with people who have an interest in native title. Of course, it may not be possible to travel to all relevant areas or to meet everyone who would want to speak to the Committee. Persons who, for any reason, are unable to meet with the Committee should provide their views about native title to the Committee Secretary in writing. Such submissions will be welcome at any time.

Senator Chris Evans
Chair

APPENDIX 1

Committee's Duties - s.206 of the Act

Duties

206. The Parliamentary Joint Committee's duties are:

(a) to consult extensively about the implementation and operation of this Act with:

(i) groups of Aboriginal peoples and Torres Strait Islanders; and

(ii) industry organisations; and

(iii) Commonwealth, State, Territory and local governments; and

(iv) other appropriate persons and bodies; and

(b) to report from time to time to both Houses on the implementation and operation of this Act; and

(c) to examine each annual report that is prepared by the President of the NNTT and of which a copy has been laid before a House, and to report to both Houses on matters:

(i) that appear in, or arise out of, that annual report; and

(ii) to which, in the Parliamentary Joint Committee's opinion, the Parliament's attention should be directed; and

(d) at the end of 2 years after the commencement of this Part, to inquire into and, as soon as practicable after the inquiry has been completed, to report to both Houses on:

(i) the effectiveness of the NNTT; and

(ii) the extent to which there are recognised State/Territory bodies; and

(iii) the appropriateness of powers of delegation exercisable by the Registrar under this Act; and

(iv) the extent of extinguishment or impairment of native title rights and interests as a result of the operation of this Act; and

(v) the operation of the National Aboriginal and Torres Strait Islander Land Fund established by Part 10; and

(vi) the effect of the operation of this Act on land management; and

(e) to inquire into any question in connection with its duties that is referred to it by a House, and to report to that House on that question.

Sunset provision

207. This Part ceases to be in force at the end of 5 years after the Parliamentary Joint Committee is first appointed.

APPENDIX 2

Consultation Program - August 1994

Consultation Program - August 1994

Hearings, Meetings and Consultations:
Sydney, Brisbane and North Queensland from 1 to 4 August

1. The Committee commenced its consultation program in Sydney on 1 August in the Jubilee Room at Parliament House. It began the process in the manner in which it intends to continue: by meeting with and hearing from the widest range of persons and organisations with an interest in native title. On that day the Committee discussed native title issues with representatives of Aboriginal, legal, environmental, pastoral and mining organisations. The details of these persons and organisations are:

- **Law Society of New South Wales, Aboriginal Justice Committee**
  - Ms Margaret Hole, Councillor, Law Society of NSW and Chair, Aboriginal Justice Committee
  - Mr Andrew Chalk, Member, Aboriginal Justice Committee
  - Mr Shaughn Morgan, Legal Officer
- **NSW Aboriginal Land Council**
  - Mr Aden Ridgeway, Executive Director
- **Aboriginal Legal Service Ltd (NSW)**
  - Ms Isabell Coe, Chairperson
  - Mr Simon Blackshield, Human Rights Solicitor
  - Mr William Craigie, Community Member
- **Australian Conservation Foundation**
  - Mr Anthony Simpson, Special Projects and International Adviser
  - Ms Vanessa Jackson
- **New South Wales Farmers' Association**
  - Mr David Hodgkinson, Vice President
  - Mr F. Gulson, Executive Director
- **Chamber of Mines, Metals and Extractive Industries (NSW)**
  - Dr W Hurditch, Executive Director
  - Mr Ian Wisken, Corporate Counsel
  - Mr D M Ryan, Member
  - Mr Michael Coyle

2. On Tuesday 2 August the Committee similarly conducted public hearings in Brisbane at the Parliamentary Annexe. There the Committee met with:

- **Aboriginal and Torres Strait Islander Commission (Queensland State Office)**
  - Mr Geoffrey Richardson, Deputy State Manager
  - Mr Rick Hill, Senior Policy Officer (Land)
  - Mr W T White, Senior Project Officer
- **FAIRA Aboriginal Corporation**
  - Mr Bob Weatherall, Coordinator
  - Mr R J Leahy, Native Title Research Officer
- **United Graziers' Association of Queensland**
  - Mr David Moore, Chief Executive Officer (also representing the Queensland Farmers' Federation)
- **Queensland Mining Council**
  - Mr Michael Pinnock, Chief Executive Officer
- **MIM Holdings Ltd**
  - Mr David Hughes, Manager, Environmental Affairs
- **Cattlemen's Union of Australia**
  - Mr K F Martin, President
  - Mr C J Petrich, Executive Director

