ECONOMICS AND INDUSTRY STANDING COMMITTEE

HEARING INTO NATIVE TITLE AGREEMENTS AND EMPLOYMENT IN WESTERN AUSTRALIA

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 14 MARCH 2018

SESSION TWO

Members

Ms J.J. Shaw (Chair)
Mr S.K. L'Estrange (Deputy Chairman)
Mr Y. Mubarakai
Mr S.J. Price
Mr D.T. Redman

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Hearing commenced at 11.04 am

Mr FRANKLIN GAFFNEY
Solicitor, Researcher, examined:

The CHAIR: On behalf of the committee, I would like to thank you for agreeing to appear today to brief us on native title agreements and employment in Western Australia. My name is Jessica Shaw and I am the Chair of the Economics and Industry Standing Committee. I would like to introduce the other members of the committee to my left: Yaz Mubarakai, member for Jandakot; Stephen Price, member for Forrestfield; and Terry Redman, member for Warren–Blackwood. The Deputy Chair, Sean L'Estrange, member for Churchlands, is an apology for today's hearing.

It is important that you understand that any deliberate misleading of this committee may be regarded as a contempt of Parliament. Your evidence is protected by parliamentary privilege. However, this privilege does not apply to anything you might say outside of today's proceedings. Before we begin with our questions, do you have any questions about your attendance here today?

Mr GAFFNEY: None whatsoever.

The CHAIR: This is a public hearing, so the transcript will be published. The paper that you provided us was done on a confidential basis. Are you comfortable for us to refer to it and publish it?

Mr GAFFNEY: I am comfortable to refer to it and if there are any parts in it that I think should not be made public, I will let you know before saying so.

The CHAIR: Perfect, thank you.

Thank you very much for that background information that you provided to us. I found it very helpful. Would you like to make an opening statement?

Mr GAFFNEY: No, Madam Chair. Apart from what is in the submission itself, I think there is a good summary there and the position, based on my experience. I am happy to answer any questions based upon that.

The CHAIR: What you have highlighted is that there seems to be an issue around the transparency and ongoing administration of Indigenous land use agreements in particular. I have a corporate background, but certainly have not been involved in the negotiation of anything like this. Can you take us through the formation process, how the terms are drafted, how the negotiations are undertaken and any observations you might have about the relative bargaining position and sophistication of the parties involved?

Mr GAFFNEY: That is a complicated process but, in summary, Indigenous land use agreements have basically been around since 1998—for around 20 years now. To facilitate and negotiate in those agreements under the Native Title Act, the commonwealth at the time established what they call native title representative bodies. There are probably four or five in Western Australia and those native title representative bodies are responsible for negotiating on behalf of native title claim groups within Western Australia. Having said that, as the number of claims have progressed through the system, a number of those native title groups have decided to go out and engage their own lawyers and to work outside the system. They can fund them through a number of ways. Either through existing royalty payments they get from mining companies or through seeking grants directly from the federal Attorney-General's Department. Normally, the federal Attorney-General's Department will push people or groups back to the NTRBs. The NTRBs have worked very well within the system given the resources that they do have. They are not very well resourced. There is a lot

of churn through them. They have been extremely busy, as you would appreciate, over the last 20 years.

With the claim resolution process coming to an end—what I mean by that is that the number of native title claims in the system is decreasing. We had a basic period of probably from five to 10 years when people were jostling for positions and they were looking how to make this an efficient type of system. But over the last 10 years, the number of native title claims has significantly decreased. It takes on average I believe, from working at the tribunal, around 8.7 years for a claim to finish. When a group puts in a claim, and this is going to the agreement itself, the claim process is different from the agreement process. To have an agreement, you need to have a claim on foot and that, you can say, opens the door. The majority of the Pilbara, which is where I am concentrating on in terms of the agreement process, is under claims and those claims are either settled or very close to being settled. In the last couple of years the federal court has done an enormous job of getting consent determinations with the state, and the people want to get the process finished in the most efficient way. But when the claim is on foot, that gives the native title party a right to negotiate.

Under that right to negotiate, in most cases, especially with large native title groups and large mining projects, they seek Indigenous land use agreements, which is probably broken into two sections. The negotiations, if you want to call it that, ends up being a deed between the parties and then it goes to the tribunal for registration. That registration process can be very long, like the current registration process for the south west native title agreement or settlement, whatever you want to call it. It consists of six agreements and has taken quite some time because of the number of objections going in. But in the Pilbara, you have not had as many objections.

