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SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Native Title Amendment (Technical Amendments) Bill 2007

WEDNESDAY, 2 MAY 2007

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Wednesday, 2 May 2007

Members: Senator Barnett *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Bartlett, Kirk, Ludwig, Parry, Payne and Trood

Participating members: Senators Allison, Barnett, Bernardi, Bob Brown, George Campbell, Carr, Chapman, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fierravanti-Wells, Fifield, Heffernan, Hogg, Humphries, Hurley, Joyce, Kemp, Lightfoot, Lundy, Ian Macdonald, McGauran, McLucas, Milne, Murray, Nettle, Patterson, Robert Ray, Sherry, Siewert, Stephens, Stott Despoja, Watson and Webber

Senators in attendance: Senators Barnett, Crossin, Parry, Siewert

Terms of reference for the inquiry:

To inquire into and report on: Native Title Amendment (Technical Amendments) Bill 2007

WITNESSES

ANDERSON, Mr Iain Hugh Cairns, First Assistant Secretary, Classification, Legal Services and Native Title Division, Attorney-General's Department 21

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Committee met at 1.34 pm

CHAIR—Good afternoon, everybody. This is a hearing for the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Native Title Amendment (Technical Amendments) Bill 2007. The inquiry was referred to the committee by the Senate on 29 March 2007 for report by 8 May 2007. The bill amends provisions of the Native Title Act 1993 relating to future acts and Indigenous land use agreements; processes for making and resolving native title claims; and obligations of the Registrar in relation to the registration of claims, native title representative bodies and prescribed bodies corporate. The committee has received 10 submissions for this inquiry. All submissions have been authorised for publication and are available on the committee's website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee. Such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. The committee prefers all evidence to be given in public, but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course also be made at any other time.

I note that Senator Crossin, the deputy chair, will be joining us by teleconference for the purposes of this hearing. I also ask that people in the hearing room ensure that their mobile phones are either turned off or switched to silent; that would be appreciated. Finally, I ask witnesses to please remain behind for a few minutes at the conclusion of their evidence in case the Hansard staff need to clarify any terms of reference—and I acknowledge the Hansard staff here today.

[1.36 pm]

DORE, Mr Martin, Principal Legal Officer, North Queensland Land Council

Evidence was taken via teleconference—

CHAIR—Welcome. I understand that you are representing the National Native Title Council.

Mr Dore—I did not appreciate that I was appearing on behalf of the National Native Title Council, but I am happy to take on that role.

CHAIR—Thank you very much.

Mr Dore—I have been involved in native title work for about 10 years now.

CHAIR—The National Native Title Council has lodged submission No. 5 with the committee. I appreciate the comments you made earlier, but do you wish to make any amendments or alterations to that submission?

Mr Dore—No, although there are some matters that I feel are worthy of highlighting.

CHAIR—I will come to that. I invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions. Would you like to proceed on that basis?

Mr Dore—Yes, thank you. The first matters that I would like to highlight are those relevant to the application of the registration test and some related issues. The National Native Title Council points out that they are in opposition to claims being struck out simply because they do not pass the registration test. I certainly strongly support that position.

There may be reasons why a claim has not passed the registration test. I understand that the idea is to try to get rid of lingering, old claims. However, there may be legitimate reasons why a claim has not been put through the registration test. We have some examples in the North Queensland region. We have claims that are in areas where there is no significant mining or other significant activity and where we have an undertaking from the state that they will still send us future act notices, notwithstanding that claims are not registered. In circumstances like that it may be counterproductive and a waste of moneys—obviously we are funded through the government so it is a waste of public moneys—to make changes simply because of the registration test. It seems to me that there are matters where you should not just say, ‘It has not passed the reg test; out it goes.’

Certainly, we would support the internal review of reg test decisions. I note the submission from the National Native Title Tribunal that that review should be conducted by a member. I would support that, as long as the member had a legal background. The registration test has turned out to be—due to various court decisions and interpretations of the tribunal delegates themselves—highly technical, highly legalised and, unfortunately in my opinion, far from what it set out to be originally. I also suggest that there should be clarity about whether there would still be a right to appeal to the Federal Court and, as some of the other respondents have indicated, clarity as to whether an appeal can be taken without first going through the review process within the tribunal.

I would bring one matter to the inquiry's attention and that is the issue of retrospectivity. Recently, in the case of Wakaman People #2, we had to run a review application against the delegate's failure to pass the claim through the reg test. Ultimately, we were successful in the Federal Court, but it took something like six months to get to that point.

The Federal Court invited submissions about retrospectivity—that is to say, if the Federal Court found that the matter should have passed and made an order to that effect, whether the order could be backdated to the date of the original decision. The court concluded that they could not do that. That had the consequence that, in the six-month gap, a number of mining tenements were granted, which meant that the claimant group in that matter lost the benefit of the right to negotiate because someone else made a mistake. That strikes me as being quite frankly appalling.

The rationale sometimes put up for that is that registration test results are a matter of record. People can look at the tribunal records and find out whether there is a registered claim or not. The argument goes that they may then act upon the information when it shows that there is no registered claim. I do not accept that as a valid argument because any prudent person would also check whether there were any reviews or appeals pending and would take that into account before deciding on action. It would not be hard administratively for such warnings to be incorporated in the material available on public search from the tribunal. It seems to me that the native title claimant group should not be penalised by missing out on important rights when some official makes a mistake and gets it wrong. I would urge the committee to look at specifically amending the technical amendment bill to include a provision that clearly makes it such that, when there is a successful review or appeal, the decision is effectively backdated to the date of the original registration test decision.

Items 72 and 76 talk about affidavits needing to go into detail about authorisation processes. I also urge the council's submission on that—that that really is a doubling up. It is difficult enough for some of our applicants to understand the standard affidavits that they are asked to sign. Indeed, there are two ways to achieve registration of a claim. One is through certification by the land council that authorisation has properly occurred; the other is to provide the tribunal with sufficient information that the tribunal delegates decide that authorisation was proper.

Sometimes that information is best put by someone other than the applicants. An example might be that someone is appointed to be one of the applicants by being nominated for authorisation at a meeting out of respect for their position as a senior elder in the group who may not even be at the meeting but who may have previously indicated their consent to so act. For them to then have to swear an affidavit about matters that they have no direct knowledge of seems somewhat contradictory.

In other cases, there may be others present at the meeting who are much more adept at putting words on paper and swearing affidavits about the process. An example of that is one of our Indigenous office staff, who is also a member of a particular claim group, who attended the meeting, was given the job of making notes of the meeting. He observed the process, was able to swear of his own knowledge about the traditional processes of decision making and so on and was a far better candidate for compiling an affidavit giving the whole history of the authorisation than the more senior people who were nominated as applicants. It seems to me

that requiring it in the affidavits of the applicants is both unnecessary and, in fact, may be not the best evidence available of authorisation. It also seems to make a nonsense of having the process of certification.

The amendment of native title applications has always been a difficult question. Certainly, we support any attempt to ease the burden of amendments, particularly where we are dealing with things like deceased applicants. Often, as I have said, senior members of a group are appointed out of recognition of their seniority and their eldership amongst a group and out of respect under traditional law and custom for that position. It is therefore unfortunately the case that it is quite a frequent occurrence that persons who are applicants pass on, and we have to deal with making amendments to the claim. Removing the requirement of having to go through a registration test process simply because deceased names have been removed would certainly be of assistance and would lead to a lessening of waste of public moneys. It should, in my opinion, require simply an application on motion in the Federal Court with the production of the death certificate, and that sort of amendment should not attract the registration test.

We also see a similar issue coming up in relation to the registration of ILUAs. Often we find that we have a deceased person still named as applicant. No application to amend has yet been made perhaps for good reason. Perhaps there are other amendments in the pipeline and it does not make sense to have multiple applications to amend. I would urge the committee to look at whether there should not be a clear process for looking into the act in relation to the registering of ILUAs where again the production of a death certificate together with a short affidavit from the legal practitioner handling the matter should be all the evidence necessary for the tribunal to proceed to register an ILUA, notwithstanding the absence of the signatures of a person who obviously cannot sign because they have become deceased. That process is not clear, and I would suggest it should be made clear by amendment to the act.

In relation to triggering the reg test for minor amendments, I endorse the statements that have been made in the submissions that the way the amendment is currently worded is perhaps not as clear as it should be. I would also like to see it go further insofar as it seems to me that one way that could address the apparent waste and futility of reg testing when there are minor amendments would be to give the Federal Court a power to make a declaration that the reg test need not apply. Obviously, then, in matters where there are purely technical amendments of no great substance not affecting any third party's rights as such, the court could declare that there was no need for further reg testing.

Perhaps I could say something about the proposals in item 91 and related matters about the determination of part areas. The express power to have a determination over part of an area of a claim is desirable. We have situations where you may get resolution with the respondents who have an interest in a certain area but not all of the respondents. There should be a clear and easy mechanism to enable part-area determinations to be made.

One of the problems referred to in the submissions is the fact that the word 'interest' has come to be very widely defined according to court and tribunal decisions. I note that the mining council's submission talks about trying to reduce the impact of that in some way. The very broad definition of 'interest', as it has come to be interpreted, is very much a bugbear to the native title claimants.

We see respondents to claims on the basis that they are recreational users whose interests properly should be defended by the state and not by individuals. There have been decisions that people who like to walk their dog along the beach have been accepted for the purposes of the native title claims and becoming a party. Quite frankly, the way the decisions have gone have, in my opinion, made a mockery of trying to define what is an interest that should have consideration given to it when one is dealing with native title matters.

The whole question of what amounts to an interest you can see in the submissions from Ergon Energy; it creates some uncertainty for them when they have unregistered interests. I would suggest that they are probably sufficiently protected, given the current wide interpretation of the word ‘interest’. If that interpretation is to be narrowed by amendment, some consideration may have to be given to the owners of infrastructure, such as Ergon, but that could be by way of specific exemption.

As for the funding for PBCs, the council’s submission is that the whole inclusion of a regulatory scheme saying what PBCs can and cannot charge for is itself discriminatory. I would strongly support that position. They are registered corporations and there is no reason, in my opinion, why they cannot charge for their services now. To impose a statutory regime, in fact, controls and constricts them rather than gives them some freedom to act.

