COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Reference: Native Title Amendment Bill (No. 2) 2009

THURSDAY, 28 JANUARY 2010

SYDNEY

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

LEGISLATION COMMITTEE

Thursday, 28 January 2010

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

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, 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, Crossin, Feeney and Siewert

Terms of reference for the inquiry:

To inquire into and report on: Native Title Amendment Bill (No. 2) 2009

WITNESSES

Committee met at 8.37 am

CHAIR (Senator Crossin)—I declare open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee. The committee is inquiring into the Native Title Amendment Bill (No. 2) 2009. I recognise the traditional owners of the land on which this committee meets today and pay respect to their cultures past and present. This inquiry was referred to the committee by the Senate on 29 October 2009 for inquiry and report by 2 February 2010. We have received 15 submissions to the inquiry. All those submissions have been authorised for publication and are available on the committee's website. I remind 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, witnesses have the right to request to be heard in private session or in camera. If that is their wish, all they need to do is ask us and we will try and accommodate that. If a witness objects to answering a question the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer there is also the option of providing that answer in camera.

MUNDINE, Mr Warren, Chief Executive Officer, NTSCorp

CHAIR—The committee have submission no. 10 from NTSCorp. Do you need to make any changes to that before I invite you to make a statement?

Mr Mundine—No. Maybe I could expand on it a little bit, but that is it.

CHAIR—Well, if you want you could make an opening statement and then we will go to questions.

Mr Mundine—We see this process that the government is going through with regard to these amendments as again a piecemeal picking at the Native Title Act and a watering down of it. Our organisation comes from the south-east of Australia, an area that has a background of massive dispossession and loss of land to Indigenous communities, the loss of culture and the trucking of people around the state onto other people's country and so on. So we have had massive dislocation, massive movements of people and massive loss of lands—you only have to look around the city of Sydney here, the largest city in Australia.

With regard to our concerns I will go through a number of key points from our submission but I will also add a few other issues in that are quite relevant with regard to this—especially comments coming from Chief Justice French. For us the key objection to the bill is that there is insignificant identification of the need for the amendments. In fact, insignificant evidence has been provided with regard to the Native Title Act processes being a source of delay. In fact, we would argue the other case: in our experience on the ground on a day-to-day basis we find that the processes work quite well and that when people are willing to sit down and negotiate the process moves along very quickly. There are cases where people are not willing to sit down with Indigenous groups and have those conversations but even most of those cases move along very quickly.

We believe it undermines the process of negotiating ILUAs. We believe that it also contradicts the federal government's approach to Indigenous affairs, particularly in relation to the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs, and their acknowledgment of the importance of native title in providing very strong community foundations and also benefits in economic growth for those communities.

We also find that it diminishes the significance of native title, really reducing it to merely a symbolic right as opposed to property rights. We believe the proposed non-extinguishment provision does not really remedy this. We also believe it does not adequately address compensation issues. In the New South Wales context there is a low likelihood of successful native title determinations. In fact, most of our negotiations are through the ILUA process and through those negotiated outcomes, which means that the vast majority of the Aboriginal population in New South Wales will have no rights to compensation for activities as contemplated by the bill.

We also raise the issue of discrimination with regard to that. We believe that even if there is not legal discrimination there is a moral question about the way that Indigenous people have been treated. We believe that there has been a process by governments over a number of years of watering down and discriminating in those areas under the guise of providing services and infrastructure and making the system operate more smoothly.

In saying that, I also say that we do not object to amendments. In fact, we look at amendments that are needed to strengthen the act, make the act work more smoothly, and make it work for all communities—the wider Australian community as well as the Indigenous community. We believe that what has been happening since 1993 is that there has been more watering down of the acts and that other people's rights have been put over the top of Indigenous people's rights. We believe that there are alternatives to the passing of the bill. The utilisation of the future act regime in the Native Title Act, we believe provides a proper process for the compulsory acquisitions and public infrastructure.

We are utilising the ILUA process. We think it is a credible way of doing things that requires meaningful engagement. This act is inconsistent with bypassing that ILUA process. We believe the ILUA process is very flexible and works very well. I have had the pleasure—or non-pleasure—of having people looking at it who have worked on both sides of the fence. They have worked for mining companies and gas and energy companies in previous lives and are now working in the native title field, and through that ILUA process we found it very successful for all parties who wanted to sit down, have that conversation and get things done. We believe that this approach diminishes that and brings out undue conflict within the communities as well as outside the communities with the rest of the Australian community.

We believe it does not really address the issues of bureaucratic inefficiency. We have a long experience with regard to state governments and public housing in New South Wales. If you are going to look for any evidence, you will find in New South Wales—as you will find in many other states—a very dismal record with regard to the provision of services to Indigenous communities across the state for the last 30 to 40 years. That evidence is quite easy to obtain.

We believe that the suspension of native title rights is an extreme interference in the whole native title rights issue. We want informed consent. What you will find is that Indigenous communities want housing. The people have been crying out for housing and proper infrastructure on our land for a number of years. We want a proper process where we can not only get public housing but build up our own home ownership processes. So we are very happy to work with people and work with governments. We feel this process is coming over the top of us and hitting us with a big stick.

To move on from that, some other things that I would like to raise are with regard to the legislation. We are looking at amendments to that. There are comments by Chief Justice French with regard to the reversal of the onus of proof. Currently, under the Native Title Act traditional owner claimants bear the onus of proof to show who and what they are. I think that if you ask any Australian across the country, no matter what their political persuasion, they will all acknowledge that Indigenous people are the owners of the land and the people who were here first. There is no argument about that, so it is really about people challenging the right of those people to that land. I think the onus of proof needs to be reversed. They have the rights and interests that are possessed under traditional laws and they have connection with the land wherever that law has remained unbroken since the colonisation. We believe that the suggestions put forward by Justice French are the sensible way to go and that there should be more debate and discussion about those.

We also believe the reversal of the onus of proof is consistent with the stated intention of the Native Title Act as expressed in the preamble of the act. We also believe the current procedure is costly, complex and longwinded for all parties involved, particularly the often underresourced claimants. I always find it quite amazing to sit there and see the amount of money that is being spent within court processes on lands that, if the money were given to the Aboriginal community in the first place, could probably have been purchased five or six times over. We believe it has become too bureaucratic and too legalistic an approach; sitting down and having discussions to get proper outcomes that benefit all the communities—that is, the Indigenous community as well as the wider Australian communities—would, I think, be a better approach than the current approaches that we have now.

We find state governments especially are very resistant and very wasteful in the processes. You have only to look at New South Wales and the negotiations that we go through; you would be very lucky to find anything with regard to determinations that happen in under 10 years of negotiations. In the area of ILUAs, which have a different process, we find that those conversations happen very quickly with the private sector, with developers and with other communities. Where we do find we have problems is with the state government, and that is where there are a number of issues that need to be resolved.

With the commercial activities—developers, mining companies and other groups of people—we usually find that within six months we have a negotiated outcome and that things are developed and move ahead very quickly. It is only in these other areas where we are dealing with state government developments and that that we find long drawnout debates and arguments. In fact, I am on record as saying that I find the New South Wales department of lands to be the last bastion of the colonial secretariat of London. It takes that long to get through these discussions and arguments.

We think there is an easy process to go through. Aboriginal people are crying out for housing and they are crying out for infrastructure on their land. They are looking at economic development on their land. You only have to see the debates over the last five to 10 years in that area about things moving ahead. We see native title as not only a recognition of our culture, history and our rights to land but us contributing to the wider Australian economy and to the wider Australian society. This is how we can do these things. We are very happy to sit down with governments of all political persuasions and have conversations about moving ahead and doing things. There is a record of that.

What we are finding is that governments are picking things out when they have to do something rather than looking at a full settlement or discussion about the whole picture and the whole issue. They say: 'We've got to fix housing today and next week it has to be something else. We have to do another amendment here and another amendment there.' These are the things that we want to get away from. Rather than these knee-jerk political pushes we want to actually deal with the real issues.

Senator SIEWERT—Did you put a submission in or make comment on the discussion paper that preceded these amendments?

Mr Mundine—Our paper actually dealt with the amendments.

Senator SIEWERT—Yes, to this one, but what about to the discussion paper that came out in I think August last year? A number of submissions have commented on the fact that that was quite an expedited process as well—there was a short paper with the discussion paper and then the amendments came out. I am looking at the consultation process in the lead up to the amendments.

Mr Mundine—We have had a number of consultations with the Attorney-General about things that should be done. We feel that the skin of that has been taken up, but the body of it has not. We think there is a lot more that needs to be done in those discussions and rather than just taking the skin of it we actually need to deal with the real body of the issues that can make changes. An example would be looking at this stuff in regard to housing. Yes, the skin of it is that we need housing, it needs to be done. The body of it, how we should do that, is the debate we are having here today. We believe that the amendments are not dealing with the true issues of the body of it.

Senator SIEWERT—You talk about the body of the issues. There have been a number of comments. You yourself made a comment about the issues around evidence. A number of submissions say, 'Where is the evidence to suggest that this is the process that is actually holding up the provision of housing?' Is that what you are talking about in terms of getting down to dealing with the real issues?

Mr Mundine—That is right, dealing with the real issues. I know—and we have to live in the real world—that governments of all persuasions are under pressure from a number of areas about dealing with this issue, moving ahead and making substantial changes. This is why I believe the government came out with closing the gap where within a period of time Indigenous Australians are going to be equal with the rest of Australia with regard to housing, infrastructure, jobs and health—and housing plays a very important role in that process. We feel they have taken these issues that we all agree have to be done—so there is no argument about that—but we find that they say: 'We have to do this and we have to do it quickly,' and they charge like a bull at a gate.

There is no evidence to show—and we argue the contrary—that Indigenous communities have been the ones that have slowed the process down. My previous experience in working with mining companies and energy companies and my experience now with native title is that the thing that really holds it up is government process. When we want to sit down and have a deal and get things done properly we find it is a very quick process, people are willing to sit down and have those discussions and people are willing to focus on the real target—getting infrastructure and housing on the land. We find that happens quickly. With the mining companies and other companies that happens quickly as well.

Senator SIEWERT—On page three of your submission you make comments about other areas of land that you think will be affected. Could you go through that a little bit as it pertains particularly to New South Wales?

Mr Mundine—In New South Wales we have, like many other states, a number of titles of land that Aboriginal communities hold under the land rights act. We believe it would affect that land. We also believe it affects leasehold lands around the state, as well as the native title land. We know that through the land rights act and also the other acts native title can exist and does exist within those areas, and through this process we believe that that will affect the traditional owners' rights within those lands. So what you will have is a group of people who will become second-class citizens on their own country because of the way the government has acted.

Senator SIEWERT—In terms of the issues around the discriminatory nature of the changes that are proposed, a number of submissions talk about the fact that this is further discrimination and that the measures are discriminatory. Could you go into that in little bit more detail?

Mr Mundine—We believe that through this process—and these are our property rights in relation to native title—Indigenous groups are being treated differently from what the wider Australian community is being treated like. For example, the freehold test has been bypassed. We believe our rights as Australian citizens have been bypassed in this whole area. We see that as a discriminatory act. I know Cape York Land Council have a proposal in relation to legal argument on that, but I think that goes beyond legal argument. In some cases what you think might be illegal might be legal. I had this debate the other day in regard to slavery. Previously slavery was recognised and therefore you could not have a legal argument against slavery, but you did have a moral argument. That is why the laws were changed. We believe it is a moral argument here in the

treatment of Indigenous people in that they have been treated differently and in a discriminatory way because their rights in regard to having input and discussions and their rights in regard to what happens on their country have actually been taken away from them.

The idea that you can make a comment is very much a personal thing in a lot of ways. You people in front of us, for example, might be very happy to sit down and have a conversation and take our comments on board, but there is no guarantee that anyone else who sits in your chairs in five years time or four years time or whatever will take the same view. We believe that we have to have strong control and input into that whole process, and that is being taken away from us. We do not have a say, really, in it. You can say that we have a comment, but what is a comment? We want to actually have a few teeth in our comments. We see native title as regaining the ground which was taken away from us from 1788. There has been a diminishment of our rights in the area. We also see there is a positive side to this if you are talking about closing the gap and getting us to be contributors and workers in the community, getting us off welfare and seeing us have teeth in the native title process. That actually helps us in that economic area.

Senator SIEWERT—One of the arguments that I suspect will be put during this debate in the parliament is, yes, it might be discriminatory but supporters of the legislation would see it is at a special measure—in other words, it is okay. We all know what a special measure is. It is along the lines of a special measure.

Mr Mundine—This is why we argue for the bigger picture. We are finding that governments, because of expediency and other issues, seem to cherry-pick things. They say: 'You need housing. This is the way to get housing. How could you speak against that?' We are finding that every time something comes up that is a special measure and every time something comes up that needs to be done, all of a sudden our native title rights are weakened further. That is the problem that we have.

What we are feeling, because we have seen this happen before, is that every time something special comes up—housing, economic development, education or anything else—they have to weaken the act. We will end up with a pretty toothless tiger at the end of the day. It will probably be a toothless kitten—we will not even have a tiger.

We believe that they have to address the full range of issues and deal with it that way. We think that they do not need to make these amendments at all. They make the claim that they are special measures, that it is only a small bit and so on. We believe that through the processes that are in place now, even though they are weakened processes, we are given some teeth in the process and can expedite it.

At the end of the day, the benefits are for us—we get the houses, we get the infrastructure and we get those things that happen on our land—so we are not going to be the ones holding that up; we are going to be the ones very much working with the governments to make those things happen. I find it bizarre that people think that we would hold up our own social, economic and housing development just for the fun of it. We will be there progressing the development of our housing and progressing the development of the infrastructure. We need it, because it is our people, our families and our country.

Senator BARNETT—Thanks, Mr Mundine. I appreciate particularly those last comments that you made. They are very notable. Can you respond to the government's $5.5 billion funding under the COAG agreement for better housing and the national partnership on remote Indigenous housing? I assume you support that and the Closing the Gap initiatives flowing from it.

Mr Mundine—Yes, we do support the housing initiatives. There is no doubt that we support the housing initiatives. In saying 'we', I am using the royal 'we', I suppose, for the Indigenous communities—the Aboriginal communities and so on—who have argued for a very long time about the inadequacies of housing and infrastructure on our land. We need to have that infrastructure, that housing, if we are to drive forward and play a major role from our side in closing the gap between our communities and the rest of Australia. So we are supportive of it happening; our only concern is about the process of its happening.

Senator BARNETT—The supplementary question that flows from that is: how is it going? How do you see the progress of that initiative and can you advise how many houses have actually been built and what the locations are? We can ask the department later, but have you got an understanding of that? How is progress to date?

Mr Mundine—We are moving into a new area. The area that we are moving into is this change over the last few years, a process that was started by the previous government, in outcomes. The feeling was that the way we did things in the past, I use 'we' for us as a country and as governments, was that there seemed to be a lot of process but not very good outcomes. The record speaks for itself. Look at the last 30 or 40 years—we

would not be having this discussion today about the billions of dollars that need to go to housing, employment and so on otherwise.

So at the moment there is an interesting discussion about how we get outcomes to happen and how we meet the targets. One thing I do like about Closing the Gap is that you have actually got targets, time frames and money that is going to be spent and you can measure and do things against those.

Senator BARNETT—Do support those targets?

Mr Mundine—I support that process and I support the targets that can be met. They are achievable. In fact, I am on the public record as saying that we could probably even reduce the time frames in those areas and drive forward. But, at the same time, that takes time to shift. The government will have been in power now, if my mathematics are right, for three years at the end of this year, so we are a bit concerned about the time. It is taking a little longer than we thought it would, but, again, that was not the Indigenous community's fault; that is a discussion between the states and territories and the federal government. We know that is the area where those hold-ups occur.

At the same time we are sympathetic, in that when you are making a change in policy and you are driving forward in a number of areas it takes time to get that number of governments on board, for them to change their attitudes and to get the outcomes that we need. I am also on record as saying that I have concerns about the state and territory governments' delivery of housing services to Indigenous communities and the process that we are going through in this area. I have those concerns because the track record over the last 30 to 40 years is dismal in regard to the delivery of houses by state and territory governments, so that is a problem. I know the government is working very hard, from personal experience, on changing that and trying to drive forward on it. That is a long-winded answer—we do have concerns.

Senator BARNETT—Yes, and it is a circular answer, in a way. The government says that the motivation behind this legislation is that they want to improve housing, education and health and to close the gap. They have a fund set up, at least with respect to housing—the $5.5 billion over a number of years—to make things happen. They say this legislation is going to help make that happen as quickly as possible. But you have said in your submission and in your statements today that they have provided insufficient evidence of the need for the legislation and that they have not adequately tried to consultant with and talk to you and your Indigenous colleagues across the country to see if there is a better way of moving forward with these objectives, which you pretty much agree on, to get better housing, education and health services. It seems to me that it is the process that you have a problem with, and I would like you to confirm if that is the case. Like other submitters, you have put up some alternatives to going down the government's track: ILUA and the other alternatives that are set out on page 9 of your submission. Have you sat down with the government and the department to say, 'This is not the best way to go. We can actually negotiate this under the current laws and arrangements. There are alternatives'? You must have had those discussions with the government over the last few months. If so, what were the outcomes of those discussions?

Mr Mundine—We have had discussions. There are a number of things I have to respond to in your question. The first thing is that, yes, we support the government in closing the gap, providing houses and getting this infrastructure in place. What we do not support is the notion that the government needs this legislation to weaken the powers and the rights of the Indigenous community. All the fingers point to where the hold-ups are, and you will find those hold-ups are in the processes of governments. I say 'governments' because I am talking about the state and territory governments involved in this process. That is where all the hold-ups are and where all the mistakes are being made, so I find it bizarre that the government is putting forward that argument. Our argument is that we are the ones who are cooperating and we are the ones who are working with you. Across Australia you will see that the Indigenous community as a whole is doing that. As with any community, there may be individuals who are against that process, but the vast majority of Indigenous people want the houses, want the infrastructure and want to work with government for that to happen. The houses and benefits that they are going to get through it are theirs.

I find it interesting that there is a history of this. Every time there are hold-ups, every time there are problems, every time there are funding issues, when you look at the processes it is usually the governments who have made these mistakes, and yet it is always the Indigenous committees that have to wear the consequences of those mistakes. We end up finding that the legislation that is put in place for our benefit to help us is usually legislation that is watered down and weakened. In this case we believe that we are on side. We are working with the government and on the native title side we have had a few conversations with the government. We would like to have a lot more conversations, and more constructive and better conversations,

and have input into how things could be changed, and we would like the government to take on some of the valid points that we raise. We are very happy to work with government hand-in-hand to get the changes that we need. I am talking here not only about the federal government but also about the state and territory governments and the delivery of those services.