The CHAIR: Can you just expand a little on the difference between those? The word "negotiation" implies that there is a whole lot of toing and froing. It sounds to me like the registration process is not just, "Here's a document. It's registered as X", but that it is registered for further subsequent comment from affected stakeholders or —

Mr GAFFNEY: How it works is that Indigenous land use agreements can be between three parties. It can be between the native title party, the proponent—could be a resource company or whoever it may be—and it can be the state. The Western Australian state has decided to not get involved in the negotiations between proponents and native title groups. How the negotiation starts off is that a mining company will put in a notice that it wants to get a lease or a licence or some form of tenement to start the process off. Then they will send notification to the representative body or the lawyers who are representing those groups, and those negotiations can commence. There are probably maybe seven or eight legal firms within Australia that manage the representation on behalf of resource companies, and then you have the representative bodies doing it on behalf of the native title groups. That process can be very quick or protected, just like any other forms of negotiation.

What leads to a protracted negotiation can be many things. It can be talking about what the terms and conditions will be, if there is agreement about the head, or main, terms and conditions, the intergroup issues and the dynamics within the community, and also the views of the mining companies. Some mining companies are more aligned with the Indigenous groups and what they are looking for and others have a different philosophical view about the world. Normally, in my experience, you would get an agreement completed within two years on average with an Indigenous land use agreement.

The CHAIR: Prior to registration?

Mr GAFFNEY: Prior to registration.

The CHAIR: So what is happening in this registration process that takes so long?

Mr GAFFNEY: Normally they do not. The south west settlement is a different kettle of fish, but how the registration process works is that there is an authorisation meeting. Once an agreement is concluded between the lawyers representing the parties—you would have often seen them in the back of *The West* or the papers where they have a notice of an authorisation meeting for an agreement and they have a little map and say, "This is the group. If you believe you are a common law and native title holder for this group, you are entitled to come along to the meeting." Those meetings in the Pilbara are normally held in Roebourne in 50 Cent Hall, or in Point Sampson, Newman or Port Hedland. I have been to many of those meetings and you generally get five to 10% of the community. The notice is put out for all the community to get in and then around five to 10% of the community will come to that meeting.

The working group, which is normally a small subset of the group that has negotiated the agreement with the mining company, consists of, depending on the number of applicants in the working group, between four to maybe 12 or 16 people, depending on the group. They will present a report to their group. The group generally does not get to see the agreement. You have probably heard of "Death by PowerPoint". It is the same thing at community meetings—it is death by PowerPoint. They go through what the agreement is and the main issues, so the mining companies, and they go through the area, "This is the area we're looking at. This is the type of mining that's going to take place. This is the life of the mine." Some mines can go for five to 10 years, and BHP believes that one of its Newman mines will go to 100 years. Most of them go to around 40 years, so it goes through that process. That is what the mining company is requesting. Then it will go through what the Indigenous group is giving up in relation to the agreement that they are getting into. It can consist of, for example, that they will not make any more claims around native title, and so the mining company gets the security that it needs for financial purposes. So they can say, "Yes we can go ahead with the mine and banks are happy with it."

So it does that and in exchange, there are different forms of compensation. The compensation can consist of land. Sometimes mining companies are prepared to give a pastoral station or a lease over a pastoral station. It can consist of cash, which can be royalty payments and those royalty payments are sometimes a straight payment, an annual payment of, say, $1.5 million, or it can consist of a percentage of the freight on board. Normally, in the Pilbara, those freight on board percentages range from 0.5 to 1%.

The CHAIR: Can I just pause there before we move on?

Mr GAFFNEY: Yes.

The CHAIR: With the constitution of the working group that is instructing the solicitors developing the deed, how is that composed? The community are essentially presented with a negotiated deal, but how are the working groups that are instructing the solicitors determined?

Mr GAFFNEY: There is no one way of doing it. It depends on the dynamics within the group to be honest with you. With some groups, there might be individual families who are very strong, or some groups might feel that these are the most competent people to do it. From my experience, you normally have elders. The elders will generally talk for land. Then you have people who have a bit more knowledge about the business—if you want to say the mining industry, business development, employment and education—and they might consist of members of the working group. It is a combination of elders and maybe younger people who have worked more within our system.

