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LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

LEGISLATION COMMITTEE

Tuesday, 30 March 2010

Members: Senator Crossin *(Chair)*, Senator Barnett *(Deputy Chair)*, Senators Feeney, Ludlam, Marshall and Parry

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Collins, Coonan, Cormann, Eggleston, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, Marshall, Mason, McEwen, McGauran, McLucas, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Boswell, Crossin, Heffernan, Ludlam, Macdonald and Trood

Terms of reference for the inquiry:

To inquire into and report on: Wild Rivers (Environmental Management) Bill 2010

WITNESSES

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JONES, Ms Katherine, First Asssistant Secretary, Social Inclusion Division, Attorney-General's Department 2

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Committee met at 2.05 pm

CHAIR (Senator Crossin)—I declare open this hearing of the Senate Legal and Constitutional Affairs Legislation Committee in our inquiry into the Wild Rivers (Environmental Management) Bill 2010 [No. 2]. The inquiry was referred to the committee by the Senate on 25 February 2010 for inquiry and report by 9 May 2010. This bill is a private senator's bill introduced by Senator Nigel Scullion. An identical bill has been introduced into the House of Representatives by the Hon. Tony Abbott. The bill seeks to protect the interests of Aboriginal traditional owners in the management, development and use of native title land situated in wild river areas. It does this by requiring the agreement of traditional owners to the development or use of native title land in wild rivers areas regulated by the Wild Rivers Act 2005 of Queensland. We have received six submissions for this inquiry, and all the 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 and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. We prefer all evidence to be given in public but, under the Senate's resolutions, you can request to be heard in camera.

[2.07 pm]

HARVEY, Ms Tamsyn, Assistant Secretary, Native Title Unit, Attorney-General's Department

JONES, Ms Katherine, First Asssistant Secretary, Social Inclusion Division, Attorney-General's Department

CHAIR—Welcome. I know you have not provided a submission to this inquiry. Do you have any opening comments you want to make?

Ms Jones—No.

CHAIR—Therefore we might go to questions. Senator Heffernan.

Senator HEFFERNAN—Are you familiar with the Queensland legislation that has enacted this?

Ms Jones—We have had cause to look at the legislation.

Senator HEFFERNAN—Could you take us through the steps that are necessary to follow that legislation?

Ms Jones—Not in detail. We have not done that kind of detailed analysis, because it is Queensland legislation.

Senator HEFFERNAN—Do you have a view that it is being followed?

Ms Jones—In relation to what specific instances?

Senator HEFFERNAN—In the declaration of the wild rivers legislation, did it follow the direct path of the Queensland legislation? You are from the Attorney-General's Department. You must have a view. What is your view?

Ms Jones—No—

CHAIR—Senator Heffernan, public servants can give—

Senator HEFFERNAN—I am asking about the department's point of view, not a personal point of view.

CHAIR—I understand that, but are you asking them for a policy opinion about the legislation?

Senator HEFFERNAN—No. I am asking them, as professional people representing the Attorney-General's Department: has the legislation as enacted in Queensland been followed to make this declaration?

Ms Jones—In terms of looking at the processes involved in other jurisdictions' development and passage of legislation, we do not have a role in that.

Senator HEFFERNAN—But wouldn't that be a fundamental question that needs to be answered before anything else can be talked about—whether it complies with the law?

Ms Jones—I think that would be a matter for the Queensland parliament.

Senator HEFFERNAN—Wouldn't that be a matter for the Commonwealth too?

Ms Jones—I think it is primarily a matter for the Queensland parliament.

Senator HEFFERNAN—So why are you here today?

Ms Jones—Because the Senate committee requested us to come.

CHAIR—We requested them to be here; they did not provide us with a submission and ask to appear.

Senator IAN MACDONALD—Surely, if this is a bill before the parliament, there is a likelihood, or a possibility, that it might be adopted by the parliament. Surely the Attorney-General's Department would have looked at all aspects surrounding this bill and the bill that it was meant to negative. That is something you would do as a department, is it not?

Ms Jones—In terms of the process with which the Queensland legislation was passed, that was not something that we looked at.

Senator HEFFERNAN—What did you look at?

Ms Jones—We have looked at the private member's bill on the basis of preparing for our appearance here today.

Senator HEFFERNAN—So to look at the private member's bill, which is to revisit an issue, and to have a judgment on the private member's bill, wouldn't you have to have a judgment on the legislation that it purports to turn around?

Ms Jones—We have looked at the Wild Rivers Act but in terms of the discussion about the passage of the legislation we have not looked at that.

Senator HEFFERNAN—All right, you have looked at the wild rivers legislation. In the view of the Commonwealth Attorney-General's Department, and taking the wild rivers legislation as enacted by the Queensland government, which this private member's bill wishes to alter, does the original legislation comply with the law?

Ms Jones—I think that is a matter for the Queensland parliament. It is not something that we have looked at.

Senator HEFFERNAN—But it is a matter for you to be able to make a judgment on whether the whole thing is flawed anyhow.

CHAIR—Senator Heffernan, just before you proceed: Senator Boswell, I understand you are on the telephone. Is that correct?

Senator BOSWELL—I am, Madam Chair. I tried to get down and the plane was turned back, so I would ask you to receive my questions over the telephone.

CHAIR—All right, we will. My apologies, Senator, as we should have recognised that you were there and welcomed you to the hearing.

Senator BOSWELL—Thank you very much.

CHAIR—Ms Jones, perhaps I can assist by clarifying this. Is it that you would look at this legislation if you were so asked by the minister?

Ms Jones—That would be correct.

CHAIR—And that request has not come from the government because this is not a government bill?

Ms Jones—That is correct. Obviously, in terms of preparation for this hearing we have looked at the private member's bill but beyond that we have not gone into detail in terms of the development of the Queensland legislation.

Senator HEFFERNAN—So you, from the federal Attorney-General's Department, are not aware of the part that the original wild rivers legislation took towards World Heritage listing?

Ms Jones—That is correct.

Senator HEFFERNAN—You are not aware of that?

Ms Jones—I am not aware of that. My responsibilities relate to the Native Title Act and looking at native title issues. In terms of the earlier development, I have not been involved in that process.

Senator HEFFERNAN—What about your comrade? So what do you know about it?

Ms Harvey—I also work in the native title area.

Senator HEFFERNAN—I would have thought, as this is very much tied up with the wellbeing and future economic opportunity of the Indigenous people, that you would have taken an interest. Peter Beattie, when I chaired the Traveston Dam inquiry, said that this was a deal—the original interpretation of that—that he did in a hurry to get green preferences for the election before last. I would have thought that it would have been in your interest, as people concerned with the wellbeing and economic opportunity of the Indigenous people up there—and they want more than to have their photo taken with a spear as an economic opportunity—to actually take a look at what all this really means and where it is headed. It is all headed to World Heritage, which is about a permanent sit-down with no economic opportunity.

Ms Jones—In terms of the World Heritage issues, those would be the responsibility of the department of the environment, water and heritage.

Senator HEFFERNAN—But at the end of the day the Attorney-General's Department would tick the law side of it.

Ms Jones—Sorry, Senator, but I did not catch that last bit.

Senator HEFFERNAN—At the end of the day the Attorney-General's Department would give the legal opinion that it complied with the law.

Ms Jones—Only as it related to matters that were within our areas of responsibility.

Senator HEFFERNAN—Madam Chair, I think I will leave it there. This is very good mumbo jumbo which is meaningless.

CHAIR—Senator Heffernan, on behalf of the witness I would take offence at that. Both witnesses come from the native title unit and are happy to, and competent to be able to, answer questions in relation to the Native Title Act and amendments. But you are asking them questions about Queensland legislation and they have just simply said they do not have the capacity to do that.

Senator HEFFERNAN—I appreciate that.

CHAIR—If you want to put questions on notice about that, they might be able to assist in answering that.

Senator HEFFERNAN—Thanks very much.

CHAIR—Ms Jones, in respect of future acts, the Native Title Act provides a right to negotiate regime. Is this inconsistent with the Wild Rivers Act 2005?

Ms Jones—In terms of the impact of the Wild Rivers Act, it was amended in 2007 to provide that it does not apply in relation to native title rights. So our assessment would be that the future acts regime would need to be complied with in relation to any development activity if it were going to affect native title.

Senator BARNETT—Perhaps we could look at the constitutionality of the bill and you, if you would like, could share your opinion on it. We have an opinion from the Centre of Public Law—and it is a public document—from Professor George Williams. In short, have you seen that submission and do you concur with his advice?

Ms Jones—I am here from the social inclusion division. My responsibilities are in relation to native title. I do not have responsibilities in relation to constitutional policy. That is another area of our department.

Senator BARNETT—So you cannot answer the question?

Ms Jones—I cannot.

CHAIR—Ms Jones, do you want to take it on notice and perhaps refer it to the relevant branch?

Senator BARNETT—Could I ask Ms Harvey if she knows the answer.

Ms Harvey—I am also from the native title area. I am unable to answer your question.

Senator BARNETT—Okay, and thank you. We have the professor's submission which confirms the constitutionality of the bill. If you want to respond to it in any way, shape or form, obviously you are more than welcome.

Senator IAN MACDONALD—If I could interpose, you are the department most directly involved with this legislation if it happens to pass through parliament. Who actually chose to get you two here, competent though you are and lovely people that you are? It is lovely that you have come along. Who is responsible for selecting two from the native title regime rather than you two plus someone perhaps from the constitutional area of the Attorney-General's Department? Why are you here and nobody else? That is a simple way of putting it. That is before we really get into the questioning.

Ms Jones—We are here on the invitation of the committee to appear before it.

Senator IAN MACDONALD—The department is, yes.

Ms Jones—Our area of the department was contacted specifically to appear.

Senator IAN MACDONALD—I see.

Ms Jones—In terms of the constitutional policy unit, I think there is a longstanding practice that they do not provide constitutional advice to Senate committees, so they have not come here today.

Senator BARNETT—To interrupt—through you, Chair—Ms Jones, the department consistently comes before our committee and provides advice to this committee, the Legal and Constitutional Affairs Legislation Committee, and the references committee. It provides legal and constitutional advice as to the validity or otherwise of certain legislation before the parliament. So you may want to check with your department or other officers, but I can assure you that we have received consistent advice on, and from time to time on the

constitutionality of, relevant legislation. That is one of the reasons why we invite the department to appear, to confirm the constitutional validity of certain legislation or otherwise.