Senator BARNETT—I do not know if you have read the department's submission, specifically pages 4 and 5, where they talk about the need for the new process and they put forward their views. Being devil's advocates, and on their behalf, they say:

In some States native title has been identified as a barrier to meeting targets under the National Partnership.

That is what you and I have been talking about. They go on to list some of the issues—subdivision M, the 'freehold test', subdivision J, 'public works etc on existing reserves', subdivision K, 'facilities for the public'—and then they talk about consultations on the bill, saying that there have been a lot of consultations. They say:

The Australian Government takes the view that compulsory acquisition would rarely if ever be preferred on Indigenous held land.

I am getting a sense from your opening statement and your submission that the process of the government with this bill is bordering on compulsory acquisition and that it does limit or undermine the rights of native title holders in those areas. Could you respond to that and maybe flesh it out?

Mr Mundine—As I said in earlier statements, we would deny that it is the native title itself that is holding up these processes. We would vigorously defend that stance because the information we have about our processes is that they are not the hold-up. We find the hold-up is with the state governments and that it is about the negotiation process. As I said, we find it very interesting, I suppose because there is a commercial imperative for the private sector, that when we have conversations with the private sector they go very quickly. I am not saying that they are smooth. There is always good argy-bargy in those negotiations, but they happen a lot quicker and have an outcome a lot quicker. That has a beneficial outcome not only for the Indigenous community but for wider commercial interests as well. But with the state and territory governments we find that these conversations drag on and on. You only have to look at the record in our state and you will see that negotiations with the state government have taken years. I must admit that in the last 12 months there has been an improvement in that and a willingness on the part of the state government to sit down and have those conversations, but I am talking from an overall view since 1993.

Senator BARNETT—All right. I realise we are tight on time but I appreciate very much your response.

CHAIR—The evidence put forward to us by the department is such that this will be a new regime, in a sense, a new set of procedures that do not exactly bypass ILUAs but would be different and would expedite the process. Is there a problem there in relation to actually having a new way of doing business with the government other than ILUAs?

Mr Mundine—No, there is not a problem with looking at new ways of doing things. There is not a problem with looking at how you improve processes and how you make smooth transitions happen. In fact, as we said, on the native title side we have been very happy to sit down with governments and have conversations about making the system work better. That is not only from the Indigenous side; it is also for the wider Australian community—about how we can make processes happen that will deliver for Indigenous communities at the end of the day.

We have to recognise that the native title that we have today is a watered down version of what we had back in 1993. It is also a watered down version of what we had in 1788. So I think people need to take those things on board and work with Indigenous communities in the way they move forward on this.

We are quite happy to have conversations about improvements to the process—improvements to how things work and to the timeframes—because at the end of the day if anyone gets affected by timeframes it is the Indigenous communities. I had a determination recently—in 2008—where the original applicants had been dead for a number of years. And that was because the process and the negotiations had been dragging on for so long. The funny thing about that negotiation was that they won—what was put on the table was actually what we agreed on 10 years down the track. So I think there are stalling, obstructions and a whole lot of problems that are thrown at the Indigenous community. Quite frankly, it is unfair and it causes stress and problems in our community.

As you know from the statistics, we are not a group of people that live very long. I am getting to the age, in the next 20 years, where I will be looking at that. We are the ones who want the process to happen quickly. We

want to have the conversations. We also know that when you have these conversations and these debates there is compromise and argy-bargy but these are things that are for our benefit and for improving our communities. They are for improving our lifestyle so that we can become contributors and work within the whole Australian community as Australians just as much as anyone else.

The problem we are finding is that these obstructions and these delays are not from our side of the table. They come from the other side of the table. These are the problems that we have. When people jump up and say, 'It's taking too long; it's causing too many problems; we need to smooth the process,' that's usually a stick to weaken our positions. The records show that we are not the troublemakers here.

CHAIR—So your position would be that if you need to use land under the native title regime for the purpose of building houses, and to build houses expeditiously, you should still use ILUAs.

Mr Mundine—The processes are still there within the act for the government to work with it. I have conversations every day of the week—in fact I had a conversation yesterday—with a number of communities around Australia who are dealing with this very issue of housing. They are very much on side about getting the housing on the land and working the processes through.

The issue we have, as I said, is not with the Indigenous groups. They are very happy to sign off on these things tomorrow morning and to get these things to happen. It is just that they do not want their rights weakened. They want their rights to be protected and looked after in these areas. You will find that in any communities you go to there will be the same response: 'Yes, we want the housing; yes, we want it to happen today; yes, we want the infrastructure that goes with that housing. Let's sit down and have a chat.' You would find that within a very short period of time those things would be negotiated out.

CHAIR—Thank you very much for your attendance and for your submission. We appreciate your time.

[9.19 am]

WYATT, Mr Brian John, Chairman, National Native Title Council

SMITH, Mr Kevin James, Deputy Chair, National Native Title Council and Chief Executive Officer, Queensland South Native Title Services

HILL, Mr Kim, Executive Member, National Native Title Council and Chief Executive Officer, Northern Land Council

CHAIR—I formally welcome representatives from the National Native Title Council. We have a submission from the council that we have numbered five for our purposes. Before I ask you to make any comments about your submission, do you have any changes or amendments you want to make to your submission?

Mr Wyatt—Not changes, but we are certainly going to make some qualifications.

CHAIR—I invite you to make those comments. We will go to questions when you have finished.

Mr Wyatt—I add that I am also the Chief Executive Officer of the Goldfields Land and Sea Council. We are all CEOs of native title bodies. Our submission is in two parts. There are comments from my colleagues. We are going to talk in two contexts: one of policy and another of the legal and technical aspects of the amendments. My opening statement to that effect is that we want to expand on the six themes that we have put in the submission. In doing that, we are also going to put some alternative proposals looking at the objective of housing provision and some suggestions about how it can still work in its current form. The other point we want to make clearly is that we are change fatigued. The act has been in place since 1993—a while now—but there has been amendment after amendment, and you heard in a previous session that my colleague from New South Wales said in his submission that there has bee a general erosion of rights from the native title holders' and native title claimants' perspectives. We think that the system is not necessarily bad at the present moment. We can make it work; we have made it work. We will get into some detail with that.

In these opening remarks I want to point out that the Native Title Council represents nearly all the native title representative bodies and native title services—there are only two of those that are not members of the council—so we are speaking as a clearly peak representative body across that area. With that, I will hand it over to my colleague.

Mr Smith—Thank you. What I want to do is expand upon what Mr Wyatt has said and on what is in our written submission. Briefly, I want to talk about the objective of the amendments, the opportunities they present, the implications of the amendments as proposed and options. If the objective is to build public housing and public infrastructure for the benefit of Aboriginal and Torres Strait Islander people on Indigenous lands, we commend that objective, because on those lands reside Aboriginal and Torres Strait Islander traditional owners as well as, for want of a better expression, 'historical people': people who have been forcibly removed to those areas because of past policies. The emphasis is that, for the benefit of those people, it includes traditional owners and people who have been removed to there and who have over time built up historical connections.

With that objective comes a number of opportunities. In the native title environment this is an area that is bedevilled with a number of parties; you have one applicant and myriad respondents. With the opportunity to develop infrastructure specifically on Indigenous land, you have an opportunity to have bilateral discussions between Aboriginal parties and state, territory and Commonwealth governments. That is the first opportunity. The second opportunity is that it affords a platform to build and plan for the future. Building and planning together gets you buy-in on the implementation of it and the outcomes that are derived from it.

The infrastructure program presents us with a real opportunity for broader land settlement. Mr Mundine, in the previous session, basically talked about the incremental way changes are introduced. But if you use the housing amendments and other public infrastructure as part of a broader settlement package then that is a nice entree to broader land settlement issues as well as native title claims. Fourthly, there are the opportunities it presents. As Mr Mundine highlighted, the very small areas of land that are subject to native title and would be the subject of these amendments—Indigenous-held lands—are the very areas of land to which we as Indigenous people can, notwithstanding the very constrained jurisprudence, prove some continuity of connection. They are also the very areas where we have the opportunity to claim exclusive possession. If you have a land map of the continent, the area subject to exclusive possession is very, very small, and I would

argue that a good part of those claims have now been determined. So what is left is non-exclusive possession. The only areas where you may get exclusive possession would be the very areas that we are talking about. So, under section 47A, there will be provisions to disregard historical extinguishment. So I want to emphasise the importance of this land.

So they are the opportunities. We at the NNTC would submit that these amendments do not deliver on those opportunities. Essentially, the construction of infrastructure with associated long-term leases amounts to what we would be submitting is practical extinguishment. We can say as much as we like in amendments that the non-extinguishment principle applies, but when you build a fixture on a piece of land and have land that is held on lease for a generation—and a generation here, in Aboriginal and Torres Strait Islander terms, could very well be 40 years; that is a generation—in real terms that is the suppression of native title rights for a generation. So you actually have practical extinguishment. When you have practical extinguishment, you have de facto compulsory acquisition. Talking about this provision not being compulsory acquisition is a complete furphy. It is de facto compulsory acquisition. Under the current native title regime, compulsory acquisition outside towns and cities attracts the right to negotiate—section 24MD. The net result of these proposals is a downgrading of a very important procedural right, the right to negotiate, to a mere right, which is the right to comment and the right to consult. So in essence these provisions do not deliver on the opportunities that I have just outlined.

There are major implications, and I am going to go through that. There are four implications that I can think of off the top of my head, but there are probably many, many more. Let us start with the process first of all. The right to comment and the right to consult are couched in terms of a registered native title claim. We all know that you have to have a claim in the court and it has to be registered with the National Native Title Tribunal. It is a very laborious process to go through both. If you did not have a claim over the Indigenous lands—and I can name a couple of places where I come from where there is not a claim on foot—to avail yourself of the mere right to comment you would have to lodge a claim in the Federal Court and go through the process of the registration test under sections 190A to 190D. So that is the first thing, just to get a mere right. The cost associated with that is deplorable. We are talking about an authorisation meeting to get a claim up and running. It would be around $50,000 to $60,000. The time frame to bring a group of people together to authorise a claim is not going to be two months as foreshadowed by this amendment; it is going to be longer than that. Also, in the area that I am coming from, there is judicial comment to the effect that when you lodge a claim for the purpose of, for want of a better expression, an ulterior motive—it may very well be to invoke the right to comment—that could be considered an abuse of process. So this particular procedure that has been highlighted involves cost, time frames that are unrealistic and a potential abuse of process.

The second implication that I want to touch upon is the cultural tensions. I highlighted that in my early comments—my introductory comments. This is for the benefit of Aboriginal and Torres Strait Islander traditional owners as well as those people who are historical. Let us face it: the forced removal of people from their lands to reserves and so forth a century or so ago is bedevilled with problems. If you bring people together who should not be cohabiting together for cultural reasons, that causes its own problems. To then drive another wedge—to say 'If you traditional owners do not approve the building on this land' and so forth—may cause another problem for the relationships on the ground. So I want to highlight that point.

I also want to highlight the point that the failure to obtain the consent of the traditional owners of the subject lands may very well cause historical peoples to be complicit in a breach of Aboriginal protocol. You obviously would not go onto someone's country without permission; why would you inhabit a house that was constructed on their land without their permission? I think we really need to think through that particular issue a little bit more.

The third point I want to raise is double dispossession. I use that term 'dispossession' in a very careful manner. Not for one minute do we believe that our clients have been dispossessed to the point where they have lost connection, but this is a second risk of being dispossessed, by virtue of the building up of infrastructure on a piece of land and by piecemeal extinguishment, as suggested by Mr Mundine in a previous submission, of what is capable of being claimed. So there is the risk that, in the very limited area where we can claim exclusive possession and disregard historical extinguishment under the act as it currently stands, we could be dispossessed twice.

The fourth thing—and it is an important point because it is how we move things forward—is what will be the net effect of these procedures on the relationship between traditional owners and government? This is about a bilateral discussion around how we actually move community forward. When you downgrade the

rights we have outlined to mere rights, that has to have an impact on the relationship at a government level and also at a local level. We would submit that the effect of the bad blood that may be caused by failing to get prior informed consent could very well pollute, affect, the native title negotiations that are happening—the main table negotiations, if you like. So we have all these parallel processes running, and if it is tainted in this area of the building of housing and other infrastructure it could very well infect the negotiations at the main table. I think it is a good bet that it will infect them. Then, more broadly, there are government programs to be rolled out around Closing the Gap and the like. So there are broader ramifications of these procedures.

We do not want to be doomsayers. We actually want to come to the Senate with options. Mr Mundine obviously highlighted that there are tools in the box; they just need to be used better. We would suggest ILUAs. They are a mechanism with which we can actually deliver this particular outcome. ILUAs in particular require a coordinated and strategic approach. Some of the questions put to Mr Mundine in the previous session were along the lines of what kind of engagement has there been. The National Native Title Council, as an umbrella organisation for all the representative bodies, has not really been approached in any formal way about how there could be a better coordinated strategic approach to the delivery of the objective for government and also for traditional owners—that is, how do we get these houses on the ground. We are yet to have that dialogue. If we have that dialogue, there are sufficient tools to actually achieve that objective. So that is the first thing. The second thing is that Indigenous land use agreements were introduced in the 1988 amendments and the environment is comfortable with the concept of an ILUA. You go outside native title land and no one will know what an ILUA, but everyone involved is cognisant of what an ILUA is and of the certainty it can offer. Yes it is, at times, a convoluted process but because we are familiar with the processes we can actually deliver those in a far better way than they could have been implemented 10 or so years ago.

I mentioned certainty and the potential to resolve claims more broadly, not just in the piecemeal way of dealing with public housing and so forth. ILUAs can go beyond the four corners of the actual proposal that is on the table. You can say that in this ILUA, the clients wish to withdraw their claim or they agree to keep their claim in abeyance, with the trade-off of something else. So there is a lot more flexibility that can be offered in those processes. There are prescribed body corporate ILUAs, area ILUAs and the like. Most of the communities that would avail themselves of this provision would be prescribed body corporates. Where there are DOGITs in Queensland, for example, you may very well have a body corporate ILUA that is set up with a one-month notification, and the objective could be realised very quickly.

We have to explore template ILUAs. There is a level of corporate knowledge in the system about what should and should not go into an ILUA and what is required to get an ILUA in registrable form, so there is lot of intelligence and experience on the ground that we could avail ourselves of.

The final thing on ILUAs is that we have to be cognisant that they are time consuming. It takes time to bring people together, to settle the terms and to authorise an ILUA, and it costs money, but it is the better mechanism because it guarantees a certain outcome. That, I would submit, is the benefit of the ILUAs.

I want to introduce a second limb: a new right to negotiate. I do not want to use the language of compulsory acquisition. There is already a right under the regime to negotiate on compulsory acquisition and there is also a right to negotiate on mining and other exploration. What could happen here is the introduction of a new limb—a right to negotiate—to subdivision P. This is not covered in the submissions, and with the committee's leave we will flesh this out and provide a copy.

We would essentially be saying that, because the construction of fixtures and the period of the lease of the houses and the like is such that it suppresses native title for a period of 40 years, there ought to be a special right to negotiate on those particular matters. We would be submitting that, besides the creation of the right, all the provisions of subdivision P could be used.

In this committee, we have had miners and Mr Mundine, who I keep referring to because his submissions were spot on. Within the private sector as well as traditional owners and native title parties, there is a level of corporate experience with negotiating. They are familiar with the right to negotiate procedures under subdivision P. If we introduced a right to negotiate for this particular housing and infrastructure, we could then apply subdivision P wholesale. We could have section 29 notices so the actual project would be notified pursuant to section 29. You could have four months to have your claim registered if it had not been registered or, in fact, to lodge your objections to it. There is a negotiation in good faith. Those types of things are in there. There is a body of jurisprudence that has been built up through the tribunal over 18 years in this area. Why wouldn't you use that negotiation in good faith?

There is a six-month time frame. Obviously, there is an imperative to deliver these things within short time frames. When the notice is delivered, any party has the right to arbitration six months after the notification. It could be done in this circumstance as well.

The criteria for the arbitral body to determine whether the future act should proceed or not are there and there is a body of jurisprudence that has been evolved there. The fallback position is that, if the tribunal or the arbitral body does not make a determination, the minister can then make a decision within a six-month period. So we are suggesting that there are tools in the toolbox as it currently stands and, in fact, that is what happens—you have section 29 that may be introduced. Parallel to those section 29s around mining, for instance, you may have an ILUA that has been developed because proponents and traditional owners want to go beyond the scope of the section 29 notice. These things are not new; these things are within the legislation as it currently stands, and it is not going too much further to actually introduce this special right to negotiate.

CHAIR—Mr Smith, I am just wondering if you have much more of your introductory comments, because I think we are going to run out of your time without having the chance to ask you questions.

Mr Smith—All right. Thank you, Chair. The final thing is that we would suggest that retaining some elements of the amendments would be beneficial. The non-extinguishment principle is fine, particularly if we introduce a new class of right to negotiate. We believe the rolling out of multiple acts is a positive thing. When you are planning on the ground you want to actually plan for substantive projects as well as the processes and ancillary infrastructure around them. And we believe a 10-year sunset is beneficial. I will leave it there. Thanks for your indulgence.

CHAIR—We are running short of time so we will need to be fairly strict with our questioning. I will go to you, Senator Barnett, if you want to ask a couple of questions.

Senator BARNETT—Yes. Chair, are we going to go to 10 o'clock with Mr Kim Hill as well? I notice he is also the next witness.

CHAIR—Yes, but we will need to stop and restart with the Northern Land Council, because Mr Hill is not appearing right now in the capacity of representing the Northern Land Council. There will be a new set of witnesses.

Senator BARNETT—All right, that is fine. Mr Smith, you make some very persuasive arguments, you have argued them well and you know the act and the system very succinctly. With regard to the government's $5.5 billion 10-year plan to close the gap, they have a plan for 4,200 new houses and 4,800 upgradings of existing houses. Are you aware of that and do you have a view as to how they are progressing to date on achieving those objectives?

Mr Smith—That is a matter I think the department should answer. In my area we do not have a lot of houses being rolled out. That is a matter for the department.

Senator BARNETT—That is fine. I will certainly be asking the department that, but I thought you might be monitoring the progress and if you had a view I would be interested to know what it is.