The CHAIR: I have just one more question about composition and then I will throw it open for other questions. One of the things that you highlight in your submission is that there are groups that have

extensive experience in negotiating these types of agreements and there were four bodies that also used to do negotiation, and, for whatever reason, groups have moved away. Why did specific groups choose to move away from those four organisations that were previously negotiating and presumably had that corporate knowledge but could pass gains from one agreement on to another or learnings? Why has that been moved away from? When we are talking about these working groups, are there constraints about who can be a member? Is there any reason why someone who is not necessarily from that community but possesses those skills could not be brought into the working group?

Mr GAFFNEY: I will go to your second question first. In terms of the working group, there are constraints on the number of people who are involved in the working group, predominantly around payment of attendance fees and things like that. Mining companies will normally pay for the negotiations for people to attend as working groups. Like any other business, some mining companies are cashed up and others are not. Normally, mining companies will pay, in my experience, for around probably four attendees to attend and to negotiate at those meetings with the mining companies. In some cases, people just attend of their own volition. How it is supposed to work in theory is that the working group does the agreement and then it goes to the authorisation meeting for approval. That is how it is supposed to open up to the wider group to see whether they are happy with it.

In the negotiations, in my experience, the groups do not start off with a list saying, "These are our priority areas; this is what we are going to negotiate." Normally, a resource company will come along and say, "This is the agreement" and you negotiate on the terms of those agreements. That is not to say that the mining companies are not prepared to negotiate; it is just that they use that as a starting pitch.

The CHAIR: Like workplace bargaining? Stephen might tell us a bit about that.

Mr GAFFNEY: It is a lot like workplace bargaining, when you look at enterprise bargaining, whether it is the trade unions or the employers putting the first agreement on the table. The issue with enterprise bargaining versus Indigenous land use agreements is that every enterprise agreement is publicly available. Every enterprise agreement, and you know as well as I know, is one where the most—we often talk about the contract of employment as the most personal contract between an individual and an employer that is publicly available. So, in this case, I should say that an Indigenous land use agreement does not just bind the current generation; it binds every generation that comes afterwards. In the group of four or five, and then it goes through to the authorisation meeting, and this goes back to the south west settlement, one of the issues is that a lot of people feel—this is just my experience; I cannot speak on behalf of others—that they fought hard for their rights and then they give up their rights very quickly in these agreements without thinking them through. Each agreement is negotiated in isolation, so not one agreement is linked to other agreements. That is a common thing. You will find that mining representatives will say the exact same thing. The agreements are not linked in, so they are all asking for the same thing and you go along that way. That is in terms of the working group.

Now going to your first question about why are people moving away from it, from my experience, while the native title representative bodies have been very good at their work, they are stretched. I do not want to belittle my own profession, but they have a lot of junior lawyers. Lawyers do churn through it. They work really, really hard. Having that supervision is not what you would have in any other firm. There is a lot of burnout and there is a lot of travelling. There are a lot of young people and then people getting married—the usual thing with young lawyers. A lot of them are very

passionate but do not have the commercial nous to have an agreement, whereas if you go to some of the best, such as Ashurst, Blake or Freehills, the usual —

The CHAIR: Or Lavan!

Mr GAFFNEY: Or Lavan. Any of the large mining companies with the solicitors do have the corporate knowledge and that goes around and it is a very closed circle. A lot of groups, when they have the capacity and the resourcing to move out of the native title representative body system, they will. They will engage their own lawyers and they will do the negotiation, and there are not many firms that do it. While we sort of promote ourselves at it, the amount of money involved in the negotiations is very, very significant. We are not talking about an employment contract; we are talking about an agreement that goes on for infinity once it is registered. Once it is registered, it is for infinity. What a family might do two generations ago, in two generations' time if there is no employment or no jobs, is say, "Why did we give up all that? How did those negotiations occur? What took place?" That strategic analysis do not take place because of the lack of resources and the capacity of those native title groups to do that work.

That is what a lot of groups are doing now. Once a group has a lot of finances and a lot of capital behind it, it is doing its own demographic surveys. In the Pilbara, there have been two that I know of where you go out to each community, each family, each individual and you ask them what they want, and you look at the what is the need of the community and what the community wants, and then you try to align them as much as you can. That is what a lot of the local Aboriginal corporations and the PBCs try to do within the Pilbara.

