COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Native Title Amendment Bill 2006

TUESDAY, 30 JANUARY 2007

SYDNEY

BY AUTHORITY OF THE SENATE

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **http://www.aph.gov.au/hansard**

To search the parliamentary database, go to:
http://parlinfoweb.aph.gov.au

SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Tuesday, 30 January 2007

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

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

Senators in attendance: Senators Bartlett, Crossin, Johnston, Payne, Siewert and Trood

Terms of reference for the inquiry:

To inquire into and report on: Native Title Amendment Bill 2006

WITNESSES

ANDERSON, Mr Iain Hugh Cairns, First Assistant Secretary, Legal Services and Native Title Division, Attorney-General's Department **72**

BECKETT, Mr Dominic Patrick William, Solicitor, Chalk and Fitzgerald Lawyers and Consultants **2**

CHALK, Mr Andrew John, Partner, Chalk and Fitzgerald Lawyers and Consultants **2**

CHARLES, Mr Christopher Joffre, General Counsel, Aboriginal Legal Rights Movement **32**

DELEFLIE, Ms Anne-Sophie, Assistant Director, Social Policy, Minerals Council of Australia **49**

DOEPEL, Mr Christopher, Registrar, National Native Title Tribunal **72**

HAYTER, Ms Frances, Member, Indigenous Relations Working Group, Minerals Council of Australia; and Director, Environment and Social Policy, Queensland Resources Council **49**

JONES, Ms Katherine Ellen, Acting First Assistant Secretary, Indigenous Justice and Legal Assistance Division, Attorney-General's Department **72**

LEVY, Mr Ron Michael David, Principal Legal Officer, Northern Land Council **64**

LOFTUS, Mr Ian Dawson, Policy and Public Affairs Manager, Association of Mining and Exploration Companies **45**

MARSHALL, Mr Steven Anthony, Assistant Secretary, Claims and Legislation Branch, Native Title Unit, Attorney-General's Department **72**

MASON, Ms Bonita, Acting Executive Officer, National Native Title Council **14**

McAVOY, Mr Anthony Logan, Barrister, Queensland South Native Title Services Ltd **36**

NEATE, Mr Graeme John, President, National Native Title Tribunal **72**

ROCHE, Mr Greg, Assistant Secretary, Land, Department of Families, Community Services and Indigenous Affairs **72**

STEWART, Mr John William, Chairman, Native Title Taskforce, National Farmers Federation **26**

VINCENT, Mr Philip James, Counsel, National Native Title Council **14**

Committee met at 9.02 am

CHAIR (Senator Payne)—Good morning, ladies and gentlemen. Welcome to this hearing for the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Native Title Amendment Bill 2006. The inquiry was referred to the committee by the Senate on 7 December 2006, for report by 23 February 2007. The bill focuses largely on the framework for determining native title claims and seeks to address the effectiveness of representative Aboriginal and Torres Strait Islander bodies; coordination and communication between the Federal Court and the National Native Title Tribunal; the effectiveness of Native Title Tribunal mediation; and the functioning of prescribed bodies corporate, the bodies established to manage native title once it is recognised. The committee has received 11 submissions for this inquiry. All of those submissions have been authorised for publication and will be available on the committee's website.

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

[9.04 am]

BECKETT, Mr Dominic Patrick William, Solicitor, Chalk and Fitzgerald Lawyers and Consultants

CHALK, Mr Andrew John, Partner, Chalk and Fitzgerald Lawyers and Consultants

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

Mr Chalk—I appear in a personal capacity as a legal practitioner who works in the area of native title.

Mr Beckett—Like Andrew, I appear in a personal capacity.

CHAIR—I understand that you have not lodged a submission, which is fine. You may wish to make an opening statement in relation to the legislation and then we will go to questions.

Mr Chalk—Both Dominic and I work in a firm that specialises in Aboriginal land matters. I should indicate at the outset that our comments are made purely in a personal capacity and do not necessarily represent the views of any of our clients. My background in native title goes back to the drafting of the legislation and, in Aboriginal land matters prior to that, to work under the New South Wales Aboriginal Land Rights Act in particular. It is in that context that we have some very serious concerns about the current bill. We would say at the outset that we can see that it is a bill that has been prepared in good faith, trying to address the very serious problems that exist in terms of the timely progression and resolution of native title matters. We would also say that native title is an extraordinarily complex area of dispute resolution and that it is always dangerous to generalise. If I say such and such is generally the case, there will inevitably be instances that run directly contrary to that. Having said that, there are a number of critical aspects in which this bill does run in the wrong direction if what is sought to be achieved is a timelier and more cost-effective resolution of native title claims.

From my perspective, there are four principal areas I would like to draw to the committee's attention. Two of them concern native title representative bodies—that is, the issue of strategic plans and their role and also the process for, if you like, the re-recognition or the ongoing recognition of native title representative bodies. The third issue is the role of the National Native Title Tribunal in mediation of disputes—in particular, its role vis-a-vis that of the Federal Court. The final issue is one that is not directly raised by the legislation itself but has been identified by the Attorney-General as a principal cause of delay, and that is the issue of anthropologists and the evidence that they are commonly required to give in native title proceedings.

In relation to strategic plans, at the moment native title bodies are required to prepare strategic plans. The proposal in the bill is that that no longer be the case. I understand that strategic plans are seen as being additional red tape. Unfortunately, I disagree. I concede that some rep bodies prepare strategic plans as a pro forma exercise without sufficient consideration to exactly what it is that they intend to do. In part, that may be because they

make a conscious decision that they want to keep their plans as confidential as possible and that is not an unusual thing for regular litigants.

However, I believe that strategic plans are critically important for a number of reasons. Firstly, native title does take a long time to determine, and there is a very high turnover within native title representative bodies. If you take, for example, that a claim might, unfortunately at present, take 10 years to resolve from the date it is commenced to when a decision is reached, there may be a very significant turnover of staff within that native title representative body in that period. It is the strategic plans that provide a compass for the organisation, effectively stopping it going around in circles with each change of CEO or change of board. That might be occurring on a regular basis, but the strategic plan provides a marker as to where the organisation has come from, why it has chosen to take a particular course and how it sees its objectives being carried out. That is incredibly important where resources are so limited. They have to be applied very carefully if you are going to get outcomes in native title matters. If there is no proper guide as to how they are going to spend their money, the risk is that they keep reinventing the decision every few years and progress is not made.

Why do they need to be such public documents? I think the answer to that is that the court, firstly, has to know what the priorities are for the organisation. It may have 20 claims before it, and it wants to know how the rep body has prioritised them so that it can make programming orders that are not inconsistent with the resources that the rep body has to apply to those matters. Equally—and it is particularly important with this proposal for ongoing or periodic recognition—there needs to be an objective standard against which the minister can measure a body's performance. We know that the resources to do the tasks fall significantly short of what is required and that there will be complaints and issues about performance. But a public strategic plan that has been endorsed by the minister does provide some objective standard and a public standard that these bodies can be assessed against.

The public nature of the plans is also important for the constituents of these bodies, the potential native title claimants, so that they can understand what the objectives of the organisation are. There are always accusations of nepotism or favoured treatment in decision making by Aboriginal organisations, often very unfairly. Having a public plan brings a very important level of transparency to that decision making. It is not simply red tape; it has a fundamental role in ensuring the good governance and a strategic governance of the organisation and its limited resources. It is also relevant to state parties and to other parties—farmers' groups and others—so that they can allocate their resources in a way that has regard to what the rep body has publicly said it is intending to do. They are my brief comments on strategic plans.

The issue of recognition, or ongoing, periodic recognition, I think is also a very critical one. It is ironic that the explanatory memorandum speaks of cutting red tape by abandoning the strategic plans but imposes a very high burden on rep bodies in terms of constantly having to go back and reapply to be able to do their job. I refer the committee to what has become known as the Potok report on NTRB professional development. It was essentially a study of why NTRBs had trouble retaining their professional staff. One of the difficulties they face is the uncertainty over their status.

The proposal is for recognition as short as one year. In one year you will be doing nothing other than preparing your application for the next round. But even if you allowed for three years, the problem is that, if you lose a member of staff halfway through that period, the best you can do by the time you finish your recruitment process is offer a 12-month contract. It is such a specialised area, and if the matters themselves are taking up to 10 years or longer to resolve what you are essentially offering a lawyer, for example, is the opportunity to participate in one-tenth of a case. Professionally, it is just not an attractive option and it makes the job of the rep bodies that much harder. The issue which I think the proposal is trying to address is how you deal with rep bodies that are not performing, and I think there are much better ways of doing that than simply subjecting all rep bodies to this ongoing process of recognition.

I am conscious of time and I will try to speed up my comments. In relation to the role of the tribunal and the court, I have to say that I have serious concerns about this proposal. I do not think the tribunal has been effective in its mediation function, as a general rule. The experience in native title is not that different from the experience in any other area of dispute, and that is that without the threat of the court taking the matter into its hands and reaching a determination it may not be in the interests of any party. There really is not an incentive to settle for some parties. Delay in any form of litigation will favour one party, and in the case of native title it most commonly favours those parties that have an interest in waiting, being governments.

That is not always the case. As Mr Hiley noted in his report, there are many claims where the parties have no interest in seeing the matter moved to a resolution; they are happy to sit there enjoying certain procedural rights without ever wanting to be tested. Where it really bites is in those claims where there is good evidence of native title and people die waiting to see some advancement. Unfortunately, my experience of the tribunal is that a millimetre of advancement warrants a celebration and cause to tell the Federal Court that everything is going swimmingly.

In the early days of the tribunal, particularly where there were Federal Court judges appointed as members, they would quickly look at a matter, assess whether there was any real prospect for settlement and move it back into the court stream if they felt that was not the case. More recently, there are very few, if any, instances that I am aware of where the tribunal have actually recommended to the court: 'No, this matter is unlikely to be settled. We suggest that mediation should cease and it should be back in your hands.' The problem with the proposals as far as the tribunal go is that they set up a number of other diversions by which parties with an interest in delaying the resolution of the matter have options to play around in the paddle pool without being seriously confronted as to the issues.

Mr Hiley rightly noted that mediation generally does not get serious until parties have had a good look at the evidence. It should be for the Federal Court to program matters through to a point where at least the written evidence is there for the other parties to see. If mediation occurs then we would suggest that there should be a window after that evidence is on where the mediation can then occur—via the tribunal, no problem, but where it is a narrow window so the parties have to put their evidence on and it is managed through the court. It is not a cheap process, but it is certainly a lot cheaper than spending years and years in mediation.

In the Wellesley Islands claim, which we conducted, even though it was ultimately determined by litigation, the process of putting the evidence on occurred within about a year and resources were available for that. But were we left to mediate that matter, and were it not for the fact that the Commonwealth said outright, 'We're not prepared to mediate this one,' we would still be there mediating it. The last issue I wanted to raise before questions was this issue—

CHAIR—Can you do that briefly, Mr Chalk?

Mr Chalk—It will be very brief. It is the issue of anthropologists. It is not dealt with in the legislation but it is a significant reason for delay. One way of addressing that would be to make clear that the issue of an anthropological expert's report in proceedings is not a question of admissibility but one of weight. At the moment, anthropologists are reluctant to become involved in native title matters because of the dilemmas that have occurred as to the admissibility of their reports. They are used to writing in a particular style. For experts generally, the court requires a different approach. The court's approach is designed around medical negligence and matters where there is a very small and defined issue usually for determination by experts. The problem with native title is that the field is enormous as to what they are required to cover. You cannot do that effectively, I think, within the court's existing rules. A better way of approaching it would be to remove the requirements for admissibility in relation to experts' reports and adopt some of the practices, for example, that have been applied in the New South Wales Land and Environment Court and the New South Wales Supreme Court in relation to experts. I think you would see a very much faster progression of matters certainly at the litigation end. They were my main comments.

CHAIR—Thank you, Mr Chalk. Mr Beckett?

Mr Beckett—I will not make any opening address but I would be happy to address questions.

CHAIR—Let me start with two brief questions and then we will go to the deputy chair. In terms of the consultation process that has led to the development of this legislation, did your firm play any role in that?

Mr Chalk—We did play a role, though not in our own capacity. But we have advised parties on the bill and on the earlier stages, including the Hiley-Levy report.

CHAIR—Let me just take up briefly your first point in relation to strategic plans. In the combined submission to the inquiry of the Attorney-General's Department and the Department of Families, Community Services and Indigenous Affairs they say in relation to the changed proposals for strategic plans that this area is a dynamic environment and they found that the plans are often concluded in such general terms that they are so broad they are not particularly informative, nor, I think they say, useful. They propose to remove that requirement but at the same time to maintain a requirement for the production of what are described as:

... detailed annual operational plans, including estimates of costs and timeframes beyond the immediate 12 months ...

That is an ongoing part of the process. Why is it such a problem to remove strategic plans if that requirement continues?

Mr Chalk—At the moment the strategic plans have to be approved by the minister. Many rep bodies do take up the option of providing quite detailed strategic plans. Once they are approved by the minister, in the past grant conditions have been tied to implementing those plans. It is a means of rep bodies saying to the court, 'Here is our public statement of the detail of what we want to do, and which the minister and our grant conditions oblige us to do.' It may be that a rep body does not want to take that path and then does not have the option of telling the court its prioritisation in that way. It may find another way. But the transparency of the strategic plans is what I think is so important. It is the fact that they do have that statutory foundation.

CHAIR—If I have read this correctly, the operational plans will still be publicly available documents, but they do not have to go to the expense of, for example, producing documents for printing and tabling.

Mr Chalk—I am not sure about that. At the moment, there are operational plans but they are not public documents; they are documents that arise under the grant conditions.

CHAIR—Okay, we will check that with the department.

Senator CROSSIN—Mr Chalk, I want to go to two areas you have touched on. With regard to the registration of the native title rep bodies between one and six years, my understanding is that that is exclusively at the invitation of the minister.

Mr Chalk—That is correct.

Senator CROSSIN—So we could see a whole new world of rep bodies. We could have legal firms like Clayton Utz, as opposed to representative bodies that Indigenous people have endorsed.

Mr Chalk—In theory that is possible, but I do not see it as really likely. The real problem is the one that Aboriginal legal services confronted when their services were put up for tender—that is, they had to divert such enormous resources to that process of re-recognition. The tender process, in this instance, will be applied to re-recognition, with no certainty—given that, as you say, the minister does not have to reinvite—that they will be called on to reapply and, if they do reapply, that it will be accepted. The mischief seems to be those bodies that are not performing their functions effectively. There are ways of streamlining a response in the legislation that do not necessarily catch each and every rep body, no matter how well they are performing.

Senator CROSSIN—There are a couple of issues there. Doesn't this proposed change actually remove from Indigenous people their right to choose the native title rep bodies?

Mr Chalk—It certainly does in part, although it might be said that the existing system suffers from some of those faults as well. Ultimately, it is the minister's choice as to who the minister recognises as the rep body.

Senator CROSSIN—What is the process now for rep bodies that are not performing up to standard and, as I think you said in your opening comments, why are we changing the whole system and targeting all the native title rep bodies rather than just improving the system of accountability or quality?

Mr Chalk—The existing act does provide mechanisms for the withdrawal of recognition of a body that is not performing. The view of the government—I obviously cannot speak for them—may be that those mechanisms are too slow and that the level of procedural fairness afforded may be too onerous. So long as there is transparency, those issues can be looked at without targeting all rep bodies. Again, an important reason for the strategic plan is that they provide an independent set of standards or marks against which performance can be assessed. If a rep body wants to put in a very general strategic plan it runs the risk that it will be very easy to assess it down.

Mr Beckett—I want to address the point about how a rep body's standard is maintained. It is more often done not through the legislation as a legal process but rather through the process of controlling the funds which they receive. So a representative body's performance will be linked to their funding. That, rather than the formal withdrawal of recognition, is the more common lever that is used against them.

Senator CROSSIN—Finally, I want to ask you about the way in which the tribunal and court will now interact. A number of the submissions have raised some doubts about the quality of the tribunal mediation, and the Federal Court submission is certainly not particularly positive about the idea. What do you believe would need to be provided to the NNTT to improve the mediation process that exists?

Mr Chalk—Part of the problem, as I think we mentioned before, is structural—that is, ultimately the tribunal does not make a determination. It can make findings under these new provisions. We do not know yet how they will operate. But it is certainly not a court. There are some very good members in the tribunal who, within the structural constraints, do the best job they can in mediating. There are also some very ordinary members within the tribunal in my experience, I have to say.

Senator JOHNSTON—A bit like judges.

Mr Chalk—A bit like judges. Although, by and large, I have to say that I have a much greater degree of confidence in the quality of the Federal Court than in the tribunal. I think the main reasons are structural.

Senator CROSSIN—Are you convinced or not convinced that a move to provide more mediation to the tribunal will actually enhance or fast-track processes?

Mr Chalk—I think it will have the reverse effect. I strongly believe that.

Senator JOHNSTON—Thanks, Mr Chalk, for your comments. I think they are very helpful. In the situation that we are confronting is it not the case—and I think you and I would agree—that we have, through the effluxion of time, the effective extinguishment of native title by virtue of our dependence on viva voce evidence? How is the Attorney to address that? You have said there are some solutions. I think cost and the state governments' intransigence are the two major stumbling blocks. It strikes me that the Attorney is having a go at seeking to resolve that. You say that he is going down the wrong path. Tell us what you think the right path is.

Mr Chalk—In the Wellesley claim, for example, I think there were something like 52 witnesses for four claimant groups. Their evidence was heard in full in 12 days of hearings.

That was where a matter was not able to settle and had to be litigated. The reality is that so much of the work that goes into a native title claim is done whether you take the mediation path or you take the litigation path. That is all the pretrial work in assembling evidence, and that is where a significant part of the cost is. The claims, as a rule, do not settle until that work is done, whichever course you take. The difficulty with mediation is that where it is not in at least a parallel process with the litigation—if it is running a separate process or off to the side—then nothing happens. People will just sit around, but it does not mean that cost is not being incurred.

Senator JOHNSTON—Let's talk about Wellesley for a minute. That involved, I think, a very large proportion of land already extinguished by freehold. Is that correct?

Mr Chalk—No, it was a sea claim.

Senator JOHNSTON—A sea claim. That is similar. There are not the broad categories of different tenures.

Mr Chalk—Tenure was not an issue.

Senator JOHNSTON—It was not an issue.

Mr Chalk—No.

Senator JOHNSTON—The main area that I see in Western Australia, for example, is virtually hundreds and hundreds of classifications of land that have to each be addressed from the perspective of both common law native title rights and statutory rights, and that is an enormously expensive process for rep bodies, for respondents and for the state government to undertake. This attempts to say: 'We are going to emphasise mediation. We are going to give mediation a bit more grunt to try and avoid those costs,' because those costs, I think, are prohibitive.

Mr Chalk—One response to that would be that our experience of mediation is that the states will say, 'We'll do it sequentially; let's see your connection evidence first. That will take two years, then we'll look at tenure. That will take another two years plus.' So it is four years before they get to a point where they are willing to start any serious talks. When matters are with the Federal Court, if a matter is prioritised—and this is something that would need to be done through the case management principles and with discussion between the rep body, the state, the other parties and the Commonwealth—it can, I think, be advanced very much faster than when both state and claimants may be preparing evidence simultaneously. The states on the whole have not settled native title without satisfying themselves that the tenure warrants it. So they will do that work whichever course is taken. The issue is how much time they want to do it.

Senator JOHNSTON—Is it a very big job?

Mr Chalk—Yes.

Senator JOHNSTON—Let us take the South West Aboriginal Land and Sea Council's Noongar claim, for instance. That is just years of wading through folios of land tenure documents. Someone has to pay for that. There is duplication. There are the legal representatives of the claimants and of the state—that is two—and if you throw in some respondents, we are talking millions of dollars.

Mr Chalk—It is primarily the state that will take that responsibility.

Senator JOHNSTON—The lawyers have a responsibility to the claimants to make sure that if they are going to cede any titles they are doing the right thing.

Mr Chalk—What happens in practice is that they will check the work that the state has done.

Senator JOHNSTON—It is all work.

Mr Chalk—It is work but as yet no mediation in a complex matter has proceeded to a settlement, as far as I am aware, without the tenure work being done. That is in the hands of the state and they can make the call about how they want to spend their resources because they are the ones that are primarily responsible for it. If they choose to waive a very detailed investigation of tenure, that is in their hands.

Senator JOHNSTON—They have not waived any to this point, that I am aware of.

Mr Chalk—No, but these amendments will not actually have any bearing or effect on shortening that process.

Senator JOHNSTON—Give me a solution.

Mr Chalk—I think the solution, as we have said already, is this: if the Federal Court can manage it, the fear on the part of all parties of it being taken out of their hands will drive them to compromise. It is the same whatever type of litigation you are talking about. In New South Wales we do a lot of work under the Land Rights Act. We have claims that are 20 years old and are still waiting. The only difference in New South Wales is that if the minister waits 20 years before making a determination about a claim, the prejudice is against the minister rather than the claimant. In native title it is the opposite—the delay hurts the native title claimant. It is just so easy for the states to say, 'This tenure work is going to take us 10 years.' Bennell was a good example of where the state tried to find a short cut, and understandably. But then, as they moved closer to a decision, panic obviously set in and they tried to pull out. But that was the state's choice and that option is always open to a state, to ask the court to test connection first. These are very, very difficult issues.

Senator SIEWERT—I would like to follow up on that. Your contention, if I understand it correctly, is that these changes are in fact going to extend the process and delay it even further rather than shorten it?

Mr Chalk—That is right, for the simple reason that parties that do not want to get to the end point have more options to delay matters.

Senator SIEWERT—Can I go back to recognition and re-recognition. My understanding from some of the submissions is that, for the transition period, the minister writes to all rep bodies and invites them to apply but, after that transition period is set and they are given the one-to-six-year time frame, there is no requirement for the minister to invite rep bodies to apply. Is that your understanding of the legislation?

Mr Beckett—That is right. It seems to be a broad discretion—the same discretion which the minister has at the moment.

Senator SIEWERT—That is after the transition period?

Mr Beckett—That is right.

Senator SIEWERT—While the changes are being made about recognition to limit the time, that is not so now, is it?

Mr Beckett—No.

Senator SIEWERT—So they are changing that and saying, 'You can only be registered if you are invited by the minister, for this transition period, but there is no requirement after that.'

Mr Beckett—That is right.

Senator SIEWERT—So what could happen after that? Would it be up to the minister's discretion as to whom he invited?

Mr Beckett—It would be completely up to the minister about whether to invite and, if he or she decided to invite, who was invited. There is nothing in the act or in the bill which sets out how the minister is to make those decisions.

Senator SIEWERT—I want to pick up finally on the question that Senator Crossin asked. It seems to me that we are moving from a representative model to a representation model. It allows, for example, potentially non-Indigenous people to be on so-called representative bodies. That seems to me to be moving to a representation model rather than a representative model. Would that be your interpretation?

Mr Chalk—There has always been that argument, but these amendments certainly make that position much clearer.

Mr Beckett—And one of the things that does that is the proposed repeal of the strategic planning provisions because one of the aspects of the representative nature of these bodies is the process of setting regional priorities. It is a body which could look at its region as a whole, look at the potentials, and decide where it was going to put its limited resources. If the body is merely a representation body, working from year to year, it is much more like a legal aid body without any planning involved as to what is achievable and the time period over which that could be achieved and so on.

Senator TROOD—Mr Chalk, in relation to mediation: the bill has provisions in relation to negotiating or mediating in good faith, which might, on the face of it, go some way to addressing your concerns. What is your view of those provisions in that bill?

Mr Chalk—I certainly think they are a step in the right direction. I should also make it very clear that I have seen instances where claimants, applicants, have not been negotiating in what I would call good faith. Very often I have seen states and other parties doing it as well.

The difficulty is a practical one. If a party—a state party, for example—says, 'I cannot move this forward because I haven't got the resources; I have 150 other claims that I have to deal with,' it is impossible to say that they are adopting a position of bad faith. But the reality is that they might be saying that in 150 matters. And, again, it is this issue of who does delay advantage.

One other way of addressing it, which has not been considered by the review, would be to simply make mediation public. And I know the downside in that, but these are public bodies.

It may be that concessions are not admissible in court, but that in itself is not a reason why the public should not be allowed to sit in and hear what the various parties are saying.

Senator JOHNSTON—It is a cultural issue, is it not?

Mr Chalk—Very often not. There may be in particular instances, and there could be a basis for restricting some information. But taking the starting point, as Mr Hiley does, that mediation does not go very far until evidence is filed, the sensitive material is going to be in that evidence and any restrictions that are placed on that can flow through. As to the position that the parties adopt in the mediation, I think that having it open to the public will provide a greater level of scrutiny of the parties and the positions they take.

Senator TROOD—As I understood it, your position in relation to mediation was that, unless there is a sanction of the court, it is not going to be effective apart from that point you just made. That is not provided, as I understand it, in the good faith provisions. There is a reporting requirement, obviously, but it does not go as far as you wanted to go with it.

Mr Chalk—No, but it is very difficult. Ultimately we accept that if a party does not want to mediate then the only way to determine it is through the court. The fact that they are not prepared to mediate may be for reasons that are entirely their own, and making a finding of good faith or otherwise really does not take the matter far in terms of the ultimate issue. It may be that matters do have to go to court to be determined. In the Wellesley case, for example, the Commonwealth refused to even attend the mediation conference. They said, 'No, we think this is a matter that has to be to determined by the court because of the issues raised.' We accept that that is a legitimate position. There will be those cases. But reporting back to the Commonwealth minister that no-one turned up from the Commonwealth is not going to really affect the outcome. Making it public that the Commonwealth was not prepared to at least turn up and hear what was going on may encourage people to be on their best behaviour. But ultimately the court has to deal with the facts the law and these other issues are extraneous.

Senator TROOD—I can see the point that that kind of response is not going to make a lot of difference. Could you see ways in which you might enhance or strengthen the good faith provisions of the bill that might make them more effective?

Senator JOHNSTON—Like a definition?

Senator TROOD—Detailed conduct—

Mr Chalk—There is a proposal for codes of conduct. It remains to be seen whether that means not swearing at the person sitting opposite you or whether it goes to the more structural issues as to how you are allocating resources to the progression of this matter. They are very difficult things to define. It is more a sense and smell type—

Senator TROOD—A sense and smell test.

Senator BARTLETT—I missed the start of your presentation so I may be asking something you outlined the start. I want to ask a couple of very broadbrush questions, given the time. I understand from the evidence you have given you are concerned that some of the changes here may actually make things worse in terms of delay and the like. Are there any provisions within the bill that you do think have merit that should be singled out?

Mr Chalk—There are quite a number. We did prepare a short table of those provisions which we had the most concern about and some suggestions. We would be happy to provide the committee with that.

CHAIR—If you would like to table that, that would be helpful for the committee.

Mr Beckett—We will do that.

Mr Chalk—I think you can assume that those provisions that are not specifically referred to may well be an improvement. One example is splitting claims. I think if an area can be settled then it is in everyone's interests that that be dealt with separately.

Senator BARTLETT—Understandably you are focused on the parts that are causing you concern. You are not necessarily saying the whole thing is problematic.

Mr Beckett—No.

Senator BARTLETT—You are saying that these parts are problematic but there are a range of other measures that would be useful to put through.

Mr Chalk—In our earlier evidence in very broadbrush terms we identified those aspects that we thought were of most concern. They relate mainly to the tribunal's new functions, the removal of strategic plans and the ongoing recognition process for native title representative bodies.