The submission by Ergon Energy says, ‘Look, if we are supplying electricity, for example, to a remote community, why should the PBC charge us when it is a service for the benefit of that community?’ My answer to that would be that that should all be a matter for negotiation with the PBC concerned. In a remote situation the PBC will be made up, certainly in the majority, by people from that community who presumably are interested in getting those services and who may therefore waive or negotiate an extremely low fee. I see no reason for there to be statutory interference on that score.

I will comment very briefly on some matters in the other submissions. The Local Government Association’s submission talks about the proposed amendment to section 24LA and urges that it be modified. It seems to me that there is very good reason for the difference in the act as it currently stands between a predetermination position and a post-determination position. With predetermination, you are balancing asserted interests against the interests of a council getting on and doing some work; there has to be a balancing there. With post-determination, you have a determination. You know who the native titleholders are; the court has made a declaration. So I think there is good rationale behind the current different approach pre- and post-determination for section 24LA.

The submission on page 2 also talks about the necessity to develop ILUAs in each local government area. I do not see that necessarily being a necessity in each and every case. However, if it is, I can tell you that the local councils that are respondents to our claims are very adept at doing ILUAs. In many of our matters, we have ILUAs already in final drafting stages with councils. In one matter, we already have two existing ILUAs with a shire and are working on a third. So I do not see it as a problem in the way it is painted in that submission.

The other matter I wish to highlight—the Carpentaria Land Council Aboriginal Corporation’s submission picks up on this—is the amendments pertaining to Indigenous land use agreements, item 20. Certainly, in my submission, it is very desirable to have a

mechanism by which amendments to ILUAs can be made. Many ILUAs that we draft and sign off on contain provisions for mutually agreed variation. At the moment there appears to be no way, in effect, to register a change. That I think is certainly worthy of consideration. They would be my comments.

CHAIR—Thank you. Your comments have been very expansive and comprehensive in addition to the submission, so we appreciate that.

Senator CROSSIN—Thank you, Mr Dore; that was pretty comprehensive. Can you please go over the issue of the charging of the fees by the prescribed body corporate in the sense that it will now become, as I understand it, a statutory obligation rather than a discretion?

Mr Dore—I would not express it quite in those terms. The amendments set up a scheme which says, 'You can charge for this; there will be a regulation saying how much you can charge for doing this; you cannot charge for that,' and so on. In effect, it regulates what PBCs can and cannot charge for. In some cases, as I understand it, there will be, by regulation, caps at least put on the amounts they can charge. We see that as big handed, big brother interference with the free will of PBCs, which should be able to negotiate with whoever is seeking their cooperation—usually a proponent of some development or proposal, or someone who wants to do something and therefore wants native title. It seems to me that the PBCs should be free to negotiate according to the terms and conditions that they see fit—and to negotiate with the parties' cooperation.

Senator CROSSIN—Firstly, were there problems with the current situation that led the government to go down this line? Secondly, were you part of the consultation process and what was the government's rationale for moving in this way?

Mr Dore—We have made submissions on the previous changes to the law. I cannot really recall specific submissions in relation to the ability of PBCs to charge fees and so on. The submissions have turned on the fact that PBCs at the moment are without any form of funding. Of course, you have a very great variance in the financial circumstances of different PBCs. Usually it depends on how much mining activity is happening in their particular areas. Some are pulling in tidy sums, thank you very much, from mining arrangements. Some are in areas where there are no such activities and there is virtually no income for them. We have PBCs in our area who can barely afford a phone and a fax machine. Indeed, I understand that there may be some proposals coming from FaCSIA about funding for PBCs on those very basic levels. I am not aware of any discussions about their ability to charge moneys for services and I have not actually made any submissions previously on that, so I cannot say what the rationale was.

Senator CROSSIN—Can I take you to the inclusion of the authorisation of the decision-making process here, which is item 72 of the proposed amendments? What problems will this incur in respect of the work that you have done in this area? Is it an overrestrictive layer of accountability? I would have thought that a native title rep body might have to prove, in the course of trying to get a claim up, that they have undertaken the right decision-making process. What would be the need for this?

Mr Dore—That is exactly what we are saying. As the legislation stands at the moment, if you want to prove authorisation for the purpose of the registration test, you either get a

certification from the land council—and that certification will not be looked behind according to the case law, so that when the tribunal applies the registration test it has to accept that authorisation has been properly done—or you supply information to the tribunal to convince them that there has been proper authorisation. As I said, putting that information in the affidavits of the applicants may not, in fact, be the best evidence of that process. The applicants may be more elderly people who are not as well versed at having words put down on paper for them as some other people may be.

We see it as unnecessary, because the applicant may not be the person in the position to give the best evidence about authorisation. Either there will be a certification or there will be material produced to the registration test officer at the tribunal—it may be in an affidavit from the applicant, it may be in affidavits from other people, it may be records of meetings or so on. In whatever form it is produced, evidence will have to be given to show authorisation. To then say that you must have a detailed affidavit from an applicant seems counterproductive and not useful.

CHAIR—Thank you for that. Senator Crossin, do you have any final questions before we proceed?

Senator CROSSIN—No, I will move on. I am a bit short for time.

CHAIR—Thank you. Senator Parry, would you like to ask any questions?

Senator PARRY—Yes, thank you. In the interests of time, I have just one question. Mr Dore, you mentioned that you were not comfortable with the alteration of the definition of ‘interest’—you thought that the existing definition was fine. Would you expand upon representation for people who have a recreational interest?

Mr Dore—I want to set the record straight. I am not all happy with the current way that interest is being interpreted by the courts. I subscribe to the view that the body that should represent the public interest is the state, and there is some support for that in comments on decisions of the Federal Court coming out of the Torres Strait. At least one judge has said that. The state is in the position to defend the public interest.

Senator PARRY—So, your view is to exclude individual representation or individual approach for the consent?

Mr Dore—Yes, unless there is something more than, ‘I like to walk my dog on the beach.’ I do not think that that should be raised to the same level as a pastoral holder, a leaseholder or somebody with a much more concrete interest.

Senator PARRY—Okay. Thank you.

Senator SIEWERT—I would like to ask about PBCs as well—that is, the provision around the determination of the default PBC. I am wondering how you feel about the amendments as they are proposed. Do you have any problems with them? I have been noting the comments made by Tom Calma, who has expressed some concerns about the proposed amendments.

Mr Dore—Yes, I think it is difficult to impose a position by default. What you have to bear in mind is of course that a PBC, at the end of the day, is an incorporated body, and a group needs that incorporated body. We try to ensure that they have that before they get to

determination, but certainly I am not going to hold off a determination, if it is just around the corner, if there is some difficulty in establishing the PBC. I think that imposing a standard by default is not terribly suitable. The usual order you get from the court is that within six months of the determination the court be notified as to which body is to be the PBC. If there were a problem, the matter could be called back on in court and further orders made. So, yes, I get very nervous about default positions.

Senator SIEWERT—Thank you for that. The other questions I had have been largely answered.

CHAIR—Just to conclude, Mr Dore, in regard to your views about the reconsideration of the decision not to register a claim and your preference for a member of the tribunal rather than the registrar, I think you indicated that it must be a person who is legally qualified. Why do you support that view? Also, I am interested to know whether you raised this during the consultation process with the Attorney-General’s Department and, if so, what was the response?

Mr Dore—We have raised the whole issue of registration testing both with the registrar himself and with the Attorney-General in the forums held with the land councils in general. The first thing I would say is that the reg test as it has come to be applied has taken on a highly technical, legalistic nature, and that is why I would be suggesting that those who deal with it, certainly on first review, should have some legal training and background. We have found the registration testing results from different delegates inconsistent; lacking in the following of precedents; lacking, quite frankly, on some occasions, in common sense; and highly pernickety, and basically we have no faith in the delegates making registration test decisions.

We became so concerned about this that I and the principal legal officer of the Gurang Land Council went to Perth to speak to the registrar himself. We did not get much joy out of that. We said to the registrar, for example, ‘The way you’re interpreting the test, it is now harder to get through the reg test than it is to get a determination.’ The response was, ‘Yes, we know; that’s how it’s meant to be.’ So we do not have a lot of faith in the way the reg test is being administered at the moment. That is why, if there is to be a review process, we would suggest that we certainly do not mind it being a member of the tribunal, but I would suggest that you may need to appoint some more members, particularly ones with a legal background.

CHAIR—I appreciate your comments on that. Mr Dore, thanks very much for your comments and response and your submission today. We appreciate it.

Mr Dore—Thank you.

[2.09 pm]

WEBLEY, Mr Neil Charles, Property Acquisition Manager, Ergon Energy Corporation Ltd

Evidence was taken via teleconference—

CHAIR—Welcome. Ergon Energy has lodged submission No. 3 with the committee. Do you wish to make any amendments or alterations to that submission?

Mr Webley—No, I have no amendments.

CHAIR—Thank you. I now invite you to make a short opening statement, at the conclusion of which I will advise members of the committee to ask questions.

Mr Webley—Thank you, Mr Chairman. Thank you for inviting me to address the committee. Ergon Energy Corporation Ltd is a government owned corporation responsible for the distribution of electricity throughout regional Queensland, and that is the whole of Queensland exclusive of the south-east corner around Brisbane and the Gold Coast and the Sunshine Coast. An important part of our operation is the supply of electricity in all of Queensland's Aboriginal and Torres Strait Islander communities. We are the sole generator and distributor of electricity in the Torres Strait and in Aboriginal communities on the mainland. We are party to numerous native title determination applications throughout Queensland where we have existing interests in the claim areas. We always seek to resolve our involvement in the claims issues by agreement and we have consented to all of the native title determinations in Queensland to which we have been a party. Agreements about native title are sometimes also required in relation to compliance for projects and activities, particularly new electricity generation infrastructure, in communities. Ergon has successfully negotiated quite a number of Indigenous land use agreements in both the claims resolution and project compliance context.

There are two aspects of the Native Title Amendment (Technical Amendments) Bill where, in our submission, we have suggested some variations. The first is in relation to subclause 87A(1)(c)(v), which relates to consent to determinations where a respondent party has untenured infrastructure on land or waters. Ergon Energy agrees with the proposed amendment to that section and the rationale in the explanatory memorandum. We understand that the intent of this amendment is to ensure that persons with significant untenured interests within a claim area, such as infrastructure, and operators like ourselves are included as parties who must consent to a determination under clause 87A.