The CHAIR: Can I just ask one question and then I am going to go to Terry? I find that such an incredible concept, from a commercial background, that you would not have some form of reopener or some sort of re-evaluation of how a contract is operating after a period of time. You always have some sort of finite termination period or some opportunity to reopen on some basis. Has that ever been considered in any of the negotiation processes that you have gone through? I guess, if the company is holding the pen, you have got the pen and you have got the power and you put the terms forward. There is no prospect for reopening or review. I just wonder if that has ever been something that has been contemplated.

Mr GAFFNEY: Yes, it has. In the case of Rio Tinto, they had a two-year review and then a five-year review. They completed the five-year review in 2015 and in that part of the review, they went to each of the groups they had agreements with, which I think was around seven or 10 groups. As part of the review, they engaged consultants and the consultants asked them how people felt the agreement was going. They made it very plain at the very beginning, "We're not opening up the agreement." I can understand it from a commercial perspective, because you have your security of title and things like that and that cannot be touched. In my opinion, it would just lead to chaos if you were touching that; just like any other pastoral lease or whatnot, you cannot just take it willy-nilly. They had a review and the review was around how can we implement the agreement in a better way. As a result of that, some recommendations came out of it.

In a recent decision in February this year in Queensland, there was an Indigenous land use agreement in place, and then a side deed was done, which changed the agreement. They actually attached the new agreement to the deed and the court said that it was not sufficient because they had not gone through the authorisation process. So they do try to change the deeds by a deed. That is just one example of where it has happened. It was not done because the agreement was inefficient; it was done because of community politics. Once you read the decision, you can see what was driving this change. That was done and, if I recall the case correctly, it was the Conlon case.

The CHAIR: You can take that on notice for us if you like.

Mr GAFFNEY: Yes. That decision was made and that was the first time that was done. There has been a case in BHP where they had an original agreement, which had not been registered, and then they renegotiated that agreement with the Banjima people and came up a new agreement with the Banjima people. So it has been done. That is the review process, which Rio put in place after five years. Rio and the likes of BHP are very sophisticated operators and they are very good at what they do, but that is not to say all the mining or resource companies are the same. There are some companies that are very large—I do not want to divulge the names—where the implementation committees would finish after five years. There are others that have no implementation committees at all. There are some cases that have a legitimate land use agreement when it was never even registered. No jobs, no nothing, and provided the group is getting its royalty payments, the group is happy. But in the long term, is that the ideal situation that will help that group? That is the issue.

Mr D.T. REDMAN: That is kind of where I am going with the questioning. There are massive variations out there between resource companies and their capacity to pay, for starters, which means the thresholds of the claims from the Indigenous groups may or may not allow the company to fly, particularly in the agricultural sector which, has much less capacity to pay. They are trying to negotiate an agreement with agricultural access to land, which is very different from the resource sector's access to land and what they are prepared to do. I am sort of less interested in that variation because that is just going be industry by industry and resource company by resource company. But once these groups have an agreement that is settled, you point to the fact that the dollar part of that is easy because it is an amount of money going out every year. The other value-add to those agreements for the community benefits, which are perhaps more long term and sustainable if they can be enacted, is probably a bigger component of that and, arguably, with some of the more recent ones is what I am hearing. They are very much more geared on that as distinct from the dollar piece, which I think is really smart from the point of view of what you are actually getting in value for your community.

What are your thoughts on once this agreement has happened? There is a train of thought that says that the mining companies get their access, and they really do not want anyone stirring the stuff up. Who does the assessment that they are meeting the obligations for starters in terms of the things that are slightly less tangible than a dollar figure every year? I guess there are two levels. There is the level of meeting the commitments that they have agreed to; that is the first question. The second bit is if there are resources going into the Aboriginal corporations and they are not being used appropriately—there might be corrupt behaviour or, indeed, poor management of that—that means you wake up in a decade with a bucketload of money that has gone in and no-one has actually benefited from what is happening. That space is the piece that interests me and I guess public transparency of this might give some "name and shame" approach to getting better outcomes. You might have a comment on that as well. This is a piece that I think this committee might be interested in with respect to the longer term benefits of these agreements and that they have a net shift in terms of the outcomes for Aboriginal communities.