Ms Jones—I think the position, as I understand it, is that we do not provide legal advice to Senate committees.

Senator HEFFERNAN—Could you get some advice from the department and come back to us in a few minutes as to whether that is an accurate statement that you have just made?

CHAIR—Senator Heffernan, I can confirm that is accurate, through our estimates processes. My understanding is that you can ask who and when and how legal advice was provided but not what the legal advice said or for the legal advice to be tabled. It is custom and practice in our committee procedures and we have ascertained that through estimates a number of times.

Senator BOSWELL—Madam Chair, I would like to ask a question when there is some time available, please.

CHAIR—Senator Boswell, your colleagues have indicated you can go ahead with your questions by phone line.

Senator BOSWELL—Can I ask the social inclusion people this. The Social Inclusion Principles include a set of aspirations of what we want to achieve and approaches to help us get there. The Australian government has adopted the set of principles that have been developed to guide the social inclusion agenda. The aspirations are:

- reducing disadvantage
- increasing social, civic and economic participation
- developing a greater voice, combined with greater responsibility

Does the bill before the committee tick all those aspirations—

CHAIR—I think Senator Boswell may have pressed the hold button while he is waiting for your answer. It is probably not going to be of any benefit to him if you answer while he is on hold.

Senator IAN MACDONALD—Ron, can you hear us?

Senator BOSWELL—Yes, but there is some music coming in over the top.

Senator IAN MACDONALD—Could I suggest you ring off and ring back in?

CHAIR—Senator Boswell, can you hear us now?

Senator BOSWELL—Yes, but I have music coming in.

Senator HEFFERNAN—Hang up, Bossie, and ring back.

CHAIR—Senator Boswell, have you hung up? He obviously has. We will continue. Senator Barnett.

Senator BARNETT—I want to put on the record that the Attorney-General's Department consistently advises this committee of its views with respect to the constitutionality of certain bills. I am not talking about specific legal advice that you may have obtained from the Solicitor-General. We know about that; we know your views on that, but you confirm or otherwise whether the bills are constitutional or not. The fact is that you are here but you are not able to advise us of that. There are people from your department who can obviously advise us of that. One, we are surprised and staggered that there is nobody here from the department to provide that advice to us and, two, we would like to you to confirm that you will take that question on notice and come back to us. Can you take that on notice please?

Ms Jones—Senator, I can, but I just wonder if I can add one extra point—that is, legal advice has been obtained on this issue from the Australian Government Solicitor that is therefore—

Senator BARNETT—It has, has it?

Ms Jones—It has.

Senator BARNETT—On this bill?

Ms Jones—I can confirm that.

Senator BARNETT—When was that obtained, Ms Jones?

Ms Jones—I can give you the dates. The advice was provided on 9 February, 10 February and 23 February.

Senator BARNETT—Was it in letter format, in an email, or orally?

Ms Jones—A combination.

Senator BARNETT—So it was on 9, 10 and 11 February?

Ms Jones—No, on 9, 10 and 23 February.

Senator BARNETT—And it was a combination of email, letter and oral advice?

Ms Jones—The advice was sought by the Department of Families, Housing, Community Services and Indigenous Affairs in consultation with the Attorney-General's Department and the Department of the Environment, Water, Heritage and the Arts, so I would need to check with those other two departments if there was any additional oral advice provided.

Senator BARNETT—Sure, but the advice of 9, 10 and 23 February was written; correct?

Ms Jones—Yes.

Senator BARNETT—Who did it go to?

Ms Jones—It was requested by the Department of Families, Housing, Community Services and Indigenous Affairs but we were provided with copies.

Senator BARNETT—And it was requested of the Solicitor-General?

Ms Jones—Of the Australian Government Solicitor.

Senator BARNETT—And you received a copy of that advice?

Ms Jones—Correct.

Senator BARNETT—I am asking you on notice to provide a copy of that advice to us. If you do not wish to, that is your decision, but I am asking you to make that available to us.

CHAIR—We do not predominantly request copies of that advice—

Senator BARNETT—Excuse me, Chair. I am asking the question on notice. The witnesses can talk to the minister accordingly and respond to the committee accordingly.

Ms Jones—Senator, I will seek the Attorney's advice.

Senator BARNETT—Thank you. What is the content? Can you tell us the broad thrust of that advice? Have you read the advice, Ms Jones?

Ms Jones—Yes, I have.

Senator BARNETT—Can you tell us the thrust of that advice? Is it constitutional or is it not?

Ms Jones—I would need to seek the agreement of the Attorney in relation to the content of the legal advice.

Senator BARNETT—You have three pieces of written advice from the Australian Government Solicitor that you have read. We have a bill before us that is very important with respect to Far North Queensland and Cape York, and you are advising this committee, which you have been invited to appear before, that you are not providing the answers that we are seeking.

CHAIR—Ms Jones, before you answer that, I will say this, as chair. Senator Barnett, we have a longstanding custom and practice in this committee, through estimates and other processes, whereby, as I said earlier, you can ask questions about when, how and on what date advice was received, who it was from and to whom was it given, but the content of that advice is subject to release by the minister. Ms Jones has said to you that she will take that on notice and go back to the Attorney-General and seek his permission to release the advice, and I do not think it is fair to now press Ms Jones or Ms Harvey for their knowledge of the detail of that advice. You have had the answer, and that is: that question will be taken on notice. I think we should move on.

Senator BARNETT—Ms Jones, before we move on, was the advice regarding the constitutionality of the bill?

Ms Jones—Again, I think I would need to take that on notice.

Senator BARNETT—Can you advise the committee, to the best of your knowledge, as to whether the bill is constitutional—or would you need to take that on notice as well?

Ms Jones—That would be outside my specific area of responsibility.

Senator BARNETT—I know. But you have read the advice. So, as I said: to the best of your knowledge, are you aware as to whether the bill is constitutional?

CHAIR—I have said, as chair, Senator Barnett, that detailed questions about the content of that advice will be taken on notice. This is not an unusual practice. When you were in government, legal advice was never released. So this is not a precedent here; this is custom and practice.

Senator BARNETT—Madam Chair, throughout years and years of sitting on this committee, as you would know, I have seen the department of the Attorney-General regularly provide advice as to whether bills are constitutional or not and as to whether different aspects of a bill are constitutional or not. And we have not received the answer. It has been taken on notice.

I will move to my next question, relating to the United Nations Declaration on the Rights of Indigenous Peoples. Are you aware that the government has signed that declaration?

Ms Jones—Yes.

Senator BARNETT—And do you believe it has implications for Australia and the laws that we enact in this country?

Ms Jones—In terms of signing the declaration, the Australian government has obviously indicated a commitment to the principles in the declaration. But, in terms of its binding intact on laws, we have not gone through the final process. So, at this stage, while the government, in terms of the declaration, is supportive of the general principles, it does not require, in terms of the Queensland legislation, specific reference.

Senator BARNETT—Well, Ms Jones, can I alert you to article 19 of the declaration, which says:

> States shall consult and cooperate in good faith with … indigenous peoples …

and article 32, which states that:

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

Do you believe that the Queensland wild rivers legislation—you have perused and are familiar with it, and you are familiar with the amendments in 2007—is consistent with those articles of the declaration?

Ms Jones—I have not made an assessment of the Queensland legislation in the light of those provisions.

Senator IAN MACDONALD—I will put it another way. As to your responsibilities for native title, as you understand what responsibilities the Commonwealth has through the native title legislation, do you consider they are impeded by the Queensland wild rivers legislation?

Ms Jones—I will just return to the point that I made before. The Queensland legislation was amended in 2007 to exclude native title. So, on that basis, we would take the view that the exercise of native title rights and interests would not necessarily be affected by a declaration under the wild rivers act.

Senator IAN MACDONALD—In its administration of the Queensland legislation, have you received complaints from anyone that native title and other rights have been infringed upon by the Queensland legislation? I mean, have you, as being in charge of the Commonwealth's native title laws, received complaints from anyone that the Queensland legislation impinges upon those rights?

Ms Jones—Senator, I would need to take that on notice.

Senator IAN MACDONALD—I am asking if you received any complaints.

Ms Jones—We have had some correspondence in relation to the legislation. I am not aware of any specific complaints but I would need to check that, take it on notice, to be able to give a fully accurate answer.

Senator IAN MACDONALD—Nobody has contacted the Commonwealth department in charge of processing and ensuring native title rights given by the federal parliament? Nobody has contacted your department and said, 'Hey, this Queensland legislation impinges upon the rights given to us by Commonwealth legislation'?

Ms Jones—Given the length of time that the Queensland legislation has been enacted, to be able to answer that accurately I would need to take it on notice and check, because it has been over five years since the legislation was enacted.

Senator IAN MACDONALD—Some of the submissions that have been given to us have suggested that advices have been given. As you well know—and if you have read the submissions you would be very appreciative of the fact—people consider that rights which they have have been impinged upon now. I find it incredible if you are saying to me that the department does not know if anyone has complained about it.

Ms Jones—Senator, I need to take it on notice to check over the course of the last five years.

Senator IAN MACDONALD—I am not asking you to give me exact details of the complaints or how many, an exact number, but you must be aware that people, particularly people who live in the areas impacted by the wild rivers legislation, have claimed that it has unfairly affected rights that are due to them.

Ms Jones—I am aware to the extent that there has been information in the media, but I would need to check in terms of any specific representations that have been made to the department.

Senator IAN MACDONALD—But wouldn't that be front and centre of what your branch of the department is all about? You are there to administer, enforce and ensure compliance with native title laws, and if someone is saying that they have been impinged upon surely you would know that?

Ms Jones—Senator, I cannot say. I would need to check, to take that on notice.

Senator HEFFERNAN—Can I just fine that up for you. If native title is to be fully enjoyed and not interfered with by the wild rivers legislation, do you think that is true? You are the native title people.

Ms Jones—The provisions in the Wild Rivers Act explicitly exclude native title.

Senator HEFFERNAN—But do you think that the traditional enjoyment of native title is just traditional activities such as fishing, hunting and gathering or do you think they are allowed to farm and grow something for profit?

Ms Jones—Senator, that would be a matter for a court to determine based on the traditional laws and practices of a particular claim group.

