WESTERN AUSTRALIA

Parliamentary Debates

(HANSARD)

THIRTY-FIFTH PARLIAMENT
SECOND SESSION
1998

LEGISLATIVE COUNCIL

Friday, 18 December 1998

Legislative Council

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THE PRESIDENT (Hon George Cash) took the Chair at 10.00 am, and read prayers.

STANDING COMMITTEE ON CONSTITUTIONAL AFFAIRS

Report on Petition Regarding Debt Imposition on Local Government Authorities for Meat Inspection Fees

Hon Murray Nixon presented the thirty-first report of the Standing Committee on Constitutional Affairs in relation to a petition regarding debt imposition on local government authorities for meat inspection fees, and on his motion it was resolved -

That the report do lie upon the Table and be printed.

[See paper No 654.]

TITLES VALIDATION AMENDMENT BILL

Second Reading - Amendment to Motion

Resumed from 17 December on the following amendment to the motion -

To delete the words "now read a second time" and substitute the words "read a second time on Thursday, 11 March 1999.

Amendment put and negatived.

Second Reading

HON N.F. MOORE (Mining and Pastoral - Leader of the House) [10.05 am]: I will begin my summing up by thanking members who have made a contribution to the debate. Although I did not hear all of everybody's speech, I did listen to the vast amount of what was said during the debate by members who have taken a particular interest in this issue.

I have never underestimated the beliefs and the commitment of Hon Tom Stephens, the Leader of the Opposition, in respect of matters relating to Aboriginal people. I have been an admirer of his for many years for the compassion he shows and the work he does. However, on the odd occasion he tends to allow his political activities to interfere with some of his more generous other activities. That is only when elections are on, and we have already talked about that. I want publicly to acknowledge that I have a significant degree of admiration for the honourable gentleman's work among Aboriginal people. Therefore, I acknowledge that he is coming from a very genuine position and that his comments need to be taken into account and given full regard.

I cannot say the same for every other member who has spoken on this Bill. Some quite extraordinary views were being put last night. The later the night got, the more extraordinary some of the propositions became. I recall that around 11.45 pm Hon Jim Scott suggested that the Government should own all of the land. That was his fundamental political belief. That is about as far left as one can get in the political spectrum. However, I found it rather interesting in the context of the debate because he was arguing that we should be preserving native title and not extinguishing it or validating any acts that we have done in the past to grant tenure. He told us that he supports the Government owning all the land, so I guess he does not accept native title in that context.

Hon Barry House: That is communism, is it not?

Hon N.F. MOORE: It is, but I believe people in communist countries believe in some form of land ownership. I thought it was rather ironic that he should be arguing for native title and then suggesting that nobody other than the Government should own land.

Later on, if we are to debate an amendment by Hon Helen Hodgson, we will see that she is seeking to put freehold land into category B, which could have quite extraordinary consequences from the point of view of land ownership and what people in this country are led to believe is the case with native title. Let me pose this fundamental principle to members who are opposing this Bill but who reside on freehold land: I have always found a significant inconsistency in the views of members who support native title over all property other than freehold. Somehow or other they seem to be able to assuage their guilt by accepting that freehold does extinguish native title but nothing else should. I have always found it to be a fundamental inconsistency in their argument. If people fundamentally accept the notion of native title - in other words, that the land mass of Australia should all be subject to ownership by the inhabitants of the country before European settlement - it is inconsistent to argue that some titles that have been granted since 1788 do extinguish native title and others do not. There is a degree of self-interest attached to this notion in the minds of some people. I have never had anybody argue that. By way of interjection, I sought to suggest last night to Hon Jim Scott that there was a fundamental inconsistency in his view,

only to be totally surprised when he said that the Government should own every bit of land, not only leasehold or any other form of land but also freehold.

People who want to get involved in this debate need to take themselves right back to the fundamentals of what they are talking about and put the legal niceties to one side. They need to consider which philosophical position and principle they are coming from. If they support native title, fundamentally they should support native title being available over any area of land in Australia; and when arguing that freehold title should extinguish native title, at the same time they should acknowledge that they may be expressing a vested interest in their own circumstances.

Hon Tom Stephens: Do you accept native title?

Hon N.F. MOORE: Yes, I accept that native title exists, because we have been told it does. However, I live in the real world, Hon Tom Stephens.

The PRESIDENT: Order! The Leader of the Opposition.

Hon N.F. MOORE: I am sorry - the Leader of the Opposition. In his speech the Leader of the Opposition told us a little of the history of land rights in Western Australia. I was around during that debate; indeed, I was the shadow Minister for Aboriginal Affairs when the Burke Government sought to bring in Aboriginal land rights in Western Australia.

Hon Tom Stephens was disappointed and probably a bit angry about the decision of the Legislative Council on that occasion. I find it extraordinary that he felt that the Legislative Council in those days did not have the right to do what it did with that Bill, but now he feels that the Opposition has the right to emasculate the School Education Bill, the right to completely emasculate the Workers' Compensation and Rehabilitation Amendment Bill, and it has the right to throw out this Bill. It seems to me that the Opposition either accepts that this House has the right to do what it does, regardless of who is in government, or it does not. It is not good enough for him to run around and say, "You do not have the right to do this. The Government was elected. We are entitled to bring in land rights." That Bill was defeated, and some people would argue that if it had been passed we would not have the problems with which we are now faced. I will not go into that.

Hon Tom Stephens: By way of interjection, can the minister see some inconsistency in his own position as well when comparing what he did then with what he is arguing should happen now?

Hon N.F. MOORE: In the 1980s when this House debated land rights, as it was called then - it is interesting that it is now called native title; I guess it is a political use of terminology - a legal view existed. The Leader of the Opposition talked about it in his speech. That was the Blackburn decision. The fundamental legal position at the time of the land rights Bill was that terra nullius existed in Australia. One of the great furphies of the native title debate has been the way in which people have defined what terra nullius means. Those who would seek to ridicule the past position of the law, and our understanding, have argued that terra nullius means that nobody lived here. Anybody with half a brain knows that it does not mean that at all. It is concerned with whether there was a form of government in place in a particular land mass, not whether people lived there. By seeking to denigrate the past understanding in that simplistic way, people have tended to ignore the commonly held belief of most people who took an interest in this issue.

I accepted in those days that there should not be a situation in which native title should necessarily be available. We opposed the Labor Party's legislation which made it possible for Aboriginal people to claim land and to be granted an inalienable freehold title. We produced significant documentation to outline how many acres of Western Australia would be claimable. When that is added to the amount of land that is currently controlled by Aboriginal interests or set aside for the use and benefit of Aboriginal people, vast areas of Western Australia come into that category.

Hon Greg Smith: Thirty million hectares.