Senator JOHNSTON—There is one last issue: the benchmarking and the standardisation of performance of these rep bodies, given that they act for a very large number of probably quite disenfranchised people in the nature of the large claimant groups that hide behind the named claimants. I detect from these amendments that the minister is saying, 'The buck will stop with me. So if claimants are unhappy with the performance of their rep bodies and the prioritisation of various claims come to me and I can review these matters.' There is no such mechanism in place at the moment. People just like it or lump it when the rep body makes a decision as to who is going to have their claim advanced. I think that is what the minister is saying. What is the solution to that problem?

Mr Chalk—Already—certainly under ATSIC and then under ATSIS—there have been reviews of rep bodies where there were serious or ongoing complaints by a significant section. That power is there already and was used. There were rep bodies that are no longer rep bodies; they lost their recognition because of their performance. I think that you must have a mechanism to take away recognition where bodies are not performing but that does not mean to say that you jump to the other extreme and require every body to go through quite an intensive process on a regular periodic basis.

Mr Beckett—I might add that another way that that can be addressed is the way it is currently addressed, which is to deal with those issues upfront, in that a strategic plan is prepared and everybody can see three years in advance where the priorities are.

Senator JOHNSTON—Weren't the strategic plans very vague and did not disclose who was going to be in what order?

Mr Chalk—Some were very detailed. We could provide the committee with examples of detailed ones that say, 'This claim, then that claim, then the third claim,' and which proportion of resources go to which matter.

Mr Beckett—And the representative bodies received a lot of guidance, if you like, from ATSIS—as it was at the time that these plans were prepared—about what their plans had to look like. We were a little critical of those planning guidelines precisely for the reason that they led to the development of plans which were big on rhetoric but did not actually involve the hard priority decisions if you did not want to make them

CHAIR—Mr Chalk and Mr Beckett, thank you very much for appearing today and for providing us with this table which gives a summary of the comments that you have been making. If we have any further issues to pursue with you we may come back to you with question on notice.

[9.54 am]

MASON, Ms Bonita, Acting Executive Officer, National Native Title Council

VINCENT, Mr Philip James, Counsel, National Native Title Council

CHAIR—I welcome our next witnesses representing both the National Native Title Council and Goldfields Land and Sea Council, I understand. The National Native Title Council has lodged a submission with the committee, which we have numbered nine. Do you need to make any amendments or alterations to that submission?

Mr Vincent—No, thank you.

CHAIR—I invite you to make a brief opening statement and then we will go to questions from members of the committee.

Mr Vincent—Thank you, Madam Chair. The National Native Title Council very much appreciates the opportunity to come before the committee and make some submissions about these proposed amendments. As has been set out in the submission, the council is a fairly recently formed body of the native title representative bodies and the native title service providers. I am advised that it was incorporated as a company limited by a guarantee towards the end of last year. I think there are about 17 native title representative bodies and native title service providers and some 14 of them participate. Bonita Mason, who is with me, has prepared some notes just for your committee outlining the background to the council and its formation. Perhaps they could be added to the submissions?

CHAIR—I will just have those collected for you and we can take them as a tabled document. Thank you very much, Mr Vincent.

Mr Vincent—The Hiley and Levy report, which was the government review on native title processes, reported about some horrendous experiences of claimants coming before the courts: time taken for claims to be resolved, horrific objections taken to anthropological reports—thousands of objections rather than hundreds; this is a common experience—and Indigenous witnesses being cross-examined by up to eight to 10 lawyers so that, in the end, they do not actually know who their mother was or where they came from. These instances can be found in that report on page 18. It forms an appendix to the submission by the Attorney-General and FaCSIA. I think it is attachment C. That is certainly a problem which has confronted claimants, and attempts to make the process less legalistic are very much supported by the Native Title Council. It is a question of how that is to be done in a sensible, non-partisan way.

The problem can be identified as having two causes. Firstly, the Wik amendments in 1998 amended section 82 of the Native Title Act to say that the court was to be bound by the rules of evidence unless it otherwise ordered. The practice of the court has been to apply the rules of evidence quite strictly except in exceptional circumstances. Hence you have, as I mentioned, anthropological reports which are the subject of thousands of objections by many lawyers in the one proceedings, such that, as I think Mr Chalk mentioned, anthropologists are actually very reticent these days to even involve themselves in the proceedings because of the different language of reportage and the expectation on the part of the courts. The second

reason we put forward as to what has happened to the native title system is simply wholesale opposition to claims by states, territories and the Commonwealth, to the extent that most claims are being opposed and then being taken on appeal. There are some interesting statistics in the Attorney-General's submission at page 1 of attachment B, if you wish to have some sort of statistical understanding of the process.

Having said that, and we make the point in our submission, there has been progress. You are dealing with a situation in which the Native Title Act was to be a new relationship between Aboriginal people and the mainstream community about land redressing the wrongs of a couple of hundred years, and you cannot expect things to be resolved in 13 years. The starting point was some 1,683 claims filed, and 1062 have been resolved in one way or another as at January—this is from the Hiley and Levy report—leaving only 621. I am pleased to advise that in the Attorney-General's report that is down to 604 as at June.

Nevertheless, we support simplifying the process. It appears to us that the way that it is being tackled by the government with these proposed amendments is firstly by punishing representative bodies by making their tenure so indeterminate that they cannot operate in any confident way. Indeed, as the Minerals Council of Australia advised in their submission, it also will make it very difficult for third parties to deal with them on the basis of an expectation of certainty. So strategy 1 is to punish representative bodies. Strike out is strategy 2: investing powers in the National Native Title Tribunal at the expense of the Federal Court when many people suggest that the National Native Title Tribunal has not at present got the capacity to fulfil its expected functions.

In relation to the representative bodies, the Attorney-General's submission at page 9 gives a little bit of an insight into the fact that the attack is well and truly on the representative bodies. It suggests that representative bodies need to be more focused on outcomes and work harder in finalising claims and agreements. There have been some problems with representative bodies in the past but they are huge organisations with statutory functions and so far are Aboriginal bodies. I suggest that it is to their credit that they have been able to achieve the outcomes that they have.

The Minerals Council of Australia in their submission suggest that the proposed amendments are overly onerous. That is on page 2 of their submission. The Office of Native Title of WA on page 2 of their submission talk about the important functions carried out by and the need for certainty of representative bodies. They are two third parties who deal with native title claims who see the dangers, I would suggest—and you will have the opportunity to ask them about that—of periodic recognition. The problems with lack of continuity are found in the loss of corporate memory, the inability to have effective infrastructure and staffing and the lack of certainty for outsiders dealing with them.

One of you suggested that there had been a change from representative bodies being truly representative to them simply representing Aboriginal claimants in the legal process. That does seem to be the case. We see a move towards having non-Indigenous bodies taking over those functions. There are a lot of hungry solicitors out there who would not mind the work. We would suggest that they are not going to be less expensive; they are going to be more expensive. And less effective, because they will still want to stay in the capital cities; they will

not want to go out and actually engage on a day-to-day basis with clients if they can help it. That is the attack on the representative bodies as we see it.

With regard to the vesting of powers in the National Native Title Tribunal, the statistics do not look good for them. On page 8 of our submission we refer to the statistics that were gleaned by the Hiley and Levy review. At 17 January 2006, of 356 claims currently with the NNTT for mediation, 272—approximately 76 per cent—had been with them for more than three years and 170—just under 48 per cent—for more than five years. That is an accurate reflection of the perception of the representative bodies who have put this submission to you.

It is suggested by the amendments that having provisions about mediating in good faith with reporting conditions will overcome that, but it is not merely a matter of mediating in good faith, in our submission. Mediation is a skill. They have good faith provisions for negotiation in the future act regime of the Native Title Act where parties are obliged to negotiate in good faith, and there is some jurisprudence that has been put together about that, but it does tend to be making sure that parties respond to communication and offers in some sort of physical way and turn up and so forth—in other words, just going through the motions. That is what good faith can imply and mean.

To be a mediator you have to be more proactive. You have to be imaginative. You have to have an understanding of what options are available and what might work in the region and generally at law. You have to be able to give confidence to representatives and to their clients, not only native title claimants but pastoralists, graziers and mining representatives. You have to have a management approach and crunch the deal. As Mr Chalk said, there is a certain frisson in the context of going through a court process where it weighs heavily on the minds of the representatives, the claimants and other parties' respondents that there is a judge who is actually going to decide something unless there is an agreement. It can work wonderfully well in that context. I was involved in a case—it is referred to in Hiley's report on page 16 and in the footnote case of Smith—where Justice Madgwick took the parties aside and said: 'I'm not going to tell you how I'm going to decide it but one of you is going to lose, basically. So I really suggest you get your heads together, otherwise I will crack your heads together.' Indeed, the matter was settled and, one could suggest, probably on terms which neither party was actually all that happy with, but that sometimes is indicative of a pragmatic settlement.

With regard to the Federal Court, I suggest that a finetuned reading of the provisions leave the Federal Court out of the picture. Certainly they can, if you like, sack the Native Title Tribunal, but the court has to make a finding that it is not likely to be resolved in the Native Title Tribunal. It is an embarrassing finding that a court has to make initially when it says, 'Sorry, tribunal, you're out of it and we're going to take over now.' It would be far better if there could be some mutuality of operation between the tribunal and the court in leaving the court as the ultimate arbiter and ultimate mediator as it sees necessary.

On the question of the National Native Title Tribunal's powers, the powers of reporting absence of good faith, in our submission, are actually quite oppressive. To report to the funding body as though somebody has been a bad boy is oppressive because they indeed are representatives of the Commonwealth, and most of their claims are on the other side anyway. Even worse is the power to report to the legal disciplinary committee of a state or territory. Firstly, one notes that that is not a reporting of the actual client for refusing to negotiate in

good faith but, rather, of the client's representative. So what is the representative to do? Who is the master? Is it the client? It would be wrongful conduct to not act on instructions, without misleading the court—there are a few exceptions there. If, for example, an offer is not to be smiled on, is not to be responded to a positive way, that could well be a proper stance for a client in certain circumstances, but if there is a perception by the tribunal member—and we do not know how the tribunal member might perceive something—the next thing will be that he is up before the barristers board or legal practice board of the state or territory for some alleged fault. What lawyer would want to go into a mediation proceeding on that basis? There are two masters, there is uncertainty and there is a condign punishment at the end of it on the perception of a member.

As to strikeouts, we simply say that it is not the way to go, on two bases. Firstly, looking at the motive for lodging the claim, the motive for lodging the claim is well and truly endorsed as a part of the future act proceedings in the Native Title Act. If there is a future act and you do not have a claim in, you do not have a right to negotiate. You have to be a native title party—that is, a registered native title party or a party with a claim that has gone through. Suddenly you are going to be disadvantaged because you have put a claim in pursuant to a specific process allowed for by the act, with the suggestion that it was wrongful or sharp practice in some way.

The other basis for strikeout is also, we say, fundamentally misconceived. If you fail the registration test criteria on merit and in some cases for procedural reasons, you can be struck out. The registration test is for giving people interim rights to negotiate. There are some real concerns that these days, the law having become rather more crystallised, some of the bases for passing the registration test or some of the things that you have to do to pass the registration test are not actually required by law anymore to show that you have native title. So if you do not pass something not required at law for native title you can be struck out of the court. What we say about that too is that here we have an example of an approach which in a sense punishes native title claimants and their claims in an unfair way rather than looking at a systemic change to get away from the legalism that we currently find within the Federal Court operation.

The amendments on prescribed body corporates seem sensible enough, but everybody, it seems, even the Commonwealth in its explanatory memorandum on page 73 in the second paragraph, says that funding of them is the issue. It has simply been sidestepped. It talks about funding native title representative bodies in an administrative way, but there is no statutory basis for funding any prescribed body corporate either directly or indirectly. So you are going to have these bodies being set up as a requirement of the act and being not really capable of acting.

The new relationship, the Native Title Act, set this panoply of bodies up, and they are all necessary. Native title tribunals are necessary. I notice that they have been getting a lot more money and special funding over the last few years. The Federal Court has not had quite as much money, I do not think. Representative bodies have always been complaining, and I will not bore you with their constant complaints. I know Senator Johnston has heard them before. But prescribed body corporates, which are another essential part, do not get anything that is

statutorily underlined, just some sort of commitment that says, 'Oh, well, they can get some help from representative bodies administratively.'

Section 183 funding is the funding to respondents. I do not think any member of the Native Title Council would refuse the ability for people to have legal aid for these cases, which are so significant to everybody. But we make the point that under that section it is a single-liner that says that the Attorney-General can grant assistance unconditionally or in such conditions as he determines. That single line has to be compared with the ever-increasing onerous obligations of native title representative bodies. We would also say that we have not really been accorded the consultation in relation to these matters that should be reflected in this type of matter in the Native Title Act for the reasons which I have already mentioned—the novel aspect of this legislation.

In relation to the Hiley-Levy operation, there was a committee supervising that process. There was the process itself, but representative bodies were not included. After the report, the Attorney-General's Department sent out a memo saying what it was going to do, and that was about it. Since then, we have simply been told what is going to happen. There has not been any working group process for any of these amendments. We would have thought that a proper working group, starting off by asking: 'What do we all see as the problems here?' and going through it step by step, would be an appropriate way of recognising the sui generis nature of this legislation and would also be respectful to the Aboriginal people.

One final suggestion is that we note that the Office of Native Title of Western Australia has suggested that section 138 on funding be reviewed—I think they suggested in a couple of years. We say that that is a good idea but we suggest that there be a review of the act in toto in a couple of years, including the effect of these amendments. Hopefully not all of the amendments will be put through in the form that has been suggested, following these and other submissions.

CHAIR—Thank you very much, Mr Vincent. We do need to go to questions but I note, Ms Mason, that the document which has been tabled bears your signature, so we take that as additional information from you.

Ms Mason—Yes.

Senator JOHNSTON—Mr Vincent, you say that the tribunal has been unsuccessful in its mediation. The statistic of 48 per cent over 10 years is an interesting statistic, but how much of the 48 per cent is claimant versus claimant generated? If we do not know, it is pretty pointless, isn't it.

Mr Vincent—I respond by saying that it is really irrelevant as to whether it is claimant/claimant, claimant/mining company or claimant/state, because the tribunal needs the skills to be able to deal with all of those issues. Maybe that is one area where it is significantly deficient, if indeed there is a significant—

Senator JOHNSTON—But these matters cannot possibly go to court if there are overlaps and disputation as to who should be claimant, surely?

Mr Vincent—They can go to court but sometimes they are intractable. People have grown up with certain views about their history and groupings. Under the act, the rep bodies themselves have a duty to minimise the number of overlapping claims—

Senator JOHNSTON—That is what I am saying.

Mr Vincent—and they do the best they can. And the tribunal—

Senator JOHNSTON—Does the best it can.

Mr Vincent—does the best it can, but we are not saying that everybody is perfect.

Senator JOHNSTON—And we are not saying that the culpability lies entirely with the tribunal. The rep bodies have allowed so many claims that have internal disputations with various groups that are unresolved, and those end up with the tribunal.

Mr Vincent—The tribunal arbitrates on them. If neither the rep bodies nor the tribunal can solve them they end up with the Federal Court and it arbitrates on them. It does have the power to arbitrate overlapping claims.

Senator JOHNSTON—Very expensively. It is at a huge cost to the taxpayer, to the claimant group and to the rep bodies.

Mr Vincent—Native title claims are expensive to litigate.

Senator JOHNSTON—They are much more expensive where every turn of the corner is contested.

Mr Vincent—I could not agree more. That is what I was saying about the state, Commonwealth and territory governments contesting just about every native title claim.

Senator JOHNSTON—The state and Commonwealth contests are by and large legally based. They are based on Wik; they are based on Mabo. They are based on those sorts of precedents. The really expensive blow-outs are the contests between claimant groups where, over many days, evidence is taken on one piece of land from two distinct groups.

Mr Vincent—I am not in a position to give you statistics but, with respect, I wonder if that is statistically sound.

Senator JOHNSTON—You know because you have been through it on the Goldfields.

Mr Vincent—All but one of the claims concerning the Goldfields approached the court on the basis of shared country. They were non-contestants; they were non-combatants.

Senator JOHNSTON—How long did it take to get to that point?

Mr Vincent—The native title representative body in that case was able to do that itself and had a memorandum of understanding. It was a professional approach. Everyone signed up and was happy. They went to the court saying: 'We have resolved this. Although we call ourselves X and they call themselves Y, we hang out on the same bit of land and we know that we share it culturally. We are not going be contesting that.' They had the same legal representatives. The main combatants were the state and Commonwealth governments, mining companies, pastoralists and graziers, all of whom had their own silks. That is where it blew out.

Senator CROSSIN—I want to ask a question that might dovetail into what Senator Johnston was asking. Won't the proposed system make that worse in the sense that the NNTT

will not have the power to order parties to negotiate? It still will not have the power, will it? If there are still delays in cases involving claimant versus claimant—the existing problems that Senator Johnston alluded to—they will not be resolved if the NNTT has more authority to mediate. At the end of the day, if there is intransigence, a claim will still have to go to the court. I do not see that this proposed new world is going to make that better.

Mr Vincent—I think the proposed new world could come about by significantly upskilling the Native Title Tribunal. I think they have a good role for mediation. Nobody says that they should not be involved, but you do need the ability of the court to step in. It does have a certain weight. For native title claimants and local pastoralists to be confronted by the Federal Court saying, 'Unless you people can agree, I am going to make a decision,' sends them a strong message, yet now the court will have to be coy and not come in. I think that is a mistake. The Native Title Tribunal can continue happily mediating but, with respect, I suggest that it get its house in order by getting proper skills in mediation and understanding what it is all about.

Senator JOHNSTON—It has to mediate in any event because the judge is sent there straightaway.

Mr Vincent—Yes, it does, in the main. But courts and parties do get fed up after a while, what with the years I was talking about, and say, 'Well, how about we try the court?' Any bona fide, good-faith lawyer would say, 'Well, we can't get anywhere with the tribunal, and it may be because it doesn't have the skills; it doesn't have the gravitas. The court is willing, and it has shown itself to be rather more expeditious in these ones.'

Senator JOHNSTON—It may be one of those cases where there will be a winner or a loser.

Mr Vincent—It could be.

Senator TROOD—Why can't the tribunal do as the court would do, saying, 'Look, I'm going to make a decision, and you should concentrate your mind on the fact that I will make a decision and there may be a winner and a loser'?

Mr Vincent—I think the problem is that the tribunal does not have power to make decisions as such, probably because of cases like Bandy. It would then be exercising the judicial power of the Commonwealth in a wrong way. So I know it is difficult and legislators have to try to give it, in a sense, more power. I cannot see a problem with reporting to the court as to how mediation has gone, but then the court having the ability to make some decisions of its own without having to come to strange decisions about: 'The tribunal has failed, and I so declare, and under section B I will take it away.' I think you need a multiplicity of strategies. A judge said to me, 'Well, you can't have mediation if—no party without punch. If one party is not there, you cannot have an agreement.' They are wise words. You cannot force parties with condign reporting conditions on their lawyers to mediate in good faith. You have to use these imaginative strategies to get people together. You cannot force people to have good faith.

Senator JOHNSTON—Can I continue on with this business of your council, which I congratulate you on. I see that there are some common threads right across the nation with respect to rep bodies, which is what the council, I think, is fundamentally directed towards.

How are we going—and we have discussed this in previous hearings—with the uniformity of agreements and the pooling of skills, such that we can minimise the diversity of land council work, such that you can in fact give advice for another land council away from the Goldfields Land Council et cetera? Pro forma documents and that sort of stuff—how far are we advancing on that?

Mr Vincent—There are pro forma documents that have been put together in the goldfields and other areas. For example, there is a future act agreement which bypasses the need to go through the arbitration processes of the tribunal. Other representative bodies in Western Australia have taken the lead on that and developed some for their regions. One also has to note that each region has different needs and different ways of doing business.

Senator JOHNSTON—But that is what worries me—the different ways of doing business. Surely it should all be the same way of doing business, shouldn't it?

Mr Vincent—There are certain nuances, if you like, from different regions which mean that, for example, even things like a site survey would be required differently from one region to another. Sometimes it is historical—they are used to doing them that way—and so you would have a different provision in an agreement as to how a site survey might be run. In saying 'site survey' I am referring to Aboriginal sites.

Senator JOHNSTON—Heritage assessments.

Mr Vincent—Heritage surveys. But hopefully this body will make that sort of cross-fertilisation of ideas more possible. It is seeking some funding, and it may well be that that will advance this. I know you have indicated your interest in this previously, and that might be a way of doing it.

Senator JOHNSTON—I note that you say in here that the council 'absolutely opposes the idea that non-Indigenous bodies should take up the role of representative bodies'. What is wrong with calling for tenders for claims? Before you answer that, what are the figures with respect to Indigenous people employed by rep bodies as both professional and salaried officers?

Mr Vincent—I do not have those figures but I can perhaps find them out, through this body, and send them in.

Senator JOHNSTON—As a percentage I think it is important.

Mr Vincent—I think that most representative bodies have administrative and project officers employed, and the majority of CEOs are Indigenous as well. The professional staff are probably non-Indigenous—the lawyers and the anthropologists. But that is an important aspect of why you should not just give up on representative bodies. They are taking over, in a sense, some of the functions of ATSIC. They are becoming the major organisations, in the regions, that Aboriginal people relate to. One of the other submissions made that point.

Part of the deal is about trying to teach the principles of governance and having Indigenous employment—which is very scarce. We want an environment where, rather than punishing representative bodies by deregistering them immediately for some breach—which is what the proposal is—you have a department which comes in and, in strict terms, gives them support to get their governance back on track, then monitors them. Gradually, you get a better and

better process there. The Goldfields Land and Sea Council was one of the finalists in corporate governance in Australia and it was very proud of itself.

Senator JOHNSTON—We need to see some figures. We need to have some basis for us to argue in support of that. We are arguing in a vacuum at the moment. We do not know how you are going. We do not know what you are doing. We do not know the contribution you are making. We have a gut feel in some cases—positive or negative—but we need the council to provide some benchmarking as to how you are going.

Mr Vincent—Madam Chair, I wonder if we could have leave to produce some figures and send them in.

CHAIR—You may respond to Senator Johnston's question on notice. That would be helpful. Thank you.

Mr Vincent—Thank you very much.

Senator CROSSIN—I have a particular question I want to ask you: how is the absence of good faith going to be defined?

Mr Vincent—This is one of the problems; it could be in the mind of the beholder. At the moment, the few guidelines on good faith that have emerged in the Native Title Tribunal relate to being there and answering letters. That is really not enough if you are going to get people to negotiate meaningfully. It is a matter not of directing that they have good faith but of enthusing them into the negotiation process on the basis that their rights are going to be fairly accommodated and the outcome is something which they can respect and honour.

Senator CROSSIN—But how do you define that, let alone monitor it and regulate it?

Mr Vincent—It is said that some guidelines are going to be drawn up in the explanatory memorandum. I personally believe that it is not really capable of monitoring, because this is a state of mind. It may be evidenced by certain processes, but a state of mind cannot be the subject of some sort of regulation. You can only act on a person's state of mind by encouragement, enthusiasm and getting them to change it through personal persuasion.

Senator CROSSIN—So is it a good thing that it is there or do you think it will not achieve much?

Mr Vincent—I would not say it is wrong to have it there, but I do not think it is really going to make a difference. I think having an enforced attribution to people is wrongheaded.

Senator SIEWERT—There is so much in your submission that I want to ask questions about but I know that time is limited. I want to ask—and you might want to take this on notice—about the registration test. On page 13—and you referred to it briefly a moment ago—you mention the fact that they do not ask the right questions. I understand from what you said that what is contained in the act now is different from what is being asked for in terms of registration tests. Could you take on notice providing us with the questions that they are asking that are wrong and what they should be asking.

Mr Vincent—Yes, I can do that.

Senator SIEWERT—I go back to the issue of the NNTT's review powers. In your submission you state that the review report can be provided to the court but the evidence

cannot. As I understand it, it is not then able to be discussed. Can you highlight your concerns in that regard?

Mr Vincent—I can. You go into mediation on the basis that you are often being quite open with the other parties and are perhaps canvassing options and possibilities that may mean that there is an agreement. But everybody would agree in that scenario that what was being said there should not be heard by the judge who is hearing the matter, because it would affect him. It does not matter how good a judge you are. One party might be saying that they think it is probably extinguished and they won't press for that bit of land, or they realise that in the south-west corner they might be hard pressed to show connection and, subject to instructions, they might be able to cleave that bit of land off. You would not want those sorts of things going to the judge because he would then, subliminally perhaps, take them into account.

With the review process, it is said that it is subject to the normal confidentiality provisions, but the fact is that the reviewer has the power simply to send off the report to the court. So I cannot see how he can send off a report to the court about the result of a voluntary review, which presumably is a finding as to whether there is likely to be native title or not or whether a party has rights and interests in the land, and which should be taken into account. It is said to be for the purpose of mediation, to help the parties to see the strengths and weaknesses of their own position. If the tribunal has the power simply to send that off to the court, it will immediately compromise the position of the judge. It would be as if the evidence were then before him.

That ability is found in item 53, section 136GC(7)—that evidence of review matters cannot be tendered in later court proceedings without the consent of the party. Prior to that, it was said that the review power was to be subject to confidentiality provisions. However, section 136GE provides that the reviewer can send the material off to the court. So the judge has got this review, and he can take it into account, but unless you have the consent of all parties, you cannot then refer to the evidence and say, 'Look, judge, this is what the review found, but I'd just like to refer to the evidence that went in there; it was very weak and the reviewer wrongly came to that conclusion.' Perhaps that would be because you have not got the consent of all the parties to do it. So there is an inherent inconsistency there between those provisions.

Senator TROOD—You are quite unequivocal in your submission, Mr Vincent, in attributing the causes for delay to state, territory and the Commonwealth governments. If that is the problem, how can they be made not to delay? How can they be made to address the matter more seriously, conscientiously and diligently?

Mr Vincent—It is a matter of approach. It is a matter of understanding that native title, now that the courts have had the opportunity to distil the essence of it and to interpret it, is not the horrendous sort of regime that it was first thought to be. It is a regime that people can quite happily live with, and are happily living with we now know—pastoralists, graziers and mining companies. There is no reason why state and territory governments need to go into the forum to debate the existence of native title so vociferously, if there is due diligence on the part of the parties to start with in terms of providing and considering expert material. It is an unnecessarily litigious approach for the animal that we are dealing with.

Senator TROOD—That seems to me to be an observation about the state of mind and a reflection on their culture, their view of the value or importance of native title. It does not help us in trying to deal with the problems. The question seems to me to be: what practical suggestions do you have, if any, which might concentrate these parties' minds on the need to resolve these issues?

Mr Vincent—I would like to address the first point. It is a state of mind. Sometimes people can have completely different views on questions of connection to land, and be quite honest. How many angels dance on the head of a pin? One lawyer can have a view and another lawyer can have another view. But I believe at the ministerial level that there does need to be some real discussion about why these cases are all being defended so vociferously and what can be done about that. That is an administrative, cultural aspect, if you like, at the highest level of government, which needs to be addressed.

In terms of what you can do to get the parties to really mediate properly—and I think it is all parties, not just state and territory governments—the best solution is the report to the court so that the court can then deal with that and perhaps hive it off to a registrar to meet with the representatives and then go up the chain. So you have dealt with the tribunal, you are not getting anywhere and the tribunal is tearing its hair out. The next level is the Federal Court. Give them more power too, if necessary.