Senator HEFFERNAN—This is a joke!

CHAIR—Senator Heffernan—

CHAIR—I will continue; I want to nail this down. Can I give you an instance? The Aurukun region is subject to a determination of native title in favour of the Wik peoples. Are you familiar with that?

Ms Jones—Yes, Senator.

Senator HEFFERNAN—And it is now subject to the to the Archer Basin wild river declaration. How can one be reconciled with the other?

Ms Jones—I am sorry, Senator, I am not—

Senator HEFFERNAN—Within the limitations and prohibitions mandated by the Wild Rivers Act, how is the Archer Basin wild river declaration going to satisfy the so-called native title enjoyment of the Wik peoples?

Ms Jones—Without knowing the details, it is not possible to answer that question.

Senator HEFFERNAN—It appears you do not know anything. You are representing the native title interests of people—

CHAIR—I think you need to be more specific, Senator Heffernan.

Senator HEFFERNAN—Do you have a strong view that the Queensland legislation does not override the native title rights or do you think the native title rights are restricted to traditional activities such as hunting and gathering? Do you have a view on that?

Ms Jones—The nature of native title is that it reflects the traditional practices and laws and customs of the Indigenous claimants, and if they can go through the process of proving connection and proving that these traditional customs and practices—

Senator HEFFERNAN—I think you are wrong.

CHAIR—Ms Jones, you might want to finish what you are saying.

Ms Jones—That is the nature of the common law right and in terms of native title under the Native Title Act.

Senator HEFFERNAN—So, under your interpretation of native title, if I am in Indigenous person up there I am not allowed to actually grow something for a profit?

Ms Jones—If that was consistent with traditional laws and practices then that could be recognised as a native title right.

Senator HEFFERNAN—My kids are sick of sitting around shaping boomerangs and spears and getting their photos taken that they want to get a quid and go to university, and I say, 'There's a thousand acres of damn good land there in the first kilometre from that wild river, let's grow a crop.' Not allowed to do it?

Ms Jones—It is not an issue of native title—

Senator HEFFERNAN—It is an issue of wild rivers versus the native title right.

CHAIR—Ms Jones, you might want to finish what you are saying before you are interrupted again.

Ms Jones—Native title rights and interests cannot be retrospectively or prospectively enhanced, they have to be consistent with the traditional laws and practices of those people. If they seek to undertake different economic activity, it is an issue separate to the content of the native title right.

Senator HEFFERNAN—This is an issue for my kids, who want to grow a crop.

Ms Jones—There are options in terms of working with other stakeholders in the area—

Senator HEFFERNAN—This is bureaucratic mumbo jumbo. Be specific. I get a share farmer in that has actually got a tractor instead of a cow and a plough to do something commercially because I want to send my kids to university. How do I do that in the head-on collision between the so-called traditional activities preferred to me under the native title running up against the wild rivers legislation? How do I overcome that? Does it just become a lawyers' feast for the next 50 years?

Ms Jones—I think the issue is what type of economic development activity Indigenous groups can generate in particular areas. Subject to a range of issues, not just in terms of what native title rights they can exercise but other opportunities they have to work with local government, state government, other stakeholders such as mining companies and pastoralists, to leverage economic development opportunities.

CHAIR—Ms Jones and Ms Harvey, we have now run out of time for your evidence this afternoon.

Senator BOSWELL—Madam Chair, I got cut off. Can I have a question?

CHAIR—Perhaps you could restate the question you asked. We will need to put other questions on notice. We have half an hour for each set of witnesses and we must finish at four o'clock this afternoon.

Senator BOSWELL—Okay. The Australian government has adopted a set of principles developed by the Australian Social Inclusion Board to guide the social inclusion agenda. These principles include a set of aspirations, what we want to achieve and an approach to help us get there. The aspirations are reducing disadvantage, increasing social, civil and economic participation, developing a greater voice combined with greater responsibility. Does the bill before the committee tick all those aspirational boxes?

Ms Jones—Given that it is a private member's bill, I have not made that assessment of the bill against those criteria. Certainly they are the criteria that the government would look at more broadly in terms of its own legislation, but I have not assessed this private member's bill in that way.

CHAIR—Thank you. We will need to put other questions on notice to the department or we will run out of time this afternoon. Ms Jones and Ms Harvey, thank you for your time this afternoon.

Senator IAN MACDONALD—Madam Chair, can I raise the issue of whether the department should be put on notice that at some time before the end of this inquiry we would really appreciate some evidence from non-native title officers of the department, particularly those involved in constitutionality.

CHAIR—The committee will consider that request at a meeting and perhaps set a time for that to occur.

Senator BARNETT—Madam Chair, can I interpose partly in response to Senator Macdonald and advise that the advice from the secretary I had and having liaised with the chairman, the secretary on behalf of this committee invited two representatives. One was from native title in the department and the other was the constitutional representatives. The department declined to provide representatives from the constitutional area of the department. That is the advice I have received. As a committee we will need to look into that. I find that entirely unsatisfactory bearing in mind the importance of this bill.

CHAIR—Right. Thank you both. We will now move to our next witnesses.

[2.41 pm]

McINTYRE SC, Mr Greg, Private capacity

CHAIR—Welcome to our committee hearing. You have provided us with a submission, which none of us actually has at this point in time. If you wish to make an opening statement, I invite you to do so now.

Mr McIntyre—Essentially my comments on the bill are that it probably achieves a similar effect to some provisions of the Native Title Act, as I read them, in the sense that it would render invalid declarations under the wild rivers legislation. My view is that probably the main concern which has been raised by Cape York Aboriginal peoples is probably already covered by the Native Title Act. However, the Wild Rivers (Environmental Management) Bill goes further than the impact of the Native Title Act in the sense that it covers all developments and use of native title in a wild river being subject to agreement by the Aboriginal traditional owners.

In my view, that would probably be that, under the Native Title Act at present, the Queensland Wild Rivers Act itself is not invalid but the declarations—for example, the Archer Basin wild river declaration—are arguably invalid under the Native Title Act in any event, because it was a legislative act done without compliance with the future act provisions of the Native Title Act. My view is that the Archer Basin wild river declaration, along with all the other declarations under the Wild Rivers Act, are acts in which, where there is a native title, which includes the right to leave the country—which is the colloquial way of expressing the right to exclude or make decisions about country—that right is inconsistent with the impact of the Wild Rivers Act and declarations under the Wild Rivers Act. My view would be that, to the extent that a declaration under the Wild Rivers Act pursuant to the Wild Rivers Act affects the right to make decisions about country or native title holders, it is a compulsory acquisition of that right, and in order for it to be valid it would have to comply with the future act provisions of the Native Title Act. That is, there would have to be notice given and there would have to be a process of exercising the right to negotiate before an agreement under that legislation could be enacted, before it could become valid legislation in accordance with the Commonwealth Native Title Act. However, the current bill casts the net a little broader than that. It certainly covers that area but also covers any form of development or use in a wild river.

One other thing is that my view would be the same as that of Professor Williams. I have read a copy of his submission about the constitutional validity of the legislation and I essentially agree with it that it is within the power of the federal parliament to enact this legislation as a special law for people of a race. Those are the only comments which I wish to make initially. I am happy to answer any questions.

CHAIR—Thanks. I might start. You are a member of the environment and planning law group of the legal practice section of the Law Council, aren't you?

Mr McIntyre—The environment and planning law group of the general practice section of the Law Council of Australia, yes. That is right.

CHAIR—Do you have a view about the ecological and biodiversity impacts, including from contamination and pollution? What impact would it have if you did not have environmental regulatory protections on pristine but sensitive waterways?

Mr McIntyre—There is obviously a potential, if there is no regulation of waterways, for them to be impacted adversely. So I would not argue that there should not be a form of regulation.

CHAIR—So landholders, regardless of tenure, should be subject to some level of environmental regulation and planning process?

Mr McIntyre—Yes. That would be my view generally as a person who holds views in support of sustainable development.

CHAIR—The wild rivers bill before us seeks to make agreement by relevant traditional owners necessary before there can be a wild river regulatory declaration, but 'agreement' is undefined in this bill. How do you see an agreement being made for a wild rivers declaration? For example, what happens if traditional owners downstream support wild rivers but traditional owners upstream do not and want development that pollutes the river? Do you get one group having a veto over the other? Do you see that there are problems in the fact that the term 'agreement' is undefined in this legislation, and how would you achieve agreement if it is so undefined?

Mr McIntyre—I do not think you necessarily have to define 'agreement'. Agreement is a concept that lawyers have to deal with all the time and you work that out. It means what it says and it depends on the exact situation as to whether you have reached agreement. I think probably what is deficient in this piece of legislation which you would normally find in other areas—for example, the Native Title Act—is a requirement that the native title holders agree to a future act before it would be permitted to occur. It is a similar provision and there is no actual definition of what the word 'agreement' means in the Native Title Act. What the Native Title Act does is to create a secondary mechanism if there is not agreement. So under the Native Title Act there is an arbitral process. If agreement is not reached within six months between the native title holders and usually a state government proposing a future act, then the matter is referred to arbitration by the National Native Title Tribunal.

Lawyers see this in a whole range of commercial agreements. For example, it is often proposed that, in relation to certain issues, the parties will reach agreement. As you point out, parties do not always agree on things and there may be differing views. So you then need a mechanism, where parties do not reach agreement, to get a result. Typically there are processes of mediation, followed by arbitration, followed by litigation when agreement is not able to be reached.

CHAIR—How is the process defined in this legislation? What would be your reference point for seeking a path to agreement?

Mr McIntyre—As you know, the legislation is very sparse in its detail and my view would be that that is probably a deficiency in it. It needs a process for dealing with issues where there is not agreement.

CHAIR—Finally, has there been a legal challenge to the Wild Rivers Act and the Archer River declaration specifically yet?

Mr McIntyre—No. As you possibly know from the media, if nowhere else, I have given some advice to Balkanu and to others, from whom you will be hearing via Noel Pearson later, that there is an option to make that challenge under the Native Title Act on the basis that I have described. To date, that advice has not been taken up and no legal proceeding has commenced.

Senator LUDLAM—Mr McIntyre, thank you for coming on the line for us. I know that various parties in this matter have stated that there are a range of private property rights and so on unrelated to native title that are removed by the action of the existing wild rivers legislation. In this part of the conversation, does it come down to a disagreement over whether a wild rivers declaration is considered a future act under native title or not? There seem to be divergent views on that.