3. Following the hearings in Brisbane the Committee travelled to Cairns in order to conduct a public hearing (with evidence recorded on Hansard) as well as to begin informal consultations (unrecorded) with persons having a strong interest in native title. The public hearings proceeded at a hotel in Cairns with:

- **Association of Marine Park Tourism Operators**
  - Mr P A Starkey, Executive Committee Member
- **River Operators Association**
  - Mr F G Ariel, Executive Director
- **Cape York Land Council**
  - Mr Noel Pearson, Executive Director

This was followed by a community meeting in the Council Hall at Yarrabah near Cairns. A well-attended meeting there was led by:

- **Yarrabah Community Council**
  - Mr Wayne Connelly, Chair

- **Aboriginal Coordinating Council**
  - Mr Lloyd Fourmile, Chair
  - Mr Eric Law, Executive Director

The Committee accepted the opportunity to provide explanations of various elements of the Native Title Act after hearing about the ways in which it was considered the Act could affect the Yarrabah community.

4. On Thursday 4 August further recorded public hearings were held in Mt Isa. Evidence was heard from:

- **Mount Isa City Council**
  - Mayor Ron McCullough
  - Councillor T Nolan
  - Mr K Ashworth
- **ATSIC Regional Council (Mount Isa and the Gulf)**
  - Mr Murrandoo Yanner, Coordinator
  - Mr C J Saltmere, Chairperson
  - Mr John De Satge, Alternative Deputy Chair
  - Mr W R King, Councillor
- **Mount Isa Aboriginal Media Association**
  - Mr C W Congoo, Administrator
  - Ms J M Craigie, Trainee Broadcaster
  - Mr Barry Fewquandie
- **Kalkadoon Tribal Council**
  - Mr Alf Barton, Chairman
  - Mrs Delma Barton, Cultural Heritage Coordinator

5. Following this hearing the Committee travelled to Doomadgee and met in a park area with members of the community. The (unrecorded) discussion was led by:

  - Mr Wilfred Walden, Chair of Doomadgee Community Council
  - Mr Murrandoo Yanner, Coordinator, ATSIC Regional Council

6. To complete the consultations in North Queensland, and to continue the range of its familiarisation visits, the Committee accepted an invitation from CRA

Exploration to inspect the site of the proposed lead/zinc/silver mine at Lawn Hill known as the Century Project. The Committee was briefed during the inspection by:

- Mr Jim Singer, Manager, Community Relations
- Mr Doug Fishburn
- Mr Peter Taylor
- Mr Ian Williams

7. This inspection was of particular interest in that part of the site is the subject of a native title application (QN94/1) submitted to the Tribunal by the Waanyi people. Some of these people had spoken with the Committee at Doomadgee, explaining their claim about the area. The Committee was able to examine the area with the benefit of that prior advice by the Aboriginal claimants.

Hearings, Meetings and Consultations:
Perth and North Western Australia from 15 to 18 August

8. The second stage of the Committee's winter recess consultation program began with public hearings in Perth on Monday 15 August. Not only did the hearings on that day allow a wide range of representation, including from the tourism industry, but the Premier of Western Australia also met with the Committee. Those who provided formal evidence were as follows:

- **Western Australian Government**
  - Mr Richard Court, Premier
- **National Native Title Tribunal**
  - Ms Patricia Lane, Registrar
- **WA Chamber of Mines and Energy**
  - Mr Peter Eggleston, Executive Officer, Aboriginal Affairs
  - Mr Peter Ellery, Chief Executive Officer
  - Mr Tony Finucane, Chief Adviser, Public Affairs, Hamersley Iron Pty Ltd
- **Pastoralists' and Graziers' Association of WA (Inc)**
  - Mr Tony Boultbee, President
  - Mr Ben Patrick, Pastoral and Land Use Director
  - Mr Peter Van Hattem of Freehill, Hollingdale and Page
- **Western Australian Farmers' Federation (Inc)**
  - Mr Alex Campbell, General President
  - Mr Jack Flanigan, Legal Officer