Mr GAFFNEY: There is a lot there, Mr Redman. I will start with what is at the forefront of my mind. What I am proposing is not, as you might say, a name and shame exercise. In my experience, mining companies cannot solve the social and economic issues that are facing Indigenous people in the Pilbara. I do not think government is in a position to solve them either and I do not think the Indigenous corporations are in a position to solve them. I am firmly of the view, and I have always held the view, that we need the three Cs—coordination, collaboration and community. That does not occur. It does not occur within the mining industry. It does not occur within the groups and it does not occur within government, whether that is local government or state government or federal

government in terms of—it is not the holistic approach, which we often hear about within government. No one group can actually solve the problems here.

Before I go into the economic participation obligations around the employment, training and business development aspects, in terms of the royalty payments, it is important to realise that when an agreement is established, two entities from an Aboriginal perspective are established. There is the Aboriginal corporation and then there is the Aboriginal trust. The Aboriginal trust is generally a not-for-profit. It is generally a charity. I know a lot of people talk about the confidential nature of agreements, but all you have to do is go to the ACNC website, put in the name of the trust and you get the financial report and see how much money they get every year. One group in the Pilbara got $60 million from one agreement last year. Other agreements range from $5 million to $10 million, and each Aboriginal corporation normally has a trust on the side. They are advised to have the trust in terms of their tax benefits that arise from it. There is no income tax, no GST or things like that. There are a lot of benefits to having a trust and the money that is distributed out of that trust goes directly to the beneficiaries. Each agreement has a different component on how much is distributed.

Say, for example, a Rio agreement will require between 16 and 17% of the payment to be distributed directly to the beneficiaries, which normally occurs twice a year in July and in December. They normally ask for around 50% of the funds to be put into a future fund, which will not be able to be accessed until the life of the mine is finished because that is for future generations. Then there is the other 30%, which goes into either community development programs—it could be for education, hardship assistance, funerals, health and things like that—or also funding the corporation. The corporation gets funded out of that payment. That is the Rio agreement. Other agreements like the BHP agreement, will have a floor and ceiling. It will say, "Okay, royalty payments can't go below this, but they can't go above that." That is to provide some sort of surety for the corporation so they have some sort of indication how much money they are going to have in future years so that they can start planning. Other agreements are just a straight: "Here's $1.5 million. Do what you wish", and the groups will normally distribute that money. There are many different ways to cut the pie and, as I indicated at the beginning, it depends on the philosophy. Then you have the likes of FMG in the position that there is not a huge level of financial compensation and that corporation or that company takes the view: "This is development and employment". There is a wide spectrum of how the agreements are done.

I will go to your point, and I agree with you, around business development, employment and economic participation and who monitors the obligations. Within the agreements are what they call implementation teams—not every agreement has it. In some agreements the implementation teams stop after five years. Others will meet, as I indicated in my submission, once every six months and they meet for 45 minutes. In Welcome House in Karratha, you walk in—the miners would have flown up from Perth—sit down, have a cup of tea. "How's your mum? How's your dad?". You know, the usual family talk. "There's your $500 attendance fee". And off you go.

There are others that are far more sophisticated. It could be a day or a two-day meeting with the managers from the relevant team. It could be about environmental issues, water or business development. Anything that is on the agenda for that implementation team or committee, and it is normally in the agreement what they will talk about, the relevant manager will come along and he or she will speak to the group and the group will be able to ask questions. Those committees can consist of four to six community members—they get paid for attendance—which are sometimes directors of the corporations and sometimes not. In my experience, you want to have maybe one or two directors there and the same two directors on all the committees so you start getting some capacity building and strategic analysis of how the agreements work. In other cases, the communities want to spread the benefits of the agreements. They will say: "No, you're a director.

We want to be an implementation committee member." Then they can get some payment. It is a way of, if you like, having corporate welfare, and I mean that in the nicest possible way. These committee meetings, as I said, are just like an agreement; it depends on the philosophy and the level of resource that the mining companies are prepared to put into it. In some cases, management will be allowed to be there. Some mining companies do not allow any management there. When I say "management", I mean management from the corporation, because, as I say, it is not in the agreement and in general is not in the agreement.

The CHAIR: Who is representing the corporations?

Mr GAFFNEY: Sometimes it is the four native title holders who are there. Sometimes it is native title holders and maybe —

The CHAIR: Sorry, so you mean the Indigenous corporations. Sorry, I got my wires crossed. You said the corporations but I thought you meant the mining companies.

Mr GAFFNEY: In the case of the mining companies, you will have managers—normally you would have an Indigenous manager in charge of Indigenous stakeholder engagement, or a community liaison manager or whatever. They bring the lawyers along just to see if anything is going awry —

The CHAIR: Because that makes for such a friendly environment.