Mr McIntyre—Yes. That is the main thrust of my written submission. The Queensland government has said in response to the view I have expressed that there is a special exclusion which preserves native title rights and interests, and they are partly right in that. There is a specific provision in the wild rivers legislation which preserves some native title rights and interests—the right to hunt and gather and the right to engage in activities. I could not disagree with them on that. All I say is that what the wild rivers legislation does not address is the question about who makes decisions about what can happen on the country. If the native title is a full right of exclusive possession—a right to occupy, use and enjoy native title in the same form that the Murray Islanders had following the Mabo case—then that gives them the right to make decisions about what happens on the land. If the state government chooses to intervene and impose on a piece of land a decision about how the land will be used, then it is impacting on that right. It can do that. The Native Title Act will allow it to do that. Of course, governments all over the world choose to legislate to control the way in which people will use land, and part of the purpose of environmental protection legislation is to do that. All I am saying is that, at least with native title under the Native Title Act, there is a specific process by which you do that which allows a process of negotiation in good faith with the native title parties to try to reach an agreement on that. As I say, under the Native Title Act, if you cannot reach agreement there is another process which then gets you to a result by a third party, an arbitrator.

Senator LUDLAM—From our point of view as a committee, we have got two contradictory legal opinions there, one that says that a wild rivers declaration is a future act and one that says it is not. Are you suggesting that the best way to sort out that ambiguity is for the Queensland government to legislate, or am I misreading you there?

Mr McIntyre—If it is not a future act then the Native Title Act would not apply to it and there would be a greater need for this special legislation. I think to make the legislation more consistent with the way in which the Native Title Act, for example, deals with conflicts in proper use you would need to at least add to what the

legislation presently says and have a similar process of arbitration to that which applies under the Native Title Act.

Senator BARNETT—I will be brief. We just got your submission, Mr McIntyre, and we have not had a chance to go through it. My understanding of point 18 of your submission confirms that the Queensland government legislation, specifically that the declarations are invalid under the Native Title Act.

Mr McIntyre—That is my view, yes.

Senator BARNETT—Are you aware of any action to challenge that Queensland law at this stage?

Mr McIntyre—Yes and no. As I said before I have promoted this opinion to the Balkanu Aboriginal corporation which Gerhardt Pearson is the chair of. That has been passed through to the Cape York Land Council to consider as to whether some legal action would be taken. To date as far as I am aware no legal action has been commenced.

Senator BARNETT—Thank you and finally if you could take on notice I am interested in your view as to whether the Queensland legislation breaches article 19 of the UN Declaration on the Rights of Indigenous People. Article 19 requires consultation with Indigenous peoples before certain actions occur.

Mr McIntyre—Yes. I am happy to answer that now.

Senator BARNETT—I am happy for you to take that on notice in light of the time unless you have an answer for us right now.

Mr McIntyre—Yes, I have an answer. I think it is arguably in breach of that. There is a lot of controversy about the process of consultation which was undertaken on Cape York. I believe there is a complaint to the Queensland Integrity Commissioner by Gerhardt Pearson about the process of consultation and an argument that there was insufficient time given to properly consult. There has been a process of consultation conducted by a consultancy group for the Queensland government. There are arguments that the consultation was about a proposal which was then altered after the consultation process occurred, so that they were not being consulted about the same plan that eventually the Queensland government included in the national park.

There is also a debate about the way in which the consultant considered applications for extensions of time to make submission. On the one hand, they did not extend the time for the Cape York Aboriginal people but allegedly accepted 200 submissions from the Wilderness Society after the deadline. There were all those sorts of minutiae arguments about whether the consultation process was sufficient. What I have sought to do is to avoid some of those issues of detail. I have said that under the Native Title Act it is actually more than a process of consultation required it is a process of agreement and, failing agreement, an arbitration which is a more clear-cut issue. It also means that that agreement has to be reached with the registered native titleholders. There are debates about whether the consultation process that the Queensland government engaged in sufficiently covered all of the Indigenous people on Cape York given their limited education, their geographical isolation and all of those sorts of issues.

Senator BARNETT—Thank you. That is adequate for this afternoon.

Senator BOSWELL—Years ago the Queensland government gave a lot of land to the Indigenous communities. That land was called DOGIT, or deed of grant in trust, and it covered where the previous communities were given land. In your opinion, does the Queensland wild rivers declaration actually take away some of the rights to develop the land that the Queensland government gave to Indigenous people? I was around in those days. That land was given specifically to the communities. If someone in the community wanted 20 acres to grow tomatoes or whatever, that was there for the communities to give out to specific people. Does this wild rivers legislation overrule that?

Mr McIntyre—Not specifically, no. It may. The main area of concern is where there is declared to be a high-density protection area.

Senator BOSWELL—I understand that, but the high-density protection area would cut across into some of this land.

Mr McIntyre—Some of it may. I could not tell you precisely.

Senator BOSWELL—Let us assume that it does, for the argument.

Mr McIntyre—If it did, then it would do two things. One is that it would create 200-metre setback provisions from rivers.

Senator BOSWELL—I thought it was a kilometre each side of the river.

Mr McIntyre—I did not think it was as big as that, but anyway there is a significant setback area. If somebody wanted to build a tourist lodge for the purpose of economic development, for example, they would be hampered in that. So there is that kind of thing. There are vegetation-clearing restrictions which apply to those high-protection areas. The other main thing which concerns me is that it also overlays onto the whole of this process the Integrated Planning Act, which is an extraordinarily complex process for obtaining planning approval. The main argument that Noel Pearson and others make, as I understand it, is to say that they had negotiated a Cape York Peninsula Heritage Act which was intended to cover the concepts of proper planning and environmental protection in the area. Now they have had overlaid onto that this other highly complex set of planning and legislative or regulatory provisions which Aboriginal people on Cape York now have to take on board as well. I have attempted to give some advice on some of those pieces of legislation, and you really need to have a senior experienced lawyer's advice to wade your way through all of it. I think that is probably one of the main arguments that Pearson and others make.

Senator BOSWELL—I will be asking Mr Pearson what his views are on this, because I know that land was specifically given for people to grow things on or develop farms. In a lot of the areas, the land has been allocated—200 acres or whatever it is has been allocated—to various people on those communities.

Mr McIntyre—Yes. This legislation does not prevent all developments. It is sometimes said in the press that that is the effect of it. It is not as far-ranging as that and it does allow various forms of agricultural and other development, but particularly in the high-protection areas it restricts it to some extent. As I say, my concern is that it adds another quite substantial layer of intricate regulation which people will have to become familiar with.

Senator IAN MACDONALD—You were asked earlier about the right of governments to protect environmental sustainability in various areas. I think you said—quite rightly, in my view—that of course governments have that responsibility. But the Queensland wild rivers legislation seems to be a bit more specific and a bit more targeted and not quite across the board of the state of Queensland but directed to certain areas where Indigenous people have a greater interest, one might say. Does that impact upon the right of governments to properly regulate activity for environmental purposes?

Mr McIntyre—No. Certainly the government has the right to enact legislation of this kind, but before it does that I suppose the only argument would be that where there are existing native title rights of an absolute kind then, if it is going to behave in a way which does not arbitrarily deprive people of property, it needs in accordance with, for example, the Universal Declaration of Human Rights to preserve that right, and it ought to give notice, engage in a proper process of consultation and arguably pay compensation for loss. Environmentalists and governments frequently argue that they ought not to pay compensation for legislation which may result in deprivation of property if it is for the purpose of environmental protection. That is a debate which will no doubt continue to rage between proponents of each side of it.

Senator IAN MACDONALD—A very quick personal question. Were you once based in Cairns?

Mr McIntyre—Yes, I was. I was based in Cairns half the time working for the Aboriginal Legal Service.

Senator IAN MACDONALD—We met in those far-distant days.

Mr McIntyre—That is where I commenced Mabo and cases like that.

Senator IAN MACDONALD—I remember you talking about some new legal philosophy about Mabo and I laughed at you at the time. It has come a long way since then. Congratulations for everything you have done.

Senator TROOD—On this question of the nature of property rights under the Native Title Act, there seems to be a debate as to whether or not these are narrow rights which I might describe as essentially related to traditional activities or they are broader and relate to absolute property rights. I understand you to be saying that the native title property rights are an exclusive right or a broad right. Is that correct?

Mr McIntyre—It varies depending on the circumstances. Essentially native title started out as a broad and exclusive right. For example, the Murray Islanders, the Meriam people, retain that sort of right, as do the Aurukun people,. So because of the particular circumstances there have been no extinguishments of that broad exclusive property right in the area of the determination of most of the Archer River area and the determination in favour of the Wik people. In other places around Australia there has been extensive extinguishment of native title, particularly the right to make decisions about how native title will be used. Anywhere where there has ever been a pastoral lease throughout the country the High Court has said that that right has been extinguished. So in those areas where native title continues to host pastoral leases the native title rights are much more limited. They are rights to use the land to hunt and gather and engage in activities on

the land, and there is a bit of a debate about whether that ever includes commercial rights or not. But they are more limited rights.

Senator TROOD—In relation to the lands covered by the Queensland act, am I right in saying that you believe that for the most part those rights are undiminished in the way you have just described with regard to pastoral?

Mr McIntyre—Yes. In most of the area which covers the native title in the Archer Basin declaration—and, I think, similarly, in the Lockhart River basin—there is a native title which is an exclusive native title right. It would include the areas which Senator Boswell, I think, was referring to—part of the deed of grant in trust areas.

Senator TROOD—I have one last question. Is there an argument here that the compulsory acquisition of property offends the constitutional just compensation right, or not?

Mr McIntyre—There is an argument that the legislation has the effect of compulsory acquisition without just terms, yes.

Senator TROOD—And, insofar as it does that, does it offend a constitutional right?