Mr Wyatt—We are aware of the program, but in terms of actual detail and knowledge and information, no, that is not our area and we have not been involved on the ground at that level. However, I just want to make one quick point on that. We have conveyed the message on a number of occasions that the settlement of native title will assist the process in the early stages and we ought to have been engaged at a level of assisting the program, not necessarily getting in the way or holding it up or whatever.

Senator BARNETT—My second question relates to your consultations and engagements with the department—if they have told you that, if this bill passes, they will definitely be going down this track and using this legislation to achieve the building of housing. I notice it is also health, police and education as well, not just housing. That is the way I read the legislation. Have they said they will definitely be going down this path or will they simply use it as an option—a Damocles sword over your collective heads, as it were—if the ILUA process does not work? They say in their submission at page 5:

> The existing … ILUA provisions would remain as an option for future acts otherwise covered by the new process. However, the new process would be available in circumstances where the timely negotiation and registration of an ILUA is not possible or timely.

That says to me that the options are open, so I am interested to know whether you have had liaisons with the government to say they are definitely going down this track as proposed in this legislation or they are simply

going to use it as an option and they still want to negotiate with you and work it through the regular traditional processes.

Mr Wyatt—We have been advised that is the government's intention, but we have not—

Senator BARNETT—What, specifically? To go down this track?

Mr Wyatt—With these amendments, to build the houses. However, we have not been involved in any process that says: 'Well, how is that going to happen on the ground?' Are we going to be engaged at the level that we ought to be engaged? I want to draw the comparison very quickly that in the ILUA processes we are in that from day one, and that is why it works in industry. If we were not there from day one then we would have problems. We have had problems over a long period of time but which we have ironed out and we have got that system fairly smooth and flowing reasonably well.

Mr Smith—Can I just add that we are unclear of the drivers for this legislation, why it has come to the fore. We have heard anecdotally, and obviously from the FaHCSIA submission, that some state and territory governments may not be happy with the progress, but we do not have specific examples.

Senator BARNETT—Western Australia to start with—they have put it on page 2 of their submission that they are not happy with the process.

Mr Smith—All right. But, whether there is one isolated incident or even concentrated in one area, whether that requires a blanket amendment to the act along these lines begs the question. The second thing is, when you introduce an option like this to expedite a process, why would you go down the ILUA line? Really, this is the reason why they actually want to push through certain matters. I cannot see ILUAs being put on the table. Once you provide a more attractive offer to one party which has the stronger bargaining position why would you go down an ILUA?

Mr Wyatt—Chair, can I comment on the Western Australian situation. That is where I am from. We have not been engaged at the level that we needed to be engaged at. As we have done in other parts, particularly in heritage protection in Western Australia, we have demonstrated very clearly the processes of dealing with that in terms of mining in that state, so we are ready, we are available and we can deliver in ways that make the things tick over. But in Western Australia in the housing area we are not engaged, and that is the point that I have wanted to make with rep. bodies across the state.

Senator SIEWERT—Because we have finished there, maybe I can pick up on that particular point. You have been talking about the timing of engagement. This housing plan is supposed to be rolling out and they have been talking about it for ages, yet, from what I can gather from what you are saying, you have not been engaged in that discussion about where the houses should be, the allocation and all those sorts of issues. Is that the point? So what may well happen now is that they come in, having agreed on that plan, and they say, 'Right, we want that bit of land.' Is that so?

Mr Wyatt—That is the point. I come back to Mr Mundine's point again. We are not opposed to the process. Clearly we want housing, and we have said that ourselves. However, we can help get it done, and that is the point we are making. If we are engaged at the level that we have been through the current processes as to other areas we can deliver.

Senator SIEWERT—There are a couple of things I want to ask about. Firstly, I want to clarify that you are putting in a supplementary submission, because I would particularly like more of an expansion of the suggestions that you were making at the end of the process for the way forward in terms of using the subdivision. It would be extremely useful if you could put that supplementary submission in. Secondly, what I get from the government as to the underlying motive for this is that there have been occasions when negotiations have held up the process of providing housing or some group said no to housing in a particular location. There has to be some reason in the government's mind why they think they need to try this. Have you got examples of which you can think where somebody or a group has said no to some particular housing or has held up the provision of infrastructure or housing?

Mr Wyatt—We do not have any clear indication from anybody that that has happened. I just want to come back to Mr Smith's point about the relationship between traditional owners and people with historical connections to areas. Yes, there are tensions and it is not easy addressing those tensions. But what we are saying is that we address them to move through to the future accent on native title claims. We can still do that. It is not an easy row to hoe. It is still difficult. It is still hard. But you cannot do it without us, and that is the point we are making. We do help that process come through and we do get the results in that area, because the

claims do go ahead and future acts do happen. It has not been addressed in a very clear structured way to get these agreements on housing in the communities with native title rep. bodies.

Senator SIEWERT—I know I am going to get pinged in a minute, but I want to go back to a specific issue in WA. I am aware of situations where there are some rep. bodies that have particular ideas about how they want to plan housing and the delivery of houses into communities. All that is at odds with what the state government wants. Is that a potential driver for the state government to say, 'Well, we're not happy with what the processes under native title are delivering'?

Mr Wyatt—I cannot answer that specifically but in a general sense we would have to see what is the area that we are talking about. Obviously, in their areas the rep. bodies work to their base, whomever they have got.

Senator SIEWERT—I do not want to drop the particular group in and get you to talk about this particular group but I am aware that they have been very carefully planning where they want the houses and consulting with the community, so it is not as if it has just popped into their head as they actually have a very well thought out process for where they want housing. But, as I understand it, it is not what the state government wants. Have you come across examples of that nature?

Mr Wyatt—Not yet.

Mr Smith—When you do a negotiation, it should be in good faith, so you should not go in there with preordained positions. Interest based mediation is about exploring the options available to the parties. So, if a particular state government comes in with a position, one would argue that runs pretty close to want of good faith. Similarly, the native title party could be accused of the same thing. But it is about actually having that dialogue. This particular mechanism short circuits that and basically says, 'You have a right to comment, possibly a right to consult, and then we will proceed.'

CHAIR—Did you put some comments to the department when the discussion paper was released last August or September?

Mr Smith—The National Native Title Council did and a number of our member organisations did as well, yes.

CHAIR—And are your views broadly reflected in your submission today?

Mr Wyatt—Yes.

CHAIR—I am assuming you have not changed your views since then. So you would put to us that the views you put to the department in response to the discussion paper are not reflected in the legislation that is before us?

Mr Wyatt—We were arguing on the basis that we can do what the government requires in housing under the ILUA process, very clearly. We have not shifted away from that.

CHAIR—I will go to something that Senator Barnett raised. The Western Australian government is arguing that the ILUAs can be problematic. I am assuming that that is the driver for these changes. This is actually legislation that proposes a new future act regime. In your mind, though, do you think that the establishment of a new future act would expedite the process?

Mr Wyatt—It depends on who you are talking to in the context of where we are at, but from a rep body point of view I am aware that there were ILUAs being discussed and planned for the provision of housing in some areas in Western Australia. I do not know what happened to those, whether they failed, whether they were not implemented or whether things broke down, but I do know that people were in discussion, which led to where we are today. This communication, this dialogue process, is important. As long as we are involved from day one and we know what the protocols and the processes are for getting to that end result, then it can be done. It was done in the early phases in parts of Western Australia, and the community I am talking about is Bidyadanga. There was a lot of discussion about the amendments to the act to facilitate housing in Bidyadanga.

CHAIR—Mr Smith, do you think the same thing is happening in Queensland, if the WA and Queensland governments are the drivers of this? Is there a similar situation in Queensland where negotiations through an ILUA may have fallen over or are not progressing as quickly as the parties would like?

Mr Smith—I do not have specific examples. My colleagues from the Cape York Land Council and the Northern Land Council may be able to provide specifics, but my view is that the statistics bear out that Queensland has a very active and long-held culture of agreement making using ILUAs. The NNTT statistics

bear that out. I think what is happening, though, is that when push has come to shove around bilateral negotiations the Queensland government has not actually come forward with proposals that the community would like to work with. I think what happens in the mining area is that the Queensland government, and all government parties, shift the cost of Indigenous land use agreements as well as section 31 agreements. When push comes to shove, there could be an issue of compensation. There could be a range of issues that the state governments do not want to have a discussion about, and it is a discussion that needs to be had.

CHAIR—We do not have any further questions. Thank you very much for your comprehensive submission, your opening statement and your time today. It has been quite useful.

[9.55 am]

HILL, Mr Kim, Chief Executive Officer, Northern Land Council

LEVY, Mr Ron, Principal Legal Officer, Northern Land Council

CHAIR—Welcome. Thank you for your submission, which we have received and numbered 16 for our purposes. I assume you do not need to make any alterations or amendments to it.

Mr Levy—I would only mention that it was drafted in the early hours and I expect there will be some fairly minor changes, which will be done later today and emailed to the committee—I discussed that with your secretariat—but nothing of substance.

CHAIR—I invite you to make an opening statement and then we will go to questions.

Mr Hill—The NLC supports the government's intention with regard to this proposal. However, we believe that the bill will not achieve its aims and request further consideration. Therefore, I refer you to the NLC submission.

Mr Levy—I will expand on that in a number of ways. Firstly, I know from many discussions that the Northern Land Council supports the previous submissions about the importance of ILUAs and the fact that outcomes are being delivered and so forth. But the beneficial intention of this bill seems to be threefold. The first intention is to make sure that there can be no delay or perceived delay, particularly in Western Australia and Queensland, regarding delivering housing outcomes. It is obviously an important beneficial intent and I think this bill achieves that, for reasons I will come to. However, another primary benefit it intends to deliver is that native title will not be extinguished by the housing schemes—and there is also a compensation issue. I believe there is a real risk, indeed probably a likelihood, under current law that that will not be delivered. If you put that in a practical context, solicitors will have to advise native title claimants or holders when they are talking to them that there is a real risk that in fact nonextinguishment will not be delivered. That will no doubt lead to a great deal of tension. The reason it will not be delivered relates to very technical decisions about technical provisions in the Native Title Act, both the original 1993 act and the 1998 amendments, which we say on current authority have not really delivered what the parliament wished to deliver.

I have two further points. Buried within the discussion paper is an indication that the bill applies only to some kinds of native title land. Certainly our understanding, when the discussion paper was released before the bill was released, was that it would apply to all native title land. In fact, it only applies to land which is subject to a statutory scheme to benefit Aboriginal people, like land rights act schemes, not for the Northern Territory but elsewhere, or to land that is reserved. For example, it would not apply to native title land in Alice Springs or in Timber Creek because that is fully-fledged native title land. I think there was a lot of confusion at the time of the discussion paper. Most people I spoke to at the time believed it applied to all native title land, and that may have informed some of the submissions which have subsequently been made. I am not sure it is widely realised that this applies to land only where native title coexists—in other words, only to non-exclusive native title rights which are subject to a statutory scheme.

In 1993 in the Northern Territory—I was not there then; I arrived in 1994—I understand we knew that there was a potential for spurious litigation when land trusts under the land rights act of the Northern Territory granted land or for spurious litigation when the Northern Territory government granted a minerals tenement on Aboriginal land with the consent of traditional owners. It was readily agreed by everybody that there should be a provision using a different drafting mechanism to make sure that such spurious litigation would not occur. The view about that was taken with a view as to how the law would develop. It was believed that this would not involve any interference in native title, and the crystal ball now shows that that was right—the law has developed in the way everybody thought it would.

What has happened here is that a different legal mechanism is being used to try to deliver a beneficial intent, but there is nothing in the discussion paper or the explanatory memorandum or any of the submissions before this committee to explain the precise legal basis whereby it is said there is uncertainty. I do not know what the precise legal basis is. Insofar as we can ascertain it, the law has been determined to Federal Court level in a manner which one would think means there is no uncertainty, but, of course, there is always the risk of going to the High Court.

There are other reasons why it is felt there is uncertainty, and I can go into the technical detail to explain the effect of those decisions if you wish. They relate to, for example, a pastoralist building a homestead. The

pastoral lease, when granted, will have native title coexisting but partially extinguished. When the pastoralist 40 years after the land is granted builds a second homestead, there will be extinguishment in full where the homestead is. An Aboriginal person would say, 'That cattle station manager has just extinguished my native title where that new homestead is by the action of constructing it.' The legal fiction—and I do not mean that pejoratively—is that extinguishment is rendered by the pastoral lease granted 70 years earlier, so it is something in the past.

That is the problem with the bill. The bill only applies to future acts, but if that analysis is correct regarding, for example, DOGIT land in Queensland or land in Western Australia then the bill, in attempting to deliver the benefit of nonextinguishment regarding these important housing schemes, will not have that effect because there will be no future act involved. It will be the past groping into the future—if I could be pejorative—causing an extinguishment to happen. I do not think this committee should give a tick to the bill and say: 'This is terrific. We're making sure there's nonextinguishment.' In actual fact, at least on current law, it appears a significant risk—if not likely—that will not be the outcome.

Any competent lawyer advising people after this bill goes through, if it goes through in its current form, will have to tell native title claimants, 'The government'—and a big tick to them—'is wanting to deliver a non-extinguishable outcome to you, but that's not likely to be the outcome.' That suggests to us that the drafting needs to be revisited. There may be some other reason why the Queensland and WA governments—and I am not sure about the federal government—are concerned about uncertainty. We are conjecturing, in a sense, as to what that might be. We do not know what it would be, but we think—and, again, this is in the submission—there is a general problem with Aboriginal land in the Northern Territory or elsewhere, and I am not talking about pastoral leases now.

I will finish off by saying if you take, for example, a community—it might be in Arnhem Land, granted in 1931—we know from the Ward High Court case that the grant of pastoral leases in the 19th century partially extinguished native title. If that did not happen in Arnhem Land the reservation of the land for the benefit of Aboriginal people did partially extinguish native title. It continued to exist; then there were the construction of communities like Yakala from 1931 onwards. As of 1993, when the Native Title Act was originally enacted, that might have extinguished native title at common law but, in any event, in 1998 the previous exclusive possession act amendment said that it did. So the construction of communities on Aboriginal land in Arnhem Land up until the grant of Aboriginal land in 1978—and likely up until 1996, which is the date of the Wik case—would have extinguished native title underlying the Aboriginal land.

This is a big issue in the Northern Territory: the idea that you do not just own Aboriginal land that the federal government gave to you in 1976 but that you have native title underneath protecting it, which is your own for your own traditions. If you take a community, you will have the construction by the government of development in the community up until at least 1978, and probably 1996, extinguished. Because it is under the land rights act and because of the beneficial provision of section 47A, which was brought in by the federal government in 1998, all development in that community after that—and there has been a great deal since the seventies in the major communities—will not have extinguished native title.

So if the land rights act is ever repealed in communities, for example, you will have to have a historical exercise of going through the communities working out which buildings were constructed when, to work out which ones have native title and which ones do not and then to work out which ones attract compensation and which ones do not. We could wait for courts to try and fix up this patchwork quilt; I do not think that is likely. This is an opportunity to look at it. I am not talking about a homestead example on pastoral leases—leave that to one side. At least on land subject to statutory schemes, in terms of delivering the beneficial outcome that the parliament wants to deliver—nonextinguishment—you could revisit those Federal Court decisions, Erubam Le in particular, which is the Torres Strait decision. If you did that you would deliver that outcome and lawyers would be able, under this bill, to advise people of that outcome as being delivered. That would encourage people to reach agreement and not be upset, bearing in mind that traditional owners are also on these DOGIT entities and will have influence. That is an attempted summary of what we see as being the potential problem.

CHAIR—Thank you, Mr Levy. I want to ask the first couple of questions. Given what you have heard the previous two witnesses say to us about this bill, do you believe that negotiation of the use of this land through ILUA's is a much more preferred process?

Mr Hill—Yes. That is from our experience, particularly, with the CDEP program in the Northern Territory where there were discussions and negotiations with both government and with the traditional owners.

CHAIR—You put to us in your submission that there has not been an explanation as to the legal or other basis as to why uncertainty exists. In other words, you would say to us that you are not convinced that the department has provided you with enough evidence as to why these changes need to be made as opposed to staying with the ILUA process—would that be right?

Mr Hill—From a policy perspective, yes. I will refer the legal, technical question to Mr Levy.

Mr Levy—I do not want to be too critical of the department—things have moved very quickly here. I did bring some departmental officers, but I did not actually ask them what the precise legal basis is. I should have, now I realise with retrospect, given our thoughts over the last few days.

Coming back to your first question to my CEO, it went very smoothly. There have been seven, and about to be eight, of the nine communities we need to do leases with under the SIHIP strategic housing program in the Northern Territory negotiated. We were supposed to have done four by now and we have done seven. But if in those negotiations we had had to inform people that underlying native title generated by their own traditions, their own culture, their birthright, would be extinguished by allowing the land trust, which the traditional owners control, to grant a lease for housing, then I think that would have been an emotionally difficult issue for everybody. We did not have to do that in the Northern Territory because the drafting used in 1993 meant that the non-extinguishment principle did apply. The problem with this bill is that there seems to be a significant risk at least that it does not.

CHAIR—Okay.

Mr Hill—Knowing and understanding the position of people in the Territory, Aboriginal people and traditional owners, if we had touched upon the rights agenda, we would not have had any agreements whatsoever. So what we did do through an agreed process was to talk about the service delivery. That is, what the government was merely providing—services in regard to housing and public infrastructure. If you had started talking about the rights, you would not have got an agreement.

CHAIR—So you think this bill will actually complicate future negotiations rather than simplify and expedite the process?

Mr Hill—Yes.

Senator BARNETT—Thank you very much for that. Just again a quick update from you on a previous question I have asked: where are the 4,200 new houses and the 4,800 upgrades of existing houses? Have you got a view on progress to date—because a lot of this is happening in the Northern Territory? Do you have some sort of understanding of how it is progressing?

Mr Hill—It could be a lot quicker. It is slower than we would like. However, as my principal legal officer said, we are in negotiations. We have seven of the nine TO groups from those communities who have agreed to a 40-year lease; and we have got, through the negotiations, the establishment of local boards. There is still a long way to go. There are other issues, no doubt, that will come out of this—the issue of roads and intervention issues, particularly regarding the reinstatement of the permit system. We would like to see the reinstatement of the permit system. We have a lot of illegal activities happening on land trust areas. We have had some good agreements—for example, with ENI at Wadeye, which is bringing gas onshore into Darwin through the land trust there. We have accommodated their employees to have access to fishing. Fishing on beaches was restricted in regards to where they can fish. It is not where all the good fish are, but they got a few fish. So through practical sit-downs and through negotiations, at the end of the day you can achieve what the TOs and what government want. I know government gets very frustrated.