Ergon's concern is that the current definition of 'interest' in relation to land or waters—contained in clause 253—may not provide sufficient certainty to capture our interests in all circumstances where we have existing infrastructure. Just by way of explanation, in the early nineties the state cabinet transferred responsibility for electricity supply in Indigenous communities from the state's department—and I think it was the Department of Aboriginal and Islander Affairs at the time—to a predecessor of Ergon Energy. Effectively, Ergon Energy out of that inherited infrastructure that had been constructed by other entities over decades.

When that happened virtually no records were provided about the regional development of this infrastructure and just about all of that infrastructure is untenured—that is, there are no leases, licences or documented agreements in place and we have no way now of establishing whether it was constructed under any statutory powers or other bases. This infrastructure can include remote area sections and powerline networks of significant value and importance. The absence of records means that the link between subclause 87A (1)(c)(v) and the definition of interest in relation to land or waters may not be sufficient to capture our interests in electricity infrastructure in the circumstances. Under the amendment only respondent parties with an interest in relation to land or waters must consent to a determination under that provision.

To address this concern we proposed in our submission an amendment to the definition of 'interests' in relation to land and waters by adding a paragraph (d) into the definition to say:

(d) a legal or equitable interest in, or right to operate, any infrastructure facility on the land or waters.

There is already a definition of 'infrastructure facility' in clause 253 which would limit the effect of that suggested amendment.

The second aspect in our submission where we suggested a variation is in relation to the proposed new clause 60AB, which proposes to provide prescribed bodies corporate with the statutory right to charge a fee for costs. Ergon agrees with the thrust of that amendment. In most cases a native title agreement is sought by a person for a purpose which advances the interests of that person—such as for a new mine or a land development. In those circumstances where a native title body corporate is asked to expend its time and resources on negotiating an agreement to enable a project or activity to proceed it is reasonable that the body corporate's costs should be recovered from the person seeking the benefit.

Ergon's submission is that the same rationale does not, however, apply where the person is seeking a native title agreement for the purposes of providing a benefit not for themselves but solely or primarily for the benefit of the body corporate or the common law native title holders which it represents. An example of that situation in Ergon Energy's context would be the negotiation of an ILUA with a body corporate for the purpose of constructing a new remote area power station or other infrastructure in an Indigenous community where it will provide electricity primarily for the benefit of the native title holders themselves. We have recently concluded such an agreement to enable the construction of a new power station for an island community in the Torres Strait. In those cases Ergon already makes payments to or on behalf of the native title holders in various ways. For example, a payment may be made to the native title holders as consideration for their consent to the project. Also, where the ILUA provides for the grant of tenure for the project, such as a lease over the project site, rental is normally paid for the lease.

Creating a statutory right on the part of the bodies corporate to charge an additional fee for negotiating an ILUA also does not take into account other considerations. For example, the costs of constructing the infrastructure or providing the service to native title holders in a remote location are heavily subsidised. Ergon do not achieve anything like full cost recovery for electricity supplied to communities although there may be a perception in the communities that we do. It would seem unreasonable to require another cost to be added to the supply of electricity where that supply primarily benefits the native title holders and that service is already provided on a heavily subsidised basis.

Proposed section 60AB(4) provides for some exemptions where fees would not be charged. Ergon's submission is that an additional paragraph be added to exempt from the fee persons who are negotiating to provide infrastructure or a service which is primarily for the benefit of the body corporate or the common law native title holders it represents. That is the gist of our submission.

CHAIR—Thank you very much for that. I will ask Senator Siewert to start the batting with some questions.

Senator SIEWERT—Mr Webley, I am looking at your proposed amendment (d) as to interest. I am bearing in mind the example that you used about the infrastructure that you have in place now. My understanding from what you said is that there are no records anymore.

Mr Webley—That is right.

Senator SIEWERT—So you believe that 'equitable interest in' covers the fact that there is infrastructure there that you own but over which you have no statutory or formal legal rights.

Mr Webley—We have no demonstrable rights to the land that we are on. What we are trying to state there is that evidently we do have a right to operate the infrastructure but the provisions under that definition of 'interest' in relation to land or waters seems to keep pulling you back to having some sort of interest in the land or waters. We are saying that we have an interest in the facilities that we have on the land or waters.

Senator SIEWERT—So it is actually saying 'on the land' and being prescriptive about it being on the actual land and waters?

Mr Webley—Yes. We have a more demonstrable equitable right or interest in the facilities than in the land that the facilities are on.

Senator PARRY—On the same issue, I refer to paragraph (d) at 2.8 of your submission. Have you run that past the department or discussed it with the department prior to entry into this inquiry?

Mr Webley—No, we have not.

Senator PARRY—I am not being critical at all of that. I just want to know why because I would be interested to know the department's view on that amendment—it makes sense to me. Is that simply because this is the first time you have had the opportunity to do so?

Mr Webley—The submission that we made was done in a relatively brief time. We consulted with solicitors who assist us in these matters, but I think the submission was made on the last day that submissions could be made so I guess we just did not have an opportunity to consult with anyone on it.

Senator PARRY—Have you had any other wider view about that definition from outside your organisation?

Mr Webley—We have some communication with Telstra, who have some fairly common types of interests—both of us having a lot of linear infrastructure. I could not say for sure, but I think they would probably be fairly comfortable to see that type of extension to the definition.

Senator CROSSIN—I think it is pretty succinct, but you say by adding a subsection (d) to section 253—

Mr Webley—The definition of 'interest in relation to land and water' is in section 253; yes.

Senator CROSSIN—Is a definition for 'infrastructure facility' already in the act?

Mr Webley—Section 253 is the definition in the act. 'Infrastructure facility' comes immediately after 'interest in relation to land and waters'. I have a copy of it here somewhere that I could read to you if you like, but it is pretty longwinded.

Senator CROSSIN—No, that is okay. So that would cover your concerns?

Mr Webley—Why I mentioned that there was already a definition of 'infrastructure' was to demonstrate that, because there is a definition thereof, it would already limit the extent to which that paragraph (d) could be used.

Senator CROSSIN—But that would need to be checked by the department if they were going to agree to this?

Mr Webley—Certainly. I do not pretend that I can draft legislation. It is just our suggestion.

Senator CROSSIN—After reading HREOC's submission, I am not sure the department can either, given that there are a number of flaws they have picked up in the drafting of it. I also want to ask you about the other amendment you are suggesting in 60AB. You refer to just 'a person', not 'a person, an entity or a company'.

Mr Webley—I think the term 'person' in these circumstances is deemed to cover companies, bodies corporate and whatever. I did not specifically mean just individuals.

Senator CROSSIN—That is all I had to clarify. Thanks.

CHAIR—Mr Webley, I want to go back to this legal and equitable interest amendment that you have put at 2.8 in your submission on page 2. I presume you are doing this based on some sort of legal advice that you have got which says that you do not have legal right and entitlement to make these claims under the interest in relation to land or waters in section 253, as it currently is.

Mr Webley—Our legal advice is that it may be difficult to establish those legal or equitable rights given the circumstances. This is an attempt to avoid that issue.

CHAIR—It is very surprising in a way because you say you have inherited this infrastructure from the state government in Queensland. If you are concerned about whether you have got legal right and entitlement to the infrastructure on this land, isn't there very much a fundamental issue here in terms of your legal right and entitlement to act, to raise funds and to do all sorts of things with respect to your infrastructure? It is quite perplexing.

Mr Webley—I guess this relates to infrastructure that was built somewhere between the 1950s and the 1970s. It seems that some things were done a little differently then. It was not uncommon for infrastructure facilities to be built more on a handshake than on more formal, documented leases, licences and agreements.

CHAIR—Sure, but I am saying that, notwithstanding that, you cannot seem to be sure that you can establish legal right and entitlement to the said infrastructure.

Mr Webley—When it was transferred from the state government department to Ergon Energy, I think it was done by some sort of statutory process. I do not know that every item that was transferred was described, but the responsibility and the ownership of those assets was transferred, so I would hope that would be sufficient.

CHAIR—I am not sure whether you heard Mr Dore from the North Queensland Land Council speaking. He was saying that he does not want to allow the man who is walking on the beach with his dog and has been doing it for some years to have some sort of entitlement, and that is why he referred to your submission and your suggestion for changing the draft to include a legal or equitable interest. Can you see the concerns of the North Queensland Land Council that once you used the words ‘equitable interest’ you would open up a Pandora’s box?

Mr Webley—I certainly can see where he would be coming from, but I would like to think that the role we play and the infrastructure we have there is probably seen as a bit more significant than the man walking along the beach with his dog. Certainly, I think in the way we have proposed this amendment we have tried to limit it fairly clearly to an infrastructure provider. But I understand where you are coming from.

CHAIR—Sure. We have noted that, and no doubt the department will be giving consideration to these matters. Thanks very much for that, Mr Webley. We appreciate the time you have taken to be with us today. You are welcome to stay on or you can continue with your other duties.

Mr Webley—I am sure I can go and find something else I need to do. Thank you very much.

[2.27 pm]

DOEPEL, Mr Christopher, Registrar, National Native Title Tribunal

NEATE, Mr Graeme, President, National Native Title Tribunal

CHAIR—I now welcome Mr Graeme Neate and Mr Christopher Doepel of the National Native Title Tribunal. Good afternoon, gentlemen, and thank you very much for being here. The National Native Title Tribunal has lodged submission No. 4 with the committee. Do you wish to make any amendments or alterations to the submission?

Mr Neate—No.

CHAIR—For the record, I remind senators that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of them to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Officers of the department are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. I now invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions.

Mr Neate—The National Native Title Tribunal thanks this committee for the opportunity to appear in relation to its inquiry into the Native Title Amendment (Technical Amendments) Bill 2007. I appear today with the Native Title Registrar, Mr Christopher Doepel, some of whose functions under the Native Title Act 1993 will be affected by certain amendments to be made by this bill. The tribunal made a written submission to this inquiry. It has been numbered 4 by the committee. That submission refers only to one of the proposed amendments to the Native Title Act.

In summary, the tribunal submits that the proposed internal review of registration test decisions by the registrar or his delegates should be conducted by members of the tribunal rather than by the registrar or his delegates. Such a tiered process for internal review would be akin to the scheme in the original Native Title Act. The registrar can inform the committee of the practical implications of the proposed internal review process as set out in the Native Title Amendment (Technical Amendments) Bill 2007.