Mr McIntyre—Yes, that is right. There are a couple of possible constitutional inconsistencies. I think, when you hear from him shortly, Professor Williams will point out the constitutional inconsistency between this legislation, if it is passed, as an exercise of the race power and the Queensland legislation. I am not sure whether he mentions the compulsory acquisition right. As you see, in my submission I put the view that there is a compulsory acquisition of the right to make decisions, which is one of the bundle of rights comprising property. I would argue that that compulsory acquisition must comply with—no, sorry; I am getting us confused here. It would only be if the Commonwealth were compulsorily acquiring a right that that constitutional right of just terms would apply directly. In this instance it would be a state acquisition, so that constitutional right would not apply. But you would argue it under the Racial Discrimination Act. If you wanted to run a constitutional argument about it, you would argue that it would be in breach of the Racial Discrimination Act, in the same way as they did in Mabo No. 1. They found that this legislation was inconsistent with the Racial Discrimination Act, which preserves property rights from arbitrary deprivation including deprivation without just terms.

Senator TROOD—Thank you.

Senator HEFFERNAN—If I were an Indigenous person and I lived on one of these rivers that is locked up under the wild rivers legislation—one of the Aurukun people, for instance, on the Archer River—and, unlike the previous generations, I wanted to send my son off to university to become a QC like you, and I did not just want to do traditional hunting and gathering but to have an opportunity to grow a commercial crop, do you think it would be fair that I would be excluded from that under this wild rivers legislation?

Mr McIntyre—No, I certainly would not think it fair. There is a question about whether the wild rivers legislation does entirely exclude you.

Senator HEFFERNAN—But say I wanted to get a commercial operator in. Say I had a thousand acres and I wanted to put a crop in, and I wanted to pay the university as well as the residential college fees, and I wanted to do it myself and give myself an economic opportunity. You say there is some contention over whether you can commercialise under the traditional native hunter-gatherer business. Where would that leave me?

Mr McIntyre—Well, it would leave you—

Senator HEFFERNAN—Shouldn't I be allowed, like the rest of Australians, to get a quid if I can?

Mr McIntyre—Yes. If there are no commercial rights under native title then I think we have failed Aboriginal people, because they need to be able to engage in the broader activities of the community, including economic ones and education, as you suggest. Certainly, I do not think there is any question that the deeds of grant in trust allow commercial exploitation. My view is that native title also allows commercial exploitation. But there have been some federal court conclusions on that, particularly where the native title is not the full-blown right to possess, occupy, use and enjoy. There are often arguments in the federal court about whether that entitles one to commercial exploitation. My view—which has not been tested in the courts, or has not been taken up with any reasons from the High Court—is that, if you have the right to take something from or to engage in activities on the land, then that is what your native title allows you to do. And if, once you have taken something, you then go and sell it, then that is your right as a citizen of Australia. Your native title right

is to take the vegetation or the timber or whatever it is. Then you can either take it home and use it domestically or you can choose to sell it. I think that goes beyond native title. It is the ordinary right, which every citizen in Australia has, to engage in trade and commerce.

Senator HEFFERNAN—Thank you. We had better finish there.

CHAIR—Mr McIntyre, thank you for your evidence today. We will put further questions on notice if we need to.

[3.15 pm]

WILLIAMS, Professor John, Private capacity

CHAIR—Welcome. The Gilbert and Tobin Centre of Public Law and the Faculty of Law in UNSW have lodged a submission with us which we have labelled submission No. 1. Do you need to make any changes or amendments to that?

Prof. Williams—No, I do not.

CHAIR—I invite you to make an opening statement, after which we will go to questions.

Prof. Williams—Thank you, Chair. As is evident from the submission, I am not here to make further submissions on the policy issues at the heart of this debate. I recognise that there are legitimate public policy reasons to protect Indigenous development. I also recognise there are legitimate public policy reasons to protect the environment. There might be a clash between those issues in this instance or not, but they are matters that I am unable to help the committee on further.

I do have a couple of areas I would like to elaborate on further and they both relate to the legal questions that arise out of this bill. Firstly, when it comes to the constitutional issues—and I would say I am not a native title expert—my view is that this bill would be constitutionally valid. I do believe it would be supported by the race power in the Constitution. It has been carefully drafted to pick that up and is dealing specifically with the rights of Aboriginal people in a way that I think would attract validity under that power. Equally, I am confident that this would be effective in overriding the relevant Queensland law. It sets up an express and direct inconsistency. So, from a point of view of achieving what appears to be the object, as a constitutional lawyer I would believe that it does do those things.

I would also make a couple of other comments with regard to some of the constitutional issues that have been raised. Firstly, it is hard to see that there are other possible grounds of inconsistency with existing Commonwealth legislation. It is possible you might make an argument that the Queensland legislation is inconsistent with the Racial Discrimination Act, an argument that has succeeded with regard to other state legislation. I think that is a hard argument to put here given that this is not dealing directly at the Queensland level with native title. It comes at that but in a more indirect way, and I think it would be hard to make out the inconsistency, though it is not unarguable.

Secondly, there have also been arguments raised about acquisition of property on just terms. As the last witness stated correctly, that guarantee only exists to bind Commonwealth legislation. There is no equivalent protection for property rights under state constitutions or state legislation. It means it is not possible to argue that with regard to the Queensland law. I would say, when you look at the constitutional issues, that this debate does throw up a series of deeper problems that illustrate that our system is not adequately protecting a range of important rights, particularly Indigenous rights. The absence of clear rights of consultation, clear rights of protection against racial discrimination and clear rights of protection for property as against state law are all things that I think Australians would expect to be protected but clearly are not under our current system.

The second major area I wanted to make a few general observations about is more generally the legal policy involved in a statute of this kind. My view is that it is generally better to pass a law that has a broader application than this law. It is generally preferable to pass a law that deals with these issues across the country rather than focus on a particular area. That is not an insurmountable argument but it does mean there needs to be a special consideration put towards a law of this kind. That is because it can set up two classes of rights for Aboriginal people in one area and not others. My own view is that if there are important rights involved—and clearly there are—then they ought to be protected Australia-wide.

Another concern is that for the states in a situation like this it is unclear whether it indicates a willingness of the Commonwealth to intervene in other like cases. There is the possibility of a series of legislation being enacted back and forth as states seek to exist outside the regime by passing new laws, only for the Commonwealth to have to respond again. In particular, you only have to look at the definition of 'relevant Queensland legislation' to see a number of ways that the state could get around this law, if it was minded to do so, by simply casting it in other legislation or doing so in a way that falls outside the narrowness of the Commonwealth definition. It means that if there is a good public policy goal here then it is usually appropriate to deal with it in a more general way than this, if only because of the consequences that would follow.

When it comes to the drafting of the bill itself, I do have concerns. They relate somewhat to the narrowness of the legislation, but also they relate to clause 5 of the bill, where I think it is hard to be sure as to what the interpretation of some of those provisions would be. When it comes to Aboriginal traditional owners, it is not absolutely clear who falls inside that class. I think a commonsense approach would lead us to a particular conclusion; but, nonetheless, it is not a tightly defined term, and that itself could give rise to litigation and other concerns about who is entitled to form part of the agreement or not. My second concern is that it talks about agreement. I assume we are talking here about a majority vote, but, again, that is not entirely clear. The regulations are not entirely well drafted to deal with that problem. The regulations go to a number of matters about negotiating terms and the like, but they do not explicitly enable the Commonwealth to actually set the level of agreement required.

The third concern about that provision is that it is not, again, entirely clear what Aboriginal people are agreeing to. Is it the specific instance of development or use that they agree to, and will agreement be required on every occasion upon which this needs to occur, or is it possible to agree to a general plan, which might actually mean that a number of specific developments can be covered? Again, none of these are insurmountable problems, but they are problems that in my view ought to be addressed because otherwise, if nothing else, if you want to achieve the public policy goal there are a number of loopholes and issues here that would not be that difficult to get around if you were a state that was minded to get around it through further legislation.

CHAIR—Thank you, Professor Williams. Senator Ludlam.

Senator LUDLAM—Thanks, Professor, for coming in this afternoon. I will put to you the same question that I put to Mr McIntyre. Recognising that this is a much broader debate, in the specific instance of whether native title rights are impacted on by the Queensland wild rivers legislation there are quite clearly two points of view. What is your view on the way in which the Queensland legislation impacts native title rights?

Prof. Williams—I do not think there can be any doubt that it has an impact upon native title rights. The question is what flows from that. Is it sufficient to give rise to an inconsistency with regard to the federal native title legislation? Is it sufficient even to invoke the Racial Discrimination Act—which I have suggested probably is a bit of a long bow to draw. So, yes, I think in its practical terms it must impact upon those rights, if only by denying the ability to exercise the rights to their full extent. If you are asking me the legal question of whether it leads to inconsistency or not, at this stage I would probably tend to suggest it would not. But I think there is clearly a more arguable position when it comes to native title legislation at the federal level than it would be with regard to the Racial Discrimination Act.

Senator LUDLAM—Does it come down to a question of whether a wild rivers declaration is a future act or not under the Native Title Act?

Prof. Williams—It would come down to some of those issues. If this was argued in the High Court, the first thing the High Court would do is spend an inordinate amount of time working its way through the specifics of the native title legislation to unpick exactly the nature of the native title right, the bundle of rights or particular interests affected. You would have to look at the individual case being raised, the native title holder who has actually brought the case. It would be a question of enormous complexity. That is one of the main problems with this area of native title law: there are not simple answers available.

Senator LUDLAM—So maybe this is going a little bit too far, but what would be your proposition for untangling what has obviously become a very difficult contest between different stakeholders in the area?

Prof. Williams—I do not have a clear policy prescription, though I certainly feel a lot of sympathy in this case. My preference would be that these types of issues and this issue are not dealt with with a specific law of this kind but that, in the same way the Racial Discrimination Act provides a broad and general right for the benefit of all Australians but particularly Indigenous Australians, if Indigenous interests are affected here—as they are—then that is dealt with with a general federal law that says whenever states interact with Aboriginal people that there is a right of consultation, that things follow. It may be that the new declaration that Australia has acceded to provides an appropriate basis for putting those out. That is how the Commonwealth usually deals with these things. I think dealing with it in a very specific way is unlikely to solve the problems in the longer term.

Senator LUDLAM—Okay. That was where I was going to head next. I presume you are referring to the Declaration on the Rights of Indigenous Peoples.

Prof. Williams—That is correct.

Senator LUDLAM—That has some very strong language around the notion of free prior informed consent, which obviously comes into this debate pretty strongly. The bill before the committee is silent on the issue of how the approval of traditional owners can be measured, so what impact do you think that declaration can have on a situation like this?