At the same time, we have had to deal with various bureaucrats at different levels. We welcome David Chalmers as the .FaHCSIA state manager in the Northern Territory. No doubt David has some qualities that his predecessor did not have. But we are all moving on, and that is what we intend to do.

Senator BARNETT—Do you think, therefore, that that is evidence that the ILUA process is a serious option and should be pursued by the federal government rather than this legislative approach? Do you think that the evidence you and Mr Levy have put to the committee that the system is working pretty well and that, in fact, you are ahead of time, based on the evidence you have given to us, supports your argument that you do not need this legislation?

Mr Hill—From a policy perspective, yes. I will seek Mr Levy's comments from a legal perspective.

Mr Levy—Our experience and knowledge of most places is that, if you go to an Aboriginal community that is full of impoverished people, some of whom are traditional owners and others who are closely related and

from the region, and say: 'The government is going to build you a lot of houses. Would you like them to?' People will bend over backwards to make it happen.

Mr Hill—Anyone would bend over backwards if there are 16 or 20 people living in one house. Who would not want their own bedroom?

Senator BARNETT—Is the government pursuing the 40-year lease, do you think, to give them some sort of security of tenure. Mr Levy, your earlier view from the legal perspective was that that brought into doubt the extinguishment of native title. Why do you think they have gone down that 40-year lease track?

Mr Levy—'Lease' just means an agreement with the people that own the land. It is a non-controversial term, really. We have different drafting of laws. Outside the Northern Territory the very technical areas of the Native Title Act have evolved in a particular way, which we would say is an unforeseen consequence and would be legitimate for this committee to suggest that the drafters look at that. It will make things more smooth. I do not mean in relation to pastoral leases. Since 1993, in relation to land held under statutory schemes for the benefit of Aboriginal people, or reserves under statutory schemes for Aboriginal islander people, both governments have supported the idea of nonextinguishment. It has been a platform of both governments. The township leases under the Land Rights Act are an alternative to compulsorily acquiring Aboriginal land in Aboriginal communities and converting them into NT freehold. Both governments have said no. The have said, 'We will go the township lease way, and the underlying ownership will remain.' That is what the non-extinguishment principle is about. But, because of the way the law has been developed, that is not being delivered. That is not really the government's fault. They have to get leases; that is the only way you can build houses.

Senator BARNETT—Have you considered an amendment to the bill to make that effective?

Mr Levy—Yes. We alluded to it, and we have advice from senior counsel as to what that would be. We could provide something.

Senator BARNETT—May I ask you, on notice, to consider that more seriously and, if it is within your powers and resources, provide some response to the committee.

Mr Levy—We should be able to do that by tomorrow.

Senator BARNETT—That is very efficient. The Queensland and Western Australian submissions—and I am not sure whether you have read them—refer to what they consider are deficiencies in the bill, specifically as it relates to housing for community service staff. They say that it is not covered, and specifically it is not covered in the explanatory memorandum. Do you have any response to that? Have you considered that? It is probably outside of your bailiwick a little, but I thought I would ask you the question because I will be asking the department the same question. No doubt they are listening to this question, so we will get a response from the department. Have you read the Queensland and WA submissions? Do you have a response to them and, specifically, a response to their views on the deficiencies in the bill?

Mr Levy—I have read all the submissions, and I saw those points. I think where the department are coming from is that they are concerned that this might affect native title and, therefore, to avoid questions about a breach of the UN convention, they are trying to keep a limit. There is a sunset clause, and they are keeping the ambit of it lower. If they took the alternative path, which, hopefully, we will indicate by tomorrow, they might find that alternative drafting would resolve some of those issues.

Mr Hill—I would like to follow on from that. In the Northern Territory, particularly with the SIHIP and the government infrastructure, not just houses but new clinics and schools are being built in the remote parts and, again, we are using standardised templates. We are in negotiations at the moment. The Northern Territory government has introduced new supershires. They do not own any assets on Aboriginal land. They think they do but they do not. We are talking about millions and millions of dollars. Yes, they provide a good service. Some do not. Again, Mr Smith talked about a template with regard to ILUAs. You can do that for housing, a health clinic or for the school. At the end of the day, they are all connected to the same power station and the same sewerage system. So you can have a standardised template for your ILUA in your community.

The policy thing for us all is no doubt what comes first in regard to the chicken and the egg. Do you build the schools or do you build the accommodation for the teachers or the health workers? That is the big question. TOs like to see them be accommodated, because they are not going to go anywhere. Teachers come and go. Health ministers come and go. Doctors come and go.

Senator SIEWERT—I would appreciate any additional information you could provide tomorrow because that would be really useful. I have not had a chance to read your submission because we only got it this morning. I really want to see it written down so I can understand the details. Can I go back to the point that Mr Smith raised earlier around the council's proposals for changes in subdivision P. Are you supportive of those suggestions as well in terms of providing the right to negotiate for housing infrastructure? Are those sorts of amendments also amendments that you would support? If your amendments and previous amendments suggested were agreed to by government, would you then support this bill? Is it a bill that, with amendments, should be supported? The overwhelming evidence I have heard so far from submissions is that it is not a bill that should be supported. I am looking at whether, if those amendments were made, it is something overall that you think should be supported.

Mr Hill—I cannot recall. I will just ask Ron if he can recall what Mr Smith said.

Senator SIEWERT—If you would prefer to see the *Hansard* and then give us a comment that would be fine. You can take it on notice.

Mr Hill—Yes, we will do that.

Senator SIEWERT—When I have read your submission and got my head around what you are suggesting once you put in your amendment I may have more questions. There may be a few more questions on notice.

Mr Hill—We are more than happy to meet with you.

CHAIR—Thank you both for your attendance this morning. Our reporting time line is 23 February at this stage. If we do send you some questions and we need to do incorporate your answers in our report, we will probably need a week's turnaround time.

Mr Levy—Does that mean we can give our proposed amendment on Monday rather than Friday?

CHAIR—Yes, it does. Thanks very much. We will have a break now.

Proceedings suspended from 10.18 am to 10.46 am

AHMAT, Mr Richie, Chairman, Cape York Land Council

GUEST, Ms Krysti, Senior Legal Officer, Cape York Institute

PEARSON, Mr Noel, Director, Cape York Institute

Evidence was taken via teleconference—

CHAIR—We will now reconvene the public hearing of the Senate's legal and constitutional affairs committee and our inquiry into the Native Title Amendment Bill (No. 2) 2009. I welcome Representatives from the Cape York Land Council, Ms Guest and Mr Ahmat. Good morning. We have your submission, which has been numbered 'number two' for our purposes. Before I ask you to talk to that submission, do you have any changes or amendments you would like to make?

Ms Guest—No, not to this submission.

CHAIR—All right. If you would like to give us some brief comments about your submission, we will then go to questions.

Ms Guest—Mr Ahmat is going to give some opening comments as the chairperson, then I am going to give some further opening comments about legal policy issues—if that is acceptable.

CHAIR—That is fine.

Mr Ahmat—Thank you, senators, for your time today. I guess, when I reflect back to the Prime Minister's apology speech, nearly two years ago, he said that he urged creating new approaches to the relationship to Indigenous and non-Indigenous Australians. The PM said that this new approach must be built on respect, cooperation and mutual responsibility. The Attorney-General, Robert McClelland, and the Indigenous affairs minister, Jenny Macklin, announced that as part of this new future native title was no longer to be isolated from mainstream indigenous fields, such as housing, education and employment. Native title was recognised as critical to economic development. Minister Macklin said such settlements would be whole-of-government initiatives compressing housing, economic development, health, law and order, and leadership and governance.

Minister Macklin stated that recognising native title as critical to economic and social development places the Rudd government in step with what Cape York leader Noel Pearson said is the real opportunity of the Mabo decision—the best opportunity for the resolution of colonial grievances between Indigenous and non-Indigenous Australians and the cornerstone for reconciliation. We in Cape York believe that, to prosper, the Native Title Act should not be tampered with. That is all I have to say.

CHAIR—Thank you, Mr Ahmat. Ms Guest, do you have any comments?

Ms Guest—Yes, I have got a few opening comments. The bill relates to amendments to the future acts regime, so I thought it might be helpful to make some general comments on the history of the future acts regime and its policy foundations. The Mabo decision characterised common law native title as a vulnerable property right which can be extinguished by executive actions without notice or compensation. That is in contrast to common law's characterisation of non-Indigenous land titles, which the common law says cannot be interfered with except where legislation allows that interference. That means that the common law's treatment of native title is racially discriminatory. However, the Racial Discrimination Act passed in 1975 by the Fraser government prohibits racial discrimination in relation to property rights and it prohibits racially discriminatory treatment of native title after 1975. The relationship between the RDA and the common law created a significant difficulty for the Commonwealth government and state governments after the Mabo decision came down because it meant that a vast number of government acts done after the Racial Discrimination Act where potentially unlawful and invalid on the grounds that they racially discriminated against native title holders, regardless of the fact that native title was not recognised until 1991.

After the High Court decision came down, the Keating government recognised that it was critical that the uncertainty as to invalid acts be dealt with as quickly as possible for the benefit of the government, the community as a whole and non-Indigenous interests. However, the Keating government, in step with international human rights, also wanted to respond to the Indigenous and broader community's aspirations that arose from the Mabo decision in relation to recognition of Indigenous people's rights and their prior sovereignty and rights arising from that. As Mr Ahmat just said, Noel Pearson has made clear that native title is not simply a doctrine relating to real estate, it is not simply a narrow legal doctrine; it is a doctrine that provides the foundation for respect for economic, social, cultural and political rights of Indigenous traditional

owners and as such it is the cornerstone of reconciliation. That is the opportunity that is provided by Mabo. I again note that Minister Macklin has supported those comments by Noel Pearson.

Under the vision of the Keating government, which saw this issue of dealing with invalidity but also wanted to respond to the possibilities in Mabo, the government entered into significant negotiations with Indigenous leaders and with organisations such as the Cattlemens Union to try and work out a proper balanced approach to native title which was based on just, democratic values. The outcome of that was the 1993 Native Title Act. There are three key points about that act which are relevant to this bill. Firstly, the original act allowed the validation of all the land dealings post-1975 that may have been invalid because of the RDA. The validation provisions agreed to in the Native Title Act where overtly racially discriminatory.

In order to balance this racial discrimination, 1993 act provided to any forms of protection for native title for future acts. It provided the freehold test that required native title holders to be treated the same as ordinary title holders in all future active dealings and in certain circumstances they would be granted a further right to negotiate recognising their special relationship to land. To underline this non-discriminatory future act regime, the original act specified that the Racial Discrimination Act applied to the future act regime. It was suspended only in relation to the racially discriminatory provisions that had been agreed to. It has been made clear from many former Indigenous leaders such as Noel Pearson, Mick Dodson, Marcia Langton, Peggy Leary and David Ross, who were negotiating in 1993 around the table with the Prime Minister, that they would never have supported the racially discriminatory validation provisions in the 1993 act if they were not guaranteed that the future act provisions would be non-discriminatory and that the RDA would apply to them. It was that agreement that the United Nations clearly focused on when it looked at the 1993 act. It is said that although the balance of discriminatory and non-discriminatory rights in the native title act were very finally balanced and could go one way or the other, the fact that there was Indigenous leadership agreement to that act based on a non-discriminatory future act regime meant the UN committee would accept that the act was a measure of substantive equality, or they called it a special measure. I think these days we would recognise it as an aspect of substantive equality.

However, in 1997-98 the Wik amendments altered this fine balance between racially discriminatory and non-discriminatory aspects of the NTA. They did that by extending their discriminatory validation provisions, but most importantly in relation to this bill by completely unwinding the non-discriminatory future act regime and implementing a range of discriminatory mechanisms to be applied to a limited range of future acts to be subject to non-discriminatory principles. The Labor opposition, the Greens and the Democrats strongly resisted the Wik amendments. The Wik debate was one of the longest in parliament's history. It went through three major parliamentary committees and throughout the extensive debates the Labor Party, the Greens and the Democrats consistently advocated for the principle of non-racial discrimination in the legal treatment of future act provisions in the Native Title Act, in accordance with the agreement that was made with Indigenous people in 1993.

A range of UN human rights committees have reviewed the 1998 amendments and they have all declared that those amendments have breached the standard of non-racial discrimination, particularly in relation to the future act regime, because they saw the new future act regime, which took away the freehold test in relation to a whole range of future acts, affecting the situation with native title land and non-consensual use, as benefiting governments and other third parties to the detriment of native title holders. The committees called on Australia to address these concerns by opening dialogue with Indigenous peoples. That position in I think 1999 or 2000 was overtly supported by the then Labor opposition, led by Kim Beazley. The position was taken up by the then shadow Attorney-General, Nick Bolkus.

In our view, the bill continues to go down the path of minimising procedural rights in relation to future acts. It continues that process that was started in the 1988 Wik amendments; it fails to reapply the agreed standard of non-discriminatory ordinary title holders' rights that was agreed in 1993. It is in that context that we are considering the level policy framework of the bill. We are very concerned about the practical outcomes of the bill in terms of this repealing or rewinding of the non-discriminatory basis of future acts.

Firstly, we think the bill will result in recognition of native title translating into little more than a symbolic statement with very limited real future actual rights to talk about country. Most title holders at the moment only retain non-discriminatory substantive rights in relation to—to be technical—future acts on a 24K or 24MD for services to the public in certain circumstances in compulsory acquisition, exploration and mining, and anything else that falls into 24MD. If this bill is passed, then almost the only time native title holders are going to have a right to exercise their right to speak in relation to their country in a non-discriminatory way

will be if their country is subject to mining or compulsory acquisition. In other words, if the traditional owner's country is not prospective in relation to mining, native title—after a decade of struggle by Aboriginal people to have their title recognised—will have contorted to the bizarre position that traditional owners have the right to speak for their country only when their rights are about to be extinguished through compulsory acquisition. Clearly, we do not think that was the intention of the Native Title Act 1993 and we do not think that that is the intention of the Rudd government. We just think that that is an inadvertent outcome of this bill which needs to be addressed.

The other practical outcome we are concerned about from the bill is that it will significantly impact on Indigenous land use agreements or other forms of agreements that native title holders can make over their country. The Rudd government has very properly, in our view, focused on the importance of agreements and negotiations on native title and the importance of ILUAs as a mechanism to settle all forms of native title disputes—both determinations and future acts, and any other matter such as economic development, social development and so forth on their country. That is what we understand the government means by comprehensive settlements. The Cape York Land Council fully supports the concept of comprehensive settlements and is in fact engaged with one in Kowanyama at the moment.

However, by withdrawing the legal power of native title holders to leverage an agreement through ILUAs in public housing, hospitals, educational places, police stations et cetera, negotiations over such areas or communities will only be at the behest of government goodwill and not by legal right. It is people's experience. It is certainly the experience of Indigenous people I have worked with both here and in the Kimberley that once you withdraw a legal right governments are not going to grant you a right to negotiate or make an agreement unless you have leverage of legal right to do so. That is just the reality of how governments deal with Aboriginal people.

The final small comment that I would make is that, if this bill goes through, the future act regime, as I said, will have very little future rights applicable to native title holders which are available in a non-discriminatory way. It is in complete contrast to the onerous requirements to prove native title before we can get to the future act regime and for the administrative responsibilities of PBCs. The legal maze for native title claimants to prove their native title has been diminished by many little players in the native title system, including by Minister Macklin, who stated in 2008 that 'the legal and anthropological processes in place to prove native title defies comprehension'. That is true, but that is what native title holders go through. They have done it from the Kimberley and from Cape York to prove that they have the right to speak for their country only to find the respect for those rights in future acts on their country are being whittled away further and further to become almost meaningless—except, as I have said, for mining and compulsory acquisition. Simultaneously, once you have got your native title you have to set up and fund yourself and prescribe a body corporate. There is a whole range of complex administrative requirements for prescribed body corporates and, as everybody knows, neither the states nor the Commonwealth have agreed to fund PBCs.

So native title holders are in the bizarre position, from the great promise of Mabo, of now having to go to extraordinary lengths to have their title recognised and then be placed in the complex corporate obligations of PBCs to look after their title. But, in terms of having any rights which are useful and effective for that title, all this bill will assist in is minimising those rights to the point that native title will become almost valueless, as opposed to being a valuable property right; which is what we think the Rudd government has seen it as. That is what I wanted to say as an opening comment.

CHAIR—Thank you, Ms Guest. We will go to questions.

Senator SIEWERT—I would like to go to the issue of what is supposedly underlying these amendments in that there has been a hold-up in being able to facilitate the building of houses because of native title issues. Are you aware of any circumstances or any examples of where this has in fact been the case?

Ms Guest—No, I do not know of any circumstances where that has been the case. What I do know is that Indigenous people have persistently requested houses and those requests have been stymied by governments for whatever reasons—administrative difficulties, funding and so forth—so people have not been able to gain access to the housing that they have requested. A very good example in Cape York is the town of Kowanyama. As for Kowanyama, I have read detailed files on the requests from the Kowanyama traditional owners to the council and they go back to 1995. They have been consistently asking for houses to stop what is now a chronic housing shortage in that community. The Kowanyama traditional owners have paid from their own money to get legal advice on how to sort out a huge legal issue there which was created by the state government called Katter leases. Katter leases are leases which were granted under state legislation. They are sorts of perpetual

leases and they were granted under the auspices that they would allow Aboriginal people in communities to have control over their housing and so forth. People signed up to them in Kowanyama. What I have read and what I have been instructed is that people believed that they would then have access to state housing much more quickly. However, the Katter leases take that land outside of their freehold trust or the DOGIT that is held by the community and therefore in fact the guide to the Katter lease means that you cannot have any access to public funding. There are 95 Katter leases right in the middle of town in Kowanyama and Kowanyama is listed as the third most disadvantaged community in Queensland and the seventh nationally with one of the largest housing shortages. That is because of these Katter leases.

Traditional owners and the council, working together, have been desperate to find a solution to that since, as I said, 1995. Nobody, so no government—no Commonwealth government and no state government—has come in to assist them on that in any shape or form. They have funded the work themselves. They have had these disappointments for over 18 years. It has been only in the last year and a half, through significant efforts by the Cape York Land Council, working with the Commonwealth Attorney-General's office and Minister Macklin and with, to a lesser extent, the state government, that they have managed to get a clear process on track for negotiating and resolving these Katter lease issues and that of the open-lease land so that they can address the chronic housing shortage. It is more about Aboriginal people all out of title. With that stuff with housing in Kowanyama it is state government legislation which failed to be addressed by state government officers and there was no assistance from the Commonwealth until recently. I think that is probably a situation very comparable to that of other places in Australia, plus I know that with Aboriginal people I find it inconceivable that native title is blamed for government failures in housing. It is just another case of trying to scapegoat.