The tribunal's submission also refers to a matter that is not contained in the technical amendments bill. It relates to an apparent drafting defect in section 94C which was inserted into the Native Title Act by the Native Title Amendment Act 2007. Because of the way in which section 94C is drafted, it apparently would not apply to native title claimant applications that were lodged in response to a section 29 notice given before 30 September 1998 and registered in the two months when the notice was given, or to applications lodged in response to a South Australian future act notice and registered in the two months when that notice was given. The tribunal understands that these omissions are inconsistent with the original policy intent of section 94C.

As this committee knows, the Native Title Amendment Act 2007 commenced on 15 April 2007. Since appearing before this committee in relation to that bill on 30 January this year the Native Title Registrar and I, together with members and employees of the tribunal, have been busy preparing for the implementation of that legislation. We have prepared and are preparing various guidelines and other procedures for members and employees of the tribunal.

Tribunal members have considered the criticisms of the tribunal made in submissions to the committee about your inquiry in relation to the Native Title Amendment Bill 2006. We have revised and improved our induction and professional development program for members. Independently of, but concurrently with, the legislative reforms, the tribunal has developed and is implementing a new case flow management scheme to ensure that the hundreds of claimant applications in the system at any one time are assessed, managed and progressed in a process that is more transparent to the parties and the Federal Court. The tribunal recently responded to the draft best practice guidelines for parties and their representatives undertaking mediation in the National Native Title Tribunal, prepared by the Attorney-General's Department and referred to in paragraph 2.7 of the submission of the Attorney-General's Department—submission No. 6 to this inquiry.

Discussions continue with senior representatives of the Federal Court about improving the working relationship between the two institutions. Those discussions have addressed such issues as possible practice directions of either or both institutions and forms of reports from the Native Title Registrar and the tribunal to the court about specific matters. Both institutions are preparing joint presentations to stakeholders about the amended claims resolution scheme.

In quite tangible ways, the first wave of reforms has commenced. Importantly, the Native Title Registrar has taken the first formal steps to implement his obligation in relation to registration testing approximately 118 current native title claimant applications by writing to each claim group and their representatives. He hopes to make the first reports to the Federal Court by 30 June 2007 in performance of his new functions in relation to some 147 claimant applications made in response to future act notices.

To put those figures in perspective, there are currently 537 claimant applications somewhere in the system. They comprise 37 per cent of the 1,453 claimant applications made since the Native Title Act commenced on 1 January 1994. The 118 applications that have to be registration-tested as a result of the recent amendments are 22 per cent of the current total. The 147 applications made soon after the publication of future act notices, and about which the registrar may report to the court, comprise 27 per cent of current claims. In other words, since the amendments commenced on 15 April this year, work is underway by the registrar in relation to about half the claims. It is with that work already in train that we appear before this committee to answer any questions about aspects of the next raft of reforms.

CHAIR—Thank you for that. Mr Doepel, do you have any comments in addition?

Mr Doepel—I will just respond to questions.

Senator CROSSIN—Mr Neate, going to your submission and your work in this area, have you raised the deficiencies in the drafting of section 94C with the department?

Mr Neate—Yes. This was a matter of discussion or communication with the department in relation to the draft bill. I do not have that correspondence in front of me, but it was raised

with officers of the department prior to this submission and indeed in relation to the drafting of the bill.

Senator CROSSIN—And do you have a response from them?

Mr Neate—Not before me, although we did receive a response by email from an officer of the department.

Senator CROSSIN—Are they happy to pick up this deficiency or are there still problems?

Mr Neate—I think you would have to ask the department that. I cannot speak for them in that respect.

Senator CROSSIN—We will do that. There is another issue I want to raise. You have suggested to us that the reconsideration of a decision not to register a claim should in fact be conducted by another member of the tribunal rather than by the registrar.

Mr Doepel—That is the substance of our submission; that is correct.

Senator CROSSIN—Is that a bit like what happens with a Centrelink appeal, where your first court of appeal is somebody else inside the office who looks at where there might be a problem before it goes to a higher or more senior person?

Mr Doepel—I think the proposal as contained in the amendment bill is probably closer to the internal review mechanisms that you might find in Centrelink or other Commonwealth departments and agencies—that is, an appropriate delegate or authorised officer within the agency has a second look. That is how the proposal has been crafted in the current bill. What we are suggesting is that we have a qualitative difference to that so that it would not be my office—in practical terms, a delegate of mine, a delegate of the registrar—but a different kind of statutory officer or delegate who would be vested with the responsibility of carrying out the review. In making that suggestion, I think our brief submission speaks for itself. I think it would assist with perceptions about independence of the review and it would go to allay some concerns in some quarters about whether the review decision was at arm's length and was qualitatively differently carried out.

Senator CROSSIN—Should that person have a law degree?

Mr Doepel—That is a leading question! In my experience of delegates who have been working for me over the years, there have been some without a law degree who have done a very good job indeed. Simply having a law degree I do not think necessarily makes you qualitatively better; it is your basic understanding of how to apply administrative decision making. In that respect, I do not think we are that different from a lot of agencies, in that we deal with reasonably complex criteria under a legislative scheme and you have a variety of backgrounds and experience being brought to bear in the decision makers. One thing about having a person with a law degree or legal qualifications may be that they can work through some of the fundamental concepts and the statutory constructions a bit more quickly and efficiently. But a lot of it comes down to some very practical application of the fundamental rules in, say, the merit provisions of the registration test with the factual circumstances that are presented by the applicants and their representatives to meet those criteria.

Mr Neate—Senator Crossin, if it would assist you and other members of this committee, I can advise that, of the 11 members of the tribunal who currently hold commissions, six are

qualified lawyers. The three presidential members—me and my two deputy presidents—are required under the statute to be legal practitioners in order to be presidential members. But three of our other members are also legally qualified. If there were to be that qualification, we have the strength and depth of membership to perform that function.

Mr Doepel—I have a delegates pool that varies in numbers because I have some full-time delegates allocated to the registration job and others who come from other parts of the organisation to supplement that capacity as needed. Just off the top of my head, I would say three-quarters of those delegates at any one time are people who have law degrees or some legal studies background. That is the core of the delegates pool. Most of them have legal qualifications.

Senator CROSSIN—Can I also ask you about the requirement now to prove, I think, that there has been some sort of agreement—the authorisation decision-making process. Will that require tribunal members to also check that that verification is accurate?

Mr Doepel—Are we talking in relation to the registration, or general mediation?

Senator CROSSIN—I am talking about the new proposed item 72, to amend section 62.

Mr Doepel—Excuse me for a moment; I am just conferring with the president. We will just make sure we know exactly which provision you are referring to.

Senator CROSSIN—It is the application.

Mr Doepel—Sorry—which item?

Senator CROSSIN—It is the new amendment section 62(1)(a).

Mr Neate—Would you bear with us—we need to read this in the context of the amended part.

Mr Doepel—Okay, we have located the provision. Senator, would you like to repeat your concern?

Senator CROSSIN—Submissions are put to us that this is another onerous burden on them to get proof of the authorisation for the decision-making process, when schedule R of the current application form already requires proof. Is this going to create more work for your tribunal? That is really what I am asking.

Mr Doepel—The short answer is that it will create less work if that provision is complied with. One of the issues that my delegates have to deal with, particularly around authorised applications, is having to sort of peer below the meniscus layer of the application to see what is going on around the claimant group and around the processes of authorisation.

Senator CROSSIN—Do you have to check that currently?

Mr Doepel—Sometimes we have insufficient information, and we proceed on the basis that we do have some duty to inquire, and we go back to applicants and their representatives and say, ‘It is not quite clear what was going on at that authorisation meeting; can you provide some further details?’ I have to say that some of the affidavits that come in are very sparing in describing what has been going on in authorisation and the arrangements that were being made, and I think it is fair to say that, historically, information has, in some instances, been light on.

Senator CROSSIN—How is this going to change that, though?

Mr Doepel—If there is an express requirement to set out the details of the processes of decision making, we will, I think, have more evidence before us of what the authorisation processes were.

Senator CROSSIN—Do you think the changes in this bill will be able to be done within the current resources of the NNTT, given the criticism that has been made in recent months?

Mr Doepel—Are you talking about the registration changes or all the reforms?

Senator CROSSIN—All of them.

Mr Neate—In respect of the reforms generally, we are proceeding on the basis that we will attempt to implement those and should be able to implement them using our current resources. I may have mentioned on a previous occasion before this committee that, depending on how some of the reforms are taken up—particularly, for example, requests for inquiries or reviews of material in relation to people's claims—we will assess, as the demand for those sorts of functions increases, whether we need additional resources. Those might be by way of additional members being appointed to the tribunal or redeploying staff or, indeed, engaging additional staff of the tribunal. But at this stage we have no reason to think we cannot administer the reforms with the existing resources.

It will take, as you might appreciate, Senator Crossin, some time for the impact of a number of these reforms to take effect. I indicated in my opening statement that the registrar is off and running, as he is obliged to be under the statute, in performing a range of his functions. He has put a lot of resources into those and will do so over the next 12 to 18 months. Not only will that create some additional demand within our organisation; it will also create some demand with representatives of claim groups in reassessing and perhaps revising or amending and providing additional information for the re-registration tests. So there may well be a resources hump, if I can put it that way, over the next 12 to 18 months, for implementing some of these reforms. But overall we have neither sought nor anticipated the need for additional resources in the immediate future.

Mr Doepel—I can give you a practical example of difference in resource requirements. For the current financial year, 2006-07, we estimate that through my office we will have concluded some 55 to 60 registration test decisions with these waves of amendments. In the tail end of this financial year, coming into the new financial year—the next nine to 12 months—we estimate that we will have to acquit some 125 to 130 decisions. In other words, we will have to double the quantity of decision making, and we have already recruited and are putting in place delegates and support staff to deal with that volume of work.

Senator SIEWERT—I would like to ask a similar question to Senator Crossin's question about section 64 issues, but relating it back to the reconsideration by the registrar. Have you raised this particular issue with the department?

Mr Doepel—Yes we have.

Senator SIEWERT—And?

Mr Doepel—I think it would be fair to say that initially we were not overly keen on the reconsideration option, but we could see, particularly as there was discussion of perceptions

of my office coming through in early hearings and evidence, that it might have some benefit. So we thought that it was probably a good idea, although we did say in a formal response that how this was actually done was a matter of policy. On reflection, I think it probably is a good idea. I think it all has to be seen in perspective, and I have got some interesting facts and figures here about registration testing and the volume and the rate of review by the courts, which I will give you in a moment to give you the flavour of it. So it probably is a good idea; it will certainly deal with perceptions about having the reconsideration done around my common group of delegates.