Hon N.F. MOORE: That may well be right. I hope to have some figures later on how much land we are talking about. Regardless of all the bleating of some members about this Bill, they tend to put to one side the fact that vacant crown land in Western Australia is not the subject of this Bill; vacant crown land is still subject to native title claim. That represents about 28 per cent of Western Australia. When one considers that the Aboriginal population is about 2 per cent of the State, it is a significant area of land that can be claimed. If one takes the amount of land which is already in Aboriginal control, which Hon Greg Smith tells me is 30 million hectares, one starts to realise that we are talking about vast amounts of land. Western Australia is a vast State. An irony of history is that such a small amount of it has been allocated to freehold. I think freehold is about 7 or 8 per cent or thereabouts. In comparative terms with other States, it is quite small.

Hon Tom Stephens: How big are the pastoral lease holdings in this State?

Hon Barry House: Thirty seven per cent.

Hon N.F. MOORE: Something like that.

Hon Tom Stephens: What percentage of the population of Western Australia are pastoralists?

The PRESIDENT: Members, I know it is interesting, but this is not a quiz game.

Hon N.F. MOORE: I did not interject during the Leader of the Opposition's speech. I gave him the courtesy that a person with his commitment to this deserved. This legislation does not extinguish native title completely with respect to pastoral leases. We are reflecting on the Wik decision concerning pastoral leases. By suggesting in an inane way that only a small number of pastoralists occupy a large area of land, the Leader of the Opposition is ignoring the fact that this legislation is in response to the Wik High Court decision. That decision talks about partial extinguishment of native title on pastoral leases. If the Leader of the Opposition does not agree with the Wik decision, he is entitled to disagree with it. However, he should not say that the High Court gets everything right when he agrees with it but it gets it wrong when he does not agree with it. I think they get it wrong most times, but I have to live with it and accept it. However, I am prepared to say I do not agree with it when I do not agree with it.

Returning to the point that I was making, the Burke Government attempted in the 1980s to introduce land rights legislation in Western Australia, and it did not succeed. Interestingly, when it was defeated, the then Burke Government took a completely opposite attitude to land rights. The Leader of the Opposition is probably embarrassed about this. When this State went to the 1986 elections, I remember clearly an advertisement on the television in which the Premier of the day, Hon Brian Burke, was shown to be signing a letter which said that in no circumstances - over his dead body - would a future Labor Government bring in land rights legislation. The reason that he did that was simple. He recognised that there was no appetite in Western Australia for the type of legislation that he had promoted in this Parliament. He took the political position, at which he was so adept, of denying that any future Labor Government under his direction would become involved in land rights legislation.

That was the end of it for a while. The understanding of the Leader of the Opposition was that, generally speaking, the doctrine that was espoused by Blackburn continued to exist until the Mabo decision. That decision was very much a decision in respect of a particular area of land - an island, in fact. It found that native title existed on that area of land. Since that decision, Australia has had nothing but difficulty about what it means in reality.

In response to the Leader of the Opposition's question, I am prepared to accept that native title exists. However, I still do not know what it means and what it is; I still do not know where it exists; I still do not know whether it is possible for us to reach a conclusion on this in the short term, although we would all like to. Hon Mark Nevill in his speech last night made it clear that this is just part of a long, ongoing chain of events in the process of reaching a conclusion.

The Keating Government's native title legislation followed the Mabo decision. For the purpose of that legislation, it was understood by everybody, including Mr Keating, that pastoral leases extinguished native title. As a result of that decision, the various States of Australia issued titles to land on the basis that native title had been extinguished on pastoral leases. It is interesting that Western Australia probably took its responsibilities more seriously than the other States, because it brought in the Office of Traditional Land Use legislation to try to create a framework in which titles would be issued based on the Government's understanding of what the Mabo decision had contemplated. Therefore, it required people seeking the issuing of titles to go through the OTLU process, which required consultation and required work to be done to ascertain whether these titles could be issued.

The other States simply went ahead and granted titles regardless of any other process. A doubt then arose about the situation with pastoral leases. Instead of the Keating or the Howard Governments legislating to provide certainty with pastoral leases, they left it for the courts to determine. This was a cop-out by both Governments, which should have legislated to ensure that what they believed to be the case was reflected in law. The Wik decision was that pastoral leases do not totally extinguish native title; that is, it is possible for titles to coexist, and for partial extinguishment to occur. The Wik legislation was introduced to clarify the position with pastoral leases and native title, and to clarify the common law in a practical sense. This measure also gave the States the right to legislate so that reasonable certainty could be provided in each jurisdiction regarding where native title comes from, and where it is headed in a political and practical sense. This legislation was brought to Parliament as quickly as possible following the decision by the Senate to agree to the Wik legislation, which amended the Keating Native Title Act.

Questions have been raised by a number of speakers about the urgency with which the Government wishes to deal with this Bill. We need to make progress as quickly as possible on this issue so that we remove, to the extent possible, the uncertainty which exists with title and land tenure in Western Australia. People would prefer to know their rights and obligations, whether they agree with them or not. People would rather live in a world of certainty. Significant uncertainty has existed in Western Australia since the Mabo decision and the passage of the Native Title Act in 1993. For the benefit of members who do not go beyond the confines of the metropolitan area, that uncertainty has had a significant impact on the mining and pastoral industries and upon holders of various leases other than pastoral leases. It has also had an impact on the development of residential property in a number of towns in regional Western Australia. People simply want the Parliament to sort out the mess, and to stop leaving it for the courts to decide. We must put in place some form of legislation which clarifies the position.

Generally speaking, Australians are supportive of the concept of native title and are anxious to ensure that land is provided

to Aboriginal people in a way that satisfies their many requirements. As an aside, some argue that simply by providing native title to land, somehow all the problems of Aboriginal people will disappear. I hear the noble savage argument from time to time that the only thing wrong with Aboriginal people is that Europeans settled here. That argument ignores the reality of the problem now. I have seen and read much of the commentary about the way of life of Aboriginal people prior to 1788; namely, that it was idyllic and that these people did not have a problem. More learned advice indicates that Aboriginal people faced many problems prior to 1788, many of which have not gone away. We find in 1998 that we must recognise and do what we can to sort out these problems. Simply granting native title over a vast area of Western Australia will not resolve the problems some Aboriginal people still face.

Returning to the urgency question, the Leader of the Opposition selectively quoted from evidence given by John Clarke to the Select Committee on Native Title. I have a copy of the transcript of John Clarke's evidence and a copy of the report. For the benefit of the House, I refer to page 17 of the report which quotes John Clarke - who members know is considered an expect on this issue - on the urgency question as follows -

> I think there is some sort of misunderstanding. The titles validation legislation is important . . . but I think the Government's overall statements about the urgency of the legislation actually relate to the State Provisions Bill . . .