Mr GAFFNEY: To make any agreement work, whether it is in this or any other space, it is about having relationships. Things are going to go awry but providing your relationship is strong, you can have disagreements and you are not going to walk out, and that is the same in any way of life. Their implementation is often based upon the negotiation. If you take an adversarial approach to the negotiations—either side—that can impact the implementation. I can go to the Ord, which is a classic example. One of the issues is—and it is the case in most of the Pilbara agreements—that the people who negotiate the agreement are not the people who implement the agreement. The people who negotiate the agreement have never been involved in the implementation, so there is a disconnect there about who is doing what or how it will work in the future.

The CHAIR: On both sides, do you think?

Mr GAFFNEY: It depends on the negotiating. Say, for example, in this state, you will have members of native title unit within the Premier's department negotiating the agreements. You will sometimes have individuals from some of the other departments, maybe, or RDL. I am just thinking of the ministers. I cannot remember all the new department names—the department of mines and you have state development. When it came to the Ord, you would have state development, so you have the Premier's representative, and you had RDL and you had a representative from Minister Grylls at the time, so you had representatives from various other departments there. In some cases, especially those who were living in the Kimberley in Kununurra, were involved in the negotiation and the implementation and that was good because they knew the people. It is a small area, you know the relationships and that definitely helped.

The classic example, if you look at the Ord, and I know it has been in all the reports,—the Auditor General's and the recent John Langoulant report—is that when you go into that report and putting aside all the blow-outs, and when you look at the Indigenous employment in business development, both reports say that they exceeded expectations. Over 20% of man hours was filled by Indigenous people and 70% of those Indigenous people were from within 100 kilometres of Kununurra at the time of working on the Ord. There was 129 Aboriginal people working on the Ord project with over six months' employment. There were a lot there and that was predominantly through my time as CEO of MG Corporation, which was because of the relationships that were in town. Also, the minister at the time, Brendon Grylls, was very committed to the project and wanted to get things

done as well as Leighton contractors at the time and the state. Everybody was working together who what wanted to see this work, and it did work, but it was very much cooperation, collaboration, coordination and communication.

In the Pilbara, that does not necessarily occur because you might have Rio Tinto there but it does not talk to CITIC Pacific or BHP, so not one mining company knows what the other mining companies are doing. Also to the groups, the implementation committee members often change, so who might be on one implementation may not be on the other. There is not that coordination, collaboration and communication talking place.

Mr S.J. PRICE: Mr Gaffney, what happens what it is not working? Is there a right of appeal that the Indigenous groups have or what is their redress on it?

Mr GAFFNEY: There has not been one court case about it. When these agreements were put in place, the commonwealth was of the view—it is in my paper there where I quote the relevant paragraphs from the committee meetings back in 2001 and the commonwealth's response back then—that because they were normal commercial contracts, you could then go to court and seek damages or seek an order for specific performance. That has never occurred. The reason it has not occurred, if you look at big agreements, is because if a case is brought that an agreement has not been put in place, some agreements have the ability to cut off ones going to the trust. They say, "While the case is being heard, we can cut off the trust or we can actually terminate the agreement because you've broken up some other thing." The determination provisions are pretty good from a resource company.

Again, in my experience, and we have been involved in many implementation committees, if you have a good relationship with the mining company and you are not shouting at each other and you can work through the things, in a lot of cases it is done outside the meetings and you bring the solution to the meetings and what you are proposing, but that is based on the relationships that you have. Like in every form of life, not everything is hunky-dory all the time with committees. The implementation committees, in my experience, are not working the way they should be working. That is why I have been pushing this issue because I feel that some agreements talk about reasonable endeavours, and that could mean anything. Some agreements actually say, "We will employ 10 people from your claim group"—I have one particularly in mind—"and two apprentices." They have been operating since 2012 and they have never employed any Indigenous people or apprentices, and nothing gets done.

That implementation committee meeting occurs only once every six months for 45 minutes. How they stop it at 45 minutes is that they have the next group come in. They are at the door and say, "Yes, we're ready now." They move you on and bring the next claim group in, give them the money, have a cup of tea and off they go and fly back to Perth.

The CHAIR: I do not want to verbal you, so please correct me if I am wrong, but you have proposed that, as part of the registration process, there is some formal logging of what the obligations are and then some sort of monitoring against those obligations. How do you see that operating and who do you suppose should be doing that monitoring and enforcement?