- **Aboriginal Legal Service of Western Australia**
  - Ms Catherine Crawford, Principal Legal Officer
  - Mr Greg Benn, Solicitor-in-Charge, Land and Heritage Unit
- **Mr Greg McIntyre**, Barrister-at-Law
- **ATIA (WA Chapter)**
  - Mr Noel Semmens, President

9. Following these public hearings, the Committee accepted an invitation from Hamersley Iron Pty Ltd for a familiarisation inspection of the Pilbara and the new Marandoo mine. Briefings were provided during the tour on Tuesday 16 August by:

- **Hamersley Iron Pty Ltd**
  - Mr Tony Finucane, Chief Adviser, Public Affairs, Hamersley Iron Pty Ltd
  - Mr Rod Davies, Specialist Administrator
  - Mr Jeremy van de Bund, Manager, Aboriginal Training and Liaison Unit

10. During this inspection the Committee took the opportunity to meet participants in the company's Aboriginal training program.

11. On Wednesday 17 August the Committee held a public meeting in the Mamabulanjin Resource Centre at Broome. Those present at this meeting included:

- Mr Doug Clements (ATSIC)
- Mr Dicky Cox
- Mr John Cox, Chairperson, Kullarri Regional Council
- Mr Pat Dodson, Chairperson, Council for Aboriginal Reconciliation
- Mr Arnold Franks
- Mr Ricky Roe
- Mr Adam Skinner
- Mr Peter Stevens, Chairperson, Kimberley Land Council
- Mr Peter Yu, Executive Director, Kimberley Land Council

- Ms Theresa Barker
- Mrs Rita Clements
- Mrs Cecilia Djaigween
- Miss Kim Farmer
- Mrs Kay Foster
- Ms Elsa Foy

- Miss Elaine Maher
- Mrs Mary Manolis
- Ms Louise Middleton
- Miss Rebecca Prigram
- Mrs Mary Tarran
- Ms Dorothy West

12. The Committee held a further public meeting on Wednesday 17 August. This meeting at the Adult Education Centre at Fitzroy Crossing was similar to the Broome meeting in being informal and no transcript was taken. Discussion was led by:

- Mr Eric Bedford, Chairperson, Marra Worra Worra Resource Agency

13. An invitation had been extended to the Committee by Western Minerals NL to undertake a familiarisation inspection of the Cadjebut mine. While the meeting at Fitzroy Crossing was being concluded, the Deputy Chairman and another member of the Committee undertook the inspection. Briefings provided by Western Minerals NL were given by:

- Mr Ross Calnan, Manager, Cadjebut Mine
- Mr James Kernaghan, Site Administrator (outgoing)
- Mr David Bell, Site Administrator (incoming)

14. On Thursday 18 August the Committee visited the Argyle diamond mine at the invitation of Argyle Diamonds Pty Ltd. Briefings there were provided by:

- Mr Neil Butcher, Manager, Administration
- Mr Lewis Hawkins, Superintendent, Community Relations

15. Later that day, in a park adjacent to the Kununurra Sailing Club, the Committee held an informal public meeting at which it was able to explain various aspects of the Native Title Act. Among others, the Committee consulted with:

- Mr Reg Birch (Joorook Ngarni, Wyndham)
- Mr Teddy Carlton (Waringarri Aboriginal Corporation, Kununurra)
- Mr Frank Chulung (Aboriginal Legal Service, Kununurra)
- Mr Allan Gore (Joorook Ngarni, Wyndham)

- Mr Jock Mosquito (Balingarri Aboriginal Corporation, Cattle Creek)
- Mr Ian Trust, Chairperson, Wunan Regional Council

This meeting concluded the first round of consultations held by the Committee pursuant to s.206(a) of the *Native Title Act 1993*.

APPENDIX 3

Attorney-General's Department - Advice on Financial Assistance

Provision of Financial Assistance by the Attorney-General in Native Title Matters

In certain circumstances, the Attorney-General may provide financial assistance to people involved in native title cases.