I had a look at the evidence given by Mr Clarke. He said -

> I think there is some sort of misunderstanding. The titles validation legislation is important because of the fact that we have just been talking about that potentially there are titles out there that are invalid and that the holders of those titles could find themselves involved in litigation if the legislation is not passed. So it is important from that point of view to essentially put that issue to rest. The other element that is important in the legislation are the confirmation provisions because until the State puts in place those provisions the registration test in Western Australia will remain open if you like because until such time as those confirmation provisions are there when the registration test is administered there would be no exclusive tenures that would need to be excluded from claims so that the sort of problems that have been experienced in the South-West with the petrol -

I will find out what that word should be; it is in the uncorrected transcript, which continues -

> - and conditional purchases leaseholders being pulled into the claim process would continue so it is important from that point of view but I think the Government's overall statements about the urgency of the legislation actually relate to the State Provisions Bill . . .

The report does not include all the business about the urgency of the validation Bill The report refers to the first bit and the last bit. Frankly, that is rather naughty by whoever wrote that report. John Clarke outlined the urgency of, and the necessity to deal with, this Bill. He indicated that comparatively, the state provisions Bill was more urgent, but he did not indicate there was no urgency attached to this measure.

Hon Barry House: It was sleight of hand!

Hon N.F. MOORE: I do not know who wrote it; I presume it was by the chairman of the committee.

This Bill is particularly important. Until it is passed, changes made to the commonwealth Native Title Act which came into effect on 30 September 1998 will not apply in Western Australia. I remind members, as I interjected earlier, that Queensland, New South Wales, Victoria and the Northern Territory have already passed almost identical legislation to this State's. Interestingly, Queensland, which has a Labor Government, and an almost identical Bill to that before us, passed its measure in about 37 seconds with the concurrence of both sides of the House. That Parliament recognised the need for some certainty. The Leader of the Opposition claims that the Bill is not important because no legal actions are under way. This is because there is an expectation that following the passage of the commonwealth legislation, validations will be put in place. If this Bill were to fail, I suggest that litigation will inevitably follow. Urgency also relates to the new registration test, as outlined in the comments I quoted of John Clarke. I now raise some comments by Hon Tom Stephens and others.

The PRESIDENT: The Leader of the Opposition.

Hon N.F. MOORE: When is the member Hon Tom Stephens, Mr President?

The PRESIDENT: The Leader of the House has used Hon Tom Stephens' name again rather than his title of Leader of the Opposition. That gives me an opportunity to indicate to members that some members in this House have high political office. I am not trying to be pedantic when I say that. The Leader of the Government and the ministers are some of those members and they are given special privileges because of their positions in this House. The Leader of the Opposition is also accorded special privileges because of his status as Leader of the Opposition in this House. As members are aware, I also accord not extraordinary or special privileges to Hon Jim Scott, but I recognise him as the senior member of the Greens (WA) and Hon Helen Hodgson as the senior member of the Democrats. Having said that, when the Leader of the Opposition is speaking in this House, he is speaking as the Leader of the Opposition. If a dispute should arise, he will be held to be speaking as the Leader of the Opposition unless, for some reason, he steps out of that role, indicates to the House that he

is not speaking in that capacity and decides to speak as the member for the Mining and Pastoral Region. That equally applies to ministers. It would be an unusual circumstance if they decided to speak in another capacity, rather than in their ministerial capacity. I do not want members to think that I am being pedantic. I find it necessary to say that because it has been said to me recently that I appear to be becoming grumpier. I do not believe that is the case either.

Hon N.F. MOORE: The Leader of the Opposition, Hon Tom Stephens, asked on what grounds will the State appeal the Miriuwung-Gajerrong decision. He has indicated throughout his speech that this decision should somehow affect this legislation. I have a copy of the notice of appeal which is a public document and I seek leave to table the document.

Leave granted. [See paper No 655.]

Hon N.F. MOORE: That will be available to the Leader of the Opposition. The appeal was formally lodged on 15 December and is on the public record. The grounds for the appeal will become apparent to the Leader of the Opposition when he reads the document. The Leader of the Opposition asked how the State intended to validate titles that are not covered by the validation provisions in the Bill. Part 2C of the Bill contains provisions for the validation of acts not covered by the intermediate period definition by way of agreements. This is the only way such titles can be validated. There is no way in which the legislation can be used to validate, as any such legislation would be invalid because of the Native Title Act. The Government is not aware of any titles that would need to be validated by agreement at this stage. If any such titles exist, the Government will seek to have them validated by agreement.

The Leader of the Opposition asked whether there had been any challenge to an intermediate period act. Only one court action has been taken in relation to an intermediate period act. This was an injunctive action taken by the Miriuwung-Gajerrong people in an attempt to prevent the development of an agricultural block granted in the Ord stage 1 area in 1995. A number of threats to take legal action have been made against intermediate period title holders, particularly mining leaseholders. The Leader of the Opposition asked for details of major projects that could be subject to legal challenge in the absence of validation provisions. A number of projects have received titles prior to March 1995 and could be subject to legal challenge as the titles were granted over pastoral leasehold land without being subjected to the Native Title Act procedures. Other major projects make up the seven special cases that are also subject to potential challenge. The most significant of these projects would be the goldfields gas pipeline, as the member is aware, and the associated lateral pipelines; the Pilbara energy project - the direct reduced iron process project - and the Chalice gold project. The Leader of the Opposition seems to have a bee in his bonnet about some of these so-called special cases. The Government's position is very clear on this. The Government was approached by various companies and organisations seeking to be given title over land in order for them to carry out certain activities. The best example is the DRI plant in Port Hedland. It is a Broken Hill Proprietary Co Ltd project worth about $2b which the State has been desperate for since the 1960s when Western Australia started exporting iron ore. In order to find the necessary and appropriate site for this plant, BHP made a decision that it should be located near Port Hedland on land that was a pastoral lease owned by BHP, on the basis that freehold title had extinguished native title, which was believed by everyone to be the case at that point. BHP proceeded to construct its DRI plant and, similarly, the Chalice gold operation, the Kookynie gold project and the goldfields gas pipeline also went ahead. These projects are very important for Western Australia and every endeavour was made to ensure that the land that was used was land upon which native title had been extinguished. Members must bear in mind that this was prior to the Wik decision and it was based on everyone's understanding, including Prime Minister Keating's, that pastoral leases had extinguished native title. On that understanding and belief, the Government did not require these projects to go through the native title process.

The Leader of the Opposition is seeking to somehow indicate that we are trying to validate something that we have done wrongly and which we know we have done wrongly. We do not know that we have done anything wrongly and if anything was done wrongly in providing titles or tenure for those so-called special projects, the court will make a decision on that. It is not for me to say that what the Government did in Port Hedland with the DRI plant is correct in law. It is not to for me to say that the Davey Hurst gold project, which enabled a mine to continue its life, was right or wrong in law. If someone takes offence, it is for the courts to decide. To date no-one has challenged those titles to my knowledge. In the event that this legislation is passed today, and someone wants to challenge those pre-Wik decisions, the courts will make a judgment. If the courts find that something was done which was outside the capacity of the Government, compensation will be paid and the courts will determine that amount of compensation. Nothing sneaky has been done. All this huffing and puffing about these projects is just so much huffing and puffing.