Senator TROOD—Would that in your view concentrate the mind of the governments that you hold to be responsible for obstruction?

Mr Vincent—Yes, I believe it would. In the context of mediation, getting information from government is difficult and getting proposals that are well rounded and formed is very difficult. Timetabling that can be enforced within the court system is important. I know in Western Australia Justice French got concerned about these claims languishing in the tribunal year in year out. He started a process of strict timetabling by the court under which mediation protocols had to be settled and agreed to by the court. Everybody was starting to snap their heels. But that may now not be possible because of these amendments.

Senator TROOD—Yes, because of these arrangements in relation to mediation. Shifting ground slightly, I notice that you have a strong view on the matter of mediation and the court. Would your position be ameliorated if, as I think you said in your oral evidence, there were more training and enhancement of mediation capacity within the tribunal, which clearly seems to be lacking at the moment?

Mr Vincent—I think so. Mr Graeme Neate, the President, is here and he might be able to advise your committee as to what steps are being taken at the moment. At the moment I am not aware that there are great steps being taken to get the members of the tribunal into that mindset of mediation which I described as proactive, exciting and innovative. They are described as 'merely a post office'.

Senator TROOD—You are emphasising the point that mediation is not so often about the willingness of the parties but the creativeness of the mediator to provide solutions.

Mr Vincent—Exactly.

CHAIR—Thank you, Mr Vincent and Ms Mason. There are number of issues that you have agreed to take on notice to provide further information to the committee. We will be grateful to receive that when you are able to do so. If any other matters arise during the rest of our discussions today we may approach you to seek further information. Thank you for appearing today and for your original submission and for your supplementary document, Ms Mason.

[10.47 am]

STEWART, Mr John William, Chairman, Native Title Taskforce, National Farmers Federation

CHAIR—Welcome. The NFF has lodged a submission with the committee, which we have numbered 5. If you would like to make a brief opening statement, we will then go to questions.

Mr Stewart—The Native Title Taskforce has sought legal advice from our legal representatives and, generally speaking, there is support for amendments to the bill. However, there are a couple of issues that we wish to raise. Firstly, I apologise for the way in which the submission was written in that it formed two letters from me to the Attorney-General, but what is said in there actually grabs the issues that we are concerned about.

The first recommendation in the initial amendments supported the Native Title Tribunal having an exclusive mediation role. In the NFF's opinion, history shows that the Native Title Tribunal does not have a good track record in resolving mediation issues. However, the government has obviously given the tribunal further powers which should strengthen their mediation role. To us that means we will wait and see whether it does make a difference, because mediation goes on and on and on. I cite Queensland, for instance. The only time I have seen the Federal Court intervene in mediation in Queensland is when the Native Title Tribunal has not been able to achieve anything. Then the Federal Court has come into the mediation role and got somewhere. That is what concerns us about this current situation.

The second issue goes to matters not addressed by the proposed amendments. There were suggestions initially made by the task force as to how we should speed up this process. We totally support native title and those people who show that native title exists. The quicker we get to that stage in the process, the quicker we will be happy. People probably ask, 'Why are pastoralists concerned when, after all, pastoralists rights are covered anyway?' However, there is always uncertainty among people who have not dealt with Aboriginal groups before—that there is something is out there, they do not really know what it is about and they would like some clarity.

With regard to registration, we are seeking that the Native Title Act be amended to require more detailed information in the claimant's application. That is simply because, currently, claimant summaries are reasonably simple—they are not detailed—which then leads to a situation where the state governments demand connection reports. To some extent, NFF supports connection reports because we think connection should be shown. However, we think the states take these connection reports too far because it is one way of slowing down the issue.

Again, that leads to a situation where the representative bodies, who have charge of the groups of claims within their area, find it very hard to prioritise. Quite obviously, there are many claims in Australia where native title is likely to be found to exist. But there are many claims where we are almost certain that native title will not exist, but the claims still sit there. The representative bodies find it hard to prioritise those that are likely to achieve native title. In my opinion, these should be the ones that are dealt with first—you can deal with the others

later on—but that does not necessarily happen. Quite simply, that is because many people in the NTRBs are Aboriginals—and we have no problem with that—and they are dealing with Aboriginals and they do not want to upset one claimant against another when it comes to prioritising. We think it would help the system if, in the registration process, there was a greater requirement to show more connection than is currently required.

The other issue is overlapping claims. Currently, overlapping claims can be registered. There is no change in the amendments to change that situation. I will say up-front that we are not expecting that we would deal with the overlapping claims already in place in the way we are suggesting. However, with regard to any new claims, or claims that are withdrawn and lodged again in a different manner, we think that just lodging overlapping claims tends to add to the time constraints that apply. The courts will not deal with overlapping claims and the state government will not deal with overlapping claims. Mediation is supposed to occur in the tribunal. How successful is the tribunal in achieving overlapping claims?

We have no problem with an Aboriginal group lodging a claim. If it overlaps, the overlapping section should not be registered; it should sit there until the Aboriginal groups between themselves decide who the actual claimants are. But that does not stop them dealing with the rest of their claim and progressing it through the system. Somehow this process has to be sped up, and that is what we are concerned about. Generally speaking, that is our concern. They are not major issues. We do understand that the government are concerned about affecting the rights of Aboriginal people. I am afraid we do not see it that way. We see it this way: 'If you have a claim, you know your area, you can claim that and you can go ahead with the process. However, if you overlap with another Aboriginal group, it is up to your two groups to decide who is entitled or to seek a joint hearing in the court where you are both claimants to that area of land.'

CHAIR—As you said, your submission is basically copies of your letters to the Attorney of September and December 2006. Has the NFF received responses to those items of correspondence?

Mr Stewart—We have to the one dated 15 September; we have not as yet to the one from 19 December—being right on Christmas, we had not actually expected it yet.

CHAIR—We do find ourselves having this hearing on 30 January, so we all have to keep working. Did you find in the response to your letter of 15 September that you received a favourable hearing?

Mr Stewart—I perhaps should have added the Attorney's reply to our submission. It was pointed out to us, particularly on the issue of overlapping claims, that that could affect the rights of Aboriginal people and the Attorney did not want to impinge upon any rights of the Aboriginal groups.

CHAIR—That is the point you made towards the end of your remarks.

Mr Stewart—Yes.

Senator CROSSIN—With the issue of the NNTT now having an exclusive mediation role, you mention the fact that their role has been strengthened. We have had some evidence this morning, and a lot of the submissions also suggest this, that even though the role has been

strengthened, the expertise needs to be addressed. Do you want to make some comments about the quality or the knowledge of the people handling the mediation process?

Mr Stewart—I have been part of the mediation process. In Queensland, I represent AgForce Queensland which has 1,600 respondents and 88 native title claims. So, along with our solicitor, I do quite a bit of mediation work. I was previously a member of the Queensland Aboriginal Land Tribunal for eight years, so I have some history of mediation. However, to some extent, I think the tribunal process is in a difficult situation because of the number of respondents to native title claims—there are the claimants and there are respondents of various ilk: from power companies, to pastoralists, to mining companies et cetera. Our concern probably is more that the Native Title Tribunal sees its role as protecting claimants rather than necessarily always taking into account the respondents' positions. I think mediation probably goes the same way, in that they mediate on the basis more that the claimant group is right. The respondents in mediation have difficulty getting their point across.

Senator CROSSIN—Do you think sometimes there is a bias shown by the tribunal members?

Mr Stewart—I think there can be. Some tribunal employees have said to some pastoralists that they were claiming things that were just completely wrong. We pointed that out to the chairman of the tribunal. He has told us that it has been fixed. Time will tell.

Senator CROSSIN—Can I also ask you about changes to the registration process? The minister will have a discretion to issue an invitation and then native title rep bodies will be registered for anywhere between one and six years. Won't it cause further delays and disruption to the process if native title rep bodies only get funding for, say, a year at a time and then spend a good deal of their year trying to justify their means for the next year? Is there some comment you want to make about those time lines?

Mr Stewart—I think some of the native title rep bodies do not have a terribly good history of being money managers et cetera. After all, they get certain funds. Currently, if you do your job properly you can get six years of funding before it is reviewed. If there is some doubt about how you are going to operate, obviously you would get less.

Senator CROSSIN—It has been put to us that perhaps the process should deal with those that are not operating properly, rather than target all native title rep bodies in the same way.

Mr Stewart—You have asked us for our opinion. I would think that there should be more expertise put into rep groups to improve the way they operate. I think that that is something in the system that would not require a great deal. It might cause some unrest within the rep body itself—having someone thrust upon them—but if you are going to move this thing ahead sometimes you will have to thrust things upon people.

Senator CROSSIN—I am not sure that I see that that is the intent, but that the intent of the bill is to give registration for between one and six years. I have read nothing that suggests that those rep bodies performing quite well will get six years. On the contrary, they might only get two or three years. I am just wondering if this continual cycle of rep bodies having to prove themselves, even if time and time again they are doing quite well, is not a further delay to the process—rather than targeting just those that are not acting efficiently.

Mr Stewart—Perhaps I have misunderstood something that you have picked up. As I understood it—and I have been speaking to people from that department—the only reason that you would not get six years would be that it was shown that during the six-year period something had gone wrong. Otherwise, if you were given six years up-front, the six years would exist. Something has to go wrong for you not to have the six years.

Senator CROSSIN—There is nothing in any of these submissions that suggests that the norm will be six years.

Mr Stewart—We would have to express some concern if it was said that the term for rep bodies was from one to six years. If you had shown that you were able to do the job properly and do what was required and you were given a six-year term, I think there would have to be some very good reason as to why that right was taken away from you during the process. If it was taken away I would expect that it would be for a damn good reason.

Senator BARTLETT—Can I just check this, firstly? You have obviously highlighted what you are apprehensive about in a couple of areas and you have made a few suggestions about other things you would like to see in the bill. Can I assume from that that in all the other areas which you have not raised you are broadly happy?

Mr Stewart—Yes.

Senator BARNETT—Do you think those other parts will make some improvement?

Mr Stewart—We certainly do. We feel that if there is a broader requirement for registration which improves the requirement to obtain a connection report further down the track—if there is more of that information in the initial registration phase—then there has been a lot more homework done and there will not be so much time dragged out between registration, notification and when the connection report comes in. There is a group in Queensland, Jangga, whom we talked to two years ago and asked how long it would take them to produce a connection report, and they told us it would take five years. Five years with money going out just seems ridiculous to us, but that is the way the system operates currently.

Senator BARTLETT—One of the points that was raised by the previous witness relating to the rep bodies was what they described as the expansion of the number of types of organisations that could become rep bodies and that there is no longer the need for the minister to be satisfied that the body satisfactorily represented native title claimants; there has been a shift from being a representative body to just representing, like contracting out. Firstly, do you agree with that potential outcome? Do you see that as a problem? I imagine you would have dealt with a number of rep bodies. Do you think that it is a problem if we have basically just a group of people who are lawyers contracted to do the law work that do not actually have any real representative role?

Mr Stewart—While I think there are problems with some of the current rep bodies, the claimants particularly and our legal people who deal with them a lot generally say that the system has improved out of sight. There is only one issue in the rep body process that sticks out to us and that is prioritising claims. If you cannot go in and say, 'Look, this is a claim that we know if we take it to court or we further mediate it, we are going to get a determination,' that is what is wrong with the system. Again, you have Aboriginal people dealing with

Aboriginal people with all the problems that they might have in making decisions that way. Should we go to the court to have a process whereby the court prioritises claims?

Senator BARTLETT—That is just a question you are putting, is it, rather than something you have suggested?

Mr Stewart—Because you have raised it, Senator, yes—whatever can be done to make the process work and to make it work faster than it is now. Again, from our point of view, where native title is obviously going to exist, we accept that and so be it. But let's get on and get it done.

Senator BARTLETT—Other than that prioritisation problem, would you in general terms say it is better to have rep bodies that have some genuinely representative nature rather than just people that are contracted?

Mr Stewart—I agree with you. I think it is.

Senator BARNETT—Thank you for that.

Senator SIEWERT—I have a quick question. You referred a bit earlier to expertise in rep bodies. A number of submissions and, in fact, the joint parliamentary committee on native title recommended that more resources should be given to rep bodies to be able to fulfil their duties. Do you also endorse that concept? I am thinking of your comments about the need for further expertise. Surely one of the areas for rep bodies is a lack of resources to actually acquire that expertise. Is that an issue that you also have concerns about?

Mr Stewart—I think there are a number of rep bodies, and I know I am plucking figures out of the area, that receive between $4 million and $5 million a year. They presumably prioritise their use of that money, but a huge amount of money that I see that they spend is in mediation where they drag people from all over one state to one area to hold a conference. It might a conference with respondents as well as with the claimants. That is a very expensive process.

Provided we could get this prioritisation in place—and that might require one person with the expertise and the right to do it so that there is no argument, and that might need to be an independent person to the NTRB—that would not be a huge cost. It is very easy to say, 'Throw money at something.' As farmers, we cannot always throw money at something and get a result so you have to weigh up what you are going to achieve. It could be in this case that hiring the expertise to assist the NTRB might assist the process.

Senator JOHNSTON—Mr Stewart, you say that you have a couple of issues from your letters. Do you think that getting better and more complete particulars of the length and breadth of a claim is going to assist in mediation at an early stage? I think that is what you are arguing.

Mr Stewart—Yes, that is what we are arguing.

Senator JOHNSTON—Why do you think that is going to help the mediation process?

Mr Stewart—Mediation tends to be drawn out because of these connection reports that are required. The court will not deal with a claim without a connection report or the state agreeing

that connection exists. It is the states that demand the connection reports. It is the states that can hold up this whole process in their own right, and in some cases they do.

Senator JOHNSTON—So you are advocating that the registration test—let me paraphrase and you can argue with me—includes some form of detailed explanation as to connection?

Mr Stewart—That is correct; that is what I am saying.

Senator JOHNSTON—It was put to us by an apparently experienced advocate in this area that public mediation would be beneficial, and that is that, rather like sitting around here, people can sit at the back of the room and listen to people mediating over their rights and entitlements. Do you think that would work? Your organisation has participated in some of these things. Is the attendance of the public going to make it more transparent and workable?

Mr Stewart—In our case we have 1,600 respondents and 88 native title claims whereby we gather the respondents and then we have their names. Directions hearings in the Federal Court in Queensland, for instance, occur twice a year, just like clockwork. In between them there could be some mediation. For instance, there is a cluster of claims around Mount Isa-Cloncurry where Waanyi, Kalkadoon et cetera have probably eight claims. They all overlapped at one time, but they are gradually sorting out the overlap. For some of those people to attend a directions hearing in Mount Isa would involve them driving 400 or 500 miles, and that is part of the respondence process where our legal people would be attending. What happens then is that, immediately after a directions hearing, our lawyer writes a letter to me saying what happened and that is circulated to the respondents. This is to save having a meeting. But that is in the directions hearings stage. In mediation, if we consider that it is in the best interests of our respondents to attend a mediation meeting, we will get in touch with them and say, 'We think you should be there.' In all state arrangements where we are funded through the Attorney-General's Department to look after these respondents, it is the respondents who make the decision, not the organisation that is actually doing the work pulling them together.

Senator JOHNSTON—The point I am getting to is not just the respondents being in attendance, which is probably important at mediation from time to time, but the public being able to sit around and listen to what goes on in a mediation. What do you think of that?

Mr Stewart—If they are there in the background, I have no problem with that. I have a number of meetings, particularly in the notification phase when a claim is notified. I go to perhaps one or two towns within that claim area and it is advertised in the paper that AgForce is having a meeting and that everyone is welcome to attend—that includes claimants, respondents and the general community. I go there and stand up and explain to them what it is all about, what we do to help the situation and that everyone is entitled to it. That is mediation in its earliest phase.

Senator JOHNSTON—All right. Thank you.

CHAIR—Mr Stewart, thank you again for the NFF submissions and thank you for attending today. We appreciate your contribution.

[11.17 am]

CHARLES, Mr Christopher Joffre, General Counsel, Aboriginal Legal Rights Movement

Evidence was taken via teleconference—

CHAIR—I welcome by teleconference Mr Christopher Charles. The Aboriginal Legal Rights Movement has lodged a submission with the committee which we have numbered six. Do you wish to make any amendments or alterations to that?

Mr Charles—Not that I am aware of. I was browsing through it before I came on the line and I think it is pretty right.

CHAIR—Thank you very much. I invite you to make a brief opening statement and then we will go to questions from members of the committee.

Mr Charles—Thank you for the opportunity to address the committee. This is a fairly limited submission which deals with one section of the Native Title Act. I point to the fact that it is, in our submission, unsatisfactory that there is a good deal of doubt as to exactly how this section works and how it ought to be applied by native title representative bodies. I am of course referring to sections 203EA and 203EB of the Native Title Act, which are the parts of the Native Title Act which deal with corporate governance of rep bodies. It is a significant and important section because it deals with things like the business judgement rule, conflict of interest and voting on contentious issues by native title rep body board members in relation to matters where they might have a personal interest, and also it deals with issues like misuse of office by officers and board members of rep bodies. So, again, it is important legislation and it is important law in relation to corporate governance.

Our submission essentially says that it is by no means clear how this law operates, that it has been known since at least 2000 that it is unclear how this law operates and that, frankly, there needs to be an amendment to ensure that everybody knows what the law is. That is the issue that is dealt with in the first part of the submission, specifically the uncertainties in relation to 203EA and then 203EB. There is discussion through the submission, on page 9 and the following pages, about what the material personal interest test actually means in relation to a native title matter and the difference between the operation of a native title rep body as an Aboriginal organisation as compared to a Commonwealth statutory authority, which of course the Commonwealth Authorities and Companies Act actually applies to. There is a suggestion made somewhat tentatively at the end that the Commonwealth minister or the parliament might consider applying section 27K of the Corporate Law Economic Reform Program Act to allow the minister to give dispensations to rep bodies in relation to the operation of the material personal interest test. That is the nub of the submission.

The suggestion is made that you may choose to follow what we are talking about in relation to section 27K and giving the minister the power to give a dispensation. It is my very strong submission that, if you do not choose to do that, at the very least something needs to be done about 203EA and 203EB because of the complete uncertainty in their operation. The submission, which I admit is a bit longwinded, was an attempt to make it clear how that

uncertainty arose, to make it clear that it is the opinion of the Australian Government Solicitor that it is uncertain and to confirm their advice that it does need an amendment and indeed has needed an amendment for some considerable time. That is the gist of what I want to say.

CHAIR—Thank you very much. How large a problem do these issues that you raise in your submission in relation to the act cause in your view and in your experience?

Mr Charles—I think that they are always going to be a problem because there is a law, the law applies and there is no basis to be clear as to what the law is that does apply. Any native title representative body could be called to account on the question of whether or not it has complied with the requirements, particularly in relation to the operation of 203EB in relation to whether or not a board member has complied with the requirements in not being present during deliberations or voting on a native title question when the law that requires them to abstain is not a clear law. It is not certain which of the two laws, as it were, does apply. That needs to be rectified as a matter of urgency, in my submission. Because it is the law and because the law is uncertain, it needs to be fixed. That is really what I am trying to say, with respect.

Senator CROSSIN—This committee did the inquiry into the new Aboriginal corporations act, and my understanding is that there would now be a transitional provision. You say in your submission on page 7 that there has been uncertainty about the operation of the laws on the corporate governance of native title rep bodies since 2000.

Mr Charles—That is right.

Senator CROSSIN—Can you give us some examples of that uncertainty?

Mr Charles—Yes, I can. The transitional provisions which brought into effect division 6, which includes 203EB, came into operation on 1 July 2000. That is when sections 203EA and 203EB of the Native Title Act came into operation. As I point out in the submission, when they came into operation the law to which they referred—namely the Commonwealth Authorities and Companies Act 1997—was no longer the law. In fact, that law had been replaced by the Corporate Law Economic Reform Program Act 1999. But that had not been provided for in the native title amendments which had previously been passed. Thus, it was by no means clear whether it was the Commonwealth Authorities and Companies Act 1997 or its amending act, the CLERP Act 1999, which actually applied to sections 203EA and 203EB. No-one knew, because you had to rely upon the transitional provisions of the latter act, the CLERP Act. As I have said, it was by no means clear from that whether it was the old law or the new law which applied. It is that uncertainty which causes grave concern because no lawyer in a rep body can give proper advice to its board because of the uncertainty and that continuing uncertainty for seven years.

Senator CROSSIN—So your suggestion is to amend this act to do what? Is it to provide some consistency?

Mr Charles—Yes, that is precisely my submission. There needs to be a small amendment to sections 203EA and 203EB of the Native Title Act to make it clear which of those laws applies.

Senator CROSSIN—I know this is not part of your submission but I would like your view about the ability now for the Native Title Tribunal to solely have responsibility for mediation. Do you see that that causes some problems?

Mr Charles—With greatest respect, I do not want to answer because I do not know. I have not worked in the realm of native title within ALRM since about 2001 and I am not sufficiently aware of what is going on to be able to comment. I am sorry, but I feel it is beyond my area of responsibility and knowledge, and I would be hesitant to speak.

Senator CROSSIN—I understand, thanks.

Senator TROOD—Mr Charles, this may also be outside your area of expertise but we had a representation this morning in relation to strategic plans for representative bodies. I wonder whether or not you have any particular views on those.

Mr Charles—My submission is very simple—that is, I do not know how a rep body is supposed to be able to maintain and carry out its strategic plan if, when its board has to make decisions, it is not possible to give the board clear advice as to what the conflict of interest rules are that apply to their decision making and to the votes of individual board members. That is my complaint about section 203EB. That is it in a nutshell.

Senator TROOD—If that particular concern you have raised were remedied, what would you say as to the point about the need for strategic plans and the importance of them in relation to the work of the tribunal?

Mr Charles—My submission would be—and this is based upon fairly limited knowledge—that any rep body which has the multitude of obligations and functions that are set out in the Native Title Act—and indeed in the coordinate state legislation, as we have in South Australia—must necessarily operate with a strategic plan. It must do so because it has to prioritise its functions. It has to deal with the fact that it has limited resources, the fact that it has many competing claims upon its time and energies and that in order to achieve any rational outcomes at all for native title holders and claimants it must operate strategically. It is necessary that they should do, and I would certainly endorse the suggestion that strategic plans are a good idea and that carrying out strategic plans appropriately is a proper way to carry out the functions for that body as set out in the Native Title Act.

Senator JOHNSTON—Mr Charles, I initially thought that your submission did not have much to do with the legislation that is being proposed. However, on hearing you this morning I have come to the conclusion that what you are saying is that in order to address governance, one of the starting points is that, because these rep bodies are councils, you need to resolve the conflict of interest question.

Mr Charles—Yes.

Senator JOHNSTON—And that you cannot do that in the current legislative framework unless you amend the act in accordance with what you have suggested.

Mr Charles—Thank you, Senator. That sums it up in a nutshell.

Senator JOHNSTON—Right. My question to you is: does the Aboriginal Councils and Associations Act accordingly also need to be amended?

Mr Charles—I have not looked at that in detail. You will note that, towards the end of my submission, I say on that point that you need to review the operation of 203EA and 203EB with a view to relaxing their strict and inappropriate operation to state and territory bodies that are not statutory authorities. That is the first point I make: most of the rep bodies are not statutory authorities. They are either Aboriginal associations or they are set up under equivalent state and territory laws.

Senator JOHNSTON—The former, I suspect.

Mr Charles—I think many of them come under the Aboriginal Councils and Associations Act. As it happens, ALRM does not; we are an incorporated association. Much of my written submission deals with the incongruities, inconsistencies and problems that arise because of the inconsistency of definitions. Be that as it may, at the end of the submission I say that, in the alternative, an appropriate degree of regulation for rep bodies that are not Commonwealth statutory authorities may be created under the councils and associations act, and that would, to that extent, render the operation of 203EA and 203EB redundant. You might in fact be able to repeal it.

Senator JOHNSTON—I think that is an important issue and it is one that the committee might turn its mind to.

Mr Charles—You might simply say that if all of these corporate governance issues are dealt with by the councils and associations act then this is redundant and you can simply repeal it. In that case the major legal problem that I see there would go away. I think that is a great idea, with respect.

CHAIR—There being no further questions, Mr Charles, thank you very much for your submission, for raising this issue with the committee and for appearing by way of teleconference today. The committee is grateful for your contribution.

Mr Charles—May I make a final statement, Senator?

CHAIR—Yes, Mr Charles.

Mr Charles—This is a significant point. I know that my submission is 11 pages long and, frankly, it is probably a bit turgid and legalistic. I cannot deny that; it is what a lawyer does, I suppose. But it is an important issue because we cannot have a situation, in my submission, where the Commonwealth knows, through the advice of its Government Solicitor, that this law is uncertain and difficult to operate. That is an unsatisfactory situation for the Commonwealth and for the rep bodies. In my submission it is absolutely vital that this committee makes a recommendation of some sort to deal with 203EA and 203EB, whether by way of repeal or by way of amendment to apply one law or the other. But something has to be done; it simply cannot be left. That is my very strong submission.

CHAIR—Indeed. We have noted your very strong submissions on that matter. Thank you, Mr Charles.

Mr Charles—Thank you.

[11.34 am]

McAVOY, Mr Anthony Logan, Barrister, Queensland South Native Title Services Ltd

CHAIR—Good morning, Mr McAvoy. Do you have any comment to make on the capacity in which you appear?

Mr McAvoy—I appear as counsel to the Queensland South Native Title Services Ltd. I am not employed by that organisation. I am a private barrister practising here at the Sydney bar.

CHAIR—Thank you very much. Queensland South Native Title Services has not lodged a submission with the committee. Would you like to make a brief opening statement and then we will go to questions from members of the committee.

Mr McAvoy—I will make some brief observations regarding the amendments. It would appear the time frames considered in the amendments, particularly with respect to the re-recognition process, were drafted at a time when it was envisaged there might be more time between now and the end of the transition period. That will now be very difficult to achieve in any way that respects the interests of the traditional owners, ensuring that there is an effective and timely transition. I think that it is more likely that a date of 31 December would be appropriate rather than 30 June. I say this from my observations of working with the Queensland South Native Title Services, which as some of you will be aware came into being in 2004 with the withdrawal of recognition by the minister of the Queensland South Representative Body Aboriginal Corporation.

I was counsel to the Queensland south representative body at the time that occurred. The transition from one body to another simply cannot be effected smoothly when you do not have the cooperation of the previous organisation, and that may very well be the case in these circumstances. Often there are logistical matters, such as finding offices, transferring files and obtaining instructions to act on behalf of the applicants. From my experience, that transition took maybe six months to settle down. In circumstances where the Federal Court was not being particularly conscious of the length of time it was taking for matters to progress through the courts it would not matter so much; but there is a great deal of pressure from federal courts to keep matters moving at an effective rate. This means that often applicants, traditional owners, are left in positions where they are unable to be represented or where the level of representation that is able to be provided is not as you would hope to deliver. That is an opening observation.

With respect to the proposal to give section 203FE bodies such as New South Wales and Queensland south native title services certification functions, I make the observation that it may turn out to be neither here nor there, as many of the rep bodies that presently have those functions do not use them to the extent that was originally envisaged when those provisions were inserted into the legislation. The real point of difference between a representative body and a service body, such as Queensland south, is the degree to which that body can adequately represent the interests of the traditional owners across the region. And it is affecting us in communicating with the traditional owners. I have some dismay at the proposal to remove those provisions from those eligibility criteria.