Prof. Williams—The declaration itself can have no legal impact whatsoever. It is not a binding treaty; it is merely a declaration. It does not form the basis upon which Australia can legislate in this area. Earlier media reports suggested that this bill might rely upon that declaration but, quite correctly, it has not sought to do so. The best way of describing the declaration is that, as a general description of policy objectives, Australia recognises the worth, but it does not go beyond that. Perhaps it ought to, but in this case it does not provide any further assistance as a matter of law.

Senator LUDLAM—It has been stated that this bill would overturn the Queensland Wild Rivers Act. Clearly that is not really the case because it deals only with native title rights and obligations. Obviously there is a much broader array of rights and also a lot of land that is not held under native title. How would the passage of the bill we are considering today affect Aboriginal people on the cape who are not recognised under white law as traditional owners?

Prof. Williams—I have two points. Firstly, clearly it does not seek to overturn the Queensland Wild Rivers Act. The Constitution indicates that the state laws are invalid only to the extent of the inconsistency, and the extent here is relatively narrow in dealing with in clause 5 an additional set of rights that Aboriginal traditional owners have. So there is an invalidity, but it is a very much quarantined one. Secondly, the terms of the legislation do provide additional federal rights to Aboriginal traditional owners but not to other Aboriginal people in the area. If it were desired to provide additional rights, it would need to do that. Again, that is my view and one of the reasons why it would be better to legislate generally for the benefit of the Aboriginal people and focus on a group that may not be totally descriptive of who should have the benefits of these types of rights.

Senator LUDLAM—Thank you.

Senator TROOD—Professor Williams, as I understand your submission, there are two possible grounds of unconstitutionality—that is, under placitum (xxvi) of section 51 and the section 109 provisions.

Prof. Williams—The second is not a ground for invalidity.

Senator TROOD—No.

Prof. Williams—But they are the two key provisions.

Senator TROOD—But insofar as there is inconsistency it is the section 109 argument, isn't it?

Prof. Williams—That is correct.

Senator TROOD—I understood you to be saying, and perhaps you would confirm it for the committee, that the Queensland government, if it chose to do so, could correct those consequences. Is that right?

Prof. Williams—It could certainly seek to do so. The definition of 'relevant Queensland legislation' states that it includes 'the Wild Rivers Act and future legislation amended, amending or substituted for that act'. There is a strong possibility that would not include entirely new legislation that might be complementary but directed to a somewhat different outcome that might have exactly the same impact upon Aboriginal people in that area. Let us say that it is not about wild rivers at all but about simply protecting other forms of the environment that have nothing to do with rivers. I do not think that would fit within the definition of 'relevant Queensland legislation', and it means that the Queensland government could seek to achieve other environmental objectives that would have exactly the same impact and that would not in any way, I think, be overridden by this legislation.

Senator TROOD—By this legislation, but, presumably, this legislation could be recast to try to—

Prof. Williams—You could always legislate again. I suppose that is exactly my point: that is a really bad way of going about these things. I could come up with perhaps 10 different ways you could get around it and this debate could go for years as you enact and unenact, which is entirely inappropriate for economic development if nothing else. It is very hard to pursue interests if this continues.

Senator TROOD—Indeed. I do not think we are at odds on that subject. Do you think there are any other grounds upon which this Queensland legislation might be found to be unconstitutional, apart from these two you have considered here?

Prof. Williams—There is no ground upon which the Queensland legislation would be unconstitutional, only that is may be overridden by federal law that prevents it from operating. In fact, the way in which the Constitution operates is that, if the federal law is removed, the Queensland law springs back into action. So it is only inoperative for the duration of the inconsistency. The Native Title Act is obviously a possibility; the Racial Discrimination Act is less so but still a possibility. They are the only ones I am aware of. If we go down that path, one of the unfortunate things is that we could be looking at litigation that could span not just months but years, and even then it may be that the inconsistency is curable and the Queensland government may re-legislate through parliament or attack the issue in a different way.

Senator IAN MACDONALD—How difficult would it be to draft a bill that encompasses Australia wide the sorts of things that are being attacked under the Queensland legislation? I appreciate that you are not a draftsman, here to give free advice. In reading this do you think that, with a couple of extra lines and some different definitions, it could be fixed, or would it be a very complex thing?

Prof. Williams—No it would not be. I would think that the most appropriate way to tackle it would be through either a new statute or amending the Native Title Act to provide the sorts of protection that exist in clause 5 but in a more direct and effective way than currently occurs. This is almost a special case, where extra protection is being sought to be given in addition to the Native Title Act. If that is desirable in a general sense, you could build it into that act. We are dealing with native title land as the central thing that is being protected. Another option would be to have a specific statute dealing with the rights of Aboriginal people, whether that be in a human rights act or elsewhere that provided these guarantees as well. There is a variety of ways of doing it, and other countries have done so in some instances.

Senator IAN MACDONALD—I note your comment that the Queensland government can get round this and then the federal parliament would have to pass another law to attack the particular legislation. It would be fairly ambitious, insulting almost, for the Queensland government to try to get to the same conclusion by some other way.

Prof. Williams—These types of disputes have happened many times in Australia's history. It is not uncommon to find that the Commonwealth seeks to prevent a state from doing something. It simply legislates in a different form to achieve the same objective. The federal system preserves the right of the states to legislate on any topic they want. I assume their view would be that, if the Commonwealth does so ineffectively, there is nothing to prevent it having a second go. There is a political issue and political contest, but as a matter of law there is no doubt about their constitutional entitlement to legislate to the full extent of their powers. If the political will is there, I would not be surprised if there is an attempt to do it. As I have suggested, with this bill it would probably not be very hard to do.

Senator IAN MACDONALD—One of the offences of part of the wild rivers legislation is that it particularly attacks a certain part of Queensland and, through that, attacks a particular group of people. That is the offence of part of it, as many people see it. It is an interesting point that you make, though. Thank you for your advice.

CHAIR—Professor Williams, thank you for your submission and for your time this afternoon.

Prof. Williams—Thank you.

[3.33 pm]

PEARSON, Mr Noel, Director, Cape York Institute

PIPER, Mr Terry, Adviser, Cape York Institute

CHAIR—I welcome representatives from the Cape York Institute. We have your submission, numbered 7 for our purposes. Do you need to make any changes or amendments to it?

Mr Pearson—No.

CHAIR—I ask you now to make an opening statement, if you would like to do that, and then we will go to questions.

Mr Pearson—Thank you. I thank the committee for the opportunity to present on the wild rivers bill. The three points I make in my written submission I will not go through in detail; however, I will put my three main arguments. Firstly, this bill enhances the land rights of the native title holders of Cape York Peninsula and will enable them to negotiate with the Queensland government so that they provide free and informed consent to any arrangements to protect the rivers of Cape York Peninsula, and it is consistent with the Keating Labor government's commitment to the Mabo decision. Secondly, this bill is consistent with the Commonwealth government's commitments as a signatory to the International Declaration on the Rights of Indigenous Peoples. Thirdly, the Queensland Wild Rivers Act has derailed our Indigenous reform agenda in Cape York Peninsula, and this bill will put our work back on track. I can amplify any of those arguments during questions from senators.

I want to make a few comments on some of the issues that have been raised by other speakers and members of the committee this afternoon. Firstly, in relation to the chair's question about seeking agreement from diverse groups of traditional owners in the event that we might get agreement on a wild river declaration or any such environmental agreement, the question of upstream and downstream groups having various opinions about what should happen in relation to a particular land use question is not an insurmountable problem. The ultimate answer to that question is that it would be the same as any kind of decision making and agreement making concerning any landowners. So, looking at the map there on the wall, whether you could get Rio Tinto and the CHALCO bauxite miners, who had their lands exempted from wild river areas, would be a question of going to them to seek their agreement for the inclusion of their leases. All the Aboriginal lands have been included, but I gather that the Queensland government must not have been able to get the bauxite leaseholders to agree to the imposition of wild river declarations on their lands.

The second point I would make is that there is in existence a registered Indigenous Land Use Agreement that traverses from the tip of Cape York Peninsula right down to the bottom, basically following the red line on the map. It is an ILUA that authorises a gas pipeline, if one were ever to be constructed, between Papua New Guinea and the Australian mainland. Some 30 traditional groups cooperated in the making of that agreement, and that ILUA has been registered under the Native Title Act. So there are many examples of groups voluntarily getting together and making common land use agreements sensibly and cooperatively. I will give another example. There are numerous examples of this, but this is the last one. There is a magnificent national park called the KULLA National Park on the McIlwraith Range on eastern Cape York Peninsula, where hundreds of thousands of hectares of new national park have been established. KULLA is actually not an Indigenous name; it is just the capital letters of the four tribes that got together to make the agreement for the national park—the Kaanju, the Umpila, the Lama Lama and Ayapathu. These four groups have demonstrated—and there are other instances in the Cape—groups getting together to make common agreements to confirm environmental protection regimes.

On the question of legal challenges to the Cape York declarations, we are aware that there are avenues for legal challenges to what the Queensland government has done. It has not been our desire to commence litigation, given the time and immense cost involved in legal challenges. This matter could drag on for years if we chose to pursue redress through legal challenges. That is why we have sought political intervention and governmental intervention, given the government's commitments to us that they will work together with us on our development agendas and on our reform agendas.

On the question of compensation for the effect of regimes like the wild river areas, there is no compensation attached to the declaration of wild river areas. There often is compensation with certain kinds of environmental impacts, such as the Vegetation Management Act that was introduced by the Beattie government in the year 2000. I understand—I do not have the exact figures—that a couple of hundred million dollars were allocated

by the Beattie government for compensation for the effect of the Vegetation Management Act. The Vegetation Management Act enacted in 2000 was then extended to the Aboriginal lands in Queensland, most of which are held in great volumes in Cape York Peninsula. They were extended in the 2002 state election, unbeknownst to us. The restrictions on vegetation clearing were announced by the Queensland Premier, unbeknownst to us, in the 2002 election. Unfortunately no Aboriginal landowner has received one dollar from the couple of hundred million dollars compensation that was set aside under the Vegetation Management Act. So the question of compensation, the history of that story, is that no Indigenous people have received one dollar in compensation for the effect of those environmental regimes.