Hon Tom Stephens: Which minister put up the projects for approval by Cabinet?

Hon N.F. MOORE: The member knows that what goes on in Cabinet, goes on in Cabinet and is confidential to the Cabinet process. In the past a number of Cabinet ministers have had memory lapses on various issues and cannot remember what has been said. I suspect that the Leader of the Opposition has had the same lapses during his period in Cabinet. I do not propose to talk to him about what happens in Cabinet or who took these issues to Cabinet. I took one matter about a mining proposal to Cabinet because it was put to me that if we did not provide title, a goldmine would close down and 300 employees would be sacked. If the Opposition members do not think that the Government should have done what it did,

they should say so. They should say up-front that the Government should not have allowed the building of the DRI plant and the Pilbara goldfields gas pipeline nor should it have allowed the Chalice goldmine to proceed. By saying that, they must acknowledge the consequences of that not happening. If something were done pre-Wik on pastoral leasehold property that is now found to be invalid, it will be found invalid by the courts and not by me, the Leader of the Opposition or Parliament. I do not propose to spend a great deal of time dealing with those issues although the Leader of the Opposition can spend a fair amount of his speech talking about them.

The Leader of the Opposition's claim that the problem caused by overlapping claims was unique to the goldfields region and it had led to the need for amendments to the claim registration process was not correct. The problem of overlapping claims is more extensive than the goldfields; it occurs throughout the south west, the mid-west, the Murchison and the Pilbara, as well as other parts of Australia.

He claimed in his speech that Queensland introduced an expedited compensation regime as part of the titles validation legislation. I am advised that is not the case. The Queensland legislation, called the Native Title (Queensland) State Provisions Act 1998, contains virtually identical provisions to those contained in the Bill under consideration by this House. The Leader of the Opposition appears to want the State to pay compensation to any claimant who asks for it without any requirement on the claimant to first establish whether he has any native title rights or interests. The complexity and time required to deal with compensation is not due to any state legislation requirement, but is caused by commonwealth processes that require people to establish whether they are native title holders. It is interesting that the Leader of the Opposition should be arguing for an expedited compensation process when he is not arguing for an expedited process to determine whether native title exists. One cannot have one without the other. We are trying to put in place a process which is possible or permitted under the commonwealth law to expedite all aspects of the native title process. Hon Tom Helm would agree with me that we want to sort this out and ensure that everybody knows where they stand. Once a process is in place that works and everybody understands - whether or not they agree with it - we will at least have some certainty in what we are doing.

Hon Tom Helm: It is a negotiated process. We have tried everything else.

Hon N.F. MOORE: Some have and some have not. Some negotiated processes have worked with an extraordinary amount of time, energy and money by certain people. For example, Murrin Murrin was a negotiated situation in which 13 claimants had to be negotiated with, and at the last minute another claimant turned up when the proponent had already reached agreement with everybody else. There are many examples in the gulf which comprise many claimants to particular areas of land and it has been impossible to reach and negotiate a settlement. The problem that has been around - the Department of Minerals and Energy will tell any member about this - is that the only party which is required to negotiate in good faith in the negotiation process is the Government. The Government has been left high and dry on many occasions trying to resolve claims and the allocation of mining titles in many parts of Western Australia.

Hon Tom Helm: Can you point to any legislative solution?

Hon N.F. MOORE: One can only hope that what we are now doing will go some way towards reaching a legislative solution. If there is no legislative solution, we will keep going the way we are whereby the courts make the decision for us. If Hon Tom Helm wants to abdicate his right to make the laws in this State and give it to the legal system or the courts, that is entirely his judgment. I do not share that view.

The Leader of the Opposition also claimed that the amendments he is proposing which will delete reference to schedule interest will help claimants to define their claim boundaries in a way that will satisfy the new registration test. This could not be further from the truth. If the Opposition's amendments were to be adopted, claimants would not have any specific list of leasehold tenures that they needed to exclude from their claim. Instead they would have to make a complex legal assessment of exactly what leases within their claim constitute residential, commercial, and exclusive agricultural or community purpose leasehold tenures. If they were to make a mistake in the process and include any such tenures, their claims could not be registered and would be potentially subject to a strike-out action.

The Leader of the Opposition refuses to accept that the schedule is no more than a list of specific forms of leasehold tenures which have been issued in Western Australia that meet the Native Title Act definition of exclusive possession acts and constitute residential, commercial, exclusive agricultural and community purpose leases. It is not some additional list; it is a list that is believed to be included within the generic definitions within the Native Title Act. The purpose of the schedule is to provide both native title parties and leaseholders with certainty about what forms of tenure can and cannot be claimed. There is an attempt to defy what is a leasehold tenure so there can be some certainty in these matters. The Leader of the Opposition made a number of references to exclusive pastoral leases and implied that the State Government was somehow attempting to include such tenures in the schedule. I state that there is no such thing as an exclusive pastoral lease in Western Australia to my knowledge, and the State Government has no hidden agenda to the schedule. It has gone through an exhaustive process with the Federal Government to ensure that only tenures which confer exclusive possession on the lessee have been included on the schedule.

At the end of yesterday's sitting the member also gave me a long list of questions, which I do not propose to read out. I have

already answered some of them. I propose to give to the member a copy of the answers based on the questions he asked yesterday that have been provided to me.

Point of Order

Hon HELEN HODGSON: Would it be in order for that list to be tabled?

The PRESIDENT: Under the standing orders, it appears to be a document that the minister was quoting from. Unless the minister tells the House that it is a confidential document, Hon Helen Hodgson is able to ask for it to be tabled.

Hon N.F. MOORE: I am happy to table the document.

[See paper No 656.]

Debate Resumed

Hon N.F. MOORE: It is interesting in the context of this debate that the Leader of the Opposition should provide me with a long list of questions in the second reading debate and seek responses in the summing up period. I would have thought that after having had a committee look at this Bill - I know the honourable member has been interested in this issue for a very long time - and having known that this Bill has been in the State Parliament - not necessarily this House - for a number of months, he might have received the answers to those questions. If the purpose of the exercise is simply to have them on the Table, that is fine by me. That places the system under a fair amount of pressure, not simply because of what the Leader of the Opposition has sought to do, but because his colleague Hon John Halden, in his speech, referred to a list of questions he had but did not read out. He passed them to me and asked if I would give him answers to those today. As it turned out, the list of questions provided by Hon John Halden was a list of questions asked by the Aboriginal Legal Service. It was on an ALS fax paper written by ALS lawyers who are seeking to use the Parliament as a basis for their response to the appeal that we are going through in the Miriuwung-Gajerrong case. Most of the questions relate to that case. Again, rather than read out the questions that Hon John Halden did not read out last night, I would like to table the answers to the questions.