CHAIR—Do you have any other comment?

Mr McAvoy—Not at this point.

CHAIR—Thank you very much. I think it is the case that you are helping out Queensland south at some short notice, so we are very grateful for your appearance and attendance today. I know that is not necessarily a simple thing to do. We have received submissions from organisations such as the National Native Title Council. Is Queensland South Native Title Services a member of that organisation?

Mr McAvoy—I am not aware of whether they are or they are not.

CHAIR—I wonder if you would not mind taking on notice the question of whether they are and then, if they are, having a look at the submission from the NNTC and identifying for the committee whether or not Queensland South Native Title Services supports the contentions they have made.

Mr McAvoy—Certainly.

Senator CROSSIN—You raised something a minute ago which I did not pick up in the reading I have done. Are you suggesting that in future some measure of the test of the effectiveness of a native title representative body will not relate to the degree to which, and the competency with which, they consult with traditional owners?

Mr McAvoy—This refers to section 203AD1(a) and (b). The amendments propose to repeal subparagraphs (a) and (b). Those subparagraphs require the Commonwealth minister to be satisfied, in recognising representative bodies, that the body will satisfactorily represent persons who hold or may hold native title in the area and that the body will be able to effectively consult with Aboriginal and Torres Strait Islander people living in the area. It is proposed to remove those two provisions in the eligibility criteria.

That seems to me to be directed towards allowing service bodies to take over the role that representative bodies now fulfil. It allows the providers of native title services to be less connected to the people that they represent, in my view. That is a concern, not so much in the provision of direct legal services—as one would provide in the litigation process—but from the standpoint that a body fulfilling these functions, whether it be a representative body or a service body, must deal with the various levels of government. That involves negotiating and participating in the development of appropriate policy in the way that native title applications are managed and native title claims are run. Without being required to have that representativeness, I believe that it would potentially be far more difficult for a service body to represent the interests of the traditional owners across the region effectively.

Senator CROSSIN—Under the proposed changes, the minister will now invite them, rep bodies will only get a one- to three-year registration and this eligibility criteria is to be dismissed. It seems to me that there will be fewer guarantees for traditional owners that they will be adequately consulted and adequately able to determine who will represent them.

Mr McAvoy—That appears to be more open under the proposed amendments, yes. Certainly, the idea that recognition may be given on a year by year basis raises some concerns. When you have applications before the court that have been on foot for 10 years, when the traditional owners have been working for years to negotiate and mediate in conflicts

that they may have internally or with their neighbours, and when the representative body has policies and structures established to try to deal with those very long-term issues, it seems to be quite harsh to make those bodies accountable on a year by year basis when in fact the outcomes may not be seen for several years. I say that with some first-hand experience in that, in 2005, the New South Wales Native Title Services Ltd introduced a legal services strategic plan. They have been applying that plan for just over a year, and the outcomes are long-term outcomes; they are not going to be seen, necessarily, within a short period of time. To place rep bodies on an annual review seems to me to be very harsh.

Senator CROSSIN—I also want to ask you about the intersection between the Native Title Tribunal and the Federal Court, with the NNTT now being given the responsibility for mediation. Does this enhance the process or restrict it further?

Mr McAvoy—My observations from working with Queensland South Native Title Services are that it has been necessary in the past to utilise the services of both the tribunal and the court. One of the difficulties in ensuring that parties on both sides participate adequately has been the lack of the ability of the tribunal to force parties to attend and negotiate in good faith and their capacity to report to the court. In those circumstances, where there are parties who are not willingly participating in the mediation processes before the tribunal, it has been useful to Queensland South Native Title Services to participate in case conferences ordered by the Federal Court and which parties are required to attend. That may not necessarily be so if the tribunal obtains its increased powers, but I would not at this point necessarily support the proposal that the tribunal and the court not be able to exercise their powers simultaneously. That is only perhaps a lawyer's caution in not knowing how it is going to work and perhaps reserving some ammunition for later down the track.

Senator JOHNSTON—Mr McAvoy, you say that year by year is too harsh—I think that was your word—too oppressive.

Mr McAvoy—It was too harsh.

Senator JOHNSTON—If—and I think you have seen firsthand a failing representative body—

Mr McAvoy—I have seen a withdrawal of recognition.

Senator JOHNSTON—You have seen some problems.

Mr McAvoy—I have observed things, Senator; yes.

Senator JOHNSTON—The question is: how does the minister resolve those as expeditiously and quickly as possible, given that people's rights are on the table and are diminishing and depreciating as time goes by? It strikes me that he needs to have some capacity to roll the sleeves up and wade in and fix the issue so that we can get back into delivering those rights in an expeditious and cost-effective way. It strikes me—and I think the argument is—that 12 months is not unreasonable for him to be able to use those powers which he would use in certain circumstances, and those circumstances are where people's rights are not being adequately represented.

Mr McAvoy—It is not so much about the capacity of the minister to wade in and use what powers he may or may not have. It is about the capacity to accurately assess whether the

organisation delivering the services is in fact delivering those services. And my observation is that it is sometimes difficult to explain to people in Canberra how things work in western Queensland.

Senator JOHNSTON—I can relate to that. So what is the solution?

Mr McAvoy—The solution, I believe, is to at least allow for a minimum term of two years to make some real informed assessment as to the capacity of the organisation to deliver.

Senator JOHNSTON—I am interested that you would use time as an informant. I would have thought that time would be an exacerbator.

Mr McAvoy—I am not using time as an informant. I am seeking to persuade the committee that if a period of one year is settled upon then you will find that assessments are having to be made in time frames in which results may not be available and the capacity to convey those results to people who do not practise in the area will be diminished.

Senator JOHNSTON—So two years would be preferable to one year?

Mr McAvoy—In my view, yes.

Senator JOHNSTON—I think that has some merit. You talked about section 203. There is an introduction of the concept of the minister exercising fairness when using these powers. Do you have a comment about that?

Mr McAvoy—There is a substantial body of law about the exercising of ministerial discretion in a fair manner. I see it as an attempt by the parliament to move away from the existing provisions, which require in one view a more exacting approach to the consideration of withdrawal than the fairly open approach that is provided for in the proposed amendments.

Senator JOHNSTON—The minister is making an adjudication on whether the representative body is acting fairly. I think that that is a positive ingredient to introduce. Isn't it?

Mr McAvoy—The obligation upon all service delivery bodies in receipt of government funding is to act in a fair manner—to represent and to deliver those services fairly to the constituents or customers of that organisation. The question is whether the minister is going to be in a position to adequately assess that. Again, this leaves the door open to matters of policy and to what the priorities of the government might be in terms of the delivery of services. Queensland South Native Title Services has applied its energies to dealing with the resolution of overlaps within its region. That might not be the flavour of the day with the government and it might be that the government takes the view that all of the energies of the representative bodies or service bodies may be best put into settlement and the negotiation of ILUAs. During that period, if Queensland South Native Title Services does not have any ILUAs signed, it might be said to have not been acting according to policy. If it does not have ILUAs signed in one subregion but has several ILUAs signed in another region where there is a lot of activity, it might be said to be acting unfairly towards the people in the area where no ILUAs have been signed. It is open to interpretation, is what I am saying.

Senator JOHNSTON—We should put that to the department, shouldn't we? We should ask the department whether it is likely that the minister will exercise his power to withdraw

recognition of a representative body because they focus on resolution of overlaps as opposed to the outcomes based ILUA delivery level. We should ask them that, shouldn't we?

Mr McAvoy—With respect, that was an example drawn off the top of my head. I do not think that that line of inquiry would be particularly fruitful. We do not know what the priorities will be over time.

Senator JOHNSTON—Both are legitimate pursuits, as you, I think, are saying. It might be, with the minister having discretion, that he or that the department, in fact, or the person responsible for carrying out the report for the minister prefers to see ILUAs as opposed to overlap resolutions.

Mr McAvoy—Certainly.

Senator JOHNSTON—I think that you have raised a legitimate point, so we need to get to that. Is it a matter of policy? Is it a matter of peccadillo as to whether the minister takes a hostile view or is there some formal, proper structure whereby the representative body knows what is expected of them?

Mr McAvoy—Under the legislation in its present form I do not believe that can be safeguarded against, no matter what evidence is presented to you during the course of this hearing.

Senator JOHNSTON—I think that is legitimate. Thanks, Chair.

Senator BARTLETT—I want to go back to an issue that has come up a few times today. I would like your view on it as well as to the level of significance of it. I refer to the changes that will potentially allow a wider group of organisations to serve as rep bodies and to shift away from what has been called 'representative' to 'representing'—just being a service organisation. Do you see that as a problem? If so, is it a significant problem or is it less than ideal but not that big a worry?

Mr McAvoy—Of course it is a problem. I refer to my previous comments about the representativeness of the organisation. It is not simply the case that native title bodies, be they rep bodies or service providers, as they are at the moment, are providing strict legal representation. They are providing social services and they are engaging with government in the management of policy relating to native title and its impact on the land and waters. If the amendments go through as they are proposed, clearly, the door will be open for a diminution of that capacity. My view is that that is not a desirable outcome.

Senator BARTLETT—With Queensland South's own situation—and you referred briefly to the circumstances of not too long ago when the rep body status changed in that region; I don't necessarily want to revisit all of that—you cover a pretty broad patch, from my recollection. You almost run out to the border, don't you?

Mr McAvoy—It covers from the coastal waters to the South Australian border, from Gympie in a line across, westerly.

Senator BARTLETT—In that sense of representing all the different traditional owners, there are a hell of a lot of different traditional owner groups.

Mr McAvoy—As an administrative tool, Queensland South has divided the region into three subregions—the western, central and eastern subregions. The western subregion would be, from recollection, from Cunnamulla west. That has been a policy decision by Queensland South to assist in the management of the rights, interests and claims in that area. The issue, I suppose, is to ensure that those people have a representative voice as to how the claims process is managed.

Native title claims are all about process. If you can organise the process in a way which is beneficial to the whole of your client group then as a representative body or a service body you are doing well. That should be the aim—to organise the framework so that it assists your client's interests. But if you are not held responsible to the people in the west, it would be very easy to organise a process so that it assists people more easterly, or vice versa, or in another way, so that particular types of applications are not progressed at the same rate. There are a number of ways in which you can tweak the process. A lack of representativeness, a lack of requirement to communicate effectively with the customers, the traditional owners, concerns me for those reasons.

Senator BARTLETT—I want to ask you something in relation to a current claim. You can tell me if it is not appropriate for you to answer this, but I am trying to use it as an example rather than finger-pointing. Obviously a big thrust of all of these changes is to try to make the process faster. It is in everybody's interests, and I think arguably even more so with the claimants. The claim that had a fair bit of coverage at the start of the year was that of the Githabul in northern New South Wales and southern Queensland. There seems to be quite a big distinction between where the New South Wales government has got to and where the Queensland government has not got to—basically there is no movement at all. I am not asking you to comment on something that is before the courts, but it seems to me that that example is mostly a matter of attitude—of who wants to advance it and who does not. We have had this in some of the earlier commentary. I am not sure if you were here for their evidence, but the National Native Title Council were talking about the problem of an attitude and a mindset in governments in general. Can we really address something like that through legislation, and particularly in this sense where it seems to be loosening things up at the claimants' end rather than at the other end?

Mr McAvoy—It is a good question. I will decline to comment on the Githabul claim. I am counsel for the Githabul people and it is inappropriate for me to comment about that matter. I will say, though, that there are marked variations between the approaches of the various state governments to negotiation and settlement of native title, and gauging how any particular state government is approaching native title and performing depends on which time period you look at. It is interesting that there is a proposed settlement in New South Wales in the Githabul matter. It is also interesting that it is the first settlement of its kind in New South Wales, whereas in Queensland there have been many, many consent determinations.

In answer to the last part of your question, I believe it is impossible to dictate how state governments should approach native title, because as much as I said the native title process is about process it is also about resources. One of the difficulties which applicants have is the capacity of the state government to deliver the resources necessary to progress all the claims. If all the claims in New South Wales and Queensland were able to proceed today, it would

still take years for the respective state governments to do all of the things that are necessary for them to be able to negotiate, let alone litigate. The land tenure searches are often quite voluminous propects. No, I do not think you can legislate to affect the approach or intent of a state government in these matters in particular.

Senator TROOD—I want to take up that point, because one of the earlier witnesses made a very strong point that the real problem we have to overcome here is the difficulties arising from state, territory and Commonwealth governments. You seem to be putting a much more qualified, nuanced position about that and directing it not so much to states of mind but to limitations on resources. Would that be an accurate reflection of your position?

Mr McAvoy—Certainly I think both issues are always in play.

Senator TROOD—And you are saying that they vary around the country?

Mr McAvoy—They vary around the country.

Senator TROOD—I want to take you to this matter of good faith. We had some strong representations in relation to the consequences should there be a finding that a member had not exercised good faith in a mediation process and that breach were reported to agencies and also to legal professional bodies. What is your reflection on that requirement of the bill in light of your own status as a member of the legal profession?

Mr McAvoy—It will create some tension for the tribunal in how it assures parties to mediation processes that their participation is being dealt with on a confidential and without prejudice basis. It seems to me to be a little antithetical to open and frank discussion if you are going to be reported for saying something that a member considers to be said in bad faith. However, I believe that reporting by the tribunal to the court about the mediation process is necessary if the tribunal is going to conduct mediation. If it is going to conduct mediation, it needs to have the capacity to force parties to attend, it needs to be able to call the process to a halt and it needs to be able to report to the court. If it cannot have that capacity then its ability to effectively mediate will remain diminished.

Senator TROOD—I am not sure that the intent of the bill is for sanction, as it were, in relation to single utterance so much as a course of conduct that might concern a member. The point you are making is a wider one about the need for some kind of sanction or reference if this mediation process is to succeed. Is that right?

Mr McAvoy—I did digress from your original question. If practitioners act in a way that requires them to be reported to their professional bodies then it is appropriate that it should be done in this jurisdiction or in any other jurisdiction. With respect to the capacity of the tribunal, I believe that it must have those powers in order to effectively carry out the task of mediation, because my experience is that parties will not turn up. When you have organisations in receipt of government funding who are working to the limits of their capacity and often beyond their capacity, the attendance at meetings in some regional location to negotiate some particular conflict may turn out to be a total waste of time and effort if a party does not attend. There is no capacity to head off that problem presently.

Senator TROOD—The good faith provisions are obviously intended to accomplish that aim to a degree. Is there more that could be included in the legislation to strengthen that focus and encourage parties to participate in good faith?

Mr McAvoy—The provisions as they are either are going to achieve what they are intended to achieve or are not going to achieve it. I do not think that you can go any further. If the legislation tried to prescribe in greater detail what it was that parties were required to do at mediation and the way in which they were required to conduct themselves at mediation, it would bog the whole process down in an administrative nightmare. In the case conferences before the court there might occasions where practice directions could be issued to assist parties in the procedure. I do not see how it could effectively assist the mediation process to have greater prescription.

Senator TROOD—Is there a need for more training in the practice of mediation? Are members adequately prepared for the role that is expected of them in relation to mediation?

Mr McAvoy—With no disrespect to the members of the tribunal, I think any mediator who comes through the normal mediation training processes or who undertakes a leader course or some other form of mediation or arbitration course, who has the appropriate qualifications, and who has been involved in mediation in the courts and commercial arbitration, is going to have problems coming from that background and going into the environment of very political Aboriginal community negotiations because there are levels of nuance and sophistication in these negotiation processes that they are simply not going to be equipped to deal with. I suppose there needs to be training. I am sure that all members of the tribunal would be assisted from ongoing training. As barristers we have to complete our continuing professional development points. I say it in the context of 'we can all improve'.

Senator SIEWERT—I would like to follow up on the comment that you made about reporting to court. The National Native Title Council raised in their submission the issue of reporting—the report can be tendered in court but the evidence cannot be discussed. Their concern is that issues could be raised in reporting that then could not be discussed. Have you considered that? And do you have an opinion on what could be done to deal with it?

Mr McAvoy—The only way in which it can be protected is by ensuring that the tribunal reports only on those matters necessary to inform the court of the things that it is required to inform the court of—that mediation is progressing or has ceased or, if a party has participated in bad faith, that a party has participated in bad faith. At present, the tribunal provides some written reports to the courts when ordered. To my knowledge, those reports are done in a fashion which ensures that the details of any mediation processes are not disclosed to the court. Certainly, in the interest of trying to resolve particularly intraclaim group or claim group against claim group conflicts, it is essential that the discussions remain confidential, otherwise people will not talk. The matters they are being asked to discuss and to negotiate are matters which may end up being used against them should they ever have to go to court—and everybody understands that.

Senator SIEWERT—The council suggested that the report being presented should also have the agreement of both parties, and it went to the fact that, if evidence is to be discussed,

the report should have the agreement of both parties to be presented. Would you agree with that concept?

Mr McAvoy—As a broadbrush approach, it sounds as though it may alleviate some of the problems; but, of course, no party is going to agree to a report which says that they have acted in bad faith, which may see their funding cut off and have other ramifications.

Senator SIEWERT—Regarding the proposals to amend the geographic responsibilities—for example, geographic areas where the minister can allocate a larger one or allocate an area to a new rep body—do you have any comments on that?

Mr McAvoy—I would prefer not to comment on that because I am here representing the Queensland South Native Title Services. It is a service body, and there are plenty of other people who can speak about the effects on representative bodies.

Senator SIEWERT—Finally, in terms of the summary dismissal provisions relating to future acts and a lack of registration for a claim, do you have any comments on those provisions?

Mr McAvoy—In what respect? Is there a particular issue that you are asking me to consider?

Senator SIEWERT—Concerns have been raised by a number of submissions about those provisions: the fact that future acts are accepted in the act and yet here there are amendments to those provisions to dismiss those provisions for something that is enabled under the act.

Mr McAvoy—I would have to take that question on notice.

CHAIR—Mr McAlvoy, again, thank you for appearing at short notice. The committee is very grateful for your appearance and for the contribution you have made to our hearing today. You may have taken a couple of issues on notice, at least one from me, and perhaps you may have taken another. If you could assist the committee with a response on those from Queensland South Native Title Services, that would be very helpful.

Mr McAvoy—Certainly.

Proceedings suspended from 12.16 pm to 1.18 pm

LOFTUS, Mr Ian Dawson, Policy and Public Affairs Manager, Association of Mining and Exploration Companies

Evidence was taken via teleconference—

CHAIR—I do not believe we have received a written submission from the association, but I invite you to make an opening statement and then we will move to questions.

Mr Loftus—I can provide my opening statement in hard-copy or electronic form later if required. The Association of Mining and Exploration Companies, AMEC, is grateful for the opportunity to appear before this committee. The association was formed in 1981 by a group of mineral explorers and is now regarded as the voice of junior and mid-size mineral exploration and mining companies within Australia. AMEC's primary objective is to secure a political and commercial environment that fosters mineral exploration and mining within Australia. In relation to native title, AMEC's interest is that of a peak body representing companies that seek to explore and/or mine on land subject to native title. AMEC's members therefore seek to have the native title process managed efficiently and effectively in order to minimise costs and maximise benefits to all parties. In considering the issue of native title, it should be noted that AMEC's members do not have any philosophical or political objections to the concept of native title, nor to the granting and recognition of native title and nor, again, to the protection of Indigenous heritage. It is the administration of the native title process that can be problematic.

Some commonly experienced problems with the native title process include: the problem of negotiating where multiple claimant groups exist; the problems of unrealistic financial and other compensation demands by some claimants; the blurring of the native title and heritage issues, with some claimants using the heritage process to leverage benefits; the problems of the Native Title Act interacting with some state legislation—for example, Western Australia's Mining Act; and the problem of adequately funding the native title representative bodies, NTRBs, to carry out their roles in the most efficient and expedient manner.

As the Native Title Act is Commonwealth legislation, AMEC looks to the Commonwealth to exercise leadership in making the native title process work better. AMEC notes and supports the comments made by Attorney-General Philip Ruddock in his second reading speech of 7 December 2006 on the Native Title Amendment Bill 2006, in which he said:

It is in the interests of all Australians, not just parties to claims, that claims are determined more expeditiously.

The major outcomes envisaged by Mr Ruddock in his speech were: more effective tribunal mediation, better coordination and communication between the court and tribunal, the behaviour of parties, effective and accountable native title representative bodies, flexibility for prescribed bodies corporate, and extending the respondent funding scheme to cover more agreements. AMEC supports efforts to achieve these goals and notes that the key elements of the bill are likely to deliver improved benefits. AMEC supports the bill and looks forward to seeing its passage and implementation in due course.

In conclusion, AMEC notes that the complexity of all the interrelated factors that form the environment in which native title exists means that there is no easy-fix solution to the

problems. It is important that all stakeholders work together in a way that improves rather than hinders the administration of the native title process. This is particularly important when timely outcomes are sought. Thank you.

CHAIR—Thank you. Senator Johnston has some questions.

Senator JOHNSTON—With respect to the consultation surrounding the inauguration of this bill, can you inform the committee about how much consultation there was between the Commonwealth Attorney-General's Department and AMEC?

Mr Loftus—AMEC have been in correspondence with the Attorney-General's Department. We are in regular communication with the native title part of the A-G's Department. We provided written material and verbal material by telephone over perhaps an 18-month period during the various stages of consultation over the various briefing papers and processes that have occurred.

Senator JOHNSTON—Did those issues that you were writing to the Attorney-General about touch on the matters contained within the bill?

Mr Loftus—Broadly they did, and our conclusion is that the contents of the bill generally address a lot of the concerns that we have.

Senator JOHNSTON—That is very good. I do not think I have any more questions.

Senator BARTLETT—A lot of the evidence we have heard this morning went to the issue of the native title rep bodies—whether they should be able or be required to be more frequently reviewed and whether they should be open to a wider group of organisations. From your experience, do you feel that there needs to be that sort of focus on the area of native title rep bodies?

Mr Loftus—I guess on the one hand we have the issue of the resourcing of rep bodies. Inadequately resourced bodies will inevitably have problems managing workloads. We are seeing that in the slowness of some of the processes in terms of getting native title outcomes. You could probably attribute some of that to rep bodies that are overworked and have far more work than they can possibly handle. In terms of getting around that problem, obviously funding is an issue. With funding comes responsibility. I guess AMEC's position is that rep bodies do need to be funded better in order to carry out those functions efficiently and effectively. However, if organisations are using Commonwealth money then there is an obligation to be transparent as to how those funds are used.

Senator BARTLETT—A number of witnesses have expressed uncertainty about whether the stated intent of having mediation happening at the tribunal level is going to achieve the goal of reducing duplication and that some of the people on the tribunal are not as good as those in the Federal Court. Do you have any comment on those aspects from your perspective?

Mr Loftus—Firstly, AMEC's position is that mediation is always better than litigation. Litigation is the path of last resort. It is the path of most expense and it is the path of greatest difficulty. Therefore, any process that is able to achieve an outcome without going down the litigious path is good. In terms of how that impacts upon the tribunal right at the moment, I cannot comment on specific cases. However, I am aware of some of the issues in the broader

context. Mediation does not always work. Parties do not always see eye to eye. How that is resolved is really an issue that needs a lot of further work. You cannot always ramp up to litigation should mediation fail. It is an issue for which there is no easy answer.

Senator BARTLETT—Do you have a view from your organisation's experience about the capability of the tribunal? I have had a picture from some witnesses that the quality is patchy, particularly with this task of mediation. Are you confident enough with the adequacy of the tribunal?

Mr Loftus—Broadly the adequacy is there. With any organisation there is always room for improvement, particularly if we are not seeing the outcomes that we would perhaps expect to see. How you would change the tribunal, improve it or tweak it around the edges to make it perform better, I could not say.

Senator SIEWERT—Have you had a chance to look at some of the submissions to the inquiry?

Mr Loftus—I have had a chance to look at some of them. I have been fairly busy and have not been able to go into the micro detail that I would have liked to. I must apologise for that.

Senator SIEWERT—A number of them raise some concerns that these changes will not reduce duplication, that they will in fact create more problems—for example, the re-recognition process. A number of submissions say that it will reduce certainty, create an area of uncertainty and divert the work being done by rep bodies into the re-recognition process et cetera. Do you have an opinion on that?

Mr Loftus—Not specifically. Getting back to the issue that some respondents had noted that the process might in fact be confounded rather than solved, AMEC's view is that the substance of the bill is good. It is not the perfect, 100 per cent silver bullet that is going to solve all the problems, but it is a good step on the way to sorting out what is a very complex situation. I note some comments in Attorney-General Ruddock's second reading speech in December last year. He noted that further technical amendments would be required along the way to have it performing even better.

Senator SIEWERT—Has reading some of the submissions, particularly from the rep bodies who are expressing concerns, altered your opinion that these changes are in fact going to help streamline the process?

Mr Loftus—I am still of the view that the changes will streamline the process and will make it work better, although obviously the proof is going to be in the eating of the pudding. At some stage there will have to be an appropriate assessment of it—that is, did it measure up against what we expected?

Senator SIEWERT—One of the issues that is raised also by a number of the submissions is that funding for prescribed bodies has not been dealt with. It has been raised on a number of occasions. Do you have any comments on that issue?

Mr Loftus—Not specifically, no.

CHAIR—Mr Loftus, that covers most of the issues the committee needed to raise with you today. If there are any further matters which come up in the course of this afternoon's proceedings on which we would like to seek further information from your association we

may be in touch with questions on notice. Other than that, though, may I thank you for your contribution to the committee's hearing today.

Mr Loftus—And may I thank you, Senators, for listening to me.

[1.31 pm]

DELEFLIE, Ms Anne-Sophie, Assistant Director, Social Policy, Minerals Council of Australia

HAYTER, Ms Frances, Member, Indigenous Relations Working Group, Minerals Council of Australia; and Director, Environment and Social Policy, Queensland Resources Council

CHAIR—Welcome. Do you have anything to add about the capacity in which you appear?

Ms Hayter—The Queensland Resources Council is an associate member of the Minerals Council of Australia. We have a similar structure to the MCA—that is, a board made up of senior mining executives. Our position is entirely consistent with the material and the position of the MCA, so I am representing the state body as well.

CHAIR—Thank you. The Minerals Council of Australia has lodged a submission with the committee which we have numbered 4. Do you need to make any amendments or alterations to that submission?

Ms Deleflie—No.

CHAIR—I will ask you to make a brief opening statement and then we will go to questions from members of the committee.

Ms Deleflie—Firstly, I would like to offer the apologies of our chief executive, Mitch Hooke, who unfortunately was not able to attend today, and also our Director of Social Policy, Melanie Stutsel. Thank you, Senators. In this presentation to support our submission I would like to address two key aspects to our position. The first is to give you some of the context within which the Australian minerals industry engages with the communities in which we operate. Secondly, I would like to underscore some key requirements still required of government to ensure the success of these native title reforms for the mutual benefit of all stakeholders in the native title system.

The Australian minerals industry today is an industry that is in transformation. We are acutely aware that we can only find and develop resources with the support of the communities in which we operate, that we are operating under increasing expectations and the scrutiny of local and global communities and that communities will continue to seek a balance between economic growth, responsible social development and effective environmental management. The communities expect to share in the benefits derived from resources development in terms of economic, social and environmental dividends.

We interpret this as the need to secure and maintain our social licence to operate. Simply defined, the social licence to operate is an unwritten social contract between mining companies, the broader society and the host communities impacted upon by our operations for the minerals industry to operate in a manner which is attuned to communities' needs and expectations.