As a matter of practice, most of my delegates are located in one office. They are in Sydney. We are not a large organisation. We only have 230 full-time equivalent employees, unlike Centrelink or Immigration, where you can have internal review officers in other parts of the organisation because the volume of matters being reviewed is far greater. We do not have the huge office and employee infrastructure to do that, so I manage most of this out of Sydney with supplementation around the other regional registries as required. The advantages of that are that you get a collegiate atmosphere, and given this is a particular area—a peculiar area of the law, in a sense—you get a common understanding developing over time amongst those people who have the job of carrying out the registration test.

It might interest you to know, though, that we have to see overall numbers as a context. Since 1998 we have applied the registration test in 1,058 matters. Some 713 matters in that number have been accepted and placed on the Register of Native Title Claims, and some 345 matters in that time have failed. At any one time, I would probably have only two or three matters on judicial review to the Federal Court. In some years and some months I have none for a period. If you add the Wakaman matter, we have had three matters before the Federal Court in recent times, and we expect to do 55 to 60 registration tests in the current financial year. Three out of 60 is one-twentieth, so five per cent or fewer matters are being tested on judicial review.

I can probably provide the committee with some clearer statistics on this and I will undertake to do that. But you will probably find that, historically, throughout the nine years or so that we have been applying the registration test, the percentage of judicial review has been relatively low. In over half the matters, the court elects not to set our decisions aside. I do not contest these matters. I follow the Hardiman principle; I submit to the jurisdiction of the court and take what the judges tell us is to be the laws application. Mr Dore talked about consistency. I have been in an ongoing discussion with representatives of some of the Queensland native title representative bodies about issues of consistency. But I think it all needs to be seen in perspective in the context of the overall numbers that we have had to deal with over the last few years.

Senator SIEWERT—If there is a submission for reconsideration, would your proposal be automatically referred to the tribunal—the president—and then a decision made as to who would hear it?

Mr Doepel—Yes. Effectively, we would formally maintain different offices for dealing with this function and the president would allocate that for review. Naturally, there would have to be some administrative liaison between our two offices, but that would be a member function.

Senator SIEWERT—I must admit your suggestion does have some appeal.

Mr Doepel—Thank you.

Senator SIEWERT—I would now like to go to your comments on section 94. When you were giving the figures I may have missed this, but how many applications are caught up under what is called the apparent defect in that section of time that you are talking about?

Mr Neate—As I understand it, the 147 applications that I referred to earlier—which the registrar is currently looking at—are the 147 applications that are clearly covered by the amendments. In addition to that, I understand that there are some other claims—about 37—which fall within one or other of the two categories that we highlight in our submission. That is in addition to the 147 that I mentioned earlier.

Senator SIEWERT—So that is 147, plus—

Mr Doepel—Thirty-seven.

Senator SIEWERT—I knew I had missed a figure. Can I ask another question—

CHAIR—Sure.

Senator SIEWERT—and the chair or you may rule my question out of order. We have obviously received a number of submissions from a range of organisations and a number of them have raised the issue around resources for—

Mr Doepel—Prescribed bodies corporate.

Senator SIEWERT—Yes. Do you have any comments on that? Some of the native title bodies and industry have raised concerns about it. Do you have any comments?

Mr Neate—This is really a policy matter for government. It is outside the realm of our responsibility or our direct interaction with native title holders, so I will leave it to others to respond to.

CHAIR—I do not have any further questions; they have been asked. Thank you for your time today.

Mr Doepel—Thank you.

[2.53 pm]

ANDERSON, Mr Iain Hugh Cairns, First Assistant Secretary, Classification, Legal Services and Native Title Division, Attorney-General's Department

HARVEY, Ms Tamsyn Jane, Acting Assistant Secretary, Claims and Legislation Branch, Native Title Unit, Attorney-General's Department

BIGG-WITHER, Ms Rebecca, Senior Legal Officer, Land Branch, Department of Families, Community Services and Indigenous Affairs

ROCHE, Mr Greg, Branch Manager, Land Branch, Department of Families, Community Services and Indigenous Affairs

CHAIR—Welcome. Do you wish to make any amendments or alterations to your submissions?

Mr Anderson—No.

CHAIR—I remind senators that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Officers of the department are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. I now invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions.

Mr Anderson—I will make a very brief opening statement. The submission already sets out a lot of detail, and obviously most of the matters that we are going to discuss are covered in that. I would like to again note that this bill is part of a broader package of reform. Some of that has already been implemented and some is still to be implemented by this bill and others. Other parts of the reforms are being implemented administratively. This particular part of the reform package in terms of the technical amendments has involved a significant amount of consultation. There have been discussions papers issued and along the way proposals have been added, modified and discarded as a result of that significant process of consultation.

As our submission notes, the bill has four different schedules. The majority of the bill is the technical amendments, which is schedule 1, and that is the responsibility of the Attorney-General's Department. The native title representative body and prescribed body corporate amendments are in schedules 2 and 3, and they are primarily the responsibility of our FaCSIA colleagues. Schedule 4 is amendments related to the Legislative Instruments Act, and they are really just procedural matters. If there are any questions on that they would come back to the Attorney-General's Department.

Mr Roche—I would like to take the opportunity to respond to some of the issues that have particularly been raised today in relation to PBC matters, just to put a bit more of the department's thinking behind some of these amendments than you have perhaps had the

benefit of to date. It seems to me three issues have been raised. The first is the general issue of why there is an amendment to allow the PBCs to charge a fee, the second is the proposal put forward by Ergon Energy for an exemption where it is for the sole or primary benefit of the native title holders, and the third is the issue of default PBCs, which Senator Siewert referred to. I will address those in that order.

It has been put to you that PBCs are no different from any other incorporated body, they should be able to charge essentially whatever the market can bear and there is no need for any form of legislation in this area. I respectfully disagree, because it would appear to us the PBCs, where they are performing a statutory function, may lack the legal power to do so. It is accepted as a matter of law that a fee can only be charged for the performance of a statutory duty or function if the statute provides for such a charge, either expressly or by necessary implication. I rely upon the decisions in the Attorney-General v Wilts United Dairies 1922 decision and the decision in McCarthy and Stone (Developments) Ltd v London Borough of Richmond upon Thames, 1991. What has essentially been happening has been, as is well known in the sector, that arrangements are entered into between PBCs and those who wish to achieve assistance with future act matters and in particular wish to bring forward the negotiations, and for that they have generally been prepared to pay a fee.

All we are seeking to do with this amendment is to make what has been so far a cosy gentlepersons' agreement a legal one. The difficulty that immediately arose for us having come to that position is that it is an accepted matter of government policy that, once you give a body a power to statutorily set a fee, there has to be some form of regulatory mechanism in place to ensure that that power is not abused. Of course, there is the normal reliance upon the market. If the proponent is a large mining company, it has a number of normal legal methods of redress, but we were also concerned about situations where smaller proponents may feel themselves aggrieved and lack the resources to litigate. Therefore, two regulatory mechanisms were placed into the bill.

The first of these regulatory mechanisms is that the fee cannot amount to taxation. What that essentially means is that the level of the fee must bear some relationship to the services being provided. Secondly, there is the mechanism of the opinion of the Registrar of Aboriginal Corporations and her opinion as to whether or not it amounts to taxation. That mechanism in particular we thought was a relatively straightforward, low-cost mechanism which would provide guidance for both PBCs and for proponents of future acts and thus avoid creating a large, complex, messy regulatory structure for what are at the end of the day usually private negotiations between PBCs and proponents.

In relation to the Ergon Energy proposal about the sole or primary beneficiary being the native title holders, could I say first off that it would have been useful to have had that proposal before. It is certainly an interesting one and it is one that I think I can indicate that we will have a close look at out of those that came to our attention in the course of reading the submissions. There are, however, two points I wish to make about that proposal. One is that I respectfully adopt the point made by Mr Dore—that is, that if it is a proposal that is to the benefit of the native title holders clearly it is something that native title holders can themselves take into account as to whether they charge any fee at all, and it may not be appropriate to put in place a legislative ouster.

Secondly, there is the difficulty of the definition of sole or primary benefit. Ergon relied upon the example of Mer Island. That is an extremely good example from their point of view, but it was an extremely rare one, where a community consists of the native title holders. As you would be aware, most Indigenous communities these days consist of a mix of people who are native title holders and those who are not. Does that mean in terms of the application of that proposed amendment that you have to work out what population the community is? It raises issues. If, for example, an electricity line goes to five communities and two of them are native title holders and three of them are not, does that mean it is not substantially for the benefit? I am not ruling it out; I am just pointing out that there might be some difficulties in interpretation.

Finally—and thank you for taking your time in dealing with these matters—I quickly turn to the matter of default PBCs. The act already provides that the regulations can prescribe the kinds of PBCs. What we are attempting to do in relation to these amendments is draw on experience that we have now had for some years in the application of the Native Title Act. There are now some 50-odd PBCs in existence. Some issues about the forms of PBCs have become clear and we foresee that some may occur in years to come.

There are three categories of situations in which we think a default PBC may be appropriate. The first of those is where the PBC is unable to be created, and that situation has in fact already occurred. I would refer the committee to the native title determination in the Blue Mud Bay case. That determination was in 2005, but the PBC has still not been created, which means that legally there is no organisation there that is working to protect the interests of the native title holders. Secondly, we can foresee that as PBCs become involved in commercial activities—with the laudable objective of leveraging off the benefits that the native title rights bring—these are after all corporations and corporations have been known to fail. The act is currently silent about what happens when the corporation fails. Of course, as is obvious, the native title rights go on forever, but the corporation may not. We think it worth while putting a bit of detail in the act through the regulations about how that might be handled.

Thirdly, we are aware of the possibility that in future certain PBCs may wish for a limited period to relinquish their native title rights to an appropriate body. This may be because of the burden of decision making. I should mention here that one of the other major recommendations of the PBC report, on which a number of these amendments are based, had a reasonably lengthy discussion on the issue of resources. The government has decided to change its policy parameters, and in future my department will be able to fund PBCs for day-to-day operational costs. That said, it will only ever be, of course, limited funding. Once this amendment is carried by the parliament—hopefully—PBCs will be able to legally charge. But there are a number of PBCs in areas which do not have high levels of future act activity, so we can foresee circumstances in which the native title holders may wish to transfer their native title rights for a limited period to another body. The only organisation that we foresee perhaps being in that situation is the Indigenous Land Corporation, because, by its very name, it is concerned with the protection and preservation of Indigenous rights and interests; and, in particular, it now has a considerable amount of expertise as a land management authority. So it may be an appropriate vehicle to hold native title for a limited period.