[See paper No 657.]

Hon N.F. MOORE: I shall make a couple of comments about the speech by Hon John Halden. I was a little offended at the beginning of his speech because he sought to make the point that somehow or other all ills facing the Aboriginal community have been brought about by conservative Governments and that legislation which is brought before Parliament by conservative Governments is to disadvantage Aboriginal people. If he talks to Aboriginal people around Western Australia he will find large numbers who will say that when the Labor Party is in government they get bucket loads of rhetoric but no action; nothing is done to improve education, health, living standards, roads, electricity, water supplies and other things that most communities desperately need. They will tell Hon John Halden that they get those things when a coalition Government is in office. I am proud of the work that the Government has been able to do to assist Aboriginal communities in Western Australia. I take some pride in what I was able to do as Minister for Education, Employment and Training in respect of education, employment and training among Aboriginal communities in Western Australia. Government members are not about rhetoric. We are not about running around and saying, "We will give you back the country", or whatever the Labor Party says. We are about providing services and assistance based on people's needs. That is what must be done. Many needs among many Aboriginal people in Western Australia have not been satisfied, and it is our job to do something about it. I am pleased with the work being undertaken by Hon Kim Hames, the Minister for Aboriginal Affairs, who has taken a particular interest in Aboriginal communities and in ensuring that they are upgraded in a way which will improve the living conditions of their inhabitants.

Hon Greg Smith: We are delivering the things that are necessary.

Hon N.F. MOORE: That is true; that is the usual case. It has been suggested that the Labor Party has a mortgage on compassion in respect of race issues. By way of interjection, I reminded Hon John Halden of the White Australia policy of a previous Labor leader, Cockie Caldwell. Labor members, having come from that background, should never suggest that they have a mortgage on the high moral ground. Yesterday the high moral ground was very crowded on a range of issues. Aboriginal people want not people who aspire to the high moral ground but people who want to get down onto the ground to do some work to provide for the needs of Aboriginal people.

I do not propose to deal with every contribution. Much of the debate comprised platitudes and slogans joined together to form a speech. Many speeches were statements of basic political position - comments which I find totally unhelpful in many cases in respect of where we are on native title. Western Australia needs a resolution to the problems that have been created as a result of the Mabo decision in the first place and in particular as a result of the legislative response to that decision, because of the nature of its land mass and land system. Ironically our pastoral leases were never made freehold, quite deliberately, and ironically Aboriginal access to pastoral leases was always made part of a lease. That was different in other parts of Australia. Had we gone down the path of making pastoral leases freehold, vast areas of the State would not be subject to native title at all.

When I first became a member of Parliament back in 1977 I was lobbied by pastoral interests to provide freehold over pastoral leased land. The Government's view and my view in those days was that that was not appropriate, but I was prepared to contemplate the notion of perpetual leasehold which would give a degree of certainty to pastoral leaseholders in respect of borrowings and the development of their properties. I take great exception and I object strongly to the comment by a couple of members about the so-called romance surrounding the pastoral industry. Members who have the view that all pastoralists are wealthy trillionaire squatters who sit in large mansions on huge areas of land and have slaves working for them should go out to the pastoral land of Western Australia and have a good look. They will find people working extraordinarily long hours for small returns to provide for their families and themselves and to make an economic contribution to Western Australia.

The problem in the debate was that a couple of members, particularly Hon Jim Scott and Hon Christine Sharp, were mixed up between native title and what they wanted to do with pastoral leaseholders. They would like to remove pastoral leaseholders altogether - depopulate pastoral areas. They think that by providing native title over the land they will achieve their end, which is to depopulate pastoral areas of Western Australia. I accept that large areas of the rangelands have been denuded, but I acknowledge that much work is being done by all interests in the pastoral sector to overcome the problem. There are many good reasons that the pastoral industry should survive for the benefit of the land on which it is located.

Hon Barry House: There are environmental as well as economic reasons.

Hon N.F. MOORE: I meant from an environmental perspective.

Hon Greg Smith: What about water for wildlife?

Hon N.F. MOORE: There would be a massive loss of wildlife if the pastoral industry closed down, because there would be little water. Interestingly, the pastoral industry has provided much water for wildlife to access, but that is another story. Hon Jim Scott and Hon Christine Sharp introduced the issue as a furphy. It represents their view that people should be shifted out of pastoral areas and relocated and that we should leave the land to return to its pristine nature in time.

I thank members. Generally speaking there was a genuine attempt to come to terms with what the legislation means. It is complicated, complex and political.

I now refer to the urgency of the matter. I have talked about the issues which were raised by John Clarke. The need to remove any uncertainty in respect of anybody's tenure is a matter of urgency. Questions about the state provisions Act potentially being disallowed by the Senate introduce an element of urgency. I notice that the Democrats sit drooling at the prospect of running the country again with their tiny number of votes, which will happen when they take control of the Senate. One problem we face is that minority groups now intend to control the political agenda, be it in this House or in the Senate. Hon Giz Watson can laugh all she likes. With her percentage of votes she is not entitled to the power that she is able to wield. In particular, the policies of the Greens, as I mentioned by way of interjection yesterday, have reduced the Tasmanian economy to negative growth. They have influenced the Tasmanian economy to the point at which this State, because we are actually doing things here, is subsidising the Tasmanian economy to the tune of many tens of millions of dollars every year so that Tasmanians can sit under trees and contemplate the meaning of life.

That is what it has come down to. Those people should not make decisions for the rest of Australia - Australians who want to get on with their lives and create economic wealth for the country so that we can do the things that Aboriginal people want us to do for them, and that costs money. We cannot simply create wealth by doing nothing or by putting big fences around land and saying that nothing can happen there. We create wealth only by doing things and having economic activity. We must use the land of Western Australia to create economic activity, because all wealth comes from the land. If we exclude it, we risk excluding our capacity to raise wealth in order to provide for those in need in particular.

Therefore we need to pass this legislation and we need to pass it quickly. I hope we can pass this Bill today, get on with the Native Title (State Provisions) Bill next week, get it into the federal system so that it can be ticked off by the federal minister, agreed to by both houses of the Federal Parliament and put into practice so that we can at last move towards some degree of certainty in Western Australia on the whole question of native title.

Finally, I know of nobody who comes from my position who would suggest that what we have now is everything that this side of the argument ever wanted. The Wik response and this legislation is a result of a massive compromise right across Australia. All the interests have come together and what we have now is a compromise. It does not satisfy everything that I would want; clearly it does not satisfy everything that members on the other side would want. However, as with all compromises, it is somewhere in the middle. Members should see it in that context. As Hon Mark Nevill said - and this is what worries me in the future - this will not solve our problems. This is just another step in the road to finding a solution ultimately to this problem. I guess all compromises are subject to being flawed at some time in the future. I thank members for their contribution.