There is no better example that demonstrates the extent of change within the minerals industry and its commitment to sustainable development than the industry's approach to

Indigenous relations. This is made more acute for the minerals industry by the fact that more than 60 per cent of our operations either neighbour Indigenous communities or actually are located on the Indigenous land estate.

Accordingly, our policy platform on Indigenous relations is premised upon: firstly, respect and consideration for Indigenous Australians' rights, interests and special connection to land and waters; secondly, ensuring that the minerals industry can contribute to the development of sustainable Indigenous communities; and, thirdly, ensuring that there is an enabling legislative and institutional framework for land access which is conducive to agreement making and reaching mutually beneficial outcomes with Indigenous stakeholders.

In respect of the first point, the MCA's approach has been to seek improvements and efficiency in the operability of the native title system but without diminishing the rights of Indigenous Australians. Accordingly, the MCA has sought structured engagement with Indigenous leaders in the consideration of the reforms where practicable and possible. We also benefited greatly from engagement with the National Native Title Council, which we have heard from this morning, particularly on the technical reforms to the Native Title Act. Such engagement provided the opportunity to develop a shared understanding as to our respective positions, to clarify our common ground and, indeed, to reach consensus on many issues.

In respect of the second point, ensuring industry's contribution to the development of sustainable communities, we have instigated a memorandum of understanding between the MCA and the federal government which establishes a strategic partnership for increased collaboration between the minerals industry, all levels of government and Indigenous communities for improved outcomes and Indigenous employment and business development opportunities related to the minerals industry. Whilst that project is still in early days, the MCA is cautiously optimistic that the MOU is establishing new ways of working together that will deliver better outcomes for Indigenous communities.

However, it is the third point, ensuring and enabling a legislative and institutional framework for agreement making, that we would like to elaborate on. The MCA broadly supports the proposed amendments to the Native Title Act. Our submission refers to some particular issues of concern. The MCA considers there is a critical need to ensure that the legislative amendments are matched by increasing resources, both in terms of human and financial capital, and capacity-building initiatives for the institutional aspects, particularly native title rep bodies and prescribed bodies corporate, to support their improved performance. Without those additional resources we are concerned that these reforms will be seriously undermined.

There are currently more than 350 agreements between the minerals industry and Indigenous interests across some 200 operations. However, it is our experience that native title rep bodies, which are such a critical component of the native title system, have been chronically underresourced in fulfilling their statutory functions, which has delayed the negotiation of beneficial agreements with industry and the resolution of native title claims.

The reforms to the native title system will inevitably increase the resource burden on native title rep bodies. The MCA is concerned that the focus of the government's reforms are on governance requirements and not the functionary requirements of native title rep bodies. The

MCA considers that improved performance is best driven by adequate resources, increased flexibility in the funding arrangements and enhanced capacity. By these we mean that funding for statutory responsibilities must be: secure; guaranteed; timely; performance based, with a track record of meeting commitments and achieving outcomes; directed towards training and capacity building for NTRB board members and staff members; budgeted on a three-year business cycle; sufficiently flexible to accommodate unforeseen circumstances, changing in priorities and new levels of activity; based on a system of accountability that is consistent with good business practice; and not so onerous as to distort the focus of organisations from their core business. We also think there is a need to ensure there is NTRB staff parity with government employment conditions.

The improved powers for derecognition of native title rep bodies and the redrawing of native title rep bodies will only provide the appearance of change without necessarily addressing the core resource and capacity constraints to improved performance. This will not provide the level of certainty and stability required of the native title system but, rather, could destabilise the native title system, incur significant delays and further stretch already limited resources to the detriment of Indigenous communities, business and the achievement of mutually beneficial outcomes. It is for these same reasons that the MCA recommends that the proposed fixed terms of periodic recognition of native title rep bodies should be for a minimum of three to six years rather than the proposed terms of one to six years. It would simply be too destabilising.

In relation to prescribed bodies corporate, the lack of appropriate funding for PBCs, again, financially, in terms of capacity, is emerging for the minerals industry as a critical business issue. There are key risks for the minerals industry if PBCs are not appropriately resourced to be functioning and effective organisations which can independently and proactively give effect to native title holder aspirations, which can engage in agreement making with third parties, which can meet the statutory requirements and obligations and which can secure further assistance from existing programs and services.

The failure to have functioning and effective PBCs will make it difficult for PBCs to engage in the employment and enterprise development opportunities that arise from the mining industry. It will increase the costs and time frames of agreement making with industry. It will increase the uncertainty that finalised agreements with PBCs meet the expectations of the native title holder community and may produce an overreliance on industry to support the basic functions of PBCs, particularly in areas where there is minimum commercial activity.

Accordingly, the MCA supports amendments to the Native Title Act that relax the statutory requirements on PBCs, as this may reduce the resource needs of PBCs, but cautions that support should be provided to native title holders who decide their PBCs should still consult with native title holders on decisions that materially affect the exercise of their native title rights and interests, and urges the government to reconsider the resources available to PBCs to ensure that they are functioning and effective organisations.

In arguing for increased resources, both in relation to native title rep bodies and prescribed bodies corporate, the MCA clearly differentiates between the government's responsibilities for core funding to fulfil legislative functions, functional and capacity-building requirements and the mineral companies' responsibilities in funding Indigenous engagement in specific

commercial negotiations. The MCA considers that the capacity of Indigenous institutions and stakeholders must be addressed and enhanced if we are to see the improved outcomes intended by the statutory amendments. Our submission includes further details and additional recommendations. However, we would be happy at this stage to answer any questions you may have.

CHAIR—Thank you. Do you wish to add anything, Ms Hayter?

Ms Hayter—Not at this stage. I imagine any other questions or issues will come out of questions about the submission. There is just one slight correction to the actual submission: The date '2006' should be '2007.'

CHAIR—It seems to me, from reading your submission and from the nature of the discussion that you started there, Ms Deleflie, that the Minerals Council is, I suppose, broadly supportive of the thrust of the bill but has some fairly deep-seated concerns about the capacity to effectively implement it without further suggestions which you make in your recommendations.

Ms Deleflie—We are concerned that whilst we broadly support the bill, which is directed towards improved outcomes, if that is not matched by ensuring that, in particular, the Indigenous stakeholders and the native title system have increased resources and enhanced capacity, the whole situation may not be improved. There is enhanced capacity in the bill to allow the derecognition of native title rep bodies and redraw some boundaries. There is a lot of cost involved in deregistering and establishing new services. Negotiations involving big projects for mining companies can take two years. You develop relationships, you understand how a particular rep body works and you might have reached certain agreements on points that are not yet formalised in an agreement. If you suddenly derecognise a rep body and change some boundaries and appoint a new body, there can be some very big disruptions to those negotiations involved in that process at a time in Australia when there is a major boom in industry and there is a need to get agreements up and going.

CHAIR—In reading your submission, I think it is a very considered approach to the matter before the committee. I am interested in the questions you raise about the relationship between the Federal Court and the National Native Title Tribunal as well and how these proposals in the bill affect that and how it affects you as a player in the system.

Ms Hayter—It is a similar question that was asked of AMEC. The industry's position is that we do not want to get involved in any detailed way in the actual determination process. Our interest is in negotiating individual agreements on particular projects. We support the concept of mediation first rather than legal processes. In any system in relation to the Federal Court or the NNTT, we support their adequate resourcing, particularly in terms of their capacity to undertake certain things and their ability to fulfil obligations.

CHAIR—What do you mean by their capacity to undertake certain things? I am not sure what that means.

Ms Deleflie—The independent review highlighted some statistics about how many claims are currently in mediation with the tribunal. I have forgotten the exact details, but there is quite a large percentage that have been in mediation for more than two years and a significant percentage of claims that have been in mediation for more than five years, I think. That

highlights that there is an issue there. This morning Mr Chalk highlighted some structural constraints as to how well the tribunal can actually effectively mediate native title claims. The resolution of native title claims is not our core interest; it is much more about the negotiation of future acts. It is not something we can really comment on in detail, but if the tribunal is going to have an expanded role then we certainly think they should address the capacity to take on that expanded role. We also make the point that they should address that capacity within existing resources. We take the view that within the native title system they are a relatively well resourced institution.

Senator CROSSIN—In your opening statement you talked about a memorandum of understanding that you have signed with the Australian government.

Ms Deleflie—That is right.

Senator CROSSIN—What is the basis of that? What are some of the elements of that?

Ms Deleflie—The memorandum was signed in June 2005. It was really to try and get greater collaboration between the minerals industry, government and Indigenous communities to make sure there was an alignment of Commonwealth programs and services to facilitate the implementation of agreements between mining companies and Indigenous communities. Many of those agreements provide certain commitments in terms of employment and enterprise development opportunities. Our experience has been that there are some real structural constraints to actually achieving those commitments in terms of people not having the appropriate literacy levels et cetera. This was an attempt to work more closely together to get better outcomes. For the first two years, which has been the pilot stage, we have had eight lead sites, five of which are in WA.

Senator CROSSIN—When you talk about lead sites, are you talking about mining areas?

Ms Deleflie—Mining regions, yes. That is where this is being implemented.

Senator CROSSIN—Was it a tripartite agreement? What Indigenous communities were a part of this?

Ms Deleflie—No. The agreement was reached after ATSIC was disbanded. That is one of the difficulties for us. There was no representative body that we could easily engage with to sign the agreement. We certainly recognise that that is a shortcoming. At a regional level there is definitely a lot of engagement with Indigenous communities.

Senator CROSSIN—How do you know that the agreement reflects what Indigenous people actually want?

Ms Deleflie—Our principal objective for that increased collaboration is to actually make sure that we can implement more easily the agreements that we have reached with native title communities. If we have made a commitment, for example, to 100 employment positions, it helps to harness Commonwealth resources, and indeed state government resources too, to make sure that all those government services are available at those sites to facilitate and support that process.

Ms Hayter—The regional partnership agreements are with the Indigenous communities as well, which is the first major outcome from each of those areas.

Senator CROSSIN—I just want to concentrate on the MOU and why there was no Indigenous input to, or agreement with, it.

Ms Deleflie—The disbanding of ATSIC made that much more difficult. But it is being deployed regionally and, at the regional level, there is certainly engagement. Two regional partnership agreements have been signed under this project so far—one in East Kununurra and one in Port Hedland—and they certainly involve Indigenous groups and organisations.

Senator CROSSIN—Perhaps you might like to send the committee a copy of the MOU for us to have a look at.

Ms Deleflie—I am happy to do that.

Senator CROSSIN—I suppose that is one of the problems when you do not have a national body that can sign off on it. Did the National Indigenous Council look at it? Was it ever provided to the NIC?

Ms Deleflie—It is my understanding that they were not yet really operating as the National Native Title Council.

Senator CROSSIN—They are not the Native Title Council; they are the National Indigenous Council, which advises the Prime Minister. I wonder if they were ever given the MOU.

Ms Deleflie—Sorry, I was getting it confused with the NNTC, not the NIC. I am not sure if they were. I can take that question on notice and get back to you.

Senator CROSSIN—Talking about the NNTC, has there been any thought of giving the MOU to the new Native Title Council and bringing them into it so that it is a tripartite agreement?

Ms Deleflie—We have been very engaged with the National Native Title Council since before they formally incorporated. Our whole approach to those reforms has been to make sure there is very good Indigenous engagement in our internal consultations before we form our position. In 2004 our board formed an Indigenous Leaders Dialogue, which is co-chaired by Professor Mick Dodson. Through that dialogue—which also involves Marcia Langton and others; I can provide you a list of who is on it—we were invited to meet with the National Native Title Council. We found that incredibly useful in developing our position on those reforms, particularly in relation to the technical amendments. But that is a time-consuming, intensive process. We found we could do that most easily with the technical amendments; there were two discussion papers and there was enough time to respond and have that level of engagement.

Senator CROSSIN—I want to go to your calls for increased resources and enhanced capacity. There have been severe criticisms today of the NNTT and its capacity to progress mediation swiftly—in fact, evidence shows that is perhaps not the case. Would you have any confidence that it should be the sole body that undertakes mediation—if there are no increased resources or enhanced development of the members of the NNTT?

Ms Deleflie—As we have said, the resolution of native title claims is not an issue that the minerals industry engages in very much. It is much more focused on the negotiation of agreements. Now that the position of the minerals industry and the mining tenements is much

clearer—given particular decisions—it is not something we normally take an active role in. So we are not really taking a strong position on the issue of the Federal Court versus the tribunal, but we do see those statistics and we do think that, if they are going to have an enhanced role, they possibly need to look at enhancing their capacity to meet that role—but within existing resources, because we think they are well funded.

Ms Hayter—I think AMEC also made the point that there is always room for improvement.

Senator CROSSIN—You do suggest in your submission that there should be clarity in the respective roles of the NNTT and the Federal Court.

Ms Deleflie—I think in the past there have been concerns that there has been some duplication—that mediation has occurred in both the Federal Court and the tribunal. So, at a very general level, we support that clarity to avoid that duplication. It is my understanding that, with these reforms, there is still some scope for the Federal Court to engage in mediation but it is somewhat more limited.

Senator CROSSIN—You do not think there are times when the Federal Court needs to get involved in the mediation, even though it is happening with the NNTT, to push for a resolution in some areas?

Ms Deleflie—That is not something I am in a position to provide an answer to.

Senator CROSSIN—Are you involved in that?

Ms Deleflie—No, it is not sufficiently core business.

Senator CROSSIN—How would you define acting in good faith?

Ms Deleflie—There has been quite a bit of discussion about that this morning. The important thing is that there are some very clear expectations, protocols, guidelines, right at the outset so that it is very clear that if someone breaches, whatever that means, it is not acceptable and against what was intended. You would expect that when an offer is made that it is a genuine offer, a reasonable offer—those sorts of things—but to what degree you can codify that, I am not exactly sure.

Ms Hayter—We note in the Attorney-General's submission that there is a comment about looking to develop a protocol or some guidelines in consultation with stakeholders on that particular issue in relation to good faith. So it is certainly something we are supportive of and we want to make sure we are involved in.

Ms Deleflie—So we support a collaborative approach to developing—

Senator CROSSIN—What might be in good faith.

Ms Deleflie—those guidelines—yes.

Senator TROOD—You pointed out that your position is dependent on the resolution of the title once those matters are settled and you have obviously a strong interest in further negotiations. How difficult a problem has it been for members of the council in relation to delays? This bill is obviously trying to address the protracted time it takes to resolve title issues, which is something with which you are deeply concerned. Can you give us some sense

of how much a problem it has been for your members, or is it a relatively insignificant problem?

Ms Hayter—Sorry: I presume you are specifically talking about the delay in determinations—is that what you mean?

Senator TROOD—Yes.

Ms Hayter—From a Queensland perspective—and I know you have had a bit of a tour as well—we had an issue which has been largely overcome in terms of the granting of exploration permits. The Queensland government for some time sat on about 900 exploration permit applications because they did not know whether they would end up in a situation where they would have to pay compensation. Part of the reason for that was the lack of determination of claims, but for the industry in Queensland that particular process has been resolved and our attitude is that we are getting on with business. Regardless of determinations, we go in there—and it is part of core funding—and work with the future act process as it is. So for Queensland there was an issue, but industry generally is getting on with what they need to do and is less focused on those determinations being the requirement for its business in Queensland.

Senator TROOD—Can you give us a sense of how it is across the rest of the country?

Ms Deleflie—In Western Australia, you had the development of regional template agreements, which is one method of trying to facilitate that process. In South Australia, you have had a process which I think has taken about nine years in terms of developing a statewide ILUA that might facilitate agreement making. I think there is a need to review all of those different strategies and see what has been most effective. Clearly, the resolution of native title claims make it easier to negotiate agreements. I think in some of the reforms it is more the technical amendments that will facilitate, for example, the deregistration of claims—not needing to reregister claims but when you make minor amendments for overlaps et cetera—and make it easier to engage in agreement making. So there are a few things in the technical amendments that will make that easier, although claims may not be entirely resolved.

Ms Hayter—I think, regardless of whether or not areas are determined, companies work with their local Indigenous communities. So from a project or operational basis, regardless of any form of determination, companies are going to get on with agreements and have relationships with their Indigenous communities.

Senator TROOD—Your submission has an emphasis on mediation as a means of resolving these issues, as I understand it. You are not concerned, obviously, that that might protract the problem of settling title claims at all?

Ms Deleflie—We are really not in a position to comment on that because, as I said, we do not take an active role in the resolution of native title claims, so we have not really focused on that in terms of assessing whether we think the amendments would protract or shorten the process. But I think there is no denying that the resolution of native title claims does take a long time and we certainly would not want to see things shortened but not giving some good outcomes. We are more interested in seeing some long-lasting, solid outcomes from the

process than, for the sake of expediency, seeing agreements or resolutions that do not make everyone happy.

Senator TROOD—You have raised some questions in your written submission about the consultation process. You seem to be relatively contented with parts of it but rather more, you say, disappointed with other parts of it. Can you just elaborate on that position?

Ms Hayter—The point made in the submission was that we felt that the technical amendments process, which had taken place over 12 months—two discussion papers, acknowledgement in the second discussion paper that incorporated people's responses—was very good because it gave us the opportunity to consult with the Indigenous Leaders Dialogue and the National Native Title Council. We had a concern with this set of amendments, which is the focus of the submission, that those sorts of time frame opportunities were not given. As everybody knows, discussions with Indigenous groups take some time, and the core philosophy of the Minerals Council is to make sure that we can get as close a position and as close an agreement as possible so that we maintain the relationship between industry and Indigenous groups. So the disappointment comes from the very short time frame to look at the amendments and even to make submissions and to appear before this committee.

Ms Deleflie—And to respond to policy proposals from government. I can give one practical example. In the first discussion paper, in the technical amendments, there was a particular proposal about section 24MD6B. At face value we thought, 'Yep, that sounds good', so we supported that in our first submission. In the second discussion paper the government elaborated a bit on what would be required to give effect to that, and it was from that elaboration that we realised that in fact we would prefer to keep section 24MD6B as it was.

That is an example of how useful that process was, of how useful it was to have a reasonably detailed policy proposal to respond to. There is a bit more work done on it, it gets presented again and then you realise that that is actually not the best way to go, whereas for some other aspects of the reforms it has been more a case of announcing what the government's policy position is and then introducing the bill to parliament.

Senator TROOD—Ms Hayter, when you referred to the shortened time that we are all under in relation to this matter, were you saying you just have not had an opportunity to have the discussions you would have liked to have had with Indigenous groups, or that any discussions you have had have just been very constrained?

Ms Hayter—I think it is the first. And it is also in relation to consultation with our members as well; it makes it difficult to get out broadly to all of our members.

Senator TROOD—So you would want a couple more months; is that what you are saying?

Ms Hayter—Yes. I think the process that was followed for the tech amendments was good.

Ms Deleflie—Generally I would say that officers of the Attorney-General's department and OIPC have been very accessible. But we would have preferred to have seen more policy positions being presented with enough time to then respond.

Senator SIEWERT—I want to follow up this issue of the MOU and the 'pilots', I think you were calling them; I think you said there was one in east Kununurra and one in Port Hedland—

Ms Deleflie—East Kimberley.

Senator SIEWERT—Sorry; East Kimberley. I think Senator Crossin asked for a copy of the MOU. Is it possible that when you provide us with that you could provide us with a list of where you are piloting it?

Ms Deleflie—Absolutely.

Senator SIEWERT—Have you been reviewing the success or otherwise of agreements? Has the council done anything in terms of looking at how they are being implemented?

Ms Hayter—You mean agreements overall—agreements between individual mining companies and groups?

Senator SIEWERT—Yes. Do you have any involvement there?

Ms Deleflie—No. We have not done that. Certainly, the MOU is squarely focused on assisting the minerals industry to implement commitments made in agreements. It is difficult. There are many agreements. Many of them are actually not public agreements. For commercial reasons, they are kept confidential agreements. But certainly we are always looking to set the benchmark and keep setting it higher by facilitating the best possible agreements. And we saw a real need to make sure that there was that better service delivery from state governments and the Commonwealth government that would support the implementation of agreements.

Senator SIEWERT—It sounds like the pilots that you are running have not been up and running very long. Do you have any initial feedback on the success or otherwise of them?

Ms Deleflie—They have been established in the last 18 months, but 18 months in Indigenous affairs is not such a long time. In WA a lot of that time has actually been spent getting the state government on board on the project. There are capacity constraints on all sides—within the minerals industry and government, as well as on the Indigenous side. It has taken longer than we expected to establish the pilot sites, but we do have two regional partnership agreements arising from the MOU pilot sites, which we could send to you as well.

Senator SIEWERT—That would be useful, thank you. I want to go to the reregistration process. I note your comments both in your submission and just now. One of the issues that has also been raised is not only the time frame but also the fact that, after the first transition period, the minister is not required to write to rep bodies to invite them to reregister. Do you have any thoughts on that? It has been raised is an issue here with us.

Ms Deleflie—You certainly need a mechanism to derecognise organisations that are not performing. What we are saying is: please be very careful about this—we do not want to see wholesale changes. Overall we think that the system is working pretty well. If there are areas where there is a need to improve performance, we would really like to make sure that that is not because of a constraint in capacity—that it is actually because it is essentially a dysfunctional organisation or whatever. We are very cautious. We do not want to see big

changes, because it is really important in these scenarios to have that stability amongst native title rep bodies.

Senator SIEWERT—I think you said you think there should be a mechanism—

Ms Deleflie—I think that you definitely need a mechanism to derecognise organisations that are not performing, but we do not want to see wholesale, big changes occurring where a lot of energy and limited resources are going into winding up organisations and re-establishing organisations—effectively delaying any negotiations by 12 months or more. Maybe increased efforts should go towards making sure that existing rep bodies have the capacity to improve performance. Without looking at those resourcing capacity issues, a lot of what is intended by these amendments may not eventuate.

Senator SIEWERT—The other issue that has also been raised in submissions here today is the issue of 'representative' versus 'representation' and the broader possibility of recognising, for example, service delivery organisations as rep bodies. Do you have an opinion on that?

Ms Deleflie—We would certainly support representative organisations. We even think that there is potentially a role for native title rep bodies to take on a broader regional development role beyond their statutory functions. We in the minerals industry are very interested not just to negotiate with the traditional owners of a particular area but all persons who might be affected by a mining operation. That might include, for example, Indigenous people who are not the traditional owners of that area. Since ATSIC was disbanded, native title rep bodies are sort of the next best thing.

Ms Hayter—Could I just add a comment in regard to deregistration. An additional comment in support of not ending up with wholesale changes is that we would certainly encourage the government to ensure that as soon as issues come to their attention they are responded to and not let get out of hand. There are certain rep bodies that people are aware of where I believe a situation was allowed to continue for several years that should have been pulled up earlier. There may have been the potential to address those issues before it got to such a crisis point.

Senator JOHNSTON—Ms Deleflie, how often does the council appear as a respondent to claims in the Federal Court on behalf of its members?

Ms Deleflie—Never.

Senator JOHNSTON—Does the council actually participate in mediation with respect to a claim?

Ms Deleflie—No.

Senator JOHNSTON—So its sole function is to represent its members, who are themselves involved in basically the future act process?

Ms Deleflie—That is right.

Senator JOHNSTON—Are there many members who actually engage in the native title process beyond the future act process?

Ms Deleflie—It is my understanding that, whilst they might formally be respondents to claims, they do not actually take an active role.

Senator JOHNSTON—So when you talk about chronic underfunding—I think that was your expression—you are talking about the future act process.

Ms Deleflie—That is right. It is in our interactions with native title rep bodies, which is primarily to do with future act processes—how an organisation prioritises where it is going to spend its money.

Senator JOHNSTON—But the problem you are confronted with is that you have a claimant group of, say, several hundred people, and the alleged executive of the claim may or may not have the authority to negotiate. To ensure the future act process as your members invest in it you have to bring them all together. That is a very expensive proposition and there is often no alternative to that—trucking them in or flying them in from all over, often from other parts of the state or from other states. So when you are talking about chronic underfunding you are talking about the future act process, I think—correct me if I am wrong—because I do not think you actually have much experience with what goes on with the validation and determination of claims.

Ms Deleflie—Our direct experience is certainly in the future act agreement making, and there we experience chronic underfunding. One would presume that that extends to the claims resolution process, but we do not have direct experience of that because we do not take an active role in it.

Senator JOHNSTON—I have a problem with the council saying that there is chronic underfunding. You have an interesting expression for it. In Mr Tuckwell's submission it says:

> In arguing for increasing resources, the MCA clearly differentiates between the Government's responsibilities for core funding to fulfil legislative obligations, functional and capacity building requirements, from minerals companies' responsibilities in funding Indigenous engagement in specific commercial negotiations.

Ms Deleflie—I can give an example of what we mean by that. If we were to do a negotiation with a prescribed body corporate, for example, we would not want to be in a situation where we turned up to find that they had not met for a year, the group did not have a strategic vision of where they wanted to go and what they wanted to achieve out of the agreement making and they had not engaged a lawyer or whatever. There is a certain amount of funding that is required to make sure that these organisations are functional and effective. Beyond that, industry recognises that it should make a contribution to the legal costs of particular negotiations, but those costs can really blow out when you do not have functioning organisations.

Senator JOHNSTON—I put it to you that the problem is one that many of your members have brought upon themselves through paying very large sums of money in the nature of compensation in the future act process without attaching any strings to the future of the prescribed body corporate or indeed investing in the negotiation resources that can be brought to bear in the future act process by the rep body. In many cases, the money has just been paid with no strings attached, without any thought to capacity building and without any thought to investing in bringing forward the rep body and its constituent claimant groups such that when

they do get native title they will know what to do with it. Isn't that a problem, from your point of view?

Ms Deleflie—Across the minerals industry there are a whole spectrum of mining companies and different approaches. I cannot refer to any particular examples, but I know there are some very large articles today in the *Australian* that refer to agreement making between the minerals industry and Indigenous groups. There is certainly a recognition there that there are some outstanding agreements that do give attention to the implementation process.

Senator JOHNSTON—Trusts have been set up, jobs have been provided, educational foundations have been set up and scholarships have been provided, but not enough of that has been happening. When you say that things are chronically underresourced and underfunded, from a commercial negotiation perspective I rather suspect that that is because your members are looking to carry out negotiations but are not able or have not been prepared to fund the necessary capacity building that goes with that. We have a very skilled and intelligent person on one side of the contractual equation and we have Indigenous people on the other side who often cannot even read or write and who sometimes cannot even speak English.

Ms Deleflie—Yes, but it would reduce costs significantly if there were proper institutional arrangements on the Indigenous side that actually supported that process, even though particular negotiations might need to be supported by the minerals industry.

Senator JOHNSTON—Tell us what sorts of institutional arrangements they would be and how they would look.

Ms Deleflie—The PBC, for example, would be meeting regularly and would have set out some of their core requirements that they might have in negotiations. It is not unusual at the moment to find that some PBCs have not even met when they have been supposed to meet under their own constitutional rules. It is not appropriate that industry should be supporting those processes.

Senator JOHNSTON—But industry is the principal beneficiary, because industry wants to contract with those people. Industry wants the vicarious liability that flows from the executive of those corporate bodies to sign agreements into the future to conduct business.

Ms Deleflie—I think it would be a missed opportunity if we only saw prescribed bodies corporate as existing for third parties. I think it is an opportunity for traditional owner groups to achieve some of their own aspirations.

Senator JOHNSTON—That is another question altogether. But your members are predominantly interested in being able to do a deal.

Ms Deleflie—That is right.