These amendments recognise the fact that the opportunity to propose amendments to the Native Title Act does not come along very often. So to some extent I would agree that it is quite possible that a number of these circumstances may not occur, but we would like to have the opportunity to allow for the development of PBCs. The native title claim process has now been in existence for some years. There is now quite a lot of settled law and practice about claims. It is still very early days for PBCs, particularly on mainland Australia. So we think this would be an opportunity to perhaps put some mechanisms into the act at this stage.

CHAIR—Thank you. I will take up the batting first in terms of questions. Have you taken on board and reviewed the submissions or are you taking on board and reviewing the submissions with respect to the technical amendments that are recommended by the National Native Title Council—for example, section 94C and the apparent defect that they see? Mr Dore referred to some concerns that he had. I do not know if you have taken them on board. Are there any other matters that you would like to alert the committee to in terms of amendments that need to be taken on board by the department?

Mr Anderson—We certainly have had regard to all the matters contained in the submissions. There are a number of matters that are still being considered and that might form the basis for government amendments to the bill, subject of course to the availability of drafting resources. It is always a challenging process. Some of the matters that are noted in the submissions have been raised with us previously, although I should note that, for the most part, they were matters that were raised with us fairly late in the piece—for example, with respect to the tribunal submission.

As was noted by Mr Doepel, the tribunal's initial view on the question of review was that it was a policy matter for the department. It was only more recently that they raised with us the matter as to whether it should be members or not. Matters like that we are still considering. I should also note for the sake of completeness that Mr Dore noted that he had not been aware of any previous discussion of the question of charging by PBCs, but that was something that was actually a publicly released document and a recommendation of the PBC reform report that was carried out by a steering committee of the department, FaCSIA and the Office of the Registrar of Aboriginal Corporations. So that has been in the public domain for some time.

The drafting errors that were picked up by the Social Justice Commissioner are also matters that we are addressing. I should say as well in relation to the 94C issue in particular that when that was first raised with us it was indicated that it was something that would apply to only a very small number of claims—some 10 or so. The indication that it would be 37 was something that was brought to our attention much more recently. So we are still considering that. Thirty-seven is a much more significant number of claims.

CHAIR—Will you take that matter on notice?

Mr Anderson—Yes.

CHAIR—As far as you are concerned was the consultation process adequate and comprehensive, and do you feel as though you have got the feedback and that that is now being inserted into this bill?

Mr Anderson—Yes. There has been a very extensive consultation process about the technical amendments in particular. The first discussion paper was issued in November 2005

and the second discussion paper was issued in November 2006. There has been a process of going out and talking with a range of bodies in the meantime as well as the formal processes of calling for submissions. The fact that the second discussion paper, for example, contained some 40-odd additional suggestions or proposals that had come out of that consultation process reflects the fact that we have been listening to what people have been saying. The fact that the bill itself now does not contain some of those measures is because things that are welcomed by some stakeholders are not welcomed by others, and the government has sought to strike an appropriate balance in what are intended to be technical amendments.

CHAIR—Sure. I want to ask about one of those matters under section 24LA of the Native Title Act relating to low impact future acts. You will be aware that the New South Wales government and the Local Government Association of Queensland put forward some views about allowing excavation and clearing to be carried out as low impact future acts for public health and safety or environmental protection initiatives. That was in the original discussion paper, but it is not in this bill. What is your reasoning for that?

Mr Anderson—We thought that it seemed like a sensible proposal, and that is why we initially floated it for consultation. We had some very strong responses to that from a range of parties—both stakeholders on the native title representative side as well as the Law Council had had concerns about it. When we inquired further about that proposal with the Local Government Association of Queensland, they indicated that there had in fact been no practical problems with the way in which these provisions currently operate. It was simply a theoretical problem that they were concerned about. Given the very strong concerns that had been raised, it did not seem appropriate to seek to move this amendment forward to address what was only a theoretical problem where no practical issues had arisen to date.

CHAIR—I want to go back to the prescribed bodies corporate matter that has been referred to and to the National Native Title Council. You may have heard Mr Dore saying—and in his submission on page 5 he says—that it was discriminatory and uncertain. What is your response to that allegation?

Mr Roche—My opening remarks explained why it was not discriminatory. PBCs are exercising a statutory function; therefore, in exercising a statutory function, they need the legal power to be able to levy the fees. As I hope I illustrated, there was quite some thought given to getting the balance right in giving the legal power—or putting beyond doubt the fact that they have the legal power to levy these charges—but doing so inside a system which is relatively straightforward, low-cost and certain.

CHAIR—According to their submission, the Minerals Council support the thrust of the amendment. They talked about the government covering the costs of the statutory functions of the PBCs. What are your thoughts on that? They recommend that the PBC should only be charging for additional costs relating to specific commercial activities. What is your response to the Minerals Council?

Mr Roche—It seemed to us that the Minerals Council's point was a little unclear because all that the amendments do is provide a power in relation to statutory functions, which in this particular case are related to future acts. That is all that the coverage of the bill provides for, so it seems to us that we are doing precisely what the Minerals Council is recommending.

There may be some confusion about the non-statutory costs of the PBCs, which have been an issue that I know the Minerals Council has made a submission to this committee about before. The government is addressing that by agreeing that it will be considering funding for the operational costs of PBCs on a case-by-case basis in the future. As a result of the combination of clarifying that the PBCs have the power to charge for their statutory functions and of a change in policy in relation to the operational costs of the PBCs and other changes which arose out of the PBC report that my colleague Mr Anderson referred to, it will now be on a much clearer, firmer footing than has been the case.

CHAIR—I think that in some ways responds to Mr Dore’s concerns as well.

Mr Roche—That is correct.

CHAIR—Finally, you touched on Ergon Energy’s concerns. They outlined reasonably comprehensively to us that they have infrastructure in Queensland that they are concerned will not be covered by a legal interest and they put forward a proposal for a legal and equitable interest so that their interests are taken into account. How would you respond to the Ergon concerns?

Mr Anderson—The act as amended by the previous bill introduced in the last sitting of parliament narrowed down considerably the question of who is required to consent. It has now been narrowed down to a proprietary interest. This committee raised concerns with us in its inquiry into that piece of legislation about whether that narrowed it too far. The government accepted the recommendation that it should expand again the class of people who are parties who can be required to give consent. The question is how far you actually go, and there are parties, as Mr Dore indicated, who might in fact have no legal interest. There have been parties who have in effect been trespassers or illegally squatting. Certainly, the intention of the reforms generally is to seek to expedite the way in which the native title processes can operate. It was certainly desirable to ensure that only parties who have real and significant interests should be required to consent, with the safeguards that all other parties still have the entitlement to object to the process and the court still has to decide whether it is willing to make the determination notwithstanding the objections that might be made. Then, in making any determinations, if the court so chooses, it has to set out the relationship between native title rights and interests and any other rights and interests. So the government view was that there were sufficient safeguards.

At this stage we do not see a need to make a specific exemption for infrastructure. We think that the sort of interests that Ergon is talking about would be covered. I also note that they have some questions about tenure in any event. Providing there was sufficient government executive power at the time to carry out the relevant act, we think there that would be sufficient to bring it within legal interest. But, of course, at the same time, if they have other problems in relation to tenure where there was no power at the time that the infrastructure was created, native title is not about correcting those issues.

CHAIR—Without wanting to tie you down to a hypothetical question, based on your reading of the submission and the evidence that you are aware of, do you think that the Ergon Energy concerns have been taken into account in the drafting of the bill and that their interests are protected under the bill?

Mr Anderson—That is our assessment. I understand their caution, but our assessment is that they are protected.

CHAIR—Thanks very much for that.

Senator CROSSIN—I think you have probably covered a lot of the areas that I was going to have a look at. I do not know if you have had a chance to have a look at the submission from the Justice Commissioner for HREOC that was emailed to us today. On page 7 of their submission they talk about a number of drafting errors. I am wondering if you have had a chance to look at those. They talk about errors in items 88 and 123.

Mr Anderson—In terms of item 88 and item 123, as I indicated earlier in my evidence, we are already seeking to address those matters. They are drafting errors.

Senator CROSSIN—Okay.

Mr Anderson—I have to say that we are not wholly responsible for the drafting. That is actually done by the Office of Parliamentary Counsel.

Senator CROSSIN—Yes, I understand that.

Mr Anderson—But they do a wonderful job.

Senator CROSSIN—I wanted to get on the record that perhaps we should look for that when we deal with the bill as it comes to the Senate; that is all. In terms of the need to set fees, how flexible will that be for prescribed bodies corporate?

Mr Roche—We think the mechanism will be quite flexible. It is not intended to work through a prescribed set of fees, for example. The range of PBC circumstances, from riverbanks in Victoria through to the Torres Strait, and the sort of range of future act activities or negotiations—it has been pointed out to me that we are actually talking about being able to charge fees for the negotiations in relation to future acts—is such that it seemed to us to be impractical to try and set a level, and unnecessarily intrusive. By the reference in the bill to it not amounting to taxation, we understand from the drafters that that is essentially code for 'the level of fee charged must be proportionate to the service which the PBC is providing'. We think that is a reasonably flexible wording to cover the range of circumstances that PBCs are in and the sorts of negotiations which they are involved in.

Senator CROSSIN—Must they charge those fees?

Mr Roche—No.

Senator CROSSIN—I do not mean: must they charge the fee that is outlined? Are you suggesting that if a prescribed body corporate does X then the fees should be from $100 to $1,000, but if they decide to not charge any fee that would be okay?

Mr Roche—That is completely a matter for the PBC.

Senator CROSSIN—So is the scheduling of fees simply a guide?