Senator SIEWERT—In terms of the discussion paper that was put out in August, did the council make a submission as to that discussion paper? If you did, do you feel that your issues were taken into account?

Ms Guest—Yes, we did send correspondence. I do not know if you would entitle it a 'submission', but we sent correspondence raising several of the issues. From memory, the key point was that this bill was unnecessary. The Native Title Act already provides mechanisms to deal with all future acts. That is why section 24MD is the catchment provision of the Native Title Act. If a future act cannot be fitted under 24F to K then it will fall under 24M or, if you do not like any of those future act provisions, you enter into an ILUA. ILUAs were inserted into the act in 1998 and they were a very positive aspect of the Wik amendments from the then Howard government. Those were a very welcomed change. The bill is unnecessary. That is what we raised. I am sorry: I do not have that in front of me; that was just from memory.

The second point the Cape York Land Council raised was what I have just said: the abysmal state of Indigenous housing in remote communities is not Aboriginal people's fault. It is not native title's fault. You cannot withdraw from Aboriginal people hard-fought-for property rights to solve a problem that has been caused by government failure. That is completely unacceptable policy and it is inexplicable in the context of the Rudd government's commitment to a new approach to native title, which Mr Ahmed set out. No, these matters were not taken into account in any way, shape or form. The bill is much wider, I think, than what was originally proposed.

Senator SIEWERT—I know I am going to get pinged for time in a minute, so I am going to ask a final question. Do you consider that this bill could be amended or would you rather see it not proceeded with?

Mr Ahmed—We would rather see it not proceeding.

Senator SIEWERT—Thank you.

Senator BARNETT—Thanks for your submission and your evidence over the phone. We are not always able to comprehend exactly your evidence over the phone, so apologies if I have missed some of it. Again, thanks for that. I have just a couple of questions to kick off. Do you think the bill is unconstitutional in its current form, based on your views with respect to the Racial Discrimination Act, its breach of it and the fact that it is discriminatory? If you think it is unconstitutional, have you sought legal advice in that regard?

Ms Guest—I do not think the bill is unconstitutional. I think I can say that uncritically. There is obviously a very complex issue, the issue of constitutional aspects that relate to this bill. The most obvious one would be the race power in the constitution. It is not clear in the bill whether the race power can be used only beneficially or beneficially and detrimentally. There is some law on that. I do not think one could make a call on that at all, but I do not think this bill would be unconstitutional. I suppose I am making a call on that. We would not be pressing a position that this bill is unconstitutional. That is a way of saying that, if that is clear.

Senator BARNETT—That is fine, thank you.

Ms Guest—There was another part of that question. The issue that we did raise in our submission, if I can just say that, is this. There was a Senate legal and constitutional committee inquiry in 1997 into the constitutional aspects of the Native Title Amendment Bill 1997. The minority report by the opposition, by the Labor Party, said that, regardless of the legality of the scope of the races power, it was not proper policy for bills that withdrew or rewound Indigenous people's non-discriminatory rights to be passed and that that was not a policy that a government should not be taking.

Senator BARNETT—Thank you. That leads to my second question. You referred on page 16 of your submission and in your opening statement to Minister Macklin and the Rudd government's promise specifically of 23 October 2008 and its confirmation in June 2009.

I am wondering if you could let me know specifically where that was with respect to the promise to repeal the suspension of the RDA in relation to the Northern Territory emergency response matters. You have referred to the 2009 spring sittings of parliament. Is that the bill? My memory is a little bit hazy. Can you confirm that that bill was introduced in late October? Was that the bill you were referring to? I guess the question is: if the government is proceeding with that approach to repeal that suspension, would you agree that this bill is contradictory to that objective of the government?

Ms Guest—Firstly in relation to your first question about where the information was from, I am happy to take that on notice and find that out. That was I think from media statements from Minister Macklin's office. I am happy to endeavour to find that information out.

I am not sure about the timing of the bill. If it is the October bill then it must be that one. In response to your main question -- do we think that is contradictory?—yes we do, absolutely. Part of the problem is that many people have forgotten that the RDA was suspended in relation to the Native Title Act in 1998. It was suspended partially in 1993 in relation, as I said, to the validation provisions for acts passed after 1975 to 1993. That was open, with the agreement of everybody, and that was the deal: you would have discriminatory past acts and non-discriminatory future acts. What happened in the Wik amendments was that the RDA was completely suspended from the operation of the Native Title Act as set down in section 7 of the NTA except in relation to very limited administrative issues. I think people have forgotten that.

I hope I am allowed to refer to a conversation that I had with Mr Pearson on this matter. I know he was talking with very senior government people about the issue of the Northern Territory and the RDA. He said: 'Why only focus on the Northern Territory; you must redeploy the Racial Discrimination Act to the NTA as well. It is completely inconsistent.' I think the people he was discussing this with were surprised. It strikes me that people have completely forgotten that the RDA does not operate on native title— and, as we all know, it was the Racial Discrimination Act itself that allowed the Mabo decision to occur. Mabo No. 1 was a question of whether laws trying to extinguish native title in the Torres Strait were racially discriminatory. The High Court in Mabo No. 1 decided that they were under the RDA. In Mabo No. 2 the High Court found native title on the basis of protection of the rights to property as being a right of the common law and that that was bolstered by Australia's obligations under the ICCPR. Justice Brennan said that we cannot remain frozen in an age of racial discrimination where the government has agreed to obligations such as under the ICCPR—the International Covenant on Civil and Political Rights. It is extraordinary that it exists—the most important thing to Aboriginal people is the land, but they have no protection from human rights any further in that land. That has been forgotten.

I think it is clearly a contradiction. Hopefully it is a contradiction made through lack of understanding, which hopefully will be remedied.

Senator BARNETT—Thank you. This is my final question. Based on Minister Macklin's promise of October 2008 and then confirmed in June this year, do you believe that the government is actually breaking that promise in proceeding with this legislation? My second part to that question relates to WA and Queensland submissions. WA indicates that they have been frustrated with the time delay under the ILUA approach. I am asking your response to that submission and those concerns. That was a two part question.

Ms Guest—I think the promise you are referring to was not only in relation to the Northern Territory National Emergency Response Act. So I do not think that that is, strictly, a broken promise. I think it is a very interesting point that you raised in relation to the WA submissions, which I have read. I worked on native title in the Kimberly for 10 years before coming to Cape York. I was involved in a very positive negotiation precisely in relation to housing and so forth in a large community, the most important part of which was that

the agreement process was very healing for a discord that had grown up between the council and the traditional owners following the traditional owners' native title claim. It was working very positively with the government, the council and the traditional owners. It was one of the most positive things that I have worked on. However, because there were personnel issues within the land council there, once I left the Kimberley I think that agreement stalled. I know that that is one of the agreements that WA refers to.

I may be speaking out of turn; I am speaking now in my personal capacity, if that is okay. I am making observations on something that I have seen previously. That agreement was very positive and it would have been finalised very quickly if not for outside personnel issues, which had nothing to do with agreements. It had to do with the organisation that I worked for. I think it would be a terrible tragedy if a bill went through, because it is something that would have absolutely nothing to do with native title at all. I completely understand the WA government's frustration at the delay but it was nothing to do with native title; it was to do with personnel issues in an organisation.

I hope that is helpful, because I feel very strongly about that. Often when you read the history of how issues arise, they arise in such bizarre circumstances that would have nothing to do with their future impacts. This is one of those issues that I think everybody wants to act honourably on. Everybody wants Indigenous housing; there are no arguments about that. It is just finding the best way to do it that will also empower Indigenous communities. Withdrawing or repealing their rights will not do that, in my view.

Senator FEENEY—I wanted to get a better sense of the Katter leases you talked about in terms of there being other explanations for problems or delays in the delivery of services. Can you explain the Katter leases in perhaps a trifle more detail than you did in your submission? Can you explain to me whether they extinguish native title?

Ms Guest—Yes. I am very happy to again put some more detail in a further written submission. That might be helpful.

Senator FEENEY—Sure.

Ms Guest—An act was passed 15 or so years ago. It was introduced by Bob Katter; that is why they are called Katter leases. They grant perpetual leases or terms, 99-year leases, to the lessee. It is a lease directly from the state government. I think the lease is from the community council that holds their grant in trust. It is some form of freehold trust arrangement. The community council grants the Katter lease. There were speedy ways of getting these leases. From what I have been told—and it seems to be correct from the records that I have seen—people thought that if they took the leases they would get houses. The lease takes the land outside of the trust. It was given to the community—the trustee—to develop public housing. They cannot be used on the Katter lease areas. In Kowanyama people had these areas of land but they could not get any public housing. The land is completely vacant in most cases or the housing that was on it when they got the lease cannot be repaired, so it is derelict and has to be knocked down. Kowanyama is a small area—maybe four streets by three streets—and peppered throughout the whole community are these huge areas of land with nothing on them. Then next door there are 14 people in a house.

Senator FEENEY—So the original proposition of the Katter leases was that Aboriginal communities, by adopting such a lease, could fast-track access to state government services.

Ms Guest—The lessees could fast-track it or just get government funding for housing. That is certainly what people understood.

Senator FEENEY—And by entering into those leases they extinguished their native title rights for a period—that, presumably, was one of the goals of the lease?

Ms Guest—No, I do not think the leases extinguished native title. They would regulate native title but in the same way that native title is regulated under the trust. I do not think that was the goal. I think Bob Katter was genuinely trying to think of a way in which Aboriginal people could have access to their own land—control their land. Katter leases are negative in the sense of public housing; they are properties in the sense of—for example, in Hopevale people may have appeared to have been raising issues about Katter leases in Hopevale but somebody who has built a house on his lease and is trying to develop a business on it cannot get any funding for the business, even though he has created his house, because he has not yet been granted a lease. He withdrew from the lease 20 years ago. He thought he had it. He bought a house and so forth but he cannot leverage any equity on the whole area because the government has failed to issue him the lease. Pearson is saying that he must issue him his lease so he has the ability to create his own business.

Katter leases can provide the opportunity for private housing. That is a very positive aspect of them and that is something that we are looking at in Kowanyama—to try to get a public housing-private housing mix, something we think people here and the government are very keen on. The point I was making about Katter leases—and people should come to Kowanyama and see it—is the ridiculousness of people. It is the third biggest housing crisis in Cape York and it has nothing to do with native title or anything. It has got to do with the state form of lease, and the state has not tried to assist in resolving that until very recently, and that was with the assistance of the Attorney-General and Minister Macklin.

Senator FEENEY—Are you aware of there being instruments like the Katter lease operating in other jurisdictions?

Ms Guest—They do not operate in Western Australia; I know that—and Richie is shaking his head.

Senator FEENEY—Thank you very much.

CHAIR—On page 11 of your submission you provide us with some commentary about the current future act rights and section 24KA and section 24MD. The bill repeals, as I understand it, these sections. Would an alternative be to leave those two provisions in the act but amend them to allow for public housing?

Ms Guest—Yes, I think that would be in line, I suppose, with everything they have said. I do not know the history of why 24KA was in fact referred, because it does not seem to me that it would make any difference if you did not have K; it would just fall into 24MD. anyway. But that does provide a foothold; that is right. It is not our position that you get a right to negotiate, the special right in relation to this; it is our position that it needs to be non-discriminatory. If the government wants to clarify it then, yes, I suppose that could be one approach. You could put it in section 24KA. Section 204J is a completely different section, as people would be aware. I guess you have to identify the evil you are trying to remedy. It is certainly not that native title stops housing.

CHAIR—So what is a way in which you can expedite the building of housing through the application of the Native Title Act? That is, the building of housing becomes a future act, but how do you do that and still protect people's native title rights?

Ms Guest—How you do it is that you enter into an agreement with them. You can negotiate with them. An ILUA does not extinguish native title. You can grant freehold in an ILUA and it does not extinguish native title. These kinds of agreements do not have to take a long time; they can be done very quickly. Doing that obviously creates goodwill and respect. I think people—I am not sure why—have it in their minds that native title agreements are going to take a long time. Agreements of these kinds happen all the time in non-Indigenous places. People have agreements over land, housing and such constantly—just normal commercial dealings. There is no magic in native title and it does not need to take a long time to get the parties to the table; you can really do it very quickly.

CHAIR—So is your preference to stay with the ILUA process and negotiate the access to the land through that or to grant freehold?

Ms Guest—We think the ILUA process would always be the preference because it is much more flexible than the future act regime. That is the good thing for all parties in an ILUA process: it is very flexible, so you can address individual matters that come up on a case-by-case basis. That is in everybody's interest, so that would always be Cape York Land Council's preference. I was not talking about granting freehold; I was talking about 24KA and 24MD and applying what is called the freeholder test. You get the same rights as an ordinary title holder. An ordinary title holder is defined as a freeholder. So if you were going to grant a particular right that an ordinary title holder—a freeholder—would have in that situation then you would give it to a native title holder. Obviously it is much more preferable to come to agreement, but that is open on the act already. Does that answer your question, Senator?

CHAIR—Yes.

Senator FEENEY—Can I ask a follow-up.

CHAIR—Yes.

Senator FEENEY—As I understand it, then, your principal point is that the barriers and delays that have been talked about are the responsibility of the actors negotiating ILUAs rather than there being a significant legal problem. Is that right?

Ms Guest—Yes, that would be right, if there is any proof that there have been delays. I understand that you are supporting the submissions of the WA government that there have been delays, and I understand that. I do

not think that is the case in Cape York. But, yes, I think that is a very good way to describe it. It is the actors, not the law. Empower the actors in an appropriate way, get people focused on the issue and just negotiate it. Just hammer out a deal. It does not have to be a big thing. I think agreements really need to be pursued.

CHAIR—Ms Guest and Mr Ahmat, thank you for your time this morning and for your submission and your evidence. It has been most helpful.

Ms Guest—May I say, in the few minutes before my chairman signs off, that we will grant the request from the committee. You said that it may be necessary that we provide a little bit more detail or a further submission in relation to the effect of the bill on very specific Indigenous communities in Queensland—the Aboriginal freehold grants that we have in Queensland as well as the DOGITs. But we have significant concerns about the impact of the bill on the grants of Aboriginal freehold here, and we are seeking further legal advice on that. If we could get that relatively quickly, we would like to have the opportunity to provide that information to the committee if that is acceptable.

CHAIR—I am sure that will be fine. Bear in mind that our reporting date is 23 February.

Ms Guest—Yes.

CHAIR—So we would need that early next week.

Ms Guest—Okay, thank you. That is great.

CHAIR—Thank you very much.

Mr Ahmat—Thank you very much.

[11.35 am]

WEBB, Ms Raelene, QC, Member, Indigenous Legal Issues Committee, Law Council of Australia

PARMETER, Mr Nicholas, Senior Policy Lawyer, Law Council of Australia

CHAIR—Welcome. We have the submission from the Law Council of Australia, which for our purposes we have numbered 14. Before I get you to make some opening comments, do you have any changes or amendments you need to make?

Ms Webb—No. There are no changes or amendments.

CHAIR—I invite you to make a short opening statement and then we will go to questions.

Ms Webb—What may not be well appreciated is that this bill has limited application to areas which are subject to the Commonwealth intervention and also to many Aboriginal communities in South Australia. This is because the bill only applies to future acts done on an area of Aboriginal or Torres Strait Islander held land, or land held for the benefit of Aboriginal or Torres Strait Islander people. This limited application was not readily apparent from the August 2009 discussion paper nor from the forum to discuss the possible amendments that I attended in Darwin—and, indeed, perhaps even in more recent comments on the bill which refer to native title land. What the bill is aimed at is a much narrower part of land. Section 233(3) of the Native Title Act provides that an act done on certain Aboriginal and Torres Strait Islander land established under laws of the Commonwealth and South Australia is not a future act.

The land that is not affected by the bill is held under, particularly, the Aboriginal Land Rights (Northern Territory) Act and two other Commonwealth pieces of legislation, the Aboriginal Land Grant (Jervis Bay Territory) Act and the Aboriginal Land (Lake Condah and Framlingham Forest) Act. So this bill cannot apply, particularly, to land that is held under the Aboriginal Land Rights (Northern Territory) Act. It is a large area of land and many of the communities that are a part of the intervention are on that land. The other areas that this bill cannot apply to, because of section 233(3), is land that is held under the South Australian acts: the Aboriginal Lands Trust Act 1966, the Maralinga Tjarutja Land Rights Act and the Pitjantjatjara Land Rights Act, where there are a number of significant communities in the northern part of South Australia.

Furthermore, the bill applies largely to land where the non-extinguishment principle applies already. Where there is a freehold or exclusive leasehold estate held by Aboriginal or Torres Strait Islanders over land where there has already been a determination of native title, the non-extinguishment principle applies already, so that native title is suspended entirely for the duration of that interest. That is under the act as presently constituted. Where there is a reserve for the benefit of Aboriginal or Torres Strait Islander people over land where there has been a determination of native title, native title will be partially suspended for the duration of that interest. This is complicated by the possibility of total extinguishment having already occurred over areas where there were public works constructed before 23 December 1996. This is the effect of the case that Mr Levy referred to: Erubam Le v State of Queensland. The scenario, then, is that the bill is expressed to apply largely to areas where native title has already been suppressed, in whole or in part, or may have already been extinguished by past public works.

The question of uncertainty when these acts are proposed arises in a very small window, and that is the window in the period before there is a determination of native title. Once there is a determination of native title, the act already deals with it quite adequately. The question is: if you are dealing with areas where native title is already suppressed or the non-extinguishment principle already applies, or if there has been extinguishment, is there a future act at all? If there has been total extinguishment there cannot be a future act, because native title is not going to be affected.

If you have land that is covered by freehold or lease to which the non-extinguishment principle applies, it is difficult to see how any of the acts provided for in subsection 24JAA would affect the continued enjoyment and exercise of native title rights so long as that freehold or lease remains in place. That is the way the non-extinguishment principle works. If that is the case, then the act will not be a future act at all. If the land is held as reserved land for the benefit of Aboriginal and Torres Strait people, the suppression of native title under the non-extinguishment principle will be partial and will be likely to be confined only to the right to control access to the land and decide the uses to which the land is put. In that case the new provisions may have application, as the kinds of acts contemplated are likely to affect the continued existence, enjoyment and exercise of native title rights in respect of parts of the land where improvements are to be constructed. But it is a limited application. The end result, which perhaps has not been fully appreciated, is that the bill has limited practical

application only to those communities which are established on reserves—and then really only to suspend any remaining unsuspended native title rights but not to extinguish them.