Senator JOHNSTON—They are complaining that there are no funds to teach the people how to negotiate a deal, yet they are paying millions of dollars in the future act process. I find that very interesting.

Ms Hayter—At the risk of sounding argumentative—which anybody who worked in my office would laugh at!—this legislation was imposed upon the mining industry. The mining industry did not go out there seeking the requirements for native title rep bodies to exist and

operate in a certain way. Therefore, we strongly believe there is an onus on the government to back up its legislative framework with its own resourcing. Secondly—and I know that the bulk of this money flows to the state and that the split between federal and state funding involves a whole different set of discussions—the minerals industry does put a significant amount of money into the coffers of government. To say that it only returns to our members and therefore it is only in our interests that those agreements are reached ignores the fact that industry already contributes to government processes, infrastructure and community development. So we do contribute, and that money could be utilised by the government and directed in certain cases to those areas from which resources have been extracted and appropriately paid in royalties.

Senator JOHNSTON—But surely your members would agree that the best way and the best people to imbue skills and capacity building in Aboriginal communities would be private enterprise, not government.

Ms Hayter—Our members' views are that there is a joint responsibility and that certainly physical infrastructure and core social fabric are the responsibility of government.

Senator JOHNSTON—I did not see that joint responsibility mentioned in the submission. That was all I was worried about, so I think we can leave it there.

Senator BARTLETT—In that general area you have been talking about on the individual agreements—and I do not want to go too far outside the scope of the legislation—your final recommendation really goes to the totality of resourcing for all these organisations and to some of the other changes that are also coming down the line for them and that, if they are not adequately resourced with all these shifts, the prospect of the whole show functioning more efficiently is not going to eventuate. The individual agreements are part of the whole native title regime, even though they are not specifically addressed in this legislation. Is that a reasonable assertion?

Ms Deleflie—Yes.

Senator BARTLETT—I think you referred to today's piece in the *Australian*. I do not know how many were from the mining industry and how many were from other areas. Does that come back to that institutional capacity that you were referring to? If you do not have the institutional capacity on both sides then all these random, one-off agreements, where you have to develop the capacity over and over again, might lead to loopholes in your agreements and might also affect the follow through. Assuming the reports in the *Australian* are generally accurate, is it that resourcing and capacity problem that is at the core of this or is it dodgy people doing dodgy deals knowing they do not have to follow through? Or is it some mix of those?

Ms Deleflie—I think if we had enhanced resources and capacity within native title rep bodies and prescribed bodies corporate, we would get much better outcomes all around to the benefit of all stakeholders.

Senator BARTLETT—You mentioned before that you had been able to get some effective engagement at the regional level. Was that through rep bodies or through other organisations?

Ms Deleflie—In some cases, it is through the native title rep bodies. Most of the sites where we have piloted the MOU have been where there are existing agreements with mining companies. You might have trusts that have already been set up. You might be dealing with the traditional owners through their trust arrangements rather than through the native title rep bodies. It varies from site to site. I think that is the other important point to make: the regional variation as to needs, requirements and circumstances. So it really depends, but in some of the areas native title rep bodies have been the key to the success of the MOU project.

Senator BARTLETT—Is that part of what you are talking about when you refer to the potential for rep bodies to play a wider role?

Ms Deleflie—That is right.

Senator BARTLETT—Are you recommending that that is the desired path?

Ms Deleflie—The other alternative might be to set up some sort of regional authority structure, but at this point it would seem easier to build on native title rep bodies. In some areas they do provide very good representation for most Indigenous people in the area; in others, they do not. Again, it is going to depend on the area and, as I said, the regional variation needs to be recognised. Ideally, yes, we would like to see rep bodies have that increased capacity to assist in the implementation of agreements, which is often about economic development. At the moment, whilst there is lots of expectation that native title rights can translate into economic opportunities, there is really no encouragement for native title rep bodies to acquire those skills to facilitate that to happen. The emphasis is more on a narrow approach about getting agreements signed and the resolution of native title claims. Those are two very big things anyway, but we think that could really be enhanced if it had that added role.

Ms Hayter—There is an opportunity there that should be considered and looked at.

CHAIR—As there are no further questions, I thank you both for appearing and thank the Minerals Council for its written submission.

Ms Deleflie—Thank you.

[2.24 pm]

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

CHAIR—Welcome. The Northern Land Council has lodged a submission with the committee, which is submission No. 12. Do you need to make any amendments or alterations to that?

Mr Levy—I would perhaps just make a small clarification. I appreciate the opportunity to make a late submission and late appearance. The submission was drafted on the red eye flight. I think the point which I can primarily assist this committee on is practical examples of the tribunal and the Federal Court vis-a-vis case management and mediation. I suggest you may wish me to focus on that.

CHAIR—We will perhaps go to that in your opening statement. But, as to the submission as it stands, you do not need to amend or alter it?

Mr Levy—In relation to the legal issue, I just want to emphasise that I am not a position at this stage, because of the holiday break, to have obtained comprehensive advice from senior counsel. To the extent that the NLC has concerns—which it does, along the lines of what the Federal Court registrar has raised about legal issues—those are simply concerns. We are not saying that it is invalid; we are just saying that we are concerned that it may be unconstitutional. We respectfully suggest that the Commonwealth lawyers are all very competent lawyers, and I know they could presumably answer that quite promptly for the committee if you wished them to. It would be of great assistance to people such as me to see what their analysis is. The existence of those concerns is a concern for the NLC, but it is really the practical stuff that I am most interested in.

CHAIR—Those questions will certainly be pursued. In my experience, the answer from departments is usually: 'What we have drafted is correct.' Notwithstanding that and my overwhelming cynicism, I suggest that, if you do feel the need to provide further submissions to the committee after hearing any evidence that is given and after the opportunity to consult senior counsel, of course you would be welcome to do that.

Mr Levy—I appreciate that.

CHAIR—As you know, we did adjust the program to facilitate your appearance. I appreciate that you adjusted your own by taking the red eye flight to be here. Thank you very much for that. I will ask you to make an opening statement and then we will go to questions.

Mr Levy—Obviously I am from the Northern Territory and that is where my primary practical experience is. I think I can say on behalf of everyone I know—all lawyers acting for private firms or governments or land councils in the Northern Territory—that we have found the Federal Court's case management, including mediation service, vastly superior to what has been provided by the tribunal. In those circumstances we were very surprised by Dr Ken Levy's findings about the court. He found that the court was hidebound by judges asserting judicial independence and so forth, and there was a recommendation that really the court should have its case management function transferred exclusively to the tribunal.

Our experience of the tribunal is that, compared to not only the court but also private mediators we have used, it just simply does not do anywhere near as good a job. That is with the greatest respect to the president and the other members, all of whom I know, respect and like. I believe that they are endeavouring to do the best job they can. But all of our experience is that they do not deliver the goods. In those circumstances, we would have thought that the correct course, rather than vesting exclusive jurisdiction in the tribunal regarding mediation, would be to expose them to the winds of competition. In that regard I pick up Senator Johnston's earlier comment regarding representative bodies—that is, should there be tenders?

Competition will sort out who does the best job. I would respectfully say that it must be assumed that the Federal Court—and in my experience all courts, including the Federal Court in native title matters—loves it when matters settle. I do not have the impression of the Federal Court that it wants things to be litigated. We settle cases before hearing at the court door and judges are always really pleased—especially in these cases, because they go forever even if you do them well. They are lengthy cases. That is the primary point I want to make. I can give examples if that is of any assistance. I can go on to that now or I can stop if you want to go to questions.

CHAIR—We will go to questions. I am sure it will draw out the information that you have, and we do have a little time available. I am interested in a number of points in your submission. You make an interesting point on page 5 in relation to attestations as to good faith in the report process that is set out in the bill. You make the point that it may be that an adverse report as to a lack of good faith could be relied on by the Commonwealth to then withdraw funding, and you would then have the Commonwealth relying on reports by Commonwealth appointed public officers, as you say, performing administrative functions through withdrawal or alteration of funding arrangements which would substantially influence the course of litigation before the court. I think that is a very interesting point you make.

Mr Levy—Again, it is not as concisely put as I would like. I do not want to suggest that the Commonwealth would act in bad faith, but it is just the way things work. Responsible officials say that something is in bad faith. The Commonwealth officers are people like me—they are just public servants doing a job. They will then write to the land council: 'What do you say about this?' We will write back and say, 'We still want to run it.' They will say, 'This looks like a very serious allegation.' You can just see where it would go.

The additional concern about it, apart from the concern about at least an appearance of an interference in the judicial outcomes, if you like, is I can see it leading to litigation. I have personal experience of this. I cannot quite remember the details, but the president, Graeme Neate—who I think might be here—may remember it. An allegation was made, inadvertently, about me by a member. It was about two or three years ago. It was in a mediation report, which went to the judge, the late Justice O'Loughlin. If I recall rightly, the member, in good faith, relied on information given by the person who drafted it—a staff member of the Native Title Tribunal—and it was incorrect. I cannot remember what the allegation was but it alleged, I think, that I as a lawyer had refused, on behalf of my client, to participate in a mediation conference arranged in Kununnura, or somewhere, and had not cooperated and so forth. It was simply untrue.

Again, the officer concerned is a responsible person. It was a mistake. It went to the judge, and the judge was irascible. That is what judges do, and a lawyer's job is to deal with that, and I am not fussed about that. I wrote a letter to the judge explaining everything. I went through my file. Like every lawyer, I keep a file note of every telephone conversation. I time-cost it, so I was able to spell out, literally, that I had been in contact with the Native Title Tribunal 37 times over a 23-day period about this matter and so forth. I was able to defend myself. From recollection—I do not want to be wrong on this—it took a year before I got the president of the tribunal to withdraw the allegation.

I am just a public servant. I am funded by the Commonwealth. Why give public servants—even if they are statutory appointed members performing administrative functions—the power to go around alleging people have not acted in good faith? They were under privilege. If it had not been under privilege I would have threatened defamation, and I am sure that the president would have fixed it within a week. But if it happened to you and you thought you were in the wrong, you would judicial review it. It is just a recipe for litigation, especially when it is almost impossible to prove people have not acted in good faith. All the case law is that it is impossible. I have run one case. We did not succeed; we failed unutterably. You need extraordinary circumstances to do it. I think it will create problems. Many of the tribunal members are not lawyers, and I think they will make mistakes—mostly honest mistakes. I think this will all lead to litigation and uncertainty and people wasting their time. What we really want is people to reach agreement or to have the matter prosecuted to a conclusion.

Senator CROSSIN—Thank you for coming down, Mr Levy. I guess that is a hazard of living in Darwin, isn't it? You have to leave at midnight. It is getting worse. You made some comments about the NNTT, and it was with interest that I read the submission from the Federal Court. Could you elaborate a bit more on where you see some problems with the NNTT. They are the only body which have the sole jurisdiction in which to mediate here. You say, though, that there will times when you can never avoid duplication.

Mr Levy—The initial phase of the tribunal, when Justice French was the president, was when claims were lodged in the tribunal. That was very much an 'educate the public' phase. I thought that the tribunal did a terrific job. We participated in all the mediations. We, and I am sure everyone involved, knew that without some test cases there were not going to be many settlements. Nonetheless, we were trying to lower the temperature, so we participated actively in that. After that, once the Croker Island case and things were underway and so forth, a few years down the track we found that the tribunal was failing the true test of mediation. An example of mediation which works—and, Senator Crossin, you will know Tony Fitzgerald, who is the Anti-Discrimination Commissioner and a very experienced mediator—was that we had an internal dispute amongst the Larrakia and there was an agreement about the suburban development in Palmerston, which is where the Larrakia have built new suburbs as a consequence of a couple of native title agreements. The Chief Minister, who had just come to power, said, 'I know that you say you cannot settle this, but I want it mediated by Tony Fitzgerald because I trust him and he is a good mediator.' He brought us together, he found out what the issues were about, he reached a conclusion, he explained it and it was all over in half a day. And he reached a correct conclusion.

The great difficulty with the tribunal is that when you go into mediation you never come out of it. I cannot think in any realistic sense of any examples where the tribunal promptly said: 'Look, I do not even think it is worth flying up for that. We know what that is about it, don't we,' or 'How can we knock this off quickly?' or 'This is something that has legs.' You mediate forever. It is your function to be in mediation. Nothing happens. If there were examples of 'this one flying, this one isn't'—but there never is.

The Newcastle Waters mediation is another example. In fairness to the tribunal, and given the amount of funding they get, I think they did a pretty reasonable job. They called us together a couple of times. We used it educatively. We tried to build a relationship with the pastoralists. We did a number of things in the Northern Territory that they had not experienced in other jurisdictions, such as we were going to give them a precis of the anthropological information and we wanted them to understand it, have their views, form relationships and things like that. So that was good. We did not need any mediation to do that; we would have done it anyway. They reported back that the pastoralists and the Territory considered there needed to be a test case, notwithstanding the Miriuwung Gajerrong case, and that is what the Newcastle Waters test case is.

But before Newcastle Waters became a test case, the registrar of the Federal Court then said, 'Well, that doesn't help me much; I knew that already.' She called us all in—this was former registrar Caroline Edwards—no doubt under the direction of the docket judge. She got all the pastoral lease claims together. She analysed them, proposed categories they could go into and proposed how a test case could be created. She did that not only in relation to pastoral cases but also in relation to half a dozen categories: towns, small towns, the sea—that sort of thing. She bestowed complete order on the landscape and confirmed that a litigation settlement could not be reached. She worked out precisely what the differences were. This was all informed to the court so that it ended up with the test case taking a week. That just did not happen with the tribunal.

You do not have to be part of the court for these things to happen. The Legal Aid Commission has criminal legal aid commissions. The New South Wales Legal Aid Commission is not part of the New South Wales Supreme Court; it works very closely with it. All of our experience is that the tribunal does not, and the Federal Court is voting with its feet and so are the parties. This is not a turf war by the Federal Court. The Federal Court is not thinking, 'It is our turf.' If the tribunal had done what the registrar did, the Federal Court would have been only too happy, and so would we. The tribunal is not plugged into the court and does not provide the service. The court is voting with its feet. It is not always the case. Of course there are examples of the tribunal mediating well, and if that happens it is taken. That is not so much in the Northern Territory. I am sure it happens elsewhere. I know there are rep bodies that are operating well and ones that are not and so forth—I cannot speak too broadly.

The Federal Court has got an extraordinarily bad rap, particularly from Dr Ken Levy, no doubt in good faith. He is an accomplished person. I have met him. I enjoyed talking to him and so on. I think he has got it fundamentally wrong. The Federal Court is not fighting a turf war; it is voting with its feet with the aim of settling as much as it possibly can: first running test cases to test the rules to allow more settlements and then prosecuting them. Either native title exists or it does not. The whole genesis of this problem is the report from Dr Ken Levy

and Mr Hiley, particularly what Dr Ken Levy had to say. He said, 'If only the tribunal had teeth it could cause people to reach results.' You do not need teeth to mediate. The whole point of mediation is to be a neutral observer to find out what the issues are and cause people to focus on them and resolve them or not. Yet Dr Ken Levy's position is that there has to be teeth but he says nothing about why that is necessary. Hence that has led to the position we are in.

I do not want to go back over ground we have covered, but I thought this document might be useful. I have a copy for everyone. This is a public document prepared by the Federal Court, dated 28 September. It is all the native title matters in the Territory. It has a colour scheme for which ones are in mediation and which ones have never been referred. The ones that have never been referred—it is a de facto order; there is no mediation, if you like. Some were referred; they were the pastoral lease ones. Some of the earlier Darwin ones were. That case had to be dealt with through the courts ultimately, although we settled a few matters on the way. That is the service the court wants. They are not getting it from the tribunal.

The court, if I could speak in relation to what I understand to be its position, is happy about a function which it thinks it is properly performing. I know from my observations that a lot of the successes in the Northern Territory have been implemented elsewhere, and no doubt vice versa. I know that the registrar in Melbourne, the registrar in the Northern Territory and the registrar in Brisbane have worked closely together in cross-fertilising. You can see that the Federal Court is absolutely focused on taking what works and applying it elsewhere where it works and adapting it to make it work.

What is happening here is a fundamental policy error, in light of all my experience. The fundamental policy error is that the result will not be greater efficiency; it will be greater litigation, greater slowness and greater lack of outcomes. Why not go for competition? Let the tribunal fight it out. They will only improve or wither on the vine, or some of them will be terrific and some of them will not. I do not understand why that course would not be taken.

Senator CROSSIN—I was going to ask a question about good faith, but I think you covered that and gave us a fairly good example in your opening statement.

Senator JOHNSTON—I have a question about good faith. Do you think that a peremptory statement by a state or federal government that this is a test case is an act of bad faith or a breach of the good faith provisions? That is, a refusal to mediate because we are saying we are going to push this all the way to the High Court.

Mr Levy—As a layperson I may well do, but legally, no.

Senator JOHNSTON—Given the prerogative by governments—and in many situations the Commonwealth has set up a model litigant structure—and in circumstances where the tax department, as you might be aware, is seeking legal direction and takes a test case, it pays for it. This is not exactly beneath the umbrella of our terms of reference but I think it logically flows from it. If we are looking to expedite the procedure, is there a circumstance where the respondents, namely, state, federal and other participating respondents, who refuse to enter into mediation because they want a determination, fund the determination?

Mr Levy—Yes. I can take that further, and it may be that case law develops this way. There is scope for the Federal Court to make cost orders where they are not satisfied with how any party, particularly a model litigant government party, has acted. I agree with you.

Senator JOHNSTON—The point I make is that we have set up the framework—

Mr Levy—Yes, but there is no penalty for people who act badly.

Senator JOHNSTON—But one section of the process—namely, the government section, to some large degree—can simply opt out and say, 'You spend the money and we'll sit back and watch what happens.'

Mr Levy—Yes, that is right.

Senator JOHNSTON—I would have thought that was reasonable if there were fairness and equity in terms of resources in going forward.

Mr Levy—Yes, I agree with you.

Senator SIEWERT—I know that you commented at the beginning that you had not had time to get full advice on this, but my understanding from your submission is that you are saying that NLC feels like issues that are the jurisdiction of a court—because they are judicial—are being handed over to an administrative body, and you are arguing that that is in fact unconstitutional.

Mr Levy—It is reasonably arguable that it is unconstitutional. I would not put it more strongly than that because I am a solicitor who spots issues. Barristers tell you what the strenghth of the case is. And my concern is that while that argument is there someone is going to take it.

Senator SIEWERT—So somebody will take that and then argue that?

Mr Levy—Yes.

Senator SIEWERT—In other words, challenge it in court?

Mr Levy—That is right. It only takes one judge to uphold it or reject it, and then it flows through; everyone knows about it; it will muck around at solicitor level for a while—you know, just directions hearings and things—and then someone will run a test case on it. Why even go there?

Senator SIEWERT—So the upshot of your comments on that and the other issues is that, in the end, instead of cutting red tape and unpacking the system, it will actually just clog it up even more and have the reverse effect.

Mr Levy—The NLC submission is: as much as possible, get rid of extraneous interlocutory skirmishes. And I think this will be one of them. If it is the case that there are significant legs to the argument, it could become a major issue and, for the reasons I gave before, unnecessarily. There is no reason to be exclusive about it. Trust the Federal Court to want to settle things; make it clear by whatever means that they can use whoever they want. Supreme courts and federal courts in non native title matters regularly engage, through their registrars, consultants. They have a list of them—people who are good at construction cases. That is what will develop I would expect, whether the tribunal exists or not, whether people

are there or not. People might leave it—they could become consultant mediators if they are good. Some of them will be good. They are competent people.

Senator SIEWERT—So that is your argument: competition is—

Mr Levy—It is my primary—

Senator SIEWERT—To not take the mediation role away from the court but in fact open it up to other bodies—

Mr Levy—Open it up.

Senator SIEWERT—to be able to provide that negotiation.

Mr Levy—There is an extra thing. I think I am almost the longest-serving lawyer in native title matters—I commenced in May 1994—and I do not think native title litigation is particularly different to other litigation, for the reasons explained by Paul Hayes in hiN wonderfully titled article, 'National Native Title Tribunal: Effective Mediator or Bureaucratic Albatross?' I think mediation is usually the exception when you have competent representatives. I know there is patchy representation around the country. There have been times in native title and non native title matters when I have found mediation useful, like any lawyer. Mostly you do not need it. It is useful to have it there. I do not think that in native title matters mostly, if you have competent representation, you need it. But I think you need to have the option. I think it is an important tool in the armoury of courts to get alternative dispute resolution.

Senator TROOD—Mr Levy, I see your principal objection to the reforms, but is there anything that could be done to make them work effectively? You obviously have a strong view as to their need, but do you have a view about how they might be made to work—assuming that is the policy direction in which we are moving? What can we do to make them work?

Mr Levy—I just do not think it will work. That is from all my experience of mediation in the tribunal. Give them far less money—make them become lean and efficient, like we try to be. Seriously, they have way too much money. They always jump on aeroplanes and fly up when they could do it by telephone. Then you have a Federal Court matter where the judge does it by teleconference. Give them way less money. Make them become leaner and efficient. There is just way too much flying around and meeting people face to face. This stuff is not rocket science. You get to understand the patterns of how Aboriginal disputes work and government positions and stuff. You usually have a pretty good idea pretty fast. Anyone experienced in the area does. Give them way less money.

Senator TROOD—I can see the Treasurer being attracted to that.

Mr Levy—I am not being flippant. I will give him a ring!

Senator TROOD—I can see the Treasurer being attracted to that idea, but in relation to the wider legal principles and other matters, is there anything—

Mr Levy—There is a fundamental problem with litigation, where the first thing that happens is that you get sent off to mediation. I know I am not answering your question. But you are forced to devote resources, which are all paid for by the government, very

expensively, to participate in mediation every time you lodge a Federal Court case. That is fine if it is useful, but in litigation it is generally not required—it sometimes is. If one thinks native title is different to that, I have never seen a case for it.

Dr Ken Levy endeavours to come up with all sorts of reasons, but he does not give any examples of all these things that he says happened. He says that there is far too much focus on Federal Court trial and litigation outcomes. Well, the High Court and the Federal Court tried to create test cases. It took a decade and a bit for the land rights act test case to get sorted out. That was the eighties; the Aboriginal land rights act was introduced in 1976. By the nineties, although the public was not really aware of it, the CLP government was generally doing deals on land claims. A lot was settled in the nineties—land claims, not native title claims. With native title claims, unfortunately, there was always going to be a decade's worth of litigation. Really, there is not a lot left.

This year eight appeals come down in the Federal Court. Some of them are portrayed in the media as big issues; they are actually just technical little things. A number of them, obviously the Perth case, are going to resolve the outstanding issue which was not resolved by Yorta Yorta. Anyone in the know knew that Yorta Yorta did not resolve it. Yorta Yorta was really a case where the High Court endeavoured to assist as much as possible, but what they were really doing was saying, 'The trial judge heard the evidence and we are not interfering.' Then they had dicta, which gave a bit to everyone. Hence it is a live issue.

I think the Federal Court, very properly, is totally focused on creating clear rules about that issue. Once that happens, there will be potential for far more settlements. It only works if lawyers give the same advice. By and large, most of the lawyers I deal with, no matter who they are acting for, give the same advice as me. So if I tell my client, 'You have got a really tough case,' I know the other lawyer is saying the same thing to the government. If I say, 'Look, I think you've got a strong case,' so it is again.

I think the Federal Court deserves enormous credit for the way it has focused on this big outstanding issue. Insofar as I can see, they are plainly focused on resolving it in the public interest. My clients want it resolved one way and others do, but they should get credit. But, unfortunately, there was nothing out of the statements by Dr Ken Levy, who seems to think the court is litigious. They are doing their job. They are resolving, if you like, the second generation of outstanding legal issues. There is not a lot left after that.

CHAIR—Thank you very much. Again, thank you very much for your submission and for attending the committee hearing today. I do understand that, from your location, it is a big ask. As I said at the beginning, if there is further material which you wish to provide after you have seen the rest of the transcript from this afternoon's proceedings or, on reflection, in relation to the submission from the registrar of the Federal Court, then by all means the committee would be pleased to receive it.

[2.55 pm]

DOEPEL, Mr Christopher, Registrar, National Native Title Tribunal

NEATE, Mr Graeme John, President, National Native Title Tribunal

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

JONES, Ms Katherine Ellen, Acting First Assistant Secretary, Indigenous Justice and Legal Assistance Division, Attorney-General's Department

MARSHALL, Mr Steven Anthony, Assistant Secretary, Claims and Legislation Branch, Native Title Unit, Attorney-General's Department

ROCHE, Mr Greg, Assistant Secretary, Land, Department of Families, Community Services and Indigenous Affairs

CHAIR—I welcome representatives from the National Native Title Tribunal, from the Attorney-General's Department and from the Department of Families, Community Services and Indigenous Affairs. The Attorney-General's Department and the Department of Families, Community Services and Indigenous Affairs have jointly lodged a submission with the committee, which is numbered 1. Do you need to make any amendments or alterations to that?

Mr Anderson—No.

CHAIR—Before we begin, I remind senators that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Officers of the department are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. Before I begin, may I say that the committee is dealing with this in a reasonably speedy process. This was referred in December for report later in February. I want to thank the departments and the tribunal very much for their attendance in the hearing room during the day, because it does make the process much easier when you have had an opportunity to hear the evidence put to the committee and the committee's discussion with witnesses. It does not always happen, so when it does we regard it as a bonus. Thank you very much for that. I am going to invite opening statements.

Mr Anderson—I will start, if I may. I note that we have here representatives of the different parts of the different agencies with responsibility for native title. My division of the Attorney-General's Department, which Mr Marshall is from as well, has primary responsibility for the majority of the amendments in the bill. Ms Jones is responsible for the respondent funding measures in the bill and Mr Roche has responsibility for the native title representative body and prescribed body corporate components of the bill. The tribunal is an independent statutory body. You have the combined departmental submission, so I will not go

to that. I will just note that the bill needs to be seen as being part of a broader package of reforms, which are all set out in our submission. A number of people today have talked about the NNTT in particular and to some extent in isolation. It needs to be understood as well that while the bill proposes conferring some new functions upon the tribunal, that is in the context of the tribunal and the court being required to work far more closely together to manage the claims more efficiently. They are being required to communicate more extensively in particular to ensure that there is no situation where matters are not proceeding expeditiously with the managed and appropriate application of the whole range of dispute resolution tools that are available to the court and the tribunal.

Reviews and inquiries, which are two of the measures proposed, are only two more tools and it is certainly not envisaged that they would be deployed as a matter of course in claims. I also note that no one amendment in itself is going to dramatically change the operation of the native title system. Something that is fundamental to how native title works is the behaviour of the parties. The reforms seek to build upon the existing and reasonably well-understood framework to help further facilitate the expedited resolution of claims, ideally by parties reaching agreements. That is the main thrust and I think that needs to be borne in mind. That is all that I wish to say at this point.

Mr Neate—The tribunal thanks the committee for the invitation to appear at this hearing. As you are already aware, appearing with me is the Native Title Registrar, Mr Christopher Doepel, who will have specific functions under the amended act, assuming these amendments are passed by the parliament. As noted in my letter of 22 December 2006 to the committee secretary, the tribunal did not seek to make a written submission in relation to the legislation, but is willing to respond to submissions and to questions raised by members of the committee arising from submissions or the committee's review of the bill.