Mr Roche—We do not envisage there would be a schedule of fees as such. They would be set in the particular circumstances of each negotiation. Frankly, we expect that this particular clause, once enacted, will not actually change very much the discussions which occur between future act proponents and PBCs—that, in almost all circumstances, it will be a

private negotiation between the parties and an acceptable level of fees will be agreed to for both. It is really only in the rather extraordinary circumstances where the PBC is proposing to impose a fee and the proponent of the future act is unable to agree with the level of the fee that the other mechanism there in relation to the opinion of the registrar may come into play. It is also worth adding, of course, that already under the act the native title representative body has a statutory function of assisting PBCs in relation to future acts as well. So we are really talking about a very limited set of circumstances in which these provisions would apply.

Senator CROSSIN—Why have them there then? I am still trying to get a handle on why it is necessary to have these if they are not guidelines and if there is no requirement that they must charge these fees. What is the benefit of having them in the act?

Mr Roche—The benefit is that we would not want to see an agreement which is ultimately reached between a proponent and a PBC successfully legally challenged on the basis that the PBC had no power to set those fees. It is as simple as that.

Senator CROSSIN—I see. So it actually just—

Mr Roche—It is technically illegal for them to do it at the moment, in our view.

Senator CROSSIN—That is the best clarification I have heard to date, I have to say, as to why you would do it. But there will no enforcement of them actually charging the fees; this just gives them the power to do that if they want to.

Mr Roche—The mechanism that is set out in the bill is a rather unique one. We did not want to go down the route of having an ACCC type body deciding what the appropriate fees would be or setting a schedule, which could be outdated and not sufficiently flexible, but of the Registrar of Aboriginal Corporations being able to give her view that a particular fee did amount to taxation, meaning it could not be charged. We think that acts as sufficient redress for particularly a small business—a small miner, an apiarist or somebody like that—which would not necessarily have the financial resources to challenge the level of those fees in court. We were thinking that this was a relatively straightforward administrative system which could also assist PBCs, because it is presumed that over the years it will become clear about the sorts of things that the registrar regards as being excessive and finds are taxation. I hope that clarifies it for you, Senator.

Senator CROSSIN—Under item 107, the internal review of the registration decision and the dismissal of unregistered claims, in respect of the dismissal of claims that do not happen to pass the registration test, my understanding was that when this bill was first introduced the government gave an undertaking that it would not use this guarantee for the purpose of dismissal in the substantive determination procedures. What has happened? Is there a change of direction?

Mr Anderson—I note that the provisions dealing with the discretion for the court to dismiss matters that have failed the registration test is already law in that it was contained in the earlier bill and the reforms passed in the last sitting period.

Senator CROSSIN—Yes.

Mr Anderson—I have to say that I am not aware of the undertaking that is adverted to in one of the submissions. I can simply say that the government's view was that with a matter

that substantially impedes the effective and efficient progression of claims—such as the poor quality of some claims and the lack of incentive at times for parties to improve the quality of claims—giving the court that discretion to dismiss claims that fail to pass the registration test was seen as being one step by which to encourage claimants to improve the quality of their claims. It of course in no way prevents claimants from bringing a further claim. It simply says that if a claim is not one that reaches the prima facie threshold then it should be withdrawn or dismissed and the parties should seek to set out a better claim. Once a higher quality claim or a clearer claim is put forward, it is much easier for all parties to identify the impact upon their rights and interests and to engage in a meaningful mediation process. But some of these claims have been around for a very long time, and there is no attention being given to them to improve the quality of those claims. So it is simply an attempt to encourage the claimants to improve the quality of claims, but it in no way bars those claimants from bringing further claims if their claims are withdrawn or dismissed.

Senator CROSSIN—Isn't that the very point that the Native Title Council makes in their submission on page 4—that this point needs to be clarified. They say:

> The scheme, understandably, clearly states that an applicant cannot seek internal reconsideration after making application to the Court, however the ability to seek court review after either stage has not been made clear.

Is that not something that you would need to clarify?

Mr Anderson—Senator, with respect, I think that is a slightly different point. What they are talking about there is simply the internal reconsideration after the registrar has made a decision that a claim does not actually pass the registration test. We think that the provisions are sufficiently clear: a party has the choice of seeking internal review by the registrar or of going directly to the court. If a party does seek internal review by the registrar, it can then go to the court if it chooses. So there are two paths, and we believe that that is sufficiently clear. But, of course, if the committee is of the view that it is not sufficiently clear then we can consider whether a note should be inserted in the legislation.

Senator CROSSIN—I think, if I read it in context, there is still some confusion from the council about that, I have to say. I might leave it there, Senator Barnett.

Senator PARRY—Mr Anderson, your submission refers to discussion papers forwarded to various entities—and it is quite an impressive list—and discussion papers sent in relation to PBCs—another comprehensive list. Can you indicate, apart from the discussion papers, how lengthy the discussions were that are referred to in your submission? It is good for us to get on the record the detailed discussions that you have had, especially concerning the PBCs. Appendix A of the submission, after attachment G, states that 'Government officers held discussions with representatives of the parties listed below'. Were they phone calls, were they two-hour sessions or did they vary? I just want to get a handle on their depth, and the weight that can be placed on the discussions that have been held.

Mr Anderson—The steering committee that compiled the report on the PBCs actually travelled to a number of these places around Australia. They travelled to Alice Springs, the Torres Strait, Broome, Perth and a number of other places and Mr Roche was part of those consultations.

Senator PARRY—How were you received?

Mr Roche—I was present for the discussions with the PBCs on Torres Strait, which at the time had a majority of PBCs. We were received very well. They particularly wanted to talk to us about the issue of resourcing, and that is reflected in the report. I was also present for the discussions with the North Queensland Land Council, which talked mainly about the technical amendments. They were less concerned about PBC issues. It was a very fruitful discussion. I understand from other officers that discussions with Lhere Artepe in Alice Springs—which has now been going for some years and is a very effective, well run PBC—were also particularly useful.

Senator PARRY—Do you feel that their views have been reflected in the submission and in the framing of the legislation?

Mr Roche—In my view, the concerns that they had have been addressed in the report. Some of the issues that they struggled with, particularly in relation to their ongoing viability as organisations, have been clearly addressed by the government—not so much in legislation, but in policy changes. But it also became clear to us in the course of those consultations and also through receiving a number of submissions—from memory approximately half of the native title rep bodies provided written submissions to us—that the issues that they raised have been addressed through this.

Senator PARRY—So would it be the evidence of both you, Mr Anderson, and you, Mr Roche, that you are satisfied that extensive consultation to all affected parties has taken place?

Mr Anderson—I am certainly satisfied of that.

Mr Roche—As am I.

Senator PARRY—Okay, thank you.

Mr Anderson—If I could add one thing to what Mr Roche was saying, in terms of the measures that have addressed the concerns raised by the PBCs and by the representative bodies, it is important to note not just the measures in this bill and in the last bill in relation to PBCs but the measures in relation to the capacity building to be provided by the Office of the Registrar of Aboriginal Corporations, the measures to clarify the extent to which the representative bodies can provide assistance to PBCs and also the measure that Mr Roche has mentioned for direct funding of PBC operational needs. It is quite a package.

Senator PARRY—That is where I am heading next: to the funding issue. Mr Roche, you mentioned that hopefully there will now be an ability for government to fund PBCs when they require funding. Is that short term? I know that we are getting a little bit beyond the scope, but would that be short-term funding?

Mr Roche—It is operational funding. We are attempting to build it into the funding we will be offering the native title representative bodies in 2007-08. Because of the fact that—as you would be aware—through the previous bill a number of changes are occurring to the representative body system, it is fair to say that it is an interesting time to be bringing in this change as well. But government was persuaded that there are limited circumstances in which PBCs can make out a case for them to be provided with operational funding. There are

constraints. I suppose the fundamental one is that PBCs last forever. Governments are loath to make funding agreements of similar lengths.

Senator PARRY—That is not quite correct; a PBC might not last forever because, and you addressed this fact, they could collapse like a normal corporation.

Mr Roche—Quite correct, yes. The native title rights and interests will last forever. We have of necessity had to be a bit cautious. It is also unclear to us what the level of need is going to be because in those consultations that we had—in particular the ones in the Torres Strait—it was mentioned that the compliance obligations imposed by the then Aboriginal Councils and Associations Act, particularly the requirements to have an annual general meeting and provide annual financial reports, are likely to be significantly reduced because of the introduction of the CATSI Act as of 1 July. Those compliance requirements will not be so demanding. What we are attempting to do—preferably through their local NTRB—is provide a measure of support for the PBC so that it can perform its day-to-day operations where they are not already covered by other means. It is worthy of note that there are a number of PBCs in the country these days which have significant resources, particularly from state governments. They will not be eligible for this sort of support.

Senator PARRY—So there will be some effective means testing or merit based—

Mr Roche—It will be on the basis of need, correct.

Senator PARRY—Finally, on this issue you indicated that you thought that one of the reasons for providing assistance is because the PBCs could, like any corporate body, go into liquidation or receivership or whatever. Wouldn't the normal process of what would happen to a body of that nature then kick in? Wouldn't there be normal coverage under current legislation, such as winding-up clauses if it is limited company or a company limited by guarantee or whatever the structure is?

Mr Roche—Yes. Currently under the act—and this is not expected to change—the PBC must be a creation under the old ACA Act or the new CATSI Act. That act has provisions for winding up. What is not answered is the issue of what happens in that situation to the native title rights and interests. As you corrected me before, they are ongoing. One of the—

Senator PARRY—Couldn't that transfer across to a new entity? You mentioned the Indigenous Land Corporation as being an ideal entity. Couldn't that be part of a winding-up clause?

Mr Roche—We are not envisaging that the ILC would be a body that would be doing that unless the native title holders consent to such a transfer. That may happen in the case of winding up—that is correct. But it may not. We needed to cover the circumstances in which the PBC is being wound up, and the act and the regulations are, in our view, currently silent about how the transfer to a new PBC would occur.

Senator PARRY—Basically, you are indicating that a wind-up clause is not necessarily appropriate in this case because of where the control of that land would be vested and because there may be some Indigenous issues that are fairly particular in this instance.

Mr Roche—Yes. The distinction is between the normal corporate issues about liquidity, solvency and so on as opposed to the native title rights interests, which are a separate category of rights and interests which we have to allow for.

Mr Anderson—I might just add that the native title rights and interests are not an asset of the PBC in the sense that it could be exploited by a liquidator for the benefit of creditors. It still has to be dealt with by the traditional owners for the traditional owners, so in that sense there is a division between the actual assets of the PBC that would be available for creditors and the native title rights and interests.

Senator PARRY—And the trusteeship of the land in question.