Applications for assistance made by representative bodies under section 203 of the *Native Title Act 1993* should be made to ATSIC.

Statutory Native Title Scheme

The main scheme for the provision of financial assistance by the Attorney-General for native title matters is established under section 183 of the *Native Title Act 1993*. This allows the Attorney-General to provide financial assistance to respondents and non-claimant applicants under the Act, provided they meet certain eligibility criteria.

As currently drafted, section 183 of the Act only allows provision of financial assistance to people who are involved in an inquiry before the National Native Title Tribunal (NNTT) or in proceedings before the Federal Court.

It has been decided that applicants for assistance in matters before recognised State courts and tribunals and applicants who need assistance prior to the inquiry stage may apply to the Attorney-General under a separate scheme. The Native Title Financial Assistance Scheme guidelines will be applied to applications to determine whether a grant is made under the Special Circumstances Scheme.

Non-statutory Common Law Native Title Scheme

The government believes that the *Native Title Act*, and the National Native Title Tribunal established under the Act, are the best way of reaching determinations of native title. The government believes the *Native Title Act* regime will deliver determinations in a way that benefits the whole Australian community, in a quick manner which is less costly than the courts. However, the government realises that some claimants will nevertheless wish to seek remedies from the Supreme, Federal or High Courts which they cannot get through the *Native Title Act* regime. And the respondents in those cases will not be able to get financial assistance through the *Native Title Act* schemes.

Accordingly, a non-statutory scheme administered by the Attorney-General to provide assistance for respondents in common law native title matters has been established. Assistance may also be provided, *in very limited circumstances*, to claimants under common law.

Claimants may seek funding for injunctions under this scheme. However, the availability of funding from other sources would have to be considered, along with other guidelines. No indemnity for costs or damages can be offered.

Test Cases

A test case is a case brought to test a principle of law that, once established, can be applied to other similar cases. For native title matters, this means a case where an important question about the *Native Title Act*, or another Commonwealth law, will be resolved.

A committee has been established to advise the Attorney-General regarding whether certain cases are test cases. Membership of the committee comprises representatives of ATSIC, the Attorney-General's Department, the Australian Mining Industry Council (AMIC), and the National Farmers' Federation (NFF). Other representatives may be invited to sit on the committee as appropriate i.e. representatives of the tourism or fishing industries. The Attorney-General will consider advice from the committee when determining financial assistance grants.

Financial Assistance

The grant of assistance will be either a percentage of reasonable professional costs (usually 80% of Federal Court Scale fees) or a lump sum fee that the Attorney-General agrees will be paid.

Financial assistance, whether it be provided under the *Native Title Act* or under the common law native title scheme, is subject to the applicant meeting certain eligibility guidelines. These guidelines are set out separately and are available from:

The Director
Legal Aid and Family Services
Attorney-General's Department
National Circuit
BARTON ACT 2600

Guidelines for granting Financial Assistance by the Attorney-General in Native Title Cases

In certain circumstances, the Attorney-General may provide financial assistance to people involved in native title cases under the *Native Title Act 1993*. The Attorney-General may also provide financial assistance to respondents or plaintiffs in common law matters who are unable to obtain funding from elsewhere under a native title common law financial assistance scheme.

These guidelines apply to applications for financial assistance under both schemes.

Definitions

Under these guidelines, the following definitions apply:

- a "party" is either an individual, company, partnership or trust that is involved directly in a native title matter;
- an "applicant" is a party who is making a native title claim, otherwise known as a "claimant";
- a "respondent" is a party who is opposing a claim; and
- a "non-claimant applicant" is a party who applies to the National Native Title Tribunal (NNTT) to make a native title determination.

The Grant of Assistance

Applications for financial assistance in native title matters will be decided by the Attorney-General or someone who the Attorney-General has authorised to make the decision for him or her.

A person applying for financial assistance will need to provide detailed information about the costs that they think they will have to pay and the reasons that they think each cost will be necessary. They will also need

to give details of the way that the amount of each item has been calculated.

Any grant of assistance may be made either with or without conditions. If there are any conditions they will be described at the time that the grant is made.