The native title system has produced positive results, particularly in recent years, but experience shows that it needs improvement. The proposed scheme, as Mr Anderson has indicated, is a package of reforms and the tribunal considers it should assist in producing more results sooner, making the system more effective and efficient. The claims resolution process amendments in particular will clarify the respective roles of the Federal Court and the tribunal and will give the tribunal additional tools to advance the resolution of claims. I am obviously willing to expand on this in response to questions but let me say from the outset that we are ready, willing and, in my submission, able to do the work.

Both the legislation and some administrative arrangements associated with the legislation, such as the new guidelines for respondent funding, are aimed at influencing the behaviours of parties so that all participants focus on achieving outcomes and engaging in the process to do so. So far as it is within our power to do so, the tribunal will work to ensure that native title claims are not left to drift. Rather, we will work with the parties and the court to ensure that appropriate regional and claim-specific planning and prioritisation is done and adhered to. I am happy to expand on that and, indeed, to respond directly to a range of issues that have been raised about the tribunal today. I realise that we are under time constraints, so I am happy to respond to questions rather than make a statement if that is the way you would prefer to go.

CHAIR—Thank you, Mr Neate. Would you like to end there then and we will come back to questions, or do you have more?

Mr Neate—I am happy to go on now or respond to questions.

CHAIR—I think questions might be easier. Mr Roche?

Mr Roche—Thank you, madam chair. I am mindful of the time and I will be very brief. I am aware of the fact that a number of issues have been raised by submitters and those who have given evidence today about NTRBs. I propose to quickly respond to three issues. They are, firstly, the decision by the government to move to a system of periodic recognition for NTRBs as opposed to the current unlimited recognition; secondly, the issue of amendments in relation to the representation function; and, thirdly, the decision to move for the abolition of the requirement to have strategic plans approved by the minister.

Very quickly, on the review of the act, the government sees two major obstacles to NTRBs fully performing their function. The focus that has been brought is exclusively: what system is going to deliver the best outcomes for the claimants. In that regard, the difficulties which there have been for some years about decisions to attempt to derecognise poorly performing NTRBs and also about ensuring that an appropriate mechanism for review is in place have vexed the system. It is fair to say that the outcomes have been mixed. Some NTRBs have worked very well for their claimants and have achieved major outcomes, particularly in Northern Australia. However, others have not and, in fact, a number of NTRBs are no longer on the scene for various reasons. What the government is looking at here is reform and not revolution. Some have suggested that in fact what is happening is that the decks are being cleared for major law firms to take over the carriage of native title claims. I suggest that, if that was the case, this bill would look very different.

The NTRB system remains the primary focus of the government's efforts on behalf of claimants on the basis that they deliver. One part of the government's package which has not been mentioned today is that associated with decisions about periodic terms will be a related level of funding. Currently NTRBs are only funded on a year-to-year basis. In future core funding will be delivered in three-year blocks corresponding to the recognition terms. Similarly, the issue has been raised about the possibility that after the current round of recognition expires there has been no statement that well-performing NTRBs can expect to be renewed. I draw the committee's attention to page 9 of our codepartmental submission on this issue that says:

Those with a history of achieving strong outcomes and maintaining sound administration and governance could expect a maximum or near-maximum term, and to be re-recognised at the end of their terms.

Mr JOHNSON—What page is that?

Mr Roche—It is 4.3—it commences at the top of page 9. The issue of representation has also been raised. It has been said that the government is moving towards a system of representing rather than representation. With respect, that confuses the system of the act, which has always been about representation in terms of delivering outcomes for applicants and native title holders. That remains unchanged and, in fact, a number of provisions in the act which refer specifically to representation remain in the act. They include section

203AB(2) which provides that NTRBs must maintain organisational structures and initial processes that promote satisfactory representation and consultation; 203BB provides that NTRBs have to represent claimants or facilitate their representation, and, similarly, 203BC provides that an NTRB must consult with relevant bodies or persons. I could go on. All that is changing is that the function in relation to representation has been moved as a stand-alone criterion. What the minister will be looking at is the performance of the function of the NTRB.

Finally, I will briefly mention strategic plans. Let there be no doubt that the government strongly supports planning on the part of the NTRBs and the system. That is not the issue; the issue is: does a mechanism for approval of strategic plans by the minister facilitate that process? We have found that it does not. It is essentially a paper warfare exercise. NTRBs have put in and the minister has approved statements, which are anodyne in the extreme, and argue very little, if any, indication of an NTRB's true priorities and, in the native title context, that is not particularly surprising. The landscape, depending on decisions, what is happing with individual claims, and government and state government attitudes, can and will change from year to year. So it is unrealistic to expect that a document to be put to the minister can in any way indicate what an NTRB might be doing in three years time.

CHAIR—Thank very much, Mr Roche. Let me start with two questions. Firstly, I think it is only fair, Mr Neate, to say in acknowledging the evidence the committee has received today and that which has been received in submissions that there would appear on the face of it to the committee to be very significant concerns in relation to, if I might put it very simply, the mediation capacity of your tribunal. When reflecting on the increased responsibility in that area that the bill gives the tribunal, submitters and participants today are very concerned about it, assuming that there must be some foundation in that at least in part because people have come to this committee and spoken to us about it. I am interested in your response to that and even a response to a basic question: of the number of tribunal members, how many have appropriate and official mediation training?

Mr Neate—I wonder whether I could touch on a number of issues that have been raised today on that point. I may not inadvertently address all of them but if I deal briefly with the range of issues that have been raised and if the committee members have any supplementary questions on those points, I would be happy to field them. We have currently 13 members, some part time but most full time, each of whom was appointed by the Governor-General because they had one or more of the qualifications set out in section 110 of the act. Either they were a legally qualified person with a certain length of experience or they had, in the opinion of the Governor-General, special knowledge in relation to Aboriginal and Torres Strait Islander societies, land management dispute resolution or any other class of matters considered by the Governor-General to have substantial relevance to the duty of members. The duties of members ranged beyond mediation, including arbitration matters and so on.

The current tribunal members have a range of skills and experience as you might expect. Many of us have legal qualifications and experience, some have backgrounds in business, some have backgrounds in federal and state politics, at least one has valuation experience and we have people with anthropological and academic experience or practice as well as, obviously, qualifications. Two of our members are Indigenous people. Members individually

and collectively have not only mediation training of the basic sort, which I think one of the witnesses referred to this morning as of itself insufficient for this sort of work. Within the tribunal, recognising that, we have organised special week-long training units for members and senior staff with outside consultants coming in to assist us to touch on the particular features of native title which go beyond the challenges of what I might call conventional mediation.

There is plenty of material on that and I will not delay the committee with that now. If you would like further information on the particular features of native title mediation, of course I would be happy to provide it but one of the features which is unusual is that often there will be numerous parties to mediation. There will be many more than a handful and indeed in some matters, which I have had in the past and ones I still have, you can have upwards of hundreds of parties to the mediation, so the management of that process is rather different from say two, three or four parties in mediation. So that and a whole range of other cultural and other factors means that we have to concentrate on those things which are specific to the form of practice that we are engaged in. We have taken active steps in recent years to have tailored training for that purpose.

Members who are responsible for presiding at mediation are assisted by appropriately skilled staff and we can draw on legal research and geospatial technical assistance within the tribunal to assist the member in the conduct of mediation. On occasions, I will appoint more than one member to a particular matter having regard to the particular skills of the members, the background of the members and the challenges facing them from a particular mediation or cluster of matters.

The issues that have been raised by a number of witnesses seem to go beyond mere training and mediation to what seems to be a core issue and that is how much clout the tribunal can bring to the mediation process. This was at the heart of what I understood to be some of the recommendations. A criticism was made by the previous witness of Dr Ken Levy's contribution to aspects of this report. I draw the committee's attention to paragraphs 4.33 and 4.34 of the consultants' report. This is the joint part of the report where, amongst other things, the consultants together say:

Some parties see NNTT mediation as being a 'soft' process and consider that timely and effective outcomes are more likely to be achieved through Federal Court mediation. However, there appears to be no reason to assume that another body with the same constraints as those which presently exist in relation to NNTT mediation could have been more effective than the NNTT.

4.34. By comparison with the Court, the lack of these powers for the NNTT in relation to its mediation function under the NTA—

That is the Native Title Act—

is apparent.

In terms of timeliness and the more robust approach which some witnesses have been urging the tribunal to take, I make two brief responses. Firstly, when another committee of the parliament was looking into the effectiveness of the tribunal some years ago, a criticism was that the tribunal was too directive and trying to push the parties along to quickly and that the tribunal should back off. Others were saying the tribunal was adopting far too soft an

approach and allowing the parties to run the show and that really the tribunal should be banging heads together and providing more direction. The trend, certainly from the submissions and the oral presentations made to this committee, is more towards the directive approach—and, in any case, that is what the tribunal is doing in contemplation of the additional powers which the bill proposes to confer on us.

We have had a number of meetings of members and senior managers of the tribunal in recent months in relation to the review, where we have resolved to take a far more directive approach to mediation. That is not to say we act independently of the parties, but we have already demonstrated that we can and do work with the Federal Court in creative ways to ensure more rigour in the disposition of claims on a regional basis. I refer the committee to a recent judgement of the Federal Court, in the matter of Franks v State of Western Australia [2006] FCA 1811, where Justice French was faced with a very robust report from the tribunal about how matters were going and suggestions about orders that ought to be made. Not all the respondents, I think, were keen to submit to that more robust approach, but the court thought it was very helpful to have the tribunal putting a clear perspective on where the matters were going and what needed to be done to move things along.

That judgement builds on an earlier judgement of Justice French in the Federal Court, in the matter of Frazer and Others v State of Western Australia [2003] FCA 351, which outlines the role of the tribunal and the fact that the tribunal is charged under the act to oversee and move along the mediation process and that no one party, be it a state government or anybody else, can unilaterally determine the pace of mediation. The tribunal, for its part, does seek to explore better ways of assisting parties to negotiate outcomes. We have a number of examples in our practice in recent years of enhanced research tools which are being used effectively with parties to bring together material which otherwise would take a long time for different parties to bring together or would reduce the amount of duplication and hence the cost as well as the speed of the process.

The tribunal also encourages parties to explore non-native-title or non-determination outcomes. One of the suggestions that Mr Vincent was making this morning was that a mediator needs to be creative and to explore with, and even raise with, parties a range of options they may consider. What has become clear in recent years, as the law has become clearer, is that many groups in Australia will find it very difficult to establish that they have native title, or, if they can establish that have native title to a region by virtue of their continuous connection with that region, much of their native title will have been extinguished by private dealings with land, and what remains will be fairly minimal both as to the rights and interests that the law will recognise in the areas of land that would be covered by those determinations.

Increasingly, the tribunal has been seeking to explore with the parties what other options might be looked at. If at the outset, or near the outset, parties are willing to look at a range of options in addition to or in lieu of a determination of native title then clearly the cost of preparing connection reports and doing the extensive tenure research—which Senator Johnston was referring to earlier—will be significantly reduced, if not done away with completely, because a different package of outcomes is being negotiated. Over a number of years now, the tribunal has assisted parties to negotiate non-native-title outcomes which are,

in themselves, sometimes quite modest but nonetheless result in the withdrawal of the claim and meet, as I understand it, the interests of all the parties to resolve the matter. So any criticism that we lack creativity or the willingness to explore other options should be dismissed, because there are various examples of that on a small scale as well as a large scale.

A recent large scale settlement which the tribunal was involved in from the outset right to the conclusion was the Wimmera determination in Victoria in which there were in excess of 400 parties, including all levels of government. It was necessary to get the consent of all those parties to a settlement which involved a determination that native title existed over some parts of the area, a determination that native title did not exist over most of the area, and a package of other components which the parties agreed to.

By reference to the backlog—which has been suggested either directly or indirectly by some witnesses as being attributable to the tribunal—it is undoubtedly the case that many matters, indeed hundreds of matters, that were referred to the tribunal some years ago have not yet progressed to resolution. One needs to ask why that might be so. I would submit that, far from it simply being the fault of the tribunal, being unable to mediate, there have been a range of other factors which have inhibited any mediation occurring at all in many cases. Although hundreds of matters have been referred to us by the Federal Court, I have said in recent annual reports that many of those cannot be considered active matters because, for example, no connection material has been prepared on behalf of the claimants who, in many instances, will be represented by native title representative bodies but who, also in many instances, will have no representation or will be relying on pro bono representation by others in the legal profession. There is the readiness of applicants to actively pursue their claim, which is a barrier to active mediation. There is the capacity of state and territory governments and perhaps on occasions the Commonwealth to assess the connection material and, for their part, to do all the tenure research that is necessary. All these things have to be taken into account in determining the priority that is to be given to any particular claim or cluster of claims in a region. A program for disposing of those claims has to then be worked out—and that leads to my next point.

Various witnesses today have raised the issue of the apparent lack of prioritisation of claims and the need to prioritise claims in order to assist in their resolution. In some parts of the country, the tribunal has been working actively with representative bodies, state governments and the court in preparing regional work plans for particular districts, regions and, indeed, a whole state. The document which Mr Levy showed you in his presentation, which was prepared by the Federal Court—and which I have not seen but I think I have seen versions of it in the past—is not dissimilar to a document, for example, which the Native Title Tribunal in New South Wales has been preparing for some years with the New South Wales Native Title Services and with others to colour code, assess and rank claims of various sorts throughout New South Wales.

In some parts of Queensland and in other places such as South Australia and regions of Western Australia, the tribunal has been working for some time to actively develop regional work plans which make some sort of sensible order of the way in which claims might be resolved. Clearly, not all the claims will be at the top of the list, but as long as there is an agreed set of priorities between the key players and the court then work programs can be

developed for those at the front of the queue. This can then be monitored closely by the tribunal and the court, and the parties can be kept to those sorts of programs.

The importance of establishing priorities has been emphasised in submissions but it has also been increasingly emphasised and demonstrated in tribunal practice in various parts of the country in recent years. The recognition of the utility of that tool is apparent in some of the amendments in the bill. The amendments expressly provide for the tribunal to prepare such documents and for the court to have regard to those documents once they have been prepared. Those amendments which, in a formal sense, will confer additional powers and functions on the tribunal and obligations on the court are really building on best practice that has already been developed in some parts of the country and urged by the tribunal.

Finally, a number of the elements of the bill, including the provisions for regional mediation work plans, are aimed at developing a more transparent process, which will mean that all of the participants, be they parties or institutions, will have their performance more closely examined in a more public fashion.

The requirement to act in good faith has often been mentioned, but that is but one of the components of trying to influence the behaviour of parties in mediation before the tribunal to engage actively with one another to try to secure some sort of outcome. Our capacity to direct people to attend mediation conferences is clearly aimed at the same end. Beyond that there are a number of additional tools, one of which is the capacity to conduct inquiries which, essentially, are voluntary exercises involving parties to matters which have been referred to the tribunal for mediation. Let me say on the experience point that a number of members of my tribunal have had extensive experience in conducting inquiries under the Native Title Act, particularly in relation to the future act regime, and with considerable success not only in terms of getting outcomes but in not attracting appeals or withstanding appeals. Some of us have had experience prior to being appointed to this tribunal in exercising arbitral or quasi judicial functions or, indeed in the case of some former members, judicial functions elsewhere. So we also bring that experience to that new tool which will be part of the mix of the mediation process.

That experience in conducting inquiries sometimes involves hearings in the country and taking oral evidence from a range of people, including Aboriginal witnesses. So we already have extensive experience in that area to bring to the new functions which it is proposed will be conferred on the tribunal. I have taken some time to respond. If there are any other particular aspects of our capability to do the job, I would be happy to address them.

CHAIR—Briefly, in response to your very comprehensive statement, my experience in these processes leads me to think that there must be some meeting in the middle here between those who are expressing concerns about the operation of the tribunal and the glowing commendation that you have just given the tribunal and your members, as I would expect you to do. One of the challenges we face is finding where that meeting actually occurs. I guess the committee will turn its mind to that in a short time.

One point you made was that you thought concerns were raised, in particular, by a number of witnesses about the degree of clout, if you like, that the tribunal can bring to the mediation process. It was not really my largest take-away point from the submissions we received today;

it was more a reflection, I thought, of the experience of submitters and witnesses in engaging with the tribunal, particularly in mediations, not so much a question of clout.

Mr Neate—Having listened to a number of submissions made this morning, in response to your question, 'Why is the situation as it is perceived to be?' as I heard a number of the witnesses, often the tribunal could not push people along. They could convene meetings and if people came, that was fine. If they did not come, lots of resources were wasted. It may be said, if you take the market analogy, that if we are the world's best mediators, people would flock to our mediations. I do not think that is the reason why people come to mediation. They come either because they have to because the court has directed them to or because they see it is in their interests to try to move matters along. Some parties might see it is in their interests not to move matters along. Indeed, my recollection is that Mr Chalk made the point this morning that a number of matters remain notionally in mediation without progressing because it is in the interests of parties not to have the real issues pushed to resolution, and they are quite happy to let these matters drift because it suits their purposes. Those are the sorts of matters which, as we increasingly identify them and have the resources to put towards them, will become uncomfortable for the parties because we will be taking more active interventionist approach.

CHAIR—At the risk of doing to the committee the same thing that I did by asking one question of Mr Neate, I also have one question for Mr Anderson which pertains to the submission from the Registrar of the Federal Court. It would not be a surprise to you that we take that submission very seriously and there are a number of issues to pursue. We were unable to have the court here today because I understand the registrar is overseas. What response, if any, does the department propose to make to the submission? Do you want to make it now or do you want to take it on notice?

Mr Anderson—At this point, these are matters that have been canvassed with the court, as the registrar's submission makes clear. They are matters on which the government has taken advice, has considered its position and has proceeded to introduce the bill in its current form. So I think that in itself indicates that the government is comfortable with the provisions as drafted.

CHAIR—The committee wants to know what the government's response is to the points raised by the Federal Court. We are not in a position to read either your mind or the advice that has been provided to the government on this matter, and they are very serious issues. The issues involve roles, constitutionality and how the court manages its work and the powers to be conferred upon the National Native Title Tribunal. They are not ones whereby the committee can just say, 'We're very pleased the government has accepted advice and we'll take that on its face.'

Mr Anderson—I accept that entirely. I am conscious of the time; to some extent I am in your hands here. I am also obviously aware that, as to disclosing the advice to the government, that would be a matter for the government as to whether it wished to do that in any detail. It might be best if I took that on notice regarding a detailed response to the particular matters raised by the court.

CHAIR—I would not like the committee to end up in a position where we had to take our own advice on the matters raised by the registrar, Mr Anderson. I think that would be most unhelpful.

Mr Anderson—Certainly.

Senator CROSSIN—I have quite a few questions. I might put some on notice. Mr Neate, I wonder if we could go back in time by 10 minutes and could you just answer Senator Payne's question. How many members of your tribunal have had formal mediation training and what is the number who might have had informal mediation training?

Mr Neate—So far as I am aware, most, if not all, have completed basic courses such as LEADR or similar courses. A number of them have maintained the updating of that and have official accreditation.

Senator CROSSIN—How long or how comprehensive is a LEADR course? Is it two days or two years?

Mr Neate—I think the standard course goes for a week, in my experience.

Senator CROSSIN—One week's training.

Mr Neate—Yes. We appreciate that that, of itself, whilst important, is not sufficient to deal with all the issues or particular features of native title mediation. We developed our own week-long course with external consultants which each member and senior staff member who works in this area did a year or two back in various venues around the country.

Senator CROSSIN—So, at best, some of them might have had two weeks training in mediation?

Mr Neate—In that formal sense, that may well be the case. Of course, people will have had experience on the job and learning from colleagues within the tribunal.

Senator CROSSIN—Under the new regime if, in fact, matters do not get moved along under mediation, I assume that they will then be referred to the Federal Court?

Mr Neate—They are at the moment. It should be said that on a number of occasions—and I speak from personal experience here as well as with the knowledge of some my colleagues—we have recommended to the court that mediation cease. In some instances, the court has taken that advice and has ordered that mediation cease and has set matters down for trial. In some cases, judges have sent them back and said, 'Notwithstanding the recommendation of the tribunal, we want you to have another go.' In that sense, when we adjudge that a matter has no prospect of a mediated outcome before us—and we do that—we make that clear to the court. What the court does with it from there—

Senator CROSSIN—Do you think that will not change in the future? I do not want to know about now. I am talking about the future regime under these changes.

Mr Neate—I cannot predict what the court's response would be, but I cannot imagine that the tribunal would be any less inclined to say, 'It's time to draw stumps; this matter is going nowhere' and refer it to the court.

Senator CROSSIN—You envisage you would still have a capacity to do that?

Mr Neate—Yes.

Senator CROSSIN—All right. It has been put to us today that there also still may be some levels of duplication and that in fact this might still coexist. Do you think that is still going to be the case in some matters?

Mr Neate—I think that the policy intent of the legislation is quite clear that, when a matter is referred to the tribunal for mediation, we are supposed to do the mediation. We report back to the court on the progress of mediation. The court is not out of it in terms of supervising the mediation, but the mediation itself is conducted by us. I thought that policy intent was clear. It may be that, in practice, we find that there is some overlap but I am not aware of where that would occur.

Senator CROSSIN—What is your interpretation of this act? Do you believe the changes preclude the court from conducting mediation?

Mr Neate—While the matter is with the tribunal, yes.

Senator CROSSIN—I am not sure whether it is Mr Marshall or Mr Roche that this question is directed to. I think it may be Mr Marshall. You made some comments that you believed that, under this act, we would get more results sooner. Maybe Mr Roche said that.

Mr Marshall—I have not spoken yet. I will now, for the record.

Senator CROSSIN—Sorry, it might have been Mr Anderson who said that. It is early in my notes here, so perhaps it is you, Mr Anderson. What do you envisage about this act that will deliver those results sooner? What are the key changes that you think will be KPIs for you to measure that?

Mr Anderson—The aspects that are intended to help parties achieve results quicker are seeking to improve the performance of the rep bodies so that they can actually use the funds that they have to advance the claims that they have; seeking to require the court and the tribunal to work together more closely so that there cannot be duplication and there cannot be parties seeking perhaps to play the two bodies off against each other; not letting mediation drift and having the bodies working together more closely to force parties to come to either an agreed or determined outcome; measures associated with the respondent funding seeking to change the incentive that that might provide for third-party respondents to engage in litigation perhaps endlessly if it is not their own resources that are being invested in the litigation and instead requiring them to plan their activities towards reaching ideally a negotiated outcome, and if they do not engage in negotiations they can have their funding reduced or removed. Those are the main measures in this bill. There is more detail underlying each of those.

Senator CROSSIN—How many current native title rep bodies are there?

Mr Anderson—There are 14 rep bodies and three service providers.

Senator CROSSIN—How many rep bodies have been derecognised since 1998?

Mr Anderson—I defer to Mr Roche on this, as is it is his portfolio's responsibility.

Mr Roche—One has been formally derecognised.

Senator CROSSIN—You would have heard criticism today that there is a belief that all of the rep bodies are being targeted. It reminds you a bit of the time in year 4 when we all got a

whack with the ruler even though there was only one person in the classroom who had done the deed. I am wondering if this is a similar approach and why there are not perhaps ways in which you can either target or better assist a native title rep body that is not performing rather than make all 14 and three jump through a series of hoops. Why is that approach being taken rather than the other approach?

Mr Roche—Perhaps I might respond to that. In fact, a range of approaches are being taken. The legislative approach is only one. In addition, the government has decided to allocate $15.6 million over four years specifically for the purpose of performance enhancement and capacity building in the rep body system. In particular, we let a major contract with the Castan Centre at Monash University to assist NTRBs to staff recruitment, which has been a particularly difficult problem for them in the context of the minerals boom, as the MCA rep earlier mentioned, and ensuring that they have the appropriate training. That contract involves a range of services being delivered to NTRBs in the way of assistance with HR on the recruitment side, on the training side and on retention. So it is part of a broader perhaps more sophisticated package than it might appear simply by looking at the legislation.

Senator CROSSIN—Quite a number of submissions have made comment about the one-year and three-year scenarios. I do not concur with the Farmers Federation in seeing anywhere where they would be a guarantee you might get six years. It is all purely at the discretion of the minister. But you will have heard today quite a number of people suggest that one year is a very short turnaround time—it would be three months to set up, they might be operating for six months and then they have to respond again. Do you have any response to the request that that threshold be lifted to say three to six years rather than one to six years?

Mr Roche—It is a matter for the minister, of course, as to which terms he might give a poorly performing NTRB. However, we think there is a case for saying that a one-year term may be appropriate. We have had examples—one recently—of an NTRB which was able to turn around its complete operation inside 12 months. So it is certainly possible provided the will is there. The difficulty of course from our perspective and the minister's perspective is knowing in advance which one it is going to be, because there is an opportunity cost. The derecognition process for QSRB took 18 months. In that time virtually nothing happened, despite over $1 million being expended on that rep body. QSNTS, as Mr McAvoy mentioned, took six months to get working. The difficulty is that, if you decide, for example, to give an NTRB two years, you may well then have two years of poor performance and you are back where you started at the end of that two-year period. We think a 12-month period may be appropriate for NTRBs which appear to be close to falling over, but there is still the chance that they will be able to rescue themselves—and I note that it has happened recently in relation to one NTRB.

Senator CROSSIN—Would you think that any of those 17 and three are coming close to that?

Mr Roche—All I can say at the moment is that it is a matter of fact that one NTRB is currently under administration and one NTRB is under a funding controller. This is actually a considerable improvement from when I took up this position in May 2005, when they were five NTRBs under funding controllers. So generally speaking across the sector there has been an improvement, but there are still some areas of concern.

Senator CROSSIN—Has there been consideration of the submission from Mr Charles from the Aboriginal Legal Rights Movement, and the amendments to this act to remove that uncertainty about the area of law he was talking about in relation to the Corporations Act.

CHAIR—And, if not, could that be taken on notice and the response provided to the committee?

Mr Roche—Perhaps I could respond by saying we were aware of that issue and it is being considered.

Senator CROSSIN—Can I ask one question about good faith. You are there to influence the behaviour of the parties. In what context is that statement made? We have had plenty of examples today and submissions from people who believe that it is very hard to define what 'in good faith' means. I do not have a law background, which is probably to my benefit, I guess. People tell me there is a whole body of law that says it is pretty hard to define it. Why do we suddenly think we are going to be able to do it in the Native Title Act, and how are such protocols or how is such a definition going to be arrived at?

Mr Anderson—There will not be an attempt to define it in the act. What is being put in the act is simply enshrining the fact that there is an obligation to participate in mediation in good faith to make it clear that that is an expectation on all parties. It will be amplified by a code of conduct that will be developed that we are working on the moment. That will provide examples, but that in itself still will not be completely prescriptive.

Senator CROSSIN—Who is developing that and who is being consulted in that development?

Mr Anderson—At the moment the department is drafting it on its own. There will be a process of consultation after we have developed a draft and gone to the government with that.

Senator CROSSIN—With whom—all stakeholders, like the Minerals Council, the Farmers Federation and the NTRBs?

Mr Anderson—Unfortunately I cannot say how wide the consultation is going to be. It is going to partly depend upon the time as well. But I anticipate that the government will want to consult reasonably widely because it has consulted reasonably widely with all the measures to date.

Senator JOHNSTON—Is it a regulation?

Mr Anderson—No, it will not be a regulation.

Senator JOHNSTON—Just a protocol.

Mr Anderson—Yes, it will just be a code. The code will not have any status other than being a reference guide, and ultimately it is going to be a matter for either the court or for another body as to what it wishes to do if there is an allegation made that a party has failed to conduct itself in good faith.