CHAIR—Thank you. Do you have any other comments, Mr Parmeter?

Mr Parmeter—I do not have anything to add.

CHAIR—I am going to start the questions. Can I just go to the issue about consultation which you raise in your submission. It says:

... many of the future act provisions in the Native Title Act 1993 require 'consent' ...

You talk about an 'increasing trend' to consult and you go on to say:

In the context of the present Bill, the government is merely required to "notify" native title holders ...

That is, I am assuming, they do not necessarily need to get their consent. Do you want to provide some comments to us about that? That is obviously a major concern, or do you believe it is a watering down of the provisions in the main act?

Ms Webb—It is a concern in terms of a general policy approach because the focus of the Native Title Act has been to have consent where possible. The concern is that the watering down to a situation where there is another future act process put into the act which only requires a consent or a request to comment is in fact moving away from that focus. It is, I suppose, a fear of the thin end of the wedge, that once a future act process goes in with what I would describe as a weakened provision it then becomes a starting point for the next future act process, if there is one. The position of the Law Council is that as far as possible the requirement of consent should be retained and not weakened or watered down. That is the concern. It is a general concern in relation to the prospect that perhaps in the next amendment the future act process might be this or something less.

CHAIR—Could you make a comment about whether you would support the view of our first four witnesses today that the current ILUA process is adequate and there is no need for this legislation—or is this legislation which is simply poorly justified and which needs amending?

Ms Webb—In the absence of understanding where there has been any delay or any difficulty to the provision of these housing projects and infrastructure because of native title, not because of other things, it seems to us that the existing processes are adequate and, indeed, the agreement process is to be much preferred.

CHAIR—Finally, in your comments on section 233(3), are you saying to us that this bill will not apply to certain land?

Ms Webb—Yes.

CHAIR—Which means that the default position is you would need to go back to an ILUA process?

Ms Webb—The future act process does not apply at all, so you do not even go to any provision. This is because we are looking at the very areas that Mr Levy was talking about, subject to a statutory land rights scheme, where the processes are already provided and the future act provisions themselves do not apply at all.

CHAIR—What is the current situation on those parcels of land if housing is to be built? How do you negotiate access to and use of that land now?

Ms Webb—You negotiate under the existing statutory scheme. For example, the Aboriginal Land Rights (Northern Territory) Act has a process in there and you negotiate under that process.

CHAIR—If my memory serves me correctly, though, Mr Levy was suggesting that once houses are built under a future act this legislation may well diminish or abolish the native title right.

Ms Webb—The answer to that is that, because of the structure of the Native Title Act, anything built on Aboriginal land will not be a future act. Anything built on land that is subject to this legislation or granted under this legislation is not a future act. That is why there is no application. It is simply the structure of the act. It is not a future act because the Native Title Act says so at present.

Mr Parmeter—Section 233(3) is subject to that.

Ms Webb—Yes, it has that effect.

CHAIR—The main argument put forward in this bill, and the reason these amendments are needed, is that there is a view that this is a new future act regime and requirement. This creates a new future act element under the bill.

Ms Webb—But it is still within the future act division of the Native Title Act. Anything that happens on those falls within that scheme. Section 233, as it is presently, would exclude it from being a future act anyway.

CHAIR—I see.

Ms Webb—I puzzled over what areas would be affected. There would be some areas in Western Australia and other areas, but certainly a large majority of the areas in the Northern Territory would be unaffected because of the fact that these are communities on Aboriginal land.

Senator BARNETT—Thank you for your submission. It seems to be bordering on—I will not say explosive—evidence which is substantial and critical to the effectiveness of the legislation. In short you are saying it nullifies the bill, it diminishes its effect, and section 233(3), as you read it, simply says that the bill before us does not have the effect which is intended by the government.

Ms Webb—Perhaps not to the extent that people have understood it would have an effect. There are still some areas where there would be an effect, but they are very limited.

Senator BARNETT—I have got section 233 here in front of me and it says:

(3) Subsection (1) does not apply to any of the following acts:

(a) an act that causes land or waters to be held by or for the benefit of Aboriginal peoples ...

(b) any act affecting Aboriginal/Torres Strait Islander land or waters.

That is pretty comprehensive.

Ms Webb—It is comprehensive. The legislation that I read out to you comes from the definition of Aboriginal/Torres Strait Islander land or waters in section 253. Anything held under those acts falls within that. It will not be a future act and so this bill will not apply to it.

Senator BARNETT—How has the government not seen that or not read it in the same way that you have read it? What would the department say if they were sitting here? They will be here shortly, so we will ask them that question. It seems to be a glaring omission or hole in the bill that they had not seen the effect of section 233(3) as you have.

Ms Webb—I cannot answer, obviously, for the department. Indeed it is only in my closer look at the bill in the last week that it has become apparent. That is because in the discussions that were held earlier and in the discussion paper it really was not apparent. In fact the wording used quite often in discussion was 'native title lands'. When you think of native title lands, the perception is that it is any land where native title can exist. It is only when you look at closely at where this bill is intended to apply that you see that it has very narrow application. It in fact reflects the wording of section 47A which is the part of the act that allows prior extinguishment to be disregarded once there is a determination of native title and also brings in the operation of the non-extinguishment principle. So we have really focused on areas of land where there has been a determination of native title and the non-extinguishment principle applies anyway. If there has not been a determination of native title, I would say it would only be a matter of time before there would be and perhaps the answer is to expedite determinations of native title and the Native Title Act then tells us how it interacts.

Senator BARNETT—Is this view consistent in any way with the view put by Ron Levy earlier today that he is getting his QC to provide feedback to the committee? Did you hear that evidence from him and is it consistent in any way with that?

Ms Webb—Yes, it is. It probably states it a little bit differently but it is consistent in that respect with the application of the act.

Senator BARNETT—In the consultations you had in September and October last year and the discussion paper none of these issues came up. We can double-check with Mr Levy and the Northern Land Council, but it appears that it has not been raised until your evidence now. Even your submission which is dated December what you have said today is in addition to that and over and above that in fact and in fact is critical to the effectiveness of the legislation.

Ms Webb—I apologise because it is something that I had not myself appreciated until going to the detail of the bill. I apologise for not doing that during that period.

Senator BARNETT—Thank you for that and you do not need to apologise because it is complex, but we do appreciate your being here and outlining this. The bottom line is that (1) we need to acknowledge the problem and the department needs to and (2) we need to fix it. Have you given any thought to remedying the error?

Ms Webb—My first response was does it need to be remedied once it is understood that the uncertainty perhaps, as I see it, has quite limited operation. That operation is, I believe to be, in that period before you actually get a determination of native title. That is the major area of uncertainty and I am simply not aware of any situation—that is not to say there has not been—were housing infrastructure has been held up because of that. I do not know and there may be.

Senator BARNETT—What you are saying is that you do not see any need for the bill in the first place.

Ms Webb—On this interpretation that is what I would say. There are existing processes. I have not give a thought to whether the existing processes in the act may be able to be tweaked, I suppose, to deal with the situation but again that is because I really do not know what specifically the problem is.

Senator BARNETT—Have you raised this with the department in the last week?

Ms Webb—Only just this morning when I spoke briefly with them.

Senator BARNETT—And?

Ms Webb—I am sure they have thought about it and will be responding. Indeed, they may well have a good response.

Senator BARNETT—Can I say thank you for your advice. Bearing in mind that you have shared this information with us verbally, if it was appropriate or possible for you to provide some supplementary written comment as to the views that you have put to the committee outlining your views of section 233(3) and its effect and the limited effectiveness of the bill before us, that would be greatly appreciated.

Ms Webb—Yes, certainly.

Senator BARNETT—Thank you.

Senator SIEWERT—We will hear from the department in a minute. If it is their intention that this bill should only apply to the lands that you have identified, you are saying that it does not actually achieve what they want it to achieve. Is that correct?

Ms Webb—If what they are wanting to achieve is what appears to have been the public comment on it, I think the answer is no, it does not achieve that.

Senator SIEWERT—Secondly, reading from the submission you made prior to your more detailed comments, you still think that an ILUA approach, or that sort of negotiated approach, is better than what the bill was trying to achieve. Let us leave aside whether it does or does not. You made comments about the fact that they do not even have to have notified the relevant bodies; they just have to have advertised et cetera. So, on top of all the comments you have just made, you have concerns about the approach that is advocated through the bill anyway, regardless of whether it is actually going to work or not.

Mr Parmeter—I think we should clarify that we do agree with the underlying objective and what the bill is trying to achieve. What Raelene is essentially saying is that we fail to see the necessity of it, given the narrow application of the bill. So we wonder whether it is worth having this additional process, which, in itself, appears to be a process that is somewhat deficient compared to the existing future act process.

Senator SIEWERT—When you say you agree with the underlying approach, can you clarify for me what you think that is and what you are supporting.

Mr Parmeter—If you read the explanatory materials accompanying the bill, the objective of the bill is clear: to speed up the process for investment in housing and essential infrastructure in remote communities.

Senator SIEWERT—I am trying to be clear here. I thought I heard you make the point, Ms Webb, that you did not think that was what was holding up the provision of housing. Does that mean you think that the current native title processes are holding up the provision of housing in communities?

Ms Webb—No.

Mr Parmeter—No. What we are saying is consistent. We do not think that native title is holding up the process. But to the extent that the government considers that there is a problem—and obviously the governments of Western Australia and Queensland have indicated that there is—we wonder whether the scope of the bill is too narrow.

Senator SIEWERT—So it might not actually achieve its objective. Thank you.

Senator FEENEY—Being the eternal optimist that I am, is it possible that the narrow application is in fact a masterful bit of targeting?

Ms Webb—I really cannot answer that because I really do not know what few communities it does target. What I do know is that it does not target most of the communities in the Northern Territory or the communities in the northern part of South Australia. In fact, I am not aware of what communities there has not already been a determination of native title in respect of. There are a few that I am aware of that are pending determinations. If it is targeting those few communities, I am not sure I would say it was masterful.

Mr Parmeter—It is certainly not apparent from the explanatory materials.

Ms Webb—No.

Senator FEENEY—Perhaps the department will enlighten us. Your substantive point about the narrow scope of the bill is not detailed in your submission. Am I right about that?

Ms Webb—That is absolutely right.

Senator FEENEY—So you will assist us with that?

Ms Webb—Indeed.

Senator FEENEY—Okay. I want to ask you a question on point 31 of your submission regarding compensation, where you talk about how the suppression, indefinite or otherwise, of native title interests should attract some compensation. I wonder if you could make that point in greater detail. Perhaps you could comment too on the point which you have no doubt reflected on, which is the public policy debate that no doubt would be engendered by the proposition that, in order to invest in a community, that community must firstly be compensated for the provision of that investment. Can you make that argument out for us?

Ms Webb—Can I pass the public policy aspect of it to Nick—are you happy to deal with that?

Mr Parmeter—I will have a go at it, and I think this point has been made by previous witnesses and in other submissions to this inquiry. Effectively, what we are talking about is a very long term suppression of native title interests from the outset. In order to invoke this process, there has to be essentially a 40-year lease or a very long term lease over the land. So we are talking about Indigenous communities or traditional owners effectively having their rights—

Senator FEENEY—Compulsorily acquired?

Mr Parmeter—More or less. So flowing from that is the assumption that if those rights are going to be, for want of a better word, compulsorily acquired, then there should be some form of compensation paid to the owners of those rights, effectively in terms of either lease payments or other in-kind compensation. We accept the argument that this is all aimed at benefiting the communities affected, but then you get bogged down in questions about consultation and consent and whether or not the suppression of those rights should be linked to the provision of what many in the community would regard as basic services.

Senator FEENEY—Thank you. Nothing to add, Ms Webb?

Ms Webb—I am happy to leave that with Nick, although I must say compulsory suppression of native title might be, in fact, what we are dealing with here.

Senator FEENEY—Yes, that is a better terminology. Thank you.

Senator BARNETT—Can I just follow up on that. I am looking at the bill, the Native Title Amendment Bill (No. 2) 2009, and the explanatory memorandum. It makes it pretty clear that the land, according to the department, in this bill is in the communities on Indigenous-held land and it makes it clear that future acts are covered by the new subdivision. Section 233 does not even come into it. There is no mention of it.

Ms Webb—No.

Senator BARNETT—So you have gone back to the substantive act, and that is your reading of it.

Ms Webb—Yes.

Senator BARNETT—But I cannot see how on earth they could miss that in their drafting of it, unless it is specifically intended in a masterful way, as Senator Feeney has referred to, or it is a major oversight. I have the act. Is there any other way you can read it? Is there any other angle on this to help us in our deliberations with the department?

Ms Webb—I do not see any other way of reading it, but if there is I will be interested to hear that.

Senator BARNETT—All right. We will wait and see.

CHAIR—Ms Webb and Mr Parmeter, thank you very much for your submission and your attendance this morning. I am sorry we have gone a little over time.

Ms Webb—Thank you.

Mr Parmeter—Thank you for inviting us.

[12.04 pm]

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

NELSON, Ms Sally, Principal Legal Officer, Native Title Unit, Attorney-General's Department

CATTERMOLE, Ms Amanda, Group Manager, Office of Remote Indigenous Housing, Department of Families, Housing, Community Services and Indigenous Affairs

LITCHFIELD, Mr John, Acting Branch Manager, Land Reform Branch, Department of Families, Housing, Community Services and Indigenous Affairs

CHAIR—Before welcoming our next witnesses, I remind senators that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy. It does not preclude questions about explanations of policy or factual questions about how and when policies were adopted. Officers are also reminded that any claim that it would be contrary to the public interest to answer such a question must be made by the minister and should be accompanied by a statement setting out the basis of the claim.

With that introduction, I now formally welcome representatives from the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs. The departments have lodged a submission which we had numbered 7. Before I ask you to make an opening statement, do you have any amendments or alterations to make to the submission?

Ms Harvey—Senator, we just have the one amendment, on page 4. The first dot point says:

The Attorney-General could make regulations …

That should actually be a reference to a legislative instrument. It should say 'can make a legislative instrument'.

CHAIR—Rather than 'regulations'?

Ms Harvey—Yes.

CHAIR—All right. Thank you. I invite you to make an opening statement, and at the conclusion of that of course we will ask questions. Who is going to start off?

Ms Cattermole—We do not have an opening statement. Because both agencies had lodged a submission we thought it might be appropriate to move into questions, given that after the other evidence this morning I imagine that the committee members have a range of questions which we can go directly to, perhaps in particular the most recent evidence. If you would like us to direct some of our comments to that and we could take some questions from there.

CHAIR—All right. I want to start. A discussion paper was put out last year, and there was only a two-week turnaround time for comments. How many submissions or comments did you get in relation to that discussion paper?

Ms Cattermole—We received 27 written submissions, and during that two-week period there were a range of consultations that were undertaken in cities and major regional centres.

CHAIR—Of those 27 submissions, how many are reflected in submissions to this inquiry?

Ms Cattermole—My understanding is that it is a number of them. I would have to check to confirm exactly how much they match up, but my understanding is there was quite a deal of overlap in terms of the submissions that were received then and those received through the process that you are conducting.

CHAIR—How many of the submissions back then were actually in favour of the changes you were intending to make?

Ms Nelson—Submissions to the discussion paper?

CHAIR—Yes.

Ms Nelson—We have got eight submissions here that agreed that housing and infrastructure delivery for Indigenous communities should be a priority, but there were diverging views on how native title processes would assist. So there were eight submissions to the discussion paper that held that view.

CHAIR—All of our witnesses today would say to us that they believe the provision of housing is a priority, but none of them have agreed with the way in which this bill wants to achieve that. Let me put it this way: how many of those submissions agreed with the outcome that is now reflected in the bill?

Ms Nelson—Those submissions were in response to the discussion paper, which is slightly different to the bill. I do not have the details—each submission had different details, different things they agreed with and disagreed with, so it is a little difficult to say that straight off the bat. However, there were eight submissions who did think that a new process would or might assist.

CHAIR—Eight out of 27?

Ms Nelson—Eight out of 27, yes.

CHAIR—Are those submissions publicly available?

Mr Litchfield—Yes, they are on the website.

Ms Nelson—Yes.

CHAIR—Those 27 submissions are on the website, are they?

Ms Nelson—Yes. I think there are some submissions that were confidential, and those ones are not on the website. But the vast majority are on the website, yes.

CHAIR—I am going to ask a question that is probably on everybody's lips today and that is: what justification can you give this committee that this process needs to be enacted as opposed to the existing process of using ILUAs?

Ms Cattermole—The underlying rationale for this amendment is the urgent practical need to get housing on the ground in Indigenous communities and in particular in remote Indigenous communities. That is where this proposed amendment comes from. It is designed to ensure that we can work with the states to deliver on the commitments that have been made through COAG under, for example, the national partnership on remote Indigenous housing, and to do that in a way that not only makes sure we can get housing on the ground quickly but also balances native title rights and interests and ensures that people have an opportunity to be consulted and to also be involved in matters such as planning and delivery of housing during that period.

CHAIR—I am going to be really quite tough here because I am a member of this government and this is essentially my piece of legislation. I am not convinced so far that you have provided us with a sound legal reason as to why the current provisions in the Native Title Act are not delivering that. I want to know from you about evidence, facts, restrictions and problems with the current ILUA system that you believe needs to be set aside for us to enact this legislation. As the chair of this committee, what will I tell the Senate in my report as to why we need to set aside the current provisions to enact this legislation? We all want housing and everyone this morning has said, 'We want housing and we want it as quickly as possible,' but everyone this morning has also said, 'We believe the current provisions provide for that and the Native Title Act is not the barrier.' So I want you to tell me why you think the Native Title Act is the barrier.

Ms Harvey—There are a number of provisions in the future act regime that may apply in some circumstances but there is some uncertainty about their application. Section KA may apply for some facilities but probably not for housing. Going to M gets us into the territory of compulsory acquisition, which is not the preferred method of the government. This proposed amendment is targeted at housing. It is not a replacement for any of those provisions and it is not a replacement for ILUAs; it is something that is another tool that can be used by governments in seeking to provide housing. It is for those situations where perhaps an Indigenous land use agreement might not be the most timely way of proceeding. Yes, they can be negotiated within a 12-month time frame, but that is not always the case and it is not always going to be the most timely way of proceeding. So it is not replacing Indigenous land use agreements. They still have a place—I think Western Australia indicated in its submission that it will still be using them—but it is providing another tool to bodies to try and get housing on the ground.