Mr GAFFNEY: Probably the closest international experience that we have similar to us is the Canadian model. In that model in British Columbia and a lot of the states over there, they have impact benefit agreements, or IBAs, that are very similar to our agreements. They are like community agreements and say, "Okay, this is what the resource company is committed to do." They do it every year: "This is what we said we'll employ"—for argument's sake—"10 local people from the First Nations group." They will indicate in their annual reports: "We agree to employ this many people. This is how many are employed." The beauty about those reports is that over each

year there is a longitudinal assessment and you are able to see how those people have tracked through over a period of time in that company. It is a public document.

The CHAIR: Who publishes it?

Mr GAFFNEY: The mining company publishes it. If you go to Rio Tinto's website and you go to the back of the impact benefit agreement you can see it.

The CHAIR: Are they statutorily required to publish them?

Mr GAFFNEY: They are statutorily required to publish them, but the beauty about it is that the implementation committee needs to sign off on it. So that brings the proper role for the implementation committee because then they are signing on—it is a bit like an auditor. The other party is coming in saying, "Yes, we agree with that." If it does not happen, the state comes in and says, "Where's your implementation", or , "Where's your IBA or report", and then if there is a disagreement, says, "Ok, let's go and look at it." So that is a public monitoring process. From a state perspective—I know my paper concentrates on the Native Title Act, and that can put processes in place in terms of having the native title register for indigenous land use agreements, having that there but that will only tell you what it is; it will not go to the extent of how the monitoring is taking place.

From a state perspective, there are a number of options that are available. Just like when any mining tenement or lease is provided for a mining company, there are a number of conditions often put onto it, especially around water in the Pilbara and environmental issues and rehabilitation issues and all those types of things. There is nothing stopping the state from putting in there: what are your Aboriginal commitments in your agreement? Report on it every year, like you do.

The CHAIR: And you are counting then on sunlight being the disinfectant or are you proposing that there is some sort of power that the state could have to compel certain conduct or consequences for breach?

Mr GAFFNEY: Sunlight as a disinfectant—that is a good one. Sunlight is the first thing because that brings in a level of transparency. Then the next issue is accountability. So once you have transparency, who monitors that accountability aspect to it? If you want to take a more laissez faire approach and take it out of the role of the state—I mean state with a capital "S"—you could get the implementation committee to sign off on it and then it is responsible to its own community about that at their annual general meetings. The problem with that is—this is my experience—is that at the agreement stage and at their AGMs, you are getting only five or 10% at the AGM, so how many people know about it? You have to realise that the majority of the community does not know what is in these agreements because they are not attending the meetings and there is no legitimacy if you want to say anything to the agreements and if they do not know what is in the agreement, they do not know what to as. If you go along to these implementation committees, I can guarantee you that most of the people who have the jobs of benefit—if they have jobs—are family members of the people sitting on the implementation committee because they know something is coming up. It does not get advertised—they don't. There are a lot of reasons behind that. The logistics of it is one of them.

Not a lot of members in the community of Roebourne and the two groups that we did demographic surveys for, you have 60% of traditional owners live in the Pilbara and the other 40% live elsewhere; predominantly Broome, Brisbane, Perth and the south west. So 40% of the traditional owners—or native title owners—from the Pilbara live outside the Pilbara. Just like the rest of us who need to get work, we will move to where we need to get work or live where our family is. I would say that again you have a spectrum —

The CHAIR: The consequences for a breach?

Mr GAFFNEY: My view is that I think while it would be good for the state, to be honest, I do not think that the state has the resources. The reason I say that is when you look at the department of water, mining companies are to provide reports every year about how much water they are using, you go to the department of water—last time, I believe we had fishers from the department of water—there were only three people reviewing the annual reports every year. So you did not have the resources to review them, and they were open about it. They said, "We can't review every annual report." I think there is a resourcing issue from a state perspective if you were to take on that role. I think that the best way is—if you want to put it this way—if it is a requirement to have it in a company's annual report, the best people to hold them to account are the shareholders of the companies because the shareholders' of the companies' view is, "Okay, you have entered into these agreements." I know mining companies do this because RIO and BHP are giving hundreds of millions away. A shareholder in their right mind would say, "What are we getting a return? What are the benefits?" There is a social license to operate.