Before the Attorney-General will grant assistance a person must show that it will cause hardship to them if the application is not granted. They must also show that it is reasonable for a grant of assistance to be made to them. They must also be ineligible for financial assistance from any other source, such as a prescribed Aboriginal/Torres Strait Islander representative body.

Hardship

Hardship means financial hardship. Hardship refers to whether the person applying for assistance is able to meet the cost of the case without getting into serious financial difficulty. In deciding whether refusing a grant will involve hardship to an applicant all relevant information is taken into account.

For this reason people applying for assistance will need to provide information about their income, expenditure, assets and liabilities and the amount that it is estimated the case will cost. When assessing a person's financial situation, the assets that are in dispute as a result of the native title claim will not be taken into account although these must be listed in the application.

If the person applying for assistance is a respondent in a test case the Attorney-General also considers how important it is that the law that is being tested is made clearer by a decision of a court. A test case is a case where the Court is being asked to decide the meaning of an important question about some part of the *Native Title Act* or another Commonwealth law. For this reason much more importance is given to whether it is reasonable to grant assistance than is given to hardship.

The application for assistance must provide full details of the case including the question that will be answered by the Court and any other matters a Court decision will make clearer.

Reasonableness

To decide whether a grant of assistance is reasonable the Attorney-General considers all of the following things:

(1) the prospects of success, which means

   (a) for the applicant, whether or not they are likely to win the case
   (b) for the respondent, whether they have a good case to argue
   (c) for the non-claimant applicant, whether it is necessary to have a native title determination made; and

(2) whether the benefit to the applicant or non-claimant applicant is worth the cost of the case, or whether the respondent is likely to lose an interest in his/her land; and

(3) how much benefit the general public will gain from a decision in the case.

The Attorney-General may ask for advice from other government agencies or industry bodies to help him or her decide whether it would be reasonable to grant the request for financial assistance.

Payment of costs

If the Attorney-General decides to grant assistance he will only agree to pay costs that are reasonable and proper.

The person asking for assistance will need to nominate a lawyer to conduct the case. The lawyer chosen must be experienced in conducting cases in the Federal Court or a superior court of a State or Territory.

The amount of assistance granted will be either a percentage of reasonable professional costs (usually 80% of Federal Court Scale fees) or a lump sum fee that the Attorney-General agrees will be paid. It is very important that your legal adviser understands what costs will be paid and the amount that will be paid for each item before he or she starts work.

The grant of assistance may be made in stages. Because costs for one stage of the case are paid this does not mean that all the costs will be

paid. For example, a limited grant may be made to investigate the reasonableness of the case or a grant may be made for mediation only.

It may be a condition of the grant that the parties who are assisted by the Attorney-General make some payment towards the cost of the case. This is called a contribution. Any contribution will be based on the party's ability to pay. If you have to make a contribution, the amount to be paid will be clear from the information that is given at the time that the grant is made.

You will always be asked to repay any amount that the Court awards to you as costs if you win.

All grants of assistance are monitored by the Attorney-General who may ask for information from time to time. If this information is not provided the grant of aid may be suspended which means that any work that is done after the date it is suspended may not be paid for.

Applications for Assistance

If you are applying for assistance you should make sure that you have provided all the information that will be needed before the Attorney-General can make a decision. Because of the strict timeframes under the *Native Title Act* it is essential that you include all relevant details in your application for assistance, as a decision may be based only on the information that is provided.

You should include:

- a statement giving the reasons you have been refused assistance from another source, if any (ie a prescribed Aboriginal/Torres Strait Islander representative body);
- a full financial statement including all assets, income from all sources, your expenses including loan repayments and living expenses and business expenses. You should list separately the assets that will be affected by the claim for native title;
- full details of all costs including the way each cost has been calculated;
- full details of the case, including the things that the Tribunal or Court will have to decide and, if it is a test case, why these are important;
- a statement giving the reasons that you think you will win the case or the defences that you will argue, or if you are a non-claimant applicant, why you need a determination made; and
- the name and address of your solicitor, if you have one.

You will also need to provide a statement that the information you have provided in your application is true and correct.

If you want to apply for assistance or you would like more information you should write to:

The Director
Legal Aid and Family Services
Attorney-General's Department
National Circuit
Barton ACT 2600