On the question of whether freehold lands are affected by wild river regimes, as Senator Macdonald pointed out, in fact several million hectares of land up the west coast and down the east coast is freehold land held by Aboriginal people. A couple of million hectares of land is Aboriginal freehold land under Queensland legislation, what Senator Boswell called the DOGIT title, granted by the Bjelke-Petersen government in the early 1980s. It is true that there are a few pieces of non-Aboriginal owned freehold land affected by wild rivers. But they are very trivial—99.9 per cent of the freehold land that is affected by wild rivers in the state of Queensland is Aboriginal land; there are only a couple of small blocks in the Fraser Island National Park and Cooloola National Park—so this has an absolutely discriminatory impact on the freehold land rights of Aboriginal people in Queensland

On the question of native title as a property right, I was extremely dismayed at the view of the submission makers from the Attorney General's Department because they betray a standing-on-one-leg concept of native title that, unfortunately, underpins how the Queensland government and some environmental groups have approached this whole question. They view native title in an utterly discriminatory way, that native title is not a full property right, and in my view that is a misinterpretation, plainly, of the law, particularly in those areas where exclusive possession has not been ruptured. In the case of the Wik people's claim, that constitutes all of the land that was subject to the Wik determination in 2000. In those areas the Wik people have a right of property. It is not just the right to hunt or gather; it is the right to construct a farm, construct a house, live a modern life. A proper understanding of exclusive native title is the same as where you would not restrict the title of English people to the kinds of customary uses that their Anglo-Saxon tribal forebears exercised 2,000 years ago. In the same way as you would not restrict them to their traditional uses, it is not correct to condemn Aboriginal people to their uses prior to European colonisation of Australia. The right is a property right.

I want to refer to an analogous statement about how to understand this title that was made by Justice Isaacs in a 1920 case called Commonwealth versus New South Wales. He said:

> A fee simple is the most extensive in quantum, and the most absolute in respect to the rights which it confers, of all estates known to the law. It confers, and since the beginning of legal history it always has conferred, the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination …

A full, exclusive possession native title is a title that affords every act of ownership that can enter into the human imagination.

A final point I want to make is that there is a constitutional gap that has been exposed by the plight of our people in relation to the impact of environmental regimes and in relation to the impact of environmental regimes to Queenslanders generally. That concerns the insufficient protection of property rights. The fact is that state governments and state parliaments can legislate to acquire through regulation the property rights of landowners without paying compensation. This whole area is now coming into very sharp relief for landowners generally. The Queensland parliament can undertake what lawyers call 'a process of regulatory taking of property rights' without compensation and without going through a proper procedure. My view is very similar to George Williams with respect to the insufficiency of our constitutional protections, particularly in relation to the question of property rights, the universal entitlement to just terms in the event that property is taken and the protection against regulatory taking by governments. Thank you.

CHAIR—Thank you. Have you made any applications that have been refused under the wild rivers legislation?

Mr Pearson—Applications for development?

CHAIR—Yes.

Mr Pearson—No, we have not made any applications. The wild rivers legislation is organising legislation for a range of acts of parliament. It is nine pieces of legislation, including the Vegetation Management Act 1999, which is probably the most active of all the legislation in terms of restricting land use. I know of

examples in other parts of the cape outside of the three declared areas. In 2007, the Commonwealth government allocated funding to the Hope Vale community for 40 houses. Three years later the relevant environmental approvals are still awaited for the subdivisions to take place and for the blocks to be cleared to enable construction. Three years later the community is still working through the questions of approvals to enable housing to be constructed for community members.

CHAIR—Do you know if there have been other applications for activities within the declared areas? If you have not made an application, have others made applications within the declared areas?

Mr Pearson—I do not know of any applications. The whole question of people's development plans since April last year, when these three wild river declarations were announced by the Queensland government, has been thrown into uncertainty. Aboriginal communities that had plans to undertake various developments do not know what to do.

CHAIR—But you are not aware of any other applications?

Mr Pearson—No.

CHAIR—My understanding is there have been numerous applications and none have been refused to date. You are not aware of that, or is that something you think we should confirm with the Queensland government?

Mr Pearson—There is an absolute focus now on the part of the Queensland government on demonstrating that their legislation does not cause any blockages. The example I gave you of the Hope Vale land blocks, the housing blocks, is one that I am familiar with and I know that it is three years later and no progress—

CHAIR—That is not a refusal, though. There is a delay there. I am just asking you if you know of any applications that have been refused by the Queensland government.

Mr Pearson—I do not know of any, but when does a delay amount to a refusal? There is cost and time involved in making an application. Theoretically speaking, you could apply to construct a nuclear reactor anywhere on those lands, but there is the process of getting all the necessary approvals. Governments can say there is a theoretical pathway for you to apply and that they do not refuse you upfront, but many, many years later your application has gone nowhere.

CHAIR—With all due respect, the Queensland government does not regulate nuclear reactors. I am asking you if you know of any applications that have been refused.

Mr Pearson—We do not know of anything from the public record, because applicants make private applications to government for land use. Can I say, Senator Crossin, that this question about development rights is not a question for 2010. It is not a question for 2009. It is a question of whether my son can make an application in 20 years time. It is a question of whether my grandchildren can make an application in 30 years time. My entire advocacy in relation to this question has been to preserve opportunity. We do not have a pocketful of applications that we are desperately trying to get approval for. What we are saying is that we need to preserve opportunities for future generations to use their land.

CHAIR—There are two other questions I want to ask you. When the first river declarations were made on Cape York, is it the case that $70,000 was provided to Balkanu Cape York Development Corporation to help run the first set of consultations?

Mr Pearson—I will leave that question. It would best be answered by the Balkanu representatives at the hearing on the 13th of next month.

CHAIR—But that would be a fact. Yes or no?

Mr Pearson—I can say from my knowledge of that that Balkanu did set up the logistical opportunities for traditional owners in various areas of Cape York to come together in a meeting—

CHAIR—So they were given the $70,000?

Mr Pearson—They provided camping facilities, travel arrangements and so on for people to come together in a meeting and receive presentations not from Balkanu staff but from Queensland government departmental officials explaining their proposals for wild river declarations. That did take place. There were opportunities provided for public servants to directly make their case to traditional owners. Then submissions were compiled in the wake of those meetings and presented to the Queensland government, and none of those propositions that were contained in those submissions were reflected in the final declarations.

CHAIR—We will ask the Queensland government about that. My final question to you is: did you have any role in drafting this legislation?

Mr Pearson—Not at all.

Senator IAN MACDONALD—Following on from that, you say you are not aware of any applications that have been made. Are you aware, from talking to people around the cape, of people saying, 'We had this idea to develop but it's just all been too hard; we don't know what this means and it's too difficult and we are not going to go ahead'? Have you had those sorts of opinions?

Mr Pearson—Yes, I have.

Senator IAN MACDONALD—To bring this down to a fairly base level, could you tell us what sort of development proposals you think the traditional owners of the cape might be interested in putting forward but which they are not prepared to because they do not want to wait for 10 years and go through the courts for another five years to get done over?

Mr Pearson—I think smaller scale horticulture. All of our food is imported and of very poor quality and has very high prices. If there is one thing we can and ought to be doing, it is to feed ourselves from our own land. We have small but promising examples of horticultural operations that people have undertaken. I have a cousin who has a passionfruit farm on his land and has got into selling in the Sydney markets. He makes a healthy dollar from his several hectares of passionfruit plantation. He is encouraging his cousins to get into the same game. So it is operations like that. I do not want to disclose his commercial affairs but he made 100 grand out of it and he thinks that is good for his family. Any individual or family that might seek to take advantage of their land, to use it for small-scale sustainable horticulture, has huge hoops to go through.

Senator IAN MACDONALD—But you fear that not everyone could grow passionfruit because of this—

Mr Pearson—Absolutely. If it is within a high-preservation zone it would be nigh on impossible. In relation to high-preservation zones, the legislation provides that they can be up to one kilometre from either side of the banks of a river. There was ministerial discretion to reduce the high-preservation distances in appropriate circumstances, according to the needs of the landowner and according to the science, but uniformly on Aboriginal land the Queensland minister adopted a maximum one-kilometre preclusion zone for high preservation. Yet, when it came to the miners and other developers, there was a complete preparedness to go down to 500 metres and to go less than one kilometre.

Senator BOSWELL—Mr Pearson, the Queensland government has emphasised that local Indigenous people will still be able to fish and camp and do traditional activities throughout the wild rivers area. The Queensland Department of Environment and Resource Management's website says:

In a declared wild river area:

traditional Indigenous activities such as camping, fishing, hunting and conducting ceremonies and traditional fire management are not subject to wild river requirements as they do not constitute development

there are no requirements under the Act for boating and camping …

Can you explain to this committee of employed, wealthy, healthy and educated white Australians why that is not enough for you?

Mr Pearson—The development agenda that we have for Cape York Peninsular by definition means that we have got to have economic development. The exercise of traditional rights and traditional activities is important but that will never lift our people out of poverty and misery. We have to be able to undertake land use that generates economic return for the people who live there. We are not going to be serious about closing the gap as to Indigenous disadvantage if we have this view that all that Aboriginal people should be happy with and all that they should be entitled to is to stand on one leg in the sunset picking berries. Fundamentally this is a racist expectation on the part of governments and other stakeholders to expect Aboriginal people to live in some frozen past. The Queensland legislation is unfortunately underpinned by that kind of racist thinking. It misinterprets what the meaning of native title is. I say in my written submission to the committee that Justice Brennan said in Mabo that the whole point is that we can no longer have Australian law 'frozen in an age of racial discrimination'. Aboriginal title to land is as mundane as anybody else's title. That includes the mundane business of enabling the titleholders to use their land for economic gain.

Senator BOSWELL—Going to the origins of the wild rivers declarations, you would be aware that the Queensland Premier, Anna Bligh, told the ALP state conference on 22 June that last year they declared Queensland's first six wild rivers in the gulf and on Hinchinbrook Island and Fraser Island. On that day she announced that they were formally nominating three more wild rivers, the Lockhart, the Stewart and the Archer River basins in Cape York. She said, 'These nine are down payment on our total commitment of 19 wild rivers.' I understand you have a map there—I cannot see it but someone has been pointing to it—so

please show us the rivers that make up the Queensland government election commitment on the cape. What are those other rivers? How many other rivers have we got? Why are they in declared areas? Can I ask you, Mr Pearson, how many rivers are we now talking about in total.