Ms Cattermole—If I could add to Ms Harvey's comments: under the remote housing national partnership, as I am sure you all know, the states are the major deliverers. What the states are saying—in particular Western Australia and Queensland, as you have heard from others this morning—is that native title is in some cases a barrier to being to able to deliver housing in the time frames that we need.

CHAIR—Give us an example of that.

Ms Cattermole—I do not have any examples. I think they would be in the purview of those states. But they have both clearly said through the processes and raised the concern that that is a barrier that is impeding in some cases the ability to deliver housing in the time frames that are being committed to given the urgent need that we have in so many communities and in particular in remote Australia and in WA and Queensland. That is where this bill is addressed to and I would like to get to that in a minute. Given the proceeding evidence, I think that is important. That is the underlying rationale. In some cases, those states where this is going to have the primary application—that is, in WA and Queensland—have said clearly it is an issue and they are the deliverers. The Commonwealth as the primary funder and a partner in this agreement needs to take heed of and has taken heed of those concerns. This amendment, which is targeted, as Ms Harvey said and as we will talk about further in a moment, is designed to address that.

CHAIR—Okay, give me some examples of that. Other than Queensland and WA saying to you that in some instances native title has been a barrier, other than just taking their word for it, what practical examples or cases can you show us that convinces us that it is the majority or the overwhelming number as opposed to some or just a few?

Ms Cattermole—As I said, I do not have any particular cases to bring today.

CHAIR—Can you get those for us?

Ms Cattermole—I can certainly try but, as I said, those things are within the purview of those states who are the major deliverers. They are raising that concern and we want to do everything we can—and this is only one tool. Bear in mind that the Australian government is working in a range of ways with the states so that we can deliver housing in a timelier manner. This is one tool that we can provide them to assist in working on that delivery. It does have limited application, as has been spoken about, and we will talk about that further if the committee would like, but it is important as one of the ways in which they can work to ensure we can meet that need.

CHAIR—Sure, but what you are suggesting to us is because they have said so, we should now amend the Native Title Act.

Ms Cattermole—And as I said it is a targeted amendment. It tackles one of the issues. They are the major deliverer and they are raising those concerns and have consistently done so through this process.

Senator SIEWERT—They have consistently raised concerns that native title is holding up a whole lot of things. If we take what the submitters have said, my reading of it is that it could be read as being discriminatory and substantially affecting native title. So you are proposing quite a significant change and you cannot present us with any concrete examples of why we should accept this quite substantial change to native title?

Ms Cattermole—As I said, I just do not have detailed practical examples in front of me today.

Senator SIEWERT—Which I find quite extraordinary!

Ms Cattermole—They are things that are within the purview of the states who are the primary deliverers under the national partnership.

Senator SIEWERT—This is a hearing into this legislation and why we should accept this legislation, and you cannot give us an example of why we need this legislation. Quite frankly, I find that astonishing!

Senator FEENEY—You may not have an example to hand; do you have an example in the department's possession? You say Western Australia and Queensland in particular have come to you with issues. While you may not have them to hand, would the department have examples of where native title has been a particular issue?

Ms Cattermole—I would have to take that on notice, but we can certainly check for the committee.

Senator FEENEY—Obviously the Western Australian and Queensland submissions to this committee did not offer us any examples.

CHAIR—I have not finished my questioning. Ms Harvey, when you say this is another tool, explain to us how this operates differently to an ILUA process.

Ms Harvey—Under this provision, the action body—it will usually be a state—can give notice that it wants to proceed with a particular act and there will then be an opportunity for native title holders or claimants, if they want to be consulted about the act, to be consulted through a native title rep body. There are some particular time frames set out in the legislation.

CHAIR—So this does not require native title holders to consent?

Ms Harvey—No, it does not require them to consent, but they do have an opportunity to be consulted about, for example, the design of the housing or where it might be situated.

CHAIR—So if I am a native title holder what are my rights under these changes and how are they equivalent or more superior to the rights of the state government? What are my rights under this act as a native title holder if a state government says to me: 'We want to use this land for housing. We are going to consult with you, but you don't have to consent'? What are my rights as a native title holder?

Ms Harvey—It applies to where native title is held but also where it is claimed. It is the right to be consulted and to participate in those consultations. There is also a right to compensation if native title is affected. There is also native title—it will be subject to the non-extinguishment principle if the act proceeds. It is also worth bearing in mind that in this situation, because of the way the bill is set up it is not just native title holders who will be on this land; there will also be an existing Aboriginal land rights act. For example, there might be a DOGIT as in Queensland, so there will be a couple of different—I am not explaining this particularly clearly, but there will be other regimes that will also be in place and those will have to be complied with as well as the native title.

CHAIR—Do I have a right as a native title holder to say to the state government, 'No, go away; I do not want housing on this land'?

Ms Harvey—No.

Ms Cattermole—In many cases, given what we have heard from everyone this morning, and I am sure it has been consistent as you are saying, this is not a situation where that is likely. This is really about delivering housing that Indigenous communities and people want and about doing it in a timely manner.

CHAIR—But what about in a situation where houses are going to be built where I do not want them. You have just said to me I have no right to say no.

Ms Harvey—To put it in context, there is no right to veto any act under the Native Title Act. There is a range of different procedural rights that can be gone through, but at the end of the day even the right to negotiate can be overruled by the Native Title Tribunal or a minister.

Ms Cattermole—And in this case one of the concepts behind the opportunity that is being made to consult in that two or four or possibly beyond time frame is to enable people to be involved expressly in the things that you have raised. If you look, for example, at our experience with SIHIP in the Northern Territory, that time frame, to which this is favourably comparable, has enabled Indigenous people and communities to be involved in exactly those discussions—where should housing go, what is the need, what is the allocation of housing—and for people to be involved in that on an ongoing basis. That is exactly what would be intended here.

CHAIR—The evidence from the Northern Land Council this morning suggested that if there was an emotive issue about the extinguishment of native title that that process would not have been as easy.

Ms Cattermole—In the Northern Territory?

CHAIR—Yes.

Ms Cattermole—That it would not have been as easy had there been this sort of issue?

CHAIR—Yes.

Ms Cattermole—It needs to be borne in mind that, like all of these things, we have worked through a process in the NT of engagement on these matters, which is exactly what would occur here. There would be a consultation process, which is designed expressly to work with communities on those key issues about where, when and how housing goes into those communities.

CHAIR—But that is a land rights act issue as opposed to the native title rights, which is different.

Ms Cattermole—Indeed, and one of the issues is that in the Northern Territory this amendment will not apply, and I think this came out in evidence given earlier today. There is one regime and that is the regime that we have been working through. In fact, this is about dealing with the duplication that arises in places, particularly in Western Australia and Queensland, where in fact there is more than one regime applying and that creates the duplication as well as the uncertainties that Ms Harvey has already spoken about. One of the ideas here is in fact to reduce that duplication and enable a process that still provides native title holders and claimants an opportunity to be involved in those discussions, but does so in a way that will also facilitate housing in a timely manner.

CHAIR—The Northern Land Council has said in their submission, and each and every person we have heard from this morning has said the same thing, the material associated with the bill does not explain the legal or other basis whereby it is said that uncertainty exists or may arise. So can you provide us with that material to explain the legal basis now? Can you give it to us by next Monday, or do you have it with you? The explanatory memorandum in the material does not explain the legal basis under which the uncertainty exists.

Ms Harvey—My understanding is the legal uncertainty exists because you do have these two different—you have a land rights regime and you have native title over the top, and the interaction between the two is not necessarily clear. That is why in some cases people proceed with the future acts regime. There might be an argument that the land rights might have extinguished native title and therefore the future acts regime does not apply, but out of an abundance of caution I think where there is uncertainty people usually proceed with the future acts regime. You then get into this situation of which parts of the regime would apply, which I mentioned earlier, and so then if you use particular provisions that then do not apply or are found not to apply, the act would be invalid, which then leads you into, in many cases, the choice between compulsory acquisition or an Indigenous land use agreement.

CHAIR—But in respect of WA and Queensland, the land rights act does not apply at all, so what is the legal basis under which you need to make this change to the act?

Ms Harvey—They have their own state based regimes. I understand Queensland have the deed of grant in trust. I cannot recall the name of the act that is set under, but they have their own forms of Aboriginal land rights.

Mr Litchfield—In Queensland there is the deed of grant in trusts, which come under specific Queensland legislation. In Western Australia there is the Aboriginal Lands Trust land, which is about 12 per cent of the state.

CHAIR—Is that the legislation by which those two state governments are now building houses on communities?

Mr Litchfield—It is true to say that, in terms of discrete remote Indigenous communities in WA and Queensland, the vast majority, if not all, are on a form of Indigenous land rights type legislation, including those ones I just mentioned: the Aboriginal Lands Trust and deeds of grant in trust in Queensland.

CHAIR—So the changes to this act will not apply to those communities.

Mr Litchfield—The changes will apply. Going back to what you were saying about the need for the new process, the joint submission that the Attorney-General's Department and FaHCSIA put to the committee goes through on pages 4 and 5 the need for the new process and what the government is trying to do to fulfil its COAG commitments jointly with the states and territories to provide public housing and a range of associated public infrastructure. No clear relevant subdivision under the future act regime applies. Some apply partially, some apply others and, critically, some that apply may involve the extinguishment of native title. It is probably fair to say that it is the policy of all governments in Australia to avoid, wherever possible, the extinguishment of native title. This new process puts in a new form of future act which involves genuine consultation to deliver urgent public housing and related infrastructure.

It is important to say as well—and this goes to the commentary from the Law Council of Australia and the previous questions—that this legislation is only really targeted where the future act regime applies, and the future act regime, as we know, does not apply to the Northern Territory land rights act land, APY land in South Australia and a few other smaller bits of legislation. This is clearly applied to, most importantly, the large discrete communities in Western Australia and Queensland. There is an existing land rights process in each of those jurisdictions which involves essentially the consent of the interest holder, whatever that may be, which is effectively a community council in Queensland and the lands trust in Western Australia. What this is all about is, where there is not a clear future act process, the only clear way to go might be some form of compulsory acquisition, which is a policy no government wants to adopt. It is putting in a process that delivers fair consultation. But this is all in addition to the necessary land rights process, where a lease or something equivalent may be given. This is an urgent targeted measure to address that bit of uncertainty.

CHAIR—Why can't it be done in those places through an ILUA?

Mr Litchfield—We agree that in many cases ILUAs would be the best possible vehicles. I do not have the figures before me, but I think the National Native Title Tribunal has publicly available figures. It might be fair to say that even in a best case scenario ILUAs include a necessary statutory registration test period et cetera. In a best case scenario ILUAs take a minimum of 12 months. Through the national partnership agreements the

government wants to deliver and get this security of tenure out in a quicker time frame than that, but that involves genuine consultation with the people affected, which includes the community where the urgent infrastructure is being delivered but also any native title holders or, more generally, claimants who may be claiming an interest in that land.

Senator BARNETT—I have a whole range of questions, some of which have already been asked. The third paragraph of the Attorney-General's second reading speech on 21 October states that the bill before us:

… is vital to achieving the advances needed in health, education, and employment participation outcomes for Indigenous Australians.

That is what he said on the public record. 'Vital' is the same as 'essential', 'a requirement', 'compulsory'. That gets back to and is the rationale behind the question of the chair and I think many of the committee members here at the table about why there is the need. You referred to pages 4 and 5 of your submission and I asked witnesses who appeared earlier today about subdivisions M, J and K. We know that. You have talked about the two submissions from WA and Queensland. They are simply, with respect, 1¼-page letters from those states. There is no evidence in those letters of examples. They just say the time frame has become frustrating.

Mr Litchfield, you have given us a bit of an indicator in your last response that under ILUA it is a minimum of 12 months. It appears to me that as far as the government is concerned that is not good enough. You want a faster, quicker process. Frankly, if that is the case, say it, so we are all on the public record. Say: 'That is not good enough for us as a government. We want to do it much quicker than that, and that process is inadequate.' You have got to come clean with us as a committee and with the public, frankly. We do not want to be going down a route of ducks and drakes and half measures. You need to be clear. Perhaps in a supplementary submission you can make very clear what examples there are in terms of frustrations with the native title process as it currently stands. If there are any, we want to know about them. We have letters from Queensland and WA but we want specifics and some examples from you, please.

Secondly, you have to be clear with us and say that 12 months is too long and that you want it quicker than that. How quick do you want it to be? Are you going to put months on it? Are you going to advise us that it needs to be within a certain amount of time? Is the process under this bill going to be quicker and, if so, how much quicker? Then I want to get on to section 233. Do you want to respond briefly to that or do you just want to respond in writing?

Ms Harvey—I think we will respond in writing as well, but I will just add to Mr Litchfield's evidence. Twelve months may be the best case scenario but it can also take a lot longer than that. Of course, it can also be shorter than that.

Senator BARNETT—Mr Litchfield said 'minimum of 12 months', and I am not an expert; I am taking his evidence as put to the committee.

CHAIR—And we had evidence this morning where Cape York Land Council was saying they could do it within six months.

Ms Harvey—There is no set time frame for doing an Indigenous land use agreement. But there is both the negotiation and then the registration process, which in itself can take up to a year.

Senator BARNETT—You have said on page 5 of your submission that this could be one of the options for future acts. I think Ms Harvey has mentioned that. Is that the case? Do you intend to use this legislation and, if so, where and when and how? If not, why not?

Ms Cattermole—Senator, you are absolutely right. This is intended as one option. I will just step back a bit and work through your earlier question a bit further as well. There is an urgent and often unmet need for housing on Indigenous land in communities, particularly in remote communities. This will in effect primarily focus there, and I will talk about that in a moment. Given the length of time that an ILUA takes—and as you have heard here we cannot give an exact number but there is no doubt that it will take longer than the process that is contemplated under this amendment—in some cases that will be too long given the commitments that have been made, particularly the Australian government's absolute commitment to working with the states to get those houses on the ground.

Senator BARNETT—Yes, but you have heard evidence this morning. You were sitting here listening to all the submitters who said: 'We are happy to go down the ILUA approach. We can have a template agreement. We want to sit down and work out the process. They want the housing and we are happy to negotiate.' What do you say to that?

Ms Cattermole—In some cases with all the best will and all the best intentions that will still take longer than what is going to be needed here. As we look particularly at the early part of 2010, we see this year is a very significant year around the numbers of houses that we, jointly with the states and the Northern Territory, have committed to deliver on the ground and in particular in Western Australia and Queensland where this amendment will have its greatest effect. So in some cases, yes, that is right; that is the niche into which it fits. It is a tool. We are not saying it is the only thing. In fact, I think WA, in its evidence, made clear that it intends to draw on the suite of processes that would be available, of which this would be one.

Senator BARNETT—This is about what I said earlier about coming clean as to your objectives here. You are targeting in particular WA and Queensland; is that right?

Ms Cattermole—Perhaps if I could explain that further, Senator, the reason for that is this—and this is just to step through to what sits behind this, as you have asked. The major investment that is being made under partnerships, such as those under the National Partnership Agreement on Remote Indigenous Housing, is targeted at discrete Indigenous communities, in particular a number of key communities across Australia. Most, if not all, of them are on Indigenous held land. In fact, all of those key ones are also in remote places. The way we had originally focused on it, if you recall the discussion paper, was in fact to identify that remoteness as the key, because that is primarily where they are. As you would know, most of the people who responded indicated that that was a difficulty, that using remoteness was a difficult way in which to capture it. We certainly took that on board.

Senator BARNETT—Please, Ms Cattermole; I have got a whole lot of other questions.

Ms Cattermole—What we have then done is say, in response to that, that we are focusing this amendment where it is directly to be most effective and that is on discrete Indigenous communities on Indigenous held land in remote places. In the NT, as you know, it does not apply and therefore it is focused on Western Australia and Queensland as the next two jurisdictions in which there are those numbers of remote communities. I think someone said earlier that it looks like it might have very limited effect. Yes, it is targeted but it is not limited in terms of its application. As Mr Litchfield said earlier, the Aboriginal Lands Trust in Western Australia holds 12 per cent of the land in Western Australia. That is a lot of communities. A number of them will be the beneficiaries if the state government chooses to use this tool of being able to pursue this process or the other processes that are already available. So it is targeted but it is not insignificant in terms of the numbers of people in communities that might be affected in Western Australia and Queensland.

Senator BARNETT—Okay. That leads us to section 233, so why don't we pursue that a little bit further. You heard the evidence from the Law Council. I have got a copy of the section here and we have all heard about it and it links with a section—253, I think it was—which outlines the various acts, including the Northern Territory land council act and the Jervis Bay one, an act in South Australia and another act. So is this a masterful approach, as Senator Feeney referred to earlier? How do you interpret section 233 and what is your response to the Law Council?

Ms Harvey—I might answer those questions. This amendment is only aimed at the future acts regime. The combined effect of section 233 and section 253 is that the future acts regime does not apply in all of those areas that are named.

Senator BARNETT—So you agree with the Law Council that it does not apply in those areas?

Ms Harvey—That is right, and it is not intended to apply there because the future acts regime does not apply there. What this is intended to do is target those areas where there is already Indigenous held or controlled land such as the lands that FaHCSIA have referred to where native title can also sit on top, so where you have got two lots of tenure.

Senator BARNETT—All right. For goodness sake why haven't you said that in your explanatory memorandum or why isn't it made clear in the second reading speech or elsewhere in your submission?

Ms Harvey—I suspect it is probably an oversight. If we are talking about future acts and I guess amongst native title matters we understand that the future acts regime only applies in a certain area and does not apply in other areas, it is probably an oversight by us—

Senator BARNETT—Your explanatory memorandum basically talks about Indigenous land. It does not talk about excluding the Northern Territory land. It does not talk about excluding the Jervis Bay act or the other acts referred to in 233 or 253. So I draw that to your attention.

Ms Harvey—Yes.

Senator FEENEY—I wonder if a supplementary submission of some sort might not be warranted. I think we all accept the importance of the point you just made and I think it would serve us well if you were to set it out for us, if that could be done.

Senator SIEWERT—I think, though, that the point there is that the Law Council's submission, if I understood it correctly, is that if it is intended only for those areas then it is not going to work. You heard their evidence.

Ms Harvey—My understanding of the evidence was that it operated in a very small window. Certainly that is true in terms of native title, but I think Ms Cattermole's evidence was that it has a larger effect because of the extent of those lands.

Senator BARNETT—Sure. We would not want to misinterpret the Law Council, so please look at the *Hansard*, but what is your response to Ron Levy's view? He is getting advice on that. I think his view is similar to the Law Council's view, and he is giving us further advice via his QC. Do you want to respond to his concerns?