As a shareholder, you are probably very cognisant of the money a company is spending and you want to make sure you are getting value for your buck and it is being efficiently done. If they find it is not being done, they are probably the best people, in my opinion, to ask the hard questions at the general meeting. I am not being disparaging of any of the state departments, I just do not think that the resources are there to have the capacity to monitor the agreements, and it is probably not the best role for the state to get involved in. I think that if the terms are publicly available, people can see what is being done and then they can hold each other to account. That is my own personal view. I do think that to make it a bit more enforceable and to apply a bit more community pressure or public opinion, put it into the tenements. If you have not got it in the tenements like you have with water and environmental obligations, it will say that we want you to report on it. There is already in place in state agreements that the mining companies have with the state are obligations for local participation plans and community development plans.

Mr D.T. REDMAN: Some of which cannot be seen.

Mr GAFFNEY: They cannot be seen at the moment. There is an FOI on that at this time for external review, but you are right, Mr Redman. Even though they are community development plans, the poor community does not even know what is in the plan. But you have these agreements and the mining companies are required to produce a plan within three months of the agreement being signed. That requirement came in in 2011 when Colin Barnett was the Minister for State Development. Those agreements were required to be signed off by the minister and they were supposed to report on it every 12 months, or at least annually, but we do not know what is in them, we do not know who is reviewing them and we do not know if they have been implementing them. Again, there is no light there. When I make comments about having the resources to do it, I am just basing it on my knowledge of state agreements.

Mr D.T. REDMAN: No matter what the options are and the triggers to try to get more accountability into what those agreements are, what is your view about the attitude of the resources sector to any changes? Are they very comfortable with where they are at right now, because they feel like they have a good enough relationship and/or control, if you like, and this is liable to put the cat among the pigeons? Have you got a view about that? You may not want to answer that one.

Mr GAFFNEY: No, I have a view about that. Basically, the committee or the committee secretariat could look at the submissions put into the federal Attorney-General's options paper and you get a fair view of the resource companies. But the resource companies—I will go to one quote from the

Business News of 27 February this year, the CEO of the Association of Mining and Exploration Companies, Warren Pearce, stated —

> "There's no question around the intentions or the outcomes that are sought, the problem is the system doesn't always deliver it."

Further on he stated —

> "One of the biggest frustrations is that, after nearly 20 years of these agreements and huge investments by governments and companies, the outcomes on the ground for the broader Aboriginal community don't seem to have improved that much.

I do not think anybody can say there has been an improvement. We did not do a demographic survey into what it was like beforehand —

The CHAIR: There is no baseline.

Mr GAFFNEY: Yes. But putting that aside, it does not mean that we cannot start now to have a baseline and work our way up. That is from 27 February. I should say, too, that the state government also entered into what they called a "Pilbara collaboration charter", that was approved by cabinet last September and signed off by the Premier in November. In that agreement, it states at the very beginning under a number of assumptions that there are differing levels of awareness and understanding of the existing social and economic contribution of the sector. Everybody knows that is not working and that we do not have a baseline, so if the committee was to take on an inquiry, it should ask, "What is the current state of play in the Pilbara? What resources are being put into the Pilbara by the resource companies and what are being put in by the state government?" That could be in terms of TAFE and education.

How can the state government, the resource companies and the Aboriginal corporations—a lot of those corporations have in the future funds in excess of $100 million, and it is tax free. How can they work together to actually address these issues? When you look at the Pilbara, we have got only under 9,000 Aboriginal people in the Pilbara.

The CHAIR: I am going to have to draw this hearing to a close, but thank you very much. There are some good pointers. What I will say is we do have some terms of reference that we have just initiated and we will be conducting that inquiry going forward. This is an issue that, given it raises a lot of social justice issues as well, I think we may make our other parliamentary colleagues aware of the committee proceedings today, and perhaps send a couple of other committees the transcript so that they can also have a look. Thank you very much for coming along today.

A transcript of this hearing will be emailed to you for the correction of minor errors. Any such corrections must be made and the transcript returned within seven days of the date of the letter attached to the transcript. If the transcript is not returned within this period, it will be deemed to be correct. New material cannot be added via these corrections and the sense of your evidence cannot be altered. Should you wish to provide additional information or elaborate on particular points, please include a supplementary submission for the committee's consideration when you return your corrected transcript of evidence. Thank you.

Hearing concluded at 11.52 am

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