Mr Pearson—When this whole concept of wild rivers was first heard of in the 2004 state election campaign, the talk was of rivers, that rivers would be declared under this proposed legislation. Down the track there was accumulating talk about catchments and then, when the legislation was enacted and these declarations were made in April last year, the concept of basins entered the language. There is no such word as 'basins' in the Queensland Wild Rivers Act. This was a complete extension of the modest idea of rivers turning into catchments and turning into basins. What is called the Archer wild river basin in fact includes about a half a dozen separate rivers, being the Love River and a range of other rivers on western Cape York Peninsular, most of which drain independently into the sea. It is the same with the Stewart basin area and the Nesbit River and the Chester River and Massey Creek and so on. These are independent of the Stewart River. But it enabled the Queensland government to say, 'We're just declaring three rivers,' when in fact if you do an ultimate count of the number of rivers that are covered by these first three declarations there are about 13 rivers covered by these first three declarations. In truth it was a complete obfuscation of what they were doing.

Senator BOSWELL—Mr Acting Chairman, I want to ask one more question if I can.

ACTING CHAIR (Senator Barnett)—It will have to be very brief, Senator Boswell, because we have other senators to ask questions.

Senator BOSWELL—I have already alluded to it. I will put it this way: many years ago, the Queensland National Party, the Queensland government, gave a lot of land to Indigenous communities in what were called DOGITs. Do Queensland wild river declarations take away some of the rights that have developed on the land that the Bjelke-Petersen government gave Indigenous people? Is it a step back?

Mr Pearson—Absolutely. As I pointed out to the committee, the vast amount of land covered by the proposed wild river declarations is Aboriginal freehold land. It is not just native land; it is Aboriginal freehold land. Senator Boswell and Senator Macdonald will recall that the big debates between those seeking land rights from the late Sir Joh Bjelke-Petersen in the early 1980s concerned the question of whether the Queensland parliament would restrain itself from taking over Aboriginal lands by arbitrary legislation. This was the question of the inalienability of Aboriginal land. The big concession that the social justice organisations, including the churches and the Labor Party, were seeking from Sir Joh and the National Party government of the time was a concession that the state parliament would bind itself not to take over any Aboriginal lands arbitrarily without consent. Eventually, through the advocacy of Father Frank Brennan and, as I said, the Labor opposition in the state and under the ministership of Bob Katter, Sir Joh was brought over the line on this question. The deed of grant in trust legislation established the principle that there can be no interference with the DOGIT lands unless specific legislation was passed to take away those rights.

In a sense, what the Bligh and Beattie governments have done here has taken the state of Queensland as far as land rights is concerned back to a pre-1984 position, because they have arbitrarily taken jurisdiction over Aboriginal land without obtaining the consent of the landowners.

Senator BOSWELL—Do you think that they are trying to lock up the whole of Cape York for World Heritage listing?

Mr Pearson—You are not here, Senator Boswell, but the map on the wall shows very dramatically that 80 per cent of Cape York Peninsula is proposed to be covered by the wild rivers legislation. We envisage that there will be another stage in the lockup process.

Senator LUDLAM—Mr Pearson, one of the interesting things that you said in your submission—and we have gone into this in a bit of detail—was that small developments might be disadvantaged and that you were worried about some of the larger scale players in the region being able to leapfrog the red tape and so on. What are your specific concerns? I noted that you pointed out Weipa and bauxite and so on. Have you got specific concerns about large-scale mining or palm oil production or agriculture that will still be able to bypass this legislation and get set up?

Mr Pearson—One of the things that is of concern at the moment is the proposed development of a new bauxite mine on the Wenlock River. There are views from environmental groups and Aboriginal landowners about developments like that. In our view, the relevant power rests in the Queensland government. If they do not want the bauxite mine to proceed on the Wenlock River, there are powers under the Mineral Resources Act

to put paid to that. The wild rivers legislation is not necessary in order to effect a policy decision about that new bauxite mine.

Senator LUDLAM—Notwithstanding everything that you have said today and written about the conception of native title as broader property rights than perhaps it is being conceived here, do you concede that having these wild rivers declarations in place does raise the bar for some of the big mining players or people seeking to establish large-scale plantations and that kind of thing, not the small-scale horticulture we were talking about before? Does this raise the bar for big projects?

Mr Pearson—I now understand the question. I think it ultimately will not restrain an industrial developer with sufficient pockets and sufficient ability to get their proposal shopped around Brisbane.

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

Mr Pearson—So I do not think the scheme will do that. What the scheme will do is that if there is another individual who wants to undertake a small passionfruit or small horticultural operation, similar to my cousin, it will be that operator who cannot afford the transaction costs and will not know how to go through the process of pushing the application through the bureaucracy. It will be people like that who are restrained.

Senator LUDLAM—I think what Senator Crossin was trying to get to before is that there have been a number of applications put through. Is it the case that we do not have data on the kinds of applications that are getting through or being knocked backed by the Queensland government?

Mr Pearson—I would be very pleased to receive information from the Queensland government about the applications that have been approved under these wild river schemes.

Senator LUDLAM—Or knocked back, for that matter.

Mr Pearson—Yes, absolutely.

Senator LUDLAM—I am from WA and I do not have as much of a history of this issue as some of the other senators here. Was it the case once upon a time that you and the groups that you represent or the land council or some of the other folk up there who are now against the wild rivers declarations were part of the process and you fell out of it along the way? Was there a time when this was proceeding on a reasonable track and you have parted company since then, or have you been against it from the beginning?

Mr Pearson—We were part of a process, not just with environmental groups but with pastoralists, called the Cape York Peninsula Heads of Agreement that was led by the late Rick Farley. We played a leading role in the tripartite agreement that brought pastoralists, landowners and environmentalists together about an economic and environmentally sustainable future for the cape. The problem is that environmental groups ran away from the Cape York heads of agreement. They started cutting deals with the Beattie government at the 2002 election and the 2004 election. And recently, at last year's election, they were cutting deals and the state Labor government was merrily giving away Aboriginal land in return for various electoral deals in Brisbane. That is how we have ended up in this strife.

Senator LUDLAM—As far as I am aware, there are some TOs and some representative groups on the cape who are supportive so far. To what degree has this become divisive within the different mobs up there and how can we bring people back into the fold?

Mr Pearson—You know what brings everybody together? You say, 'Those who want to make agreements about wild river declarations: there should be nothing preventing you from making an agreement.' This bill presented by Senator Scullion is a bill that would put those native title groups in a position where they could sit down at a bargaining table with the state government and work out arrangements that accommodate their needs. If the argument is put to me that there are people in Cape York that support wild river protections, I say to you, 'Yes, there are.' But my point is: if they support it, they will readily make an agreement. So afford a proper process of negotiation across the table so that groups can have fair standing when making those agreements. At the moment the Queensland government has imposed these restrictions from a position of disrespect to the standing of traditional owners.

Senator HEFFERNAN—Say I live within the first kilometre of one of these rivers and I am your son, and I want to grow 50 acres of whatever and sell it in the market in Cairns or wherever so I can get to university. I want to use the latest technology to do that—the latest environmental technology for farming which picks up all the environmental concerns. Is it possible for me to do that? I want a commercial development. By 2050 the global prediction is that 50 per cent of the world's population will be poor for water, the food task will be doubled, 30 per cent of the productive land of Asia will go out of production and 1.6 billion people on the

planet will be displaced. If I am your son, can I have a crack at commercialising a farm in the first kilometre from one of these rivers?

Mr Pearson—Not within the high preservation side. Not within one kilometre of a riverbank. The same applies to aquaculture. You cannot even make an application for an aquaculture development within one kilometre of a river. I have sat across the table from the Queensland minister who says, 'It is not outright banned.' I said to him, 'If you build aquaculture up in the hills, you might be able to undertake it. But, normally, aquaculture has to take place within a certain distance of rivers.' Scientists from the CSIRO have come to us in Cape York and told us that the environmental problems associated with aquaculture—food stock and pollution—have been resolved. We are absolutely cutting edge in this country in relation to aquaculture. The scientists tell us that the scientific solutions have been found. I do not know of any Aboriginal groups at the moment that are proposing aquaculture developments. But, as I said earlier, my concern is that whether in five or 10 years time a community wants to undertake aquaculture. Under this wild rivers scheme, you cannot build any aquaculture facility within one kilometre of a river, which is outlawing what scientists tell us is a completely environmentally sustainable activity.

Senator TROOD—There is a long list of very troubling aspects to this Queensland legislation and its consequences. One that I find deeply distressing is the question of compensation and the absence of it—and from what you have said the absence of even a discussion about compensation in relation to entitlements that the landholders have. Can you tell us whether there was ever any discussion about possible compensation, and if not why not?

Mr Pearson—None whatsoever.

Senator TROOD—I see. So at no stage during the promulgation of this legislation, in all the declarations, was there ever any question raised about the possible entitlement of landholders and Aboriginal titleholders to compensation of any kind?

Mr Pearson—Not at all.

Senator TROOD—Has anybody ever raise this with the government?

Mr Pearson—Various traditional owner groups have raised this in submissions under the wild rivers legislation. One of the people who was a party to our Cape York Heads of Agreement—which included the Cattlemens Union, the Wilderness Society, the Australian Conservation Foundation and the Cape York Land Council and which was signed back in 1996—was John Purcell, who represented the Cattlemens Union. He was recently the President of Property Rights Australia. You had all these extremely decent and honourable people, who wanted to seek a balanced approach to the future of Cape York Peninsula, who served the cattlemen, who served the Aboriginal communities and who recognised that Cape York is a very special place.

Ten years later, John Purcell is heading up Property Rights Australia because he has gone through a history of acting honourably and seeing the rights of cattlemen and other leaseholders completely trashed in Queensland—compensation rights denied to land owners, layers and layers of regulation that actually take property rights away from people, and the sheer inability of people living on the land to defend their position. Of course, there is now a confluence between non-Indigenous landholders and Aboriginal landholders in relation to the question of land rights.

CHAIR—Mr Pearson and Mr Piper, thank you very much for your submission, for your attendance this afternoon and for helping us with our deliberations on this legislation. I also want to thank other witnesses who have given evidence to the committee today.

Committee adjourned at 4.20 pm