Mr Anderson—Yes. That is why they would not be dealt with under the normal insolvency legislation.

Mr Roche—I would like to clarify something that I have just been reminded of and to ensure that I did not lead the committee astray. Currently under CATSI it is not possible for the registrar to wind up the PBC because of this problem with the native title rights and interests. The organisation can be, to all intents and purposes, defunct but it cannot be left like this.

Senator PARRY—They still have to exist.

CHAIR—That is a helpful note.

Senator SIEWERT—I will come back to the new default mechanisms in a minute. I want to touch on the funding issue. Has there been an announcement on the new funding for day-to-day operations yet?

Mr Roche—Yes, when the government accepted the report of the steering committee, which recommended that funding be made available from the Department of Families, Community Services and Indigenous Affairs.

Senator SIEWERT—But there was no detail given around that, was there?

Mr Roche—No, and we are still working on the detail.

Senator SIEWERT—That is what I was trying to get to.

Mr Roche—Yes. We had a workshop with a number of PBCs approximately a fortnight ago. We have some draft guidelines about funding for PBCs which we hope to release shortly. We would much prefer PBCs to be supported through the local native title representative body. We have been in discussions with NTRBs about how that might work.

Senator SIEWERT—It was my understanding that NTRBs could not fund.

Mr Roche—That is right. Just to be clear about this, in relation to its statutory functions, NTRBs have always been able to assist PBCs. However, until this change in policy, the department and its predecessors, extending back to ATSIC days, could only fund the operational costs of a PBC up to its first annual general meeting. After that there was no funding. That is the change.

Senator SIEWERT—So that was not a regulatory stop, it was a policy.

Mr Roche—That is correct.

Senator SIEWERT—I was under the impression that there was a regulatory thing there as well.

Mr Roche—No. That was a policy position for many years.

Senator SIEWERT—What is the timeline on the announcement? In terms of the detail.

Mr Roche—In terms of the detail, we are hoping to release the draft guidelines within 10 days to a fortnight.

Senator SIEWERT—So they will be publicly released and go to stakeholders.

Mr Roche—Yes.

Senator SIEWERT—Going back to the issue of default and the changes that are proposed, I am looking at the submission that Tom Calma has put in here from HREOC. Amongst issues that he raised, some of which we have already dealt with, he specifically raised the issue of the decision and where it should go; whether it should be a court decision rather than a departmental decision. That is largely what he said.

Mr Roche—Thank you for raising that issue. It is correct to say that under these amendments it may be possible, in the regulations, for a body other than a court. However, practically speaking, we cannot see that there is any other appropriate alternative to a court.

Senator SIEWERT—Are you saying that you anticipate that these changes would be dealt with by a court?

Mr Roche—Yes.

Senator SIEWERT—He makes the point, and I am assuming you have got the submission, in point 23, page 9 of the submission. They talk about the policy. It says:

> The Office of Indigenous Policy Co-ordination should develop a comprehensive proposal for the establishment of 'default' bodies corporate to perform PBC functions in circumstances where there is no functioning PBC nominated by the native title holders.

Has there been a policy developed?

Mr Roche—It is the outcome of the policy process which is now captured in this bill.

Senator SIEWERT—So there is nothing separate that the department has in mind beyond this? These changes are being made with the understanding that it would be administered by the court?

Mr Roche—Our expectation is that the court will be determining the body.

Senator SIEWERT—Is there a possibility that a body other than the court could make that determination?

Mr Roche—There is a possibility.

Senator SIEWERT—And that is obviously his concern. I am presuming he sees that there is a hole there that a body other than the court could make those decisions.

Mr Roche—As I mentioned in my opening remarks, it is not very often that government has an opportunity to look seriously at the Native Title Act, and there has now been a process of review for some two years. So our intent in this area is to address some issues which have

arisen, for example the fact that in at least one instance a PBC has been unable to be created, but also to cover the range of circumstances that we think PBCs may find themselves in in years to come. Practically speaking—I think I repeat myself—we cannot currently foresee circumstances in which a body other than a court might determine the body. But we thought it useful to put a little bit of scope in this regulation-making power, in case that should prove necessary.

Senator SIEWERT—You raised three issues around the issues of possibilities of default. The first one you raised is the case you just talked about, which was the Blue Mud Bay case. That has been ongoing for some time. Did I understand what you said?

Mr Roche—Yes. So there is no confusion, there has actually been quite a lot of litigation about Blue Mud Bay involving both the Native Title Act and more recently the Aboriginal Land Rights (Northern Territory) Act. It is the second act which has been the focus of the recent Federal Court decision. What I was referring to was the original determination in 2005 that there was native title, and just noting that we are now in 2007 and a PBC still has not been able to be created.

Senator SIEWERT—Is that because of the ongoing litigation—if I understand properly what you have just said—or are there other circumstances there?

Mr Roche—I would not like to say about the particular circumstances there. It is perhaps unfortunate that Mr Levy was unable to give evidence today because that is an issue he could have addressed, having been very involved in Blue Mud Bay. So I would not like to comment on the precise circumstances. I think it is sufficient for us to say that it has been two years; the PBC has not been able to be created, so therefore there seems to us to be a gap in the current act that requires filling, regardless of how that particular situation came about.

Senator SIEWERT—I understand what you are trying to say. What I was trying to get to was: is it because native title holders could not appoint a PBC, or is it because there are other circumstances which, in fact, these changes might not address?

Mr Roche—I think I can say that I am not aware that there are any legal issues with the creation of the PBC. I could be wrong; I am not an expert on Blue Mud Bay.

Mr Anderson—Senator, if I might just interpose myself on that. Blue Mud Bay is certainly not the only example. There were some complications there because of the death of the judge who referred the matter. I am not sure whether the determination was fully made in 2005, when Justice Selway handed down his decision. After his death another judge became involved and dealt with some other matters, I believe, before it came to a determination. It is certainly the case that there have been a number of determinations of native title made around Australia where there has been no PBC established in a lengthy period of a number of years since the determination, without any legal impediment to the establishment of the PBC.

Senator SIEWERT—Some of the feedback that I have had from Western Australia about PBCs is also about lack of funding. That has been a major issue in terms of people wanting to set them up and keep them functioning. It sounds like that has been dealt with.

Mr Roche—There should not be an issue about funding for the creation of the PBC because we have always supported the NTRB in relation to the creation of the PBC. The issue has been subsequent to the creation of the PBC.

Senator SIEWERT—I understand that, but groups know that there is no further funding after the first meeting. The feedback I have had verbally is that that has been an issue. But it sounds as though that is being resolved.

Mr Roche—Hopefully.

Senator SIEWERT—We touched on this and I know you said you are still seeking advice but I just want to clarify that. This is the issue the tribunal has raised, and a couple of other submissions have raised, in relation to reconsideration by members. If I understood you correctly, you are still considering a response.

Mr Anderson—We are still considering all those matters that have been raised. I should say in respect of that one, though, that our disposition is to maintain the view that it should be done by the delegates rather than by the members. We are considering everything that has been raised but we think that there are some sound reasons why it should continue to be done by the delegates rather than by the members.

CHAIR—What are they?

Mr Anderson—While Mr Doepel has different views on this, he also indicated in his evidence that it is not a question of whether you have got a law degree or not; it is a question of your understanding of the requirements of the legislation and of the practical application of the act to the factual circumstances. That is a matter that existing delegates have considerable experience in, given the vast numbers of registration decisions that have been made and the relatively rare occasions that matters actually come for review. So it would be a completely new task for members if that was to be given to them now.

Other measures in the bill also seek to maintain a separation between members and the information that is held by the tribunal in relation to its various functions and the information that can be passed to members in the claims resolution or mediation function. So we think, consistent with that, there are some sound reasons to keep the members primarily involved in the mediation function rather than in the administrative functions, as it were, that the registrar carries out. While I understand what Mr Doepel said about the majority of the delegates being based in a single location in Sydney, nonetheless that seems to be an administrative matter that we will talk further with the tribunal about as to whether, given the relative infrequency of these matters, he himself is the person who can conduct the reviews. Given that he is in Perth, he is geographically separated, we do not see that as being an insurmountable problem.

Senator SIEWERT—Okay. What about the issue of justice also being seen to be done, getting what is virtually a second opinion, I suppose, which is separate from the registrar's? I understood that to be one of the arguments.

Mr Anderson—We do not have any reason to see that one officer of the tribunal is going to be swayed by the fact that another officer of the tribunal has come to a view. It is not uncommon for different members of a Commonwealth administrative body to be required to

carry out a review function reviewing the decision of another officer of that agency or department. We see no difference here.

Senator SIEWERT—Okay. I have a question arising from the social justice commissioner's submission. In his first point on the subdivision P future acts notification in one notice, he makes some recommendations about ensuring that information that is sent out relates only to one native title claim group and one representative body area. He uses as an example that sometimes when a notice goes out, such as an application around leases and things like that, there are multiple lists and that it is often very hard for bodies to work out whether or not it relates to them and so they can be missed. Do you have a comment on that?

Mr Anderson—The bill envisages that there will be a notices determination made by the Attorney and that determination will cover the conditions that should be imposed on future act notices, in particular, ensuring that there is a reasonable provision in the way in which such notifications are given to enable a PBC or NTRB to reasonably readily determine what the pieces of land are that are going to be affected. We do understand the concern.

Senator SIEWERT—Will there be consultation about that determination so that groups can provide feedback on what they think is reasonable?

Mr Anderson—At the moment none is proposed, because we think that we have a reasonable understanding of what is required. It might be a question of some of the things we are thinking about at the moment. No decision has yet been made, obviously, by the government as to what the determination will look like but things we are envisaging are that there be a requirement for maps to be provided. We think that things like that will be readily accepted by rep bodies and others as being suitable.

Senator SIEWERT—I think rep bodies might appreciate the opportunity to give you some feedback on what they see as acceptable under that determination.

Mr Anderson—Certainly.

CHAIR—We are about to wrap up. Senator Crossin, do you have any final questions or comments?

Senator CROSSIN—I do not but I want to be reminded of when we are reporting on this bill.

CHAIR—It is 8 May.

Senator CROSSIN—We would not have time to put some questions on notice, then, I take it.

CHAIR—I think that would be very difficult. I would like to thank the witnesses for their evidence today given to the committee and I would like to declare that this hearing of the legal and constitutional affairs committee is now adjourned.

Committee adjourned at 3.57 pm