Question put and a division taken with the following result -

Ayes (27)

Hon Kim Chance	Hon Peter Foss	Hon N.F. Moore	Hon Tom Stephens
Hon J.A. Cowdell	Hon N.D. Griffiths	Hon Mark Nevill	Hon W.N. Stretch
Hon Cheryl Davenport	Hon John Halden	Hon M.D. Nixon	Hon Bob Thomas
Hon Dexter Davies	Hon Ray Halligan	Hon Simon O'Brien	Hon Derrick Tomlinson
Hon E.R.J. Dermer	Hon Tom Helm	Hon Ljiljanna Ravlich	Hon Ken Travers
Hon B.K. Donaldson	Hon Barry House	Hon B.M. Scott	Hon Muriel Patterson *(Teller)*
Hon Max Evans	Hon Murray Montgomery	Hon Greg Smith	

Noes (5)

Hon Helen Hodgson	Hon Christine Sharp	Hon Giz Watson	Hon Norm Kelly *(Teller)*
Hon J.A. Scott			

Question thus passed.

Bill read a second time.

Committee

The Chairman of Committees (Hon J.A. Cowdell) in the Chair; Hon Norman Moore (Leader of the House) in charge of the Bill.

Clause 1: Short title -

Hon TOM STEPHENS: The Labor Opposition has supported the second reading of this Bill and has positioned the House into committee. That has been done with the opposition of the Australian Democrats and the Greens (WA). They have placed on record, again by their vote, their complaint about that process. In this debate on the short title, I acknowledge the extraordinary situation in which we are placed. It is a situation of my own making - or the making of my Labor colleagues; I have participated in the process of agreeing to the situation. I place on record that anyone who observes what has just happened to the Opposition must understand the situation in which we find ourselves.

During the second reading reply the Leader of the House graciously presented to the House firstly the grounds of appeal that have been the basis upon which the State Government indicates it will appeal the decision of Justice Lee in the much talked about Miriuwung-Gajerrong determination by the Federal Court. That is a 23-page document which I had not realised existed; I accept that I should have realised that. Never had it been drawn to my attention by anybody and I am surprised by it when I flick through it. I have a problem with the document because I want to try to understand it before I conclude my remarks.

Hon N.F. Moore: I am worried about how you can read that and speak at the same time.

Hon TOM STEPHENS: I could but I will not.

This is the first document that the Leader of the House tabled. It is something that I am supposed to digest in the process of consideration of this debate; that is a challenge I have. I hope that some people in the parliamentary Labor Party in our support team are outside this House somewhere giving me an analysis of the State Government's claim in reference to Miriuwung-Gajerrong. I am looking forward to some support in reference to the document I have seen for the first time.

Hon N.F. Moore: As you acknowledged, it is your fault.

Hon TOM STEPHENS: It is my fault and I am hoping some analysis is being done quickly for me about that. What an extraordinary appeal this represents. From a cursory look at it, it is based on three principles: Firstly, that His Honour Justice Lee erred in law in ruling that native title is an interest in land, rather than a bundle of rights in respect of a particular area of land. I find the appeal process being embarked upon amazing. This is the appeal that has been struck down already.

Hon N.F. Moore: With respect, you have ignored a whole lot of findings and have selectively taken a point of view. Then you assume those are the facts.

Point of Order

Hon Greg Smith: The Miriuwung-Gajerrong case has nothing to do with the debate.

The CHAIRMAN: I am sure the Leader of the Opposition is aware that at the short title stage he must relate his comments to any clauses in the Bill before us.

Debate Resumed

Hon TOM STEPHENS: Members will appreciate that Hon Greg Smith has that view; we have another, which can be sustained by coherent and cogent argument in this place. I urge the member to desist from taking that line of argument and

point of order before the Chair. I will be endeavouring to assist the passage of this legislation. I ask the member please not to take those points of order in reference to my contribution on the short title of the Bill.

Hon N.F. Moore: Please confine yourself to the short title matters.

Hon TOM STEPHENS: The relevance of the Miriuwung-Gajerrong case is amply demonstrated, not least, by the amount of argument put during the second reading debate. If members opposite thought that was not appropriate, they are casting a reflection on the role of the presiding officer in this place, who allowed enormous debate.

The CHAIRMAN: The member may wish to resume his comments about the clause we are considering, rather than reflect on the decisions of the presiding officers.

Hon TOM STEPHENS: I am not reflecting on them; I am saying that the point of order endeavours to do that. I hope members will not cast a reflection on the decisions of the presiding officers, who allowed extensive debate of the Miriwung-Gajerrong decision. The Leader of the House has acknowledged the relevance of that decision to this debate by tabling -

Hon N.F. Moore: I tabled it afterwards. You asked for it. I did not acknowledge it. I happen to agree with Hon Greg Smith.

Hon TOM STEPHENS: I do not agree with the Leader of the House, and I ask him please not to try to mount that argument. I simply say that that is extraordinary. That is the case those opposite ran which has previously been struck down by the courts of this country. I refer to the first page and to the fifth ground of appeal, which states -

> **Miriuwung and Gajerrong**
>
> . . .
>
> 5. erred in law in failing to take account of evidence, and to find, that the Miriuwung, the Gajerrong and the Balanggarra had not continued to acknowledge the laws and (so as far as practicable) to observe the customs based on the traditions of each of those groups, and that their traditional connexions with lands had not been substantially maintained.

No-one in this Parliament is better placed to tell members what a specious ground of appeal that is, than I am.

Hon N.F. Moore: The court will decide that, not you. A federal judge has made a decision and the appeal is to the full bench. That is the appropriate place for it to be heard, not here. Let us not argue the appeal in here.

Hon TOM STEPHENS: I just want to give some progress. This will be a very brief preliminary remark, so the Leader of the House should not drag it -

Hon N.F. Moore: Don't tell me what I can and cannot do.

The CHAIRMAN: The Leader of the Opposition should proceed forthwith with his remarks so that we can make some progress.

Hon TOM STEPHENS: More than any person, I know how specious that argument is, how deep and sustained the traditional connections of the Miriuwung and Gajerrong peoples are with this area, which has recently been recognised by Justice Lee. I know that from 22 years of intense experience with the traditional life of those people. It was accepted by Justice Lee and can be found in his determination. I have quickly looked at the conclusion in paragraph 6(c), which refers to the weigh of anthropological, linguistic and ethnographic evidence taken during the trial. One interesting part of the work of both the first and select committees which considered native title was to receive evidence from Professor Richard Bartlett and to see the contrasting situations that operate in the efforts to bring about resolution of native title issues in Canada and here. He drew attention to the great problem that had arisen here, with our preoccupation with anthropological, linguistic and ethnographic evidence. With the State Government focusing on those issues, trying to generate work for the anthropologists on the determination of native title claims, we will be taken further down the path of throwing scarce public taxpayers' resources to these professionals, rather than down the more appropriate path that has been adopted in other places to determine where native title exists validly and has survived, and where it should be found to exist within the determination areas that are put to the courts in our jurisdictions. Professor Bartlett says that there is an alternative path, and that is the focus of the claim. That is the information I have gleaned from only the first two pages that I have looked at quickly.