Ms Harvey—I do not think I am in a position to respond at this time.

Senator BARNETT—All right. When that does come in early next week, please feel free to respond to that, because that will be of interest to the committee, I am sure.

Ms Harvey—Certainly.

Senator SIEWERT—Both the NLC and the Law Council are putting in additional comments. It would be appreciated if you could respond to their submissions.

Ms Harvey—Certainly. Thanks, Senator; we will.

Senator BARNETT—I asked this question earlier, and you are in the best place to answer it. With respect to the $5.5 billion over 10 years under the partnership program announced by COAG, can you advise how many houses have been built, how many have been upgraded and where? I am happy for you to take that on notice.

Ms Cattermole—I would have to take that on notice.

Senator BARNETT—Progress to date, please.

Ms Cattermole—Yes. I am sorry; I just do not have those numbers on me.

Senator BARNETT—It is an obvious question because, with respect, that is the whole rationale behind the urgency of the bill—

Ms Cattermole—Indeed.

Senator BARNETT—and the reason the Attorney-General and, I presume, the government want to push this through as soon as possible. The issue of compensation has come up consistently. What is your response to the view that compensation should be required and paid and that a 40-year lease is effectively an extinguishment of land rights or native title?

Ms Harvey—Compensation is provided for in the bill, and it is in accordance with a number of other future act provisions. It is similar to that. Sorry—I have forgotten the second part of your question.

Senator BARNETT—I just wanted your response to the submitters this morning—in particular, their view that the 40-year lease is for a long period of time and is effectively an extinguishment of land rights and therefore a compulsory acquisition. What is your response to that?

Ms Harvey—The non-extinguishment principle applies. I can understand that it may look as if you cannot have access for a long time. But I think it will come down to the nature of each act. For some of them—say, underground sewerage or pipelines—the effect on native title may well be quite minimal.

Senator BARNETT—Could you consider that in any response you provide to the committee on notice, because that is a pretty important point.

Ms Harvey—Certainly.

Senator BARNETT—On the issue of suspension of the RDA, the minister in October 2008 promised that that would be overturned with respect to the Northern Territory intervention legislation. Apparently, according to the previous submitters, that was confirmed in June last year. A bill was apparently introduced in October 2009, and I must say I am a little sketchy about that bill. Does that bill achieve that objective of overturning the suspension of the RDA under the Northern Territory emergency powers?

Ms Cattermole—I do not have all the details of that on me but, as I understand it, that matter is currently before the Senate Standing Committee on Community Affairs. I gather that they are holding a hearing next week in relation to it, where I think those matters will be looked into further. I just do not have any further detail.

Mr Litchfield—That legislation was introduced into parliament in November.

Senator SIEWERT—I am not surprised you missed it. It was when the CPRS discussion was on.

Senator BARNETT—Thanks for that clarification.

Senator SIEWERT—The timing could be coincidental or not!

Senator BARNETT—It is obviously the government's intention to pursue that legislation but, on the other hand, it does not see this as in any way conflicting with the fact that it is suspending the RDA under this approach. It seems to be a conflict of objectives. The legislation introduced in November, which has passed us—or me, at least—by to some extent, has the objective of overturning the suspension of the RDA under the Northern Territory National Emergency Response Bill. That is one objective, but under this bill it seems that the government supports the suspension of the RDA. Is that right? Do you think there is a conflict of interest or conflict of objectives there?

Ms Harvey—I think the measures in this bill—and, as we have heard, they are very targeted measures—are really aimed at providing much-needed facilities in Indigenous communities. I do not know that I can take it much further than that at this point.

Senator BARNETT—The third last paragraph on page 5 of your submission says:

There was discussion of whether the new process would be inconsistent with the *Racial Discrimination Act 1975* (Cth) or otherwise discriminatory. There was also considerable discussion of the specific procedural rights …

A number of the submitters have put to us that it is inconsistent with the RDA. A lot of submitters, all submitters this morning at least, have said that. How do you respond to their allegations?

Ms Harvey—The government sees the Native Title Act as a special measure and it views this amendment in that context. This is a very small and targeted amendment that does readjust some rights, but overall the government sees it as a special measure.

Senator BARNETT—So this is a special measure and it suspends the RDA for this purpose—is that right? Am I summarising correctly?

Ms Harvey—I think that is correct. It certainly is seen as a special measure.

Ms Cattermole—Perhaps I could clarify. The government's position is that this amendment does not have any impact or potential impact on the Racial Discrimination Act and it is a special measure, as my colleague has described. It is not about a suspension or an impairment.

Senator SIEWERT—You class it as a special measure, which is different to it necessarily being accepted as a special measure.

Senator BARNETT—That sounds pretty confusing to me, so if you want to clarify that in your response it would be appreciated. Otherwise I will remain confused until—

Senator FEENEY—The Racial Discrimination Act was suspended effectively by Wik in 1998 and what you are doing does not disturb that suspension. Is that roughly it? You are shaking your head, Mr Litchfield. Please enlighten me.

Mr Litchfield—I think there is a degree of confusion. The Northern Territory National Emergency Response Act, through which the government has committed to restore the Racial Discrimination Act, was introduced in November last year and, as we heard earlier, is before another Senate committee. It had some explicit provisions in it that were part of the 2007 legislation in relation to the Racial Discrimination Act, which effectively designated the legislation as a special measure. This government committed to remove those. That is a very different issue from the legislation that is before this committee.

CHAIR—Yes, but I think the issue here is that the Native Title Act—the original and substantive act—is itself a special measure. By virtue of its introduction back in the 1990s it stands as a special measure.

Mr Litchfield—As Ms Harvey said earlier, that is—

Ms Harvey—That is correct.

CHAIR—The issue is whether or not these changes are consistent with that.

Ms Harvey—Exactly.

Mr Litchfield—I think Ms Harvey answered that.

CHAIR—Does the department have a view that it is consistent as opposed to having it confirmed that it is? You have a view that it is consistent—

Ms Harvey—Yes.

Senator SIEWERT—Others—in fact, all the submitters—have a view that it is not.

Ms Harvey—Yes, Senator.

CHAIR—Do you have a legal opinion that it is consistent? Does the Australian Human Rights Commission believe that it is consistent?

Ms Harvey—I would have to look at the Australian Human Rights Commission submission to see exactly what they say. We do not have legal advice that it is consistent, no.

Senator BARNETT—I suggest you take it on notice, get some advice and provide an answer to the committee. And I have a final question which I am happy for you to take on notice. The Western Australian and Queensland submissions, although brief, express their views about deficiencies in the bill with respect to community service advisers and their facilities not being covered by the bill. You have not responded to their concerns. I am happy for you to respond now or for you to take it on notice. Both submissions express those concerns.

Mr Litchfield—I will respond, Senator. The bill is clearly targeted for urgent public housing and related public facilities such as health clinics, schools or police stations for the benefit of Indigenous communities. The associated staff housing raised by Western Australia and Queensland is important, though not clearly in the same way for the benefit of Indigenous communities and it was not seen as appropriate to put those in this bill. There are other procedures to deal with securing tenure for those facilities.

Senator BARNETT—Are they incidental? Are they covered by the bill? The explanatory memorandum, as per the Queensland government submission, specifically identifies 'housing for community service staff is not covered'. Can you clarify for the record: are they or are they not covered?

Mr Litchfield—The explanatory memorandum to the bill explicitly says that the bill is not intended to cover staff housing.

Senator FEENEY—Can you tell me where it says that?

Mr Litchfield—I can.

Senator FEENEY—I could not find it and I have looked.

Senator BARNETT—How do these state governments expect to get consent to build staff housing? Do they have to go through some other process to get consent to build staff housing?

Mr Litchfield—As we have talked about, this particular bill under examination today is a targeted measure to deliver urgently needed housing and related public facilities.

Senator BARNETT—You are not answering a question, Mr Litchfield.

Mr Litchfield—Sorry, Senator. The government has taken the view that this bill is for public facilities for the benefit of Indigenous people. It took the view that there were other associated processes that could deal with staff housing and that it would not be under the purview of this bill.

Senator FEENEY—But I cannot see why you are not on safe ground here. I cannot see why the sorts of facilities those states are anxious about are not covered by them being facilities provided in connection with housing or other facilities or of incidental benefit. I do not think you have a problem.

Senator BARNETT—The EM says they have.

Senator FEENEY—Yes, that is right. That is why I am trying to find this particular reference where there is a specific exclusion. I cannot see it.

Mr Litchfield—Do you have the details?

Ms Nelson—Yes, it is in paragraph 1.6 of the EM on page 5—the first dot point.

Senator FEENEY—This is where it says:

This is intended not to cover housing for community service staff or for private ownership ...

Ms Nelson—Yes.

Senator FEENEY—But then further on at the second dot point it says:

For example, a public health clinic established primarily for the local Indigenous community but which also provided services to non-Indigenous community staff would be covered by Subdivision JA.

Then again in the third dot point it says:

Certain facilities provided in connection with housing or other facilities ...

In our universe that is a lot of wiggle room.

Senator SIEWERT—It is still confusing.

Senator BARNETT—It is a conflict.

Ms Nelson—The first dot point is about housing; the second is facilities—health, education, police and emergency services. That is to the benefit of people living there.

The **Senator FEENEY**—Yes, but I do not think Western Australia makes that distinction—perhaps I should look at Queensland—they just talk of community service staff.

Ms Cattermole—Perhaps to elucidate it a bit further, it goes to the primary rationale for this, which was a targeted approach designed to tackle the thing that was most important and most urgent, and that is the unmet need to get new and better housing and related infrastructure on the ground. So given that—

Senator FEENEY—But the bill is not confined to housing, is it?

Ms Cattermole—And related infrastructure and those other facilities, which are also, as you know, those kinds of key building blocks in terms of the Closing the Gap agenda. So it was designed to make sure that it targeted the things that were most important. Therefore, that line was drawn around things such as staff housing, which are not entirely focused on getting that public housing infrastructure on the ground.

Senator SIEWERT—Give me an example of where it would be? Not that I am arguing for the bill. But in Fitzroy Crossing staff are actually leaving town because they cannot find a house. I know of an exact situation where this has happened. Yet I would argue that that was an essential service.

Senator BARNETT—Hear, hear!

Senator SIEWERT—A healthcare worker is an essential service, yet they do not get that service in town. So you are putting people in houses but not addressing their health outcomes. I am not arguing for the bill; I am just saying that I find the distinction very difficult.

Ms Cattermole—I appreciate that example. It really was just looking for that balance and making sure this was targeted to the thing that was most urgent and the key focus of things such as the remote housing national partnership. I certainly understand and take that point, but this was about trying to find that balance between those things and targeting that vital need.

Senator FEENEY—I go back to my earlier remark. You spoke about housing—everyone has—and obviously that is completely appropriate, but the bill is not simply about housing.

Ms Cattermole—Certainly.

Senator FEENEY—The explanatory memorandum talks about fire departments and health clinics, by way of examples. So while I appreciate that is a proper focus for you, we are talking about a bill here that covers the whole gamut of infrastructure.

Ms Cattermole—It identified a particular set of infrastructure which is deliberately focused on the things that are going to target need most around health, education, emergency services and, of course, public housing.

Senator FEENEY—Which might give rise to the need for staff housing.

Ms Cattermole—Accepted. As I said, there is that balance.

CHAIR—I wanted to raise the fact that, as I understood it, proposed section 24KA and 24MD already provided for facilities for services to the public.

Ms Cattermole—That is right, but there is doubt about whether 24KA would include housing, for example.

CHAIR—So why are we not just amending the bill to allow 24KA to provide housing?

Ms Nelson—The idea behind the bill is obviously to provide a timely process. 24KA would bring in the freehold test. Native titleholders would be given the same rights as ordinary landholders, which can vary in

some cases. If that was a house, that would be a compulsory acquisition. It is not a procedure you would be looking at. There is that issue. Plus, there is a timeliness issue. That would take a little bit more time.

Ms Harvey—So you could end up with compulsory acquisition through 24KA and 24M as well. That would extinguish native title forever.

Senator SIEWERT—I will go back to the letters that we have had from Queensland and WA. They do not provide any justification for these changes. I go back to the request for you to supply some more substantive arguments against the changes. One of the issues they raise and one of the issues that I think is key to this is the timeliness. It seems to me that we have taken a very long time to provide support and infrastructure for these communities and now the argument that is being put all of a sudden is, 'You have to give up some of your rights to actually facilitate your houses.' You do not want to go down the line of ILUAs because you say they take too long. Ipso facto, for me, that means states do not really care about seeking agreements from communities, because if they did they would go down the line of ILUAs.

In WA, I am aware of the situation that the community has a different opinion to the state government about where houses should be. Under this process they can say that but they actually will not get any say over where the houses go. You are going to end up with houses that people do not want to live in. We already know that this has happened in communities. You end up with empty houses. Tell me: how is this going to make that situation any better? I can tell you a number of communities where houses are not being lived in because people do not want to live in them for various reasons. Some are cultural reasons, such as there having been a death in the house, but there are some that have been built that people do not want to live in and that is exactly the situation we are going to end up with in WA again.

Ms Harvey—Part of the bill before us enables consultation to occur with that community.

Senator SIEWERT—Yes, but not agreement. You can consult till the cows come home but if people do not agree there is nothing in this now, because it is not a new ILUA, that says that people have to agree. They can consult and be told. The processes for consultation, by the way, do not seem adequate, but I will go into that later. They do not have to agree.

Ms Harvey—Part of what is envisaged through the consultation process is location and design of housing to address those types of issues. Given that there is also a different tenure existing in these places as well—other Indigenous tenure—there would be processes under that as well for talking to affected landholders there.

Senator SIEWERT—Do they have to agree?

Ms Harvey—I mentioned earlier that, no, they do not have to agree, as with a number of provisions in the future act.

Ms Nelson—I will just add to that that without this process, if states cannot get agreement to do an ILUA to put these houses up, the only thing they are looking at is compulsory acquisition in order to get these houses up. So that is the fallback that is possible. So states have that tool available to them now, and without this process that is a tool that they may utilise.

Senator SIEWERT—Isn't the Commonwealth concerned that the money it is putting into this process in fact may build houses in places where communities do not want them and that they may not in fact be lived in?

Ms Cattermole—That is a concern, and of course that is absolutely not the outcome that we are looking for. Bear in mind that this is only one tool, small in the full scheme of the arrangements that have been agreed through COAG under, for example, the Indigenous Remote Housing National Partnership, in which there are joint steering committee oversight arrangements and a range of reporting mechanisms. It is deliberately designed to ensure that, while the states are the major deliverer, given the significance and the unprecedented nature of the investment the Commonwealth is working with the states so that we achieve the best outcomes for people on the ground. That will involve things such as those kinds of discussions. There is absolutely no intention of building houses where people do not want them. If we look at the NT experience, the consultation process that has occurred through that has expressly led to people being more involved in the decision making about where houses go, what kinds of houses there are and the planning for the future of housing. In relation to site matters, this legislation only applies where there are regimes in place through the jurisdictions that cover it off and ensure that, for example, houses will not be built in places of significance for people. So there are a range of mechanisms in which the Commonwealth is significantly involved to ensure that we get the best outcomes for people.

Senator SIEWERT—You do not actually know what examples the WA government has for justifying why we need this legislation.

Ms Cattermole—I said earlier, Senator, that I do not have any examples with me today. I will certainly take on board the comments you have made and seek some further information.

Senator FEENEY—I have asked most of my questions in other members' time, so I thank my colleagues for their forbearance. But I want to harp on a little bit more about this point of the states and the predicament they are in. The Queensland letter/submission to this inquiry ended by saying:

It would be disappointing to say the least, if the State found itself in the circumstance where infrastructure necessary to "close the gap" could be provided but the operation of that infrastructure was frustrated because of the timeframes required to address native title for staff housing.

The Western Australian submission to us finished with some words that essentially have the same meaning. That is, as you would appreciate, powerful political rhetoric to suggest that essentially native title was creating delays that were preventing the provision of basic services to Aboriginal people. That obviously has everybody's attention. But, in the continuing aspiration for evidence based public policy, both of them fail to make that point out. In their submissions, both of those states have failed to give us any examples where native title provided that barrier.

I cannot help but suspect that FaHCSIA could write volumes on some of the problems that you have encountered in delivering these services. Can you tell us anything at all about how successful those two state governments or, indeed, anyone else have been in pointing out to you examples of where native title has been an impediment? You sound to me like you are persuaded that is the case. Can you tell this inquiry anything more about how and where that is the case?

Ms Cattermole—I personally do not have any practical examples that I can draw on today with appropriate specificity, but I have certainly undertaken to pursue those and provide them.

Senator FEENEY—Obviously we want to avoid a situation, which I am sure you would agree is completely unthinkable, where state governments are using that as an excuse for their own failings.

Ms Cattermole—Absolutely, Senator.

Senator FEENEY—And we do not want to be drawn into public policy debates which effectively are pointless.

Ms Cattermole—Yes, but I think it is important to bear in mind just a couple of things, and I apologise I have said most of them before. The states are the major deliverer under this partnership, so they are driving this on the ground and it is important that we respond to the concerns that they have consistently raised through this. Secondly, this is a very targeted amendment and it is designed to be one tool amongst a suite of many. Certainly, as I indicated earlier, we are working very closely with all of those jurisdictions in a range of ways—so it is not just about that; there are a whole range of other ways—and we expect the states to perform well and to deliver, as they have committed to under the agreement.

Senator FEENEY—But I guess as you craft tools at their request you need some level of satisfaction that they are necessary. Anyway, I think we have probably laboured that point as far as we can.

CHAIR—Ms Cattermole, I just want to reiterate that you say they have consistently raised them as concerns with you, but if you read the Queensland and WA submissions to this committee they do not raise any concerns that reflect your words. In submitting to us, they only tell us about the deficiencies of the bill. Neither of those governments justify and satisfy our need to know why they want the changes to the bill, and that is a problem with their submissions.

Ms Cattermole—I understand, Senator.

CHAIR—With regard to the information you are going to get to us, we will need that early next week because we are due to report on the 23rd. We need about a week to 10 days for our own process to finalise the report, so it would be useful if you could get out it to us by Monday or Tuesday next week.

Ms Cattermole—Certainly, we will meet that timetable.

CHAIR—Thank you very much, and thank you for your submission and for your time today. I thank all witnesses who have assisted the committee in our hearing into the Native Title Amendment Bill [No.2]. The hearings on that bill have now concluded.

Committee adjourned at 1.07 pm