Senator CROSSIN—Would that include native title members?

Mr Anderson—It is intended to be addressed at the parties themselves.

Senator CROSSIN—What if there is a situation where there is a reluctance or a difficulty with the native title person conducting the mediation?

Mr Anderson—If the issue is with a tribunal member, that can be raised by the party about whom an allegation is made. They can say: 'In our defence, we don't believe that we were doing what was alleged. We think that the issue here was the conduct of the tribunal member.' That can always be raised with the president of the tribunal. He might wish to say something about how he would respond to such matters if they were raised. But the code is aimed at the parties themselves participating.

Senator CROSSIN—Who is going to police the code?

Mr Anderson—As I said, ultimately it is a matter for the court, for a funding body or the body that stands behind a party. If a complaint is made to a funding body—say to a Commonwealth body that is funding rep bodies or funding third-party respondents or to a state government minister—it will be a matter for them as to what they wish to do with that complaint. I am sure that they would at least inquire as to what the party complained about wished to say about it and there would be some sort of process of seeing how satisfied they were as to the view that the NNTT had reached—whether they agreed with that or not and wished to do anything with it or not. It might be that they thought that the conduct that was complained about was perfectly explicable when all the context was taken into account or they might wish to do something about it.

Also, it could be a matter that the tribunal refers to the court and simply says, 'The reason why this mediation is not proceeding or is proceeding slowly is the behaviour of a party,' and the court might then wish to make directions for a different process to deal with the matter if that is the case. At the same time, though, you do not want to reward someone. If a party is actively delaying the mediation because they want to delay the mediation, it is likely that they will be displaying a lack of good faith. It might be a good reward for them in some ways to force the matter to go to litigation. Alternatively, that might be a spur for them to reasonably negotiate. That will ultimately be a matter for the court, because all of these matters are matters in the court's jurisdiction and the court has ultimate control.

Senator JOHNSTON—I have a few questions. I might have to put some on notice. Mr Anderson, on the matter of Brandy: section 94 as amended—94B—is mandating that the Federal Court take into account a report relating to mediation from the tribunal. Doesn't that give the report a judicial quality and don't we run the risk of setting up a Brandy type problem?

Mr Anderson—The issue here that this is seeking to address is that there were concerns that, while on occasion the tribunal will make a report to the court, just to inform the court as to what is actually happening in the matter and how it should be dealt with, on occasions some judges will choose to simply not have any regard at all to—

Senator JOHNSTON—They will be in breach if they do that, because the way I read the act is that they must take it into account.

Mr Anderson—Indeed. It was to ensure that they must at least have regard to it. As to the weight that they put on it, that is another matter, but they cannot simply say, 'I'm not going to look at it at all.'

Senator JOHNSTON—The words 'must take into account' are of quite significant judicial quality. The case cannot proceed unless the judge establishes as a threshold that he has taken into account, formally received into evidence, the report. I would have thought that we are, to some extent, opening up the sort of litigation that surrounded the expedited procedure—and Mr Neate and Mr Doepel know exactly what I am talking about there; in Western Australia we went through a huge number of Supreme Court cases—as to the report and what is in it. Arguably there will be administrative decisions and judicial review applications. That is where I think it is going to end up. I think that is right. If we are halfway through a case and it looks like the report on the mediation is going to be hostile to one party, they are going to litigate that, they are going to try and remove the mediator, they are going to do all this sort of stuff. I am not so much worried about that, but are we anticipating it? I think we need to be vigilant as to what we are creating here. Have we got some advice and do we know what we are doing precisely?

Mr Anderson—We have taken advice from people who were involved in crafting the NNTT and Federal Court response to Brandy on these measures. They are of the view that the measures as drafted avoid those problems.

Mr Neate—Can I just mention that section 86C(5) of the act already provides that the court, in deciding whether to make an order that mediation cease 'must take into account any report provided by the NNTT'. So there is already a provision there.

Senator JOHNSTON—Is that a mediation report, though?

Mr Neate—A mediation report.

Senator JOHNSTON—Of the NNTT?

Mr Neate—In relation to whether a matter should cease or not.

Senator JOHNSTON—So that is on the ceasing of a matter. That is interesting. Has it ever done that? I do not think it has, has it?

Mr Neate—We have made plenty of reports that mediation ought to cease. I know that the court has had regard to them because the court has either decided that mediation would cease or not.

Senator JOHNSTON—Has anyone ever challenged the way the report has been done or litigated—

Mr Neate—Not that I am aware of.

Senator JOHNSTON—That is good. With respect to that Corporations Law issue as raised by Mr Charles, I think that that opens a very significant area. We want these rep bodies to conduct themselves pursuant to the law, and the Corporations Law clearly prohibits council or directors or people participating in corporate governance issues if they have a conflict.

The fundamental basis for the rep bodies is that they are virtually manned by people who have a conflict. When that issue is resolved one way or the other, I would have thought that that is a very significant piece of legislation because either you are going to exempt the body from the Corporations Law requirements for fiduciaries, which is what they may well be, or you are going to enforce it, in which case you are going to make the working of councils

pretty difficult. The fact that you say we are going to be looking at that I think bears upon all of the work that we have done today. I do not think we are any further advanced with the amendments that we have in front of us when that issue is left hanging.

Mr Charles was absolutely correct in his submission. The more I think about it the more it concerns me that this is an underlying sleeper here that is quite important to the whole process. I would expect that within a very reasonable and short period of time this committee would have something to consider as to where you are going and as to what effect it has on these issues. As I say, it will be a stand-alone exemption for land councils or they will have to abide by it. If they have to abide by it, everything the Minerals Council has said will come to fruition: there will be dislocation and there will be pain. So we need to resolve that as I understand it. I do not know whether you can make any comment. Judging by the nodding and the looks I am getting, I do not think you want to comment until you have a handle on it but it is very important.

Mr Anderson—This is an issue for Mr Roche, I would say.

Mr Roche—I cannot comment in any detail, Senator, but could I respectfully agree with you and note that for the three companies currently funded under section 203FE of the act in Queensland, New South Wales and Victoria that is already an operative provision. They have as a result, particularly in Victoria, come up with measures to deal with the issue about conflict of interest issues arising in relation to claims. You are quite correct; it is a very live issue.

Senator JOHNSTON—We really do not want to be back here in a month's time having another hearing on another term of reference to do with something as important as that because I think we will have all the same witnesses turning up again, to some extent. We have this model litigation aspect where we have predominantly state governments—and the federal government from time to time—simply saying, 'We are not going to mediate this, we want to run the case, we want another High Court adjudication on something.' Why would we not put that to COAG and say, 'State governments along with us dollar for dollar, whatever, on a formula will fund these legal cases'? We want the decision we have to pay for it. What is wrong with that?

Mr Anderson—Obviously the Commonwealth is already funding the vast bulk of activity in the native title system anyway.

Senator JOHNSTON—Indirectly.

Mr Anderson—In a sense, the government is already funding it to the extent that there is a test case.

Senator JOHNSTON—The states are not funding it. The states are the ones standing on the hose predominantly. They are not funding anything on the other side. There is no incentive for them to get on with the job at all, as far as I am concerned.

Mr Anderson—I must say I am not necessarily detecting a lot of readiness on the part of the states to run test cases to the High Court either. There is no reason why it cannot be raised with jurisdictions.

Senator JOHNSTON—We have to engage them. We have got model litigant rules established in certain areas. I think it is incumbent upon us to try to lead in these areas. If we are attacking and suggesting that there is a need for expedition and corporate governance improvement in rep bodies and we are sending them off to the High Court because we think that the legal precedent is worth having I think we have to engage the states and say, 'Let's go forward if we are going to do that but let's indemnify them to some extent from the cost.' Is that not a fair and reasonable approach?

Mr Anderson—Certainly it is the approach that is taken in the tax area, as you mentioned before. If it is the government party that is seeking to take the matter on appeal for the purpose of a test case then the government party or the tax office will fund the taxpayer. I think that is not in every situation, but that is obviously a different area. I do not think there is a rush at the moment to go to the High Court on anything. There is a slightly increased level of appeal activity in the full Federal Court but that is appeals from both claimants and governments.

Senator JOHNSTON—There is one in Western Australia, for instance.

Mr Anderson—Yes, but there are also other matters in the full Federal Court brought by claimants.

Senator JOHNSTON—Yes, but the one in Western Australia is, as I understand it, simply the state and the Commonwealth saying, 'We just want the legal adjudication.' The South West Aboriginal Land and Sea Council is under the pump—and, in fact, they are in administration—because they were ordered to go and get further verification, if I remember rightly, from the Federal Court, from thousands of their claimant members. Can't we listen to COAG? What is the problem there?

Mr Anderson—It could be raised as a first option with the various native title ministers of the states and territories.

Senator JOHNSTON—I think that would be a first step. That would shake the states out of their lethargy on this.

Senator SIEWERT—I want to go back to this issue about derecognising groups. With all due respect, I do not think you have quite answered Senator Crossin's question. You told us about what other resources the government is putting in to helping rep bodies, but you did not actually say—or maybe I just did not understand—why it is not sufficient to use the current provisions; you have already derecognised one. I am not saying putting more money in is not important and helping them. I think that is good. But why can't you use the current provisions?

Mr Roche—The reason the current provisions are proving to be extremely difficult is their wording. In particular, the current section 203AH says, if I can summarise, that the minister may withdraw recognition if satisfied (a) the body is not satisfactorily representing the native title holders, is not consulting effectively or is not satisfactorily performing its functions—which is one of the ones we want to keep—and (b) the body is unlikely to take steps to ensure that, within a reasonable period, none of the above paragraphs apply. In other words, the minister has to be satisfied that there is no prospect—no prospect at all—that there is any chance that the NTRB can change. It puts, with respect, an almost impossible burden on the

minister as the decision maker. And this may be one reason why there has been only one derecognition decision. I would point out that that decision, for reasons I am not aware of, was not appealed, and we are extremely grateful for that. But it did draw our attention to the difficulty in interpretation of this particular subsection. So that is why the government decided to simplify the grounds under which recognition can be withdrawn in future, and I apologise to you and the senator if I did not fully answer the question earlier.

Senator SIEWERT—Some of the arguments that are being put in the submissions—as you will have read and be aware—say that it is putting a huge burden back on the bodies, who will also be distracted from their major task. But also they are basically arguing that it will be a much more politicised process of rerecognition and it will affect their decisions—their priorities, for example. What is your response to that argument?

Mr Roche—We would not expect that, if an NTRB were satisfactorily performing its functions—and that means representing the interests of the claimants and the native title holders in its region—it would have anything to be worried about. We are not seeking to undermine the native title rep body system. The major elements in that system remain in place and most of the functions which they currently have they will continue to have under the act. And in fact the current service providers will also be able to exercise those functions. So we are not looking at root-and-branch changes or uncertainty in the system.

Part of the guarantees that are going in is that in future funding will, unlike under the current arrangement, be tied to the recognition period, so that they will actually have more certainty that, particularly in relation to staff contracts, they will know that they will be funded for the period of the normal budgetary cycle.

Senator SIEWERT—Can I go to the period of rerecognition. I understand the minister is going to be writing to all of them to invite them for the first transition period but after that—it has come up today as well—there is no requirement for the minister. I know that in your submission you pointed out that under the fixed-term arrangements it is expected there will not be any problem being rerecognised. Why is there not, as I think Tom Calma's submission recommends, a period prior to the expiry of their recognition period when they are invited to reapply?

Mr Roche—Under these transitional provisions they are guaranteed a recognition period.

Senator SIEWERT—Yes, but the argument a number of submissions have put forward is that subsequent to that there is no guarantee. They cannot be assured that they will get rerecognition because there is actually no requirement for the minister, as there is not a transition period, to reinvite them to apply. The argument being put forward is that there should be a time frame so that then they will know with a degree of certainty that they are likely to get a reinvitation.

Mr Roche—I could not possibly speak for that or even know who the minister will be in six years time, which is when I hope most of these decisions will be made, but the minister would be mindful, whoever he or she may be, about the necessity of ensuring that there is ongoing stability and continuity in the system. NTRBs are critical players in it; they remain critical players even after these amendments; and a minister's decision not to renew recognition, I can assure you, would not be taken lightly because of the consequences. We

have heard from some of the stakeholders, like the Minerals Council today, about the importance of ongoing continuity and keeping the same faces at the table. I am sure the minister would share that. That would be a factor.

The difficulty is that under the current arrangements essentially an NTRB, once recognised—unless it voluntarily surrenders its recognition, which is what has happened in a couple of cases—is recognised indefinitely. The difficulties in being able to have a regular review of performance, to give feedback and, if necessary, blow the whistle without going into the potentially litigious realms of a derecognition process mean that the returns for the native title claimants and holders—because the system is not about protecting NTRBs; it is about the interests of the claimants—will be what the minister will be turning his or her mind to. It is very difficult from here to put in place a legislative framework which provides guarantees but does not guarantee further recognition.

Senator SIEWERT—It can work both ways, though. Setting a time frame for when the minister has to at least contact them to say whether or not the process has started does not say, 'Yes, you will be'; it means there is actually a process in place that everybody knows and that will be applied. As it stands at the moment, it could be purely up to the minister's discretion as to whether there is going to be a process or when it kicks in. There is a degree of uncertainty there.

Mr Roche—I anticipate that there will be a process in place. At the moment I cannot discuss it much.

Senator SIEWERT—Can I go back to the good-faith provisions and touch on some of the evidence that Mr Levy from the NLC gave—that is, about the likelihood or not that the provisions will open up the prospect of litigation around the issue of good faith. Has that being considered by the department? What is your opinion?

Mr Anderson—It has. We are aware of other jurisdictions where good-faith requirements have been introduced. The Administrative Appeals Tribunal one was introduced a number of years back—relatively recently—and while I note Mr Levy's point that that is an administrative jurisdiction and does not deal with issues of property, nonetheless it has not actually been contentious, as far as we are aware, in that jurisdiction. We think it needs to be viewed as being an aspirational target and we do not see that it is going to lead to reports flying hither and thither about all parties in every case; we think it is something that the tribunal will approach very cautiously. That is our view as to how they will approach it. Of course, if the tribunal do something different with it we might be faced with a different scenario. We do not think that it is at the moment a significant risk that would lead to litigation.

Senator TROOD—Mr Roche, on this matter of good faith, have there been numerous occasions that have raised questions about parties acting in good faith and that have prompted this piece of legislation? How serious a problem do you think we are dealing with here?

Mr Anderson—It was a problem that was regarded as significant by the consultants in carrying out the claims resolution review. They consulted with practitioners and parties across Australia. It was their view that it was of significance and that it was one problem that was impeding the resolution. Parties were either not turning up or not complying with requests by

the tribunal to take certain steps or were turning up but then, in effect, running dead. So they thought it was one thing that needed to be addressed as part of a package to generally seek to encourage parties to negotiate, focus on their interests and focus on getting outcomes. But it is only one part of that overall package.

CHAIR—Can I just say, on that question, that all the report says is:

It has been reliably reported that there is a growing tendency for parties to mediation to exhibit a lack of good faith during mediation.

Did the consultants give you more information than that sentence?

Mr Anderson—There was discussion by the consultants with the steering committee before their report was finalised.

CHAIR—Mr Roche is a member of that steering committee, isn't he?

Mr Roche—Yes.

CHAIR—So they gave you more than that, did they, Mr Roche?

Mr Roche—I cannot recall that discussion.

Senator TROOD—I was going to ask Mr Neate—

CHAIR—It is a pretty significant discussion.

Mr Roche—I recall other aspects of it, but I do not recall aspects of that issue.

CHAIR—I am sorry, Senator Trood, I did not mean to interrupt. Mr Anderson and Mr Roche, perhaps you could take on notice then what the evidence was that was provided by the consultants for the statement they made in their report.

Senator TROOD—I was going to ask Mr Neate whether or not he shared the consultants' view on the matter.

Mr Neate—I think there have been instances where that allegation could be made. Whether it could be sustained is another thing, but certainly I think you would have picked up from a number of the oral submissions made to this committee or evidence given to this committee today that, depending on which party you represent in the proceedings, it is always the other side who are delaying things or acting unreasonably and so on. That does not necessarily amount to bad faith. One of the things that will need to be explored if the question does arise in relation to the behaviour of a particular party or their legal representative is whether they are simply acting firmly in accordance with instructions to pursue a particular line—and I think Senator Johnston has been exploring this with a number of the witnesses—or whether the behaviour is just beyond the pale and they are, as Mr Anderson said, just playing dead, not even going through the motions and in fact impeding it.

One of the factors which the bill tries to address in another way but which is central to native title claimant resolution is that, for a consent determination to be made, every party must agree. So, no matter how significant or insignificant a particular party's interests are relative to everybody else's, if they want to frustrate, delay or deny a consent determination they can do so. So somebody's apparent behaviour or absence of good faith in participation might become more apparent towards the end of the proceedings than it has been at the beginning. It may be that a pattern of conduct emerges over time which is not only unhelpful

but positively disabling to the process. There may be occasions like that where the tribunal would have to perhaps take the person aside and say: 'Look, there's a serious issue here. There are various options open to us. Either lift your game or we may have to take it another step.'

I must say that I would hope that these provisions are—to use Mr Anderson's phrase, I think—essentially aspirational, in the sense that they will provide guidance to parties that that is the way they are meant to behave. But the aspirational, or the carrot, if you like, is supported by a stick, and, if you do not, there are some procedures that can be adopted—one would hope rarely, if ever, but nonetheless they could be adopted—if you fall below whatever that standard is.

Senator TROOD—I just hope that it does not lead to aspirational litigation around the whole issue.

Mr Neate—I would hope that also.

Senator TROOD—You referred to instances, and I recognise the fact that there may well be parties in these proceedings who indeed are determined to frustrate, but I am just wondering how widespread that particular practice may be. You have referred to a pattern of behaviour, and I think that is probably the way to address it. But what concerns me is that, as sometimes is the case, we have instances—not widespread, not substantive and not immobilising of a whole process of decision but in relation perhaps to one—that invite some kind of legislative response and create this whole apparatus which in fact is far more substantial than the kind of problem we are dealing with.

Mr Neate—I cannot give you statistics, Senator Trood. I would not say it is widespread. I think for the most part people do cooperate, with greater degrees of enthusiasm, in the process. But I think that in the past people have found ways of getting around this issue—for example, by just amending their claims so that various parties fall out or by taking action to try and have them removed as parties in order to have some difficult people removed from the process. There are a number of ways of dealing with them, and this will be just one other tool.

Senator TROOD—But you could just report to the court: 'Look, we can't get anywhere, and this is the reason. There we are.' We do not necessarily have to report good-faith activities, do we, but bad faith?

Mr Neate—Possibly. It depends, for example, on whether the tribunal has given other directions which people have failed to comply with, which on the one hand would be a breach of the directions and on the other hand, if it is repeated, might suggest a pattern of conduct which constitutes bad faith.

Senator TROOD—I just underscore some concerns I have about this. Since I have you, Mr Neate, may I ask you this. You made a conscientious defence of the tribunal's diligence in relation to mediation, but I wonder to what extent you have turned your mind to the very considerable extra demands that are being made upon the tribunal in relation to mediation and, in particular, how much more training is going to be required to provide the skills that are necessary. Most of what I heard you say was in the past tense, 'We have done this in the past,' as your response to Senator Crossin's remark seemed to me. But I sense that, if this system has any prospect of working—and I am very conscious of Mr Levy's observations prior to

your joining us—then there really needs to be a very much more substantial effort placed in relation to mediation activity.

Mr Neate—There are a number of aspects to that. Firstly, we have to see the precise form in which the additional powers and functions will be conferred but, in anticipation of the bill going through in its present form, we are currently reviewing our practices and procedures and developing new practices that would accommodate those. We are currently looking at professional development opportunities available to members, what the needs are and how they are best to be addressed. I have a number of members working at the registrar's office on that issue right at the moment. For example, in terms of conducting inquiries of a particular nature, as I mentioned earlier, some of our members already have inquiry experience and would be, I would think, ready to step into that. But if the demand for that sort of work picks up then additional training of other members or, indeed, the appointment of additional members with particular skills may be necessary.

One of the things that, as president, I will be looking to work closely with the Attorney-General on is that, as we see which aspects of this scheme—to adopt Mr Levy's analogy—are taken up in the marketplace, if I find that our resources are stretched or inadequate on that point, it may be that it is not a matter of training; it is a matter of getting some people who have particular qualifications in that area appointed to the tribunal or of me engaging consultants, if we get to that point, to perform the functions of members on a case-specific basis. That is something that has been available to the president of the tribunal I think since the act was enacted and that from time to time has occurred.

Senator TROOD—Are you expecting substantially increased financial resources to be able to accomplish those tasks?

Mr Neate—No.

Senator TROOD—Perhaps a reduction—Mr Levy wants to take your money away from you!

Mr Neate—Fortunately it is not Mr Levy's decision!

Senator TROOD—It seemed like a good idea! I am sure—

CHAIR—Happily, this is the estimates committee for the National Native Title Tribunal, Mr Neate!

Mr Neate—Indeed. I might say, Senator Payne, that the tribunal—

CHAIR—We don't see enough of you; I think you need to come over more, Mr Neate!

Mr Neate—We appear as often as the committee say they want to speak to us. To make it quite clear: in recent years—as members of the Senate estimates committee will know and as readers of annual reports will know—in those years where we have not had the demand for our services or resources that has been equated to the dollars given to us, we have not spent the money; we have returned the money.

Senator TROOD—On a completely different issue: there is the matter of anthropological evidence, which was raised earlier in the day, and the difficulty of using it. Does anybody have any observations on that particular issue?

CHAIR—You mean amongst the witnesses?

Senator TROOD—Yes.

CHAIR—You do not want a view from any of the senators?

Senator TROOD—No. Mr Anderson, perhaps, is the man.

Mr Anderson—It has certainly been an area where some anthropologists have perhaps had greater difficulty than others in coming to terms with the requirements of the rules of evidence and the role of experts. There have been cases, it is true, where substantial objections have been made to expert evidence and upheld, and the case of Yulara or Jango is a perfect example of that. But there have also been cases where experts have worked extremely well. Blue Mud Bay is perhaps another example of that. They contributed to a very expeditious process. So I think that it is perhaps something that some anthropologists have more trouble with than others. It also depends upon the ability of the barristers and solicitors they are working with to give them proper guidance as to the requirements of the court and the rules of evidence.

Senator TROOD—Has this been a policy problem that you have turned your mind to, though? Having made those observations, does it reflect a view that you see a concern here that needs addressing?

Mr Anderson—Not that aspect. That matter does seem to be within the capability of the court to address. The question with anthropologists that we are turning our minds to is generally the shortage of appropriately qualified anthropologists. That is certainly an impediment to getting more cases resolved more quickly.

Senator TROOD—You can speak to the minister of education about that.

CHAIR—We have two very quick questions, I am hoping, from Senator Siewert and Senator Johnston, and then we will conclude.

Senator SIEWERT—I just want to go to the issue of the funding for prescribed bodies. It has been raised in other submissions. It has been raised previously, and the Minerals Council also made the point about funding for prescribed bodies. Can you tell me whether that is being considered, and, if not, why not?

Mr Roche—Yes, it has been considered. In fact, it is addressed in the PBC report. The government has decided in principle that, in certain circumstances, prescribed bodies corporate will be funded. We are working on the circumstances. Could I just say, though, that the issue is—with respect to previous witnesses—much less simple than it first appears. Prescribed bodies corporate are bodies which hold native title forever, and the government would not want to be seen to be entering into a funding agreement of equivalent length. Most PBCs are completely inactive, because no-one wishes to engage with them in relation to a future act. That is completely appropriate. There is little point in putting resources into an organisation which is defunct, and everybody is happy with that. Similarly, if a PBC is in the happy position where it sits on mineral-rich country, mining companies, state governments and developers are banging down the doors to talk to it, and it does not have any issues in relation to funding.

The problem group is those which have a certain level of activity but insufficient to be able to generate sufficient income to pay for their normal activities. That is the category that we

are looking at. The difficulty for the government always, in relation to future acts, is that, essentially, a dollar provided by the taxpayer may well be a dollar that is not provided by a mining company for what is essentially a private commercial contract. Therefore, in terms of putting funds into a PBC activity as opposed to putting funding into a claim, for example, there is that issue. But, that said, the government has decided in principle that it will be considering funding to PBCs, preferably through the relevant NTRB, but again there may well be exceptions to that as well. I am sorry about the length of the answer.

Senator JOHNSTON—Mr Anderson, your last question is about this ministerial discretion. You have created these thresholds: the body is not satisfactorily performing its functions or there are serious or repeated irregularities in the financial affairs of the body—so we have serious irregularities, or we have repeated, less serious irregularities—and we have satisfactory performance thresholds. So there are about three different issues where the minister's discretion is triggered. We then go down to proposed section 203AI(1):

> In considering, for the purposes of making a decision under this Division in relation to a particular area, whether a body will satisfactorily perform, or is satisfactorily performing, its functions as a representative body, the Commonwealth Minister must take into account whether, in the Commonwealth Minister's opinion, the body's organisational structures and administrative processes will operate, or are operating, in a fair manner.

I am not sure that the organisational structures and administrative processes advance the claimants at all. We can have the best operating, most gorgeously administered rep body that does nothing—the hospital that is the most efficient, with no-one in the beds. 'In a fair manner' as to whom? It may be fair to the miners. It does not talk about the rep body's statutory obligations. In the fulfilment of those, they should be carried out in a fair manner. I think that the tenor and the direction are fine, but I think some smart lawyers are going to walk through this with a semitrailer—aren't they?

Mr Roche—The issue of fairness in that context I think needs to be seen in relation to the exercise of the NTRB's functions under that part of the act. I would suggest that it is considered to be fairness in the context of performing its functions about advancing the interests of the claimants or the native title holders.

Senator JOHNSTON—In other words, the native title provisions?

Mr Roche—That is right. Particularly that.

Senator JOHNSTON—Why don't we say that?

Mr Roche—I would not want to second-guess OPC, but my—

Senator JOHNSTON—It is our task here to do that.

CHAIR—Please do, Mr Roche.

Mr Roche—I am no longer a lawyer, Madam Chair.

CHAIR—I am afraid it never leaves you.

Mr Roche—My suspicion is that they would regard that as implicit in the way in which that section is intended to be interpreted.

CHAIR—They can always use their favourite phrase: 'to avoid doubt'.

Senator JOHNSTON—The minister is going to want to do something here. I just think that he is going to want to try and exercise maybe some procedural fairness to the rep body, and they are going to haggle with him. You have tried to make it clear so the minister has some power. I think you have left the door a bit ajar. If you want to make it clear so the minister can do something, I think you need to tighten it up.

Mr Roche—Could I perhaps take that on notice?

CHAIR—Certainly. In relation to matters taken on notice, there are a considerable number of issues which the committee has advanced on notice. I am reasonably confident in predicting that there will be more to come following our consideration of the *Hansard* transcript of today's proceedings. One question which I did want to pursue was this 2006 report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account. There are 19 recommendations in that. It is clear on the face of it that some of those have been taken up in the legislation, but some have not, and some pertain to evidence which was given to the committee today in relation to NTRBs. What we might do is seek your response on why some of those have not been taken up and whether some of the suggestions advanced to us could be pursued that align with some of these recommendations.

As there is nothing further, I thank all of the witnesses who have given evidence to the committee today and all of our witnesses from the agencies present this afternoon.

Committee adjourned at 4.23 pm