I expect that an argument will be put to the Committee by any member who saw the detailed response of the Government to my questions that I delivered to the House last night. I have looked through some of the answers to the questions quickly to see how much more information is provided by the Government. I acknowledge that some of those questions were answered in the other place, but that is a different issue. We deal with the questions asked in this place. I have been here long enough to know how vigorously members here have championed the rights of this place to obtain the information for itself. Some questions and answers are duplicates of those delivered in the other place; however, they are arriving in this

place for the first time. I acknowledge that some of those answer are duplicates of questions put to the Government in the select committees, but not in the reports presented to the House. We must now process the information contained in these answers which form a large document the Leader of the House tabled at the start of this committee debate. I also acknowledge that another set of questions tabled by Hon John Halden came from the Aboriginal Legal Service and that another wad of answers has been delivered quickly. We have a whole slab of new information that must be processed.

Hon N.F. Moore: It is not new; it is just answers to questions you have asked before. You have driven four people to the wall, as well as me, answering them again.

Hon TOM STEPHENS: First, I am very appreciative that the Leader of the House was able to make that information available to the Chamber. Secondly, I acknowledge that the work was not done by the Leader of the House; rather, he was prepared to request officers of the State Public Service, consultants and others to work overtime and produce that information. I appreciate that result. I appreciate their work in that they are serving the Government and have produced that information to be available for this debate. That information produces a new challenge for members on this side of the Chamber. We must process that information to ensure that any further information that needs to be teased out is done so in the process of debate. It seems that for each question that is asked and each answer that is given, a multiplicity of questions automatically arise on the complex issues before us. That is one conundrum that the Labor Party is faced with in view of its commitment to move this legislation to a resolution.

The committee needs to know that the Federal Court of Australia has brought down another determination on the vexed issue of native title. Justice Olney's decision in Victoria on the Yorta Yorta claim throws fresh light on many of the issues that are being argued on where native title has survived or otherwise. My colleague Hon Mark Nevill commented to me before I came into this Chamber that Justice Olney's decision rendered at least one section of the speech he delivered in the second reading debate incorrect, because for the first time a court has found against a native title claimant.

Hon Helen Hodgson: There have been more than one. It was a federal decision, and it is already wrong.

Hon TOM STEPHENS: The Fejo decision sustained the argument that native title had been extinguished over freehold title, which has been substantially re-argued in that case. I note in passing that we have had other decisions of the Federal Court of Australia. I would like the opportunity to -

Hon N.F. Moore: Why don't you move that we report progress and come back in March, as Hon Helen Hodgson moved yesterday?

Hon TOM STEPHENS: I am not going to.

Before the consideration of this Bill is finished I will try to get my head around some of the papers that have been tabled. I appreciate the difficult position that the Labor Party has put itself in as we try to process all of the information; nonetheless, we will press on.

The Leader of the House responded to the second reading debate by referring to the vast areas over which Aboriginal people exercise control over land in Western Australia. That is a false concept, and it diminishes the Leader of the House's argument in support of the Bill. Aboriginal people do have substantial interests in land in this State. Some of those interests are strong forms of title. Aboriginal people hold freehold titles, pastoral leases, and some live on Aboriginal reserves. Equity in land is not effective or absolute control over land. It is unfair to say that Aboriginal people control a vast percentage of the State; they simply have a variety of interests in that land. Reserve land is by and large vested in the Aboriginal Lands Trust over which effective control is in many ways in the hands of state ministers. The Minister for Mines makes final decisions on mining and exploration matters, and the Minister for Aboriginal Affairs can determine some matters. Control is not the correct word when referring to Aboriginal people's various interests in land in this State. It is a misuse of the word to suggest that somehow Aboriginal people control a vast percentage of this State, because there are a variety of Aboriginal interests - freehold title at its strongest, pastoral lease in a weaker form of that interest, Aboriginal reserve land which is firmly under the control of the Minister for Aboriginal Affairs, and a variety of other interests as well as a native title interest. Native title interest does not bring with it control.

Hon N.F. Moore: If the member reads Justice Lee's decision, he will see that there is some doubt about it.

Hon TOM STEPHENS: Is that the Miriuwung-Gajerrong decision?

Hon N.F. Moore: Yes, about the right of entry.

Hon TOM STEPHENS: Does the Leader of the House concede the relevance in talking about the Miriuwung-Gajerrong decision in this debate?

Hon N.F. Moore: You are talking about other things which are quite strange.

Hon TOM STEPHENS: A native title interest is not a guarantee of control. This Parliament has regularly diminished the rights of Aboriginal people over the land areas of Western Australia within the reserves and pastoral leases. Aboriginal

people have limited rights to influence what goes on within those land holdings. That does not represent control. It is not a veto. Even the right to negotiate is not a veto. It is simply a right and an interest in land that gives them a stronger position than another right; for instance, a right to consult. However, it is by no means accurately described simply as a matter of control. This is an important point when one compares their control with, for instance, the control of pastoral leaseholders over the lands covered by their grazing licence, and the control of some mining tenement and mining leaseholders over their operations. In my experience some pastoral leaseholders try to charge a fee to tourists going onto their land holdings that are held effectively only for the grazing of stock. Argyle Diamonds has exclusive control over the access of people onto its lands, as does Newcrest Mining Group over its Telfer lands. I know that my friend and colleague, Hon Ernie Bridge, landed his aircraft which was nearly out of fuel on the Telfer airstrip and was told by the American-owned company that he must stay on his aircraft. They said they might give him fuel, but he certainly was not to step off his aircraft onto the ground. That mining operator was able to say that because he had effective control of the land. Control over land is exercised in interesting ways which we sometimes accommodate in an exclusive way through foreign ownership such as Newcrest, which was then wholly American owned.

Aboriginal people's control over land has never been as strong as that, and by virtue of the legislation that is before the Chamber, we will again diminish and reduce through legislation the influence that Aboriginal people will have over land. The situation in mining towns is similar. In the past the mining operators have control of the land holdings of those town. We do not challenge control of defence land. A former Liberal member of Parliament recently complained to me about the control that was being exercised over access to a pastoral lease within my electorate, which he was visiting. He was denied access to the pastoral lease. There had been no guaranteed opportunity to improve the holding in that area, but he was denied access to a small gorge at the back of the lease. He was furious about the control that the pastoralist was exercising when he tried to get into a pastoral lease being developed without appropriate approval for tourist operations. This former Liberal member was indignant about what was going on and asked me to explore the issue, which I did. I found that the status of the tourist operation was suspect but that it had gone ahead without challenge.

The Australian Labor Party will press on in this debate with a set of amendments it believes will improve the operation of this Bill. The amendments relate to clause 7 and are included in the Supplementary Notice Paper. They are an attempt to respond to the party's understanding of the expressly stated ambit claims for this legislation; that is, to provide at statute extinguishment of native title in areas on which land tenure has been granted through previous exclusive possession acts and on which, as a result of the decisions of the court, native title has effectively been extinguished. The Labor Party's amendments seek to water down what the Government is endeavouring to do. The Government appears to be moving in front of the decisions of the court to extinguish native title interests in a much broader category of land tenure holdings that have not been extinguished by court decision. Those titles will be extinguished by this Bill if it is passed unamended.

Members have had to listen to the arguments of the indigenous peoples of this State, who have asked the Labor Party not to allow the passage of the legislation because they feel that, even with these amendments, the State will have moved beyond that common law position as determined by the courts. As far as they are concerned, we have moved a fair way beyond it.

Hon Helen Hodgson's amendment on the Supplementary Notice Paper appears to try to pull the Labor Party and others back to just behind what it considers to be the courts' decisions on common law questions. The Australian Democrats firmly support the aspirations of the indigenous peoples. The member is attempting to strike a balance that moves further in their direction than the Labor Party has been able to do. The Labor Party is trying to strike a balance between competing aspirations, including those of people who have been given land tenure in a form that the Labor Party believes should be validated. Findings of native title interests, where they have been determined by the courts, lead one to a presumption that native title has been extinguished in a number of circumstances. The Labor Party is prepared to try to accommodate that statutory extinguishment of native title provided for in the Bill.

Members of the Labor Party hope that we will eventually attract the support of the entire Committee for these amendments. This is a more appropriate way of balancing the competing interests that need to be accommodated, both of the indigenous community and the wider community. That includes those who hold various forms of title that have been referred to in what has been described as a "mini-schedule". The Labor Party will press on with that basic aim. For me at least, it will be necessary to keep an open mind about the adoption of the report or the third reading of the Bill if these amendments are not passed. My colleagues and I will wait to determine our final position. We have no position other than that we support this Bill with our amendments; it does not have our support without them. The Government should be aware of that as it enters into this debate.

Hon HELEN HODGSON: The Australian Democrats have already placed their position very firmly on the record: We are opposed to this Bill. However, we have lost that fight; we have gone past the second reading stage into the committee stage. I am encouraged to hear the Leader of the Opposition say that the Labor Party is still reviewing its position. He said that if the Bill were put to the vote unamended, it would not be supported. That could be very tempting.

Hon Tom Stephens: I did not say that. The Labor Party supports the passage of the amended legislation. Please do not put us in that position.

Hon HELEN HODGSON: I note a number of amendments on the Supplementary Notice Paper in the name of the Leader of the Opposition. The Australian Democrats have not yet decided whether those amendments will improve the Bill sufficiently for them to support the Bill. That is contrary to what was reported in the Press this morning. I suspect there was a bit of wishful thinking on the part of people talking to the media yesterday. We will consider these amendments carefully and we will do our best to improve -

Hon Greg Smith interjected.

Hon HELEN HODGSON: If the member wishes to make comments, perhaps he should use his time rather than mine to do so.

The Australian Democrats are still assessing their position in respect of these amendments. If there must be a Bill, that Bill should be the best Bill possible; I do not deny that. For those reasons, I have placed amendments on the Supplementary Notice Paper. I am not saying that my amendments present the perfect solution; however, if there must be a Bill, they will achieve the best position possible for indigenous people. The Australian Democrats will look at the Bill in its final form in the third reading stage and assess whether it will attract their support.

I also received a message this morning about the outcome of the Yorta Yorta case. Given that I do not have a research team or ministerial advisers, I have not yet looked at the case.

Hon N.F. Moore: When you are a minister you will.

Hon HELEN HODGSON: It would be nice to have a research team. I have at least had the advantage of having someone alert me to the fact that the decision has been handed down and I have been informed of a couple of the issues raised. That is another reason we must look carefully at what we are doing here today.

A couple of the issues raised in that decision are now being dealt with in this legislative process. As many members know, I have been a professional in the tax field. If members want to consider the merits of legislation as possibly reducing the likelihood of legal challenge, they should look at tax law. We only have to look at the number of amendments which come into this place to plug holes which have developed because somebody has legally challenged the tax law. Members should never think that by legislating for statutory extinguishment of native title in this way they are removing the conflict from the arena of the courts, because it will continue. We do not attack court decisions, and we accept that the Yorta Yorta decision has been handed down. Until such time as further legal analysis is made of the decision, I am not prepared to comment on its merits, except to say that apparently there was some discussion of extinguishment and related issues, particularly in the context that the Yorta Yorta people have been dispossessed of their lands for a significant time. That is factually quite different from the Miriuwung-Gajerrong case. There was also some discussion about the amount of resources utilised in the preparation of the case. That is the same situation we saw in the Miriuwung-Gajerrong case. The Government admitted to about $3.4m in legal fees.

Hon N.F. Moore: Do you know how much the WA Inc royal commission cost?

Hon HELEN HODGSON: I know it was huge amount.

Hon N.F. Moore: Let's get in this perspective. We paid $6m to buy back a piece of land.

Hon HELEN HODGSON: I am not here to defend the WA Inc deals in any way, shape or form. Those legal fees were only on behalf of the government party; there were significant other legal expenses, and everybody acknowledges that running challenges like this is a significant cost to the community as a whole, through government expenditure, the expenditure of individuals and companies and the expenditure of the claimants. I would not be surprised if $40m was far closer than the $3.4m when everything is totalled up.

The Bill has significant deficiencies in specific clauses. There is the principle of extinguishment which is being legislated for, the use of scheduling and the way the schedule has been devised in the light of at least one and possibly two legal decisions since that time. I say that without having the advantage of having looked at the detail of the Yorta Yorta decision. The same issues arise with the past extinguishment of native title. There is concern about whether this legislation provides sufficient protection for heritage issues. There are issues of compensation and whether it can be quantified and what amount the State will have to pay. I acknowledge that that will be dealt with in a piece of legislation we are not yet permitted to discuss. The community, through the State, private individuals or public companies, is being exposed to compensation claims.

I thank the Leader of the House for tabling these documents this morning. I have had a quick flick through them. They probably contain some issues which I will not have time to examine because I do not have access to a research team. I have had a quick look through the appeal, which takes me back to my past life. I spent four or five years in the appeals branch of the Australian Tax Office when tax schemes were taking place. The appeals covered absolutely everything which could possibly arise, for good reason. One covers all the grounds so that if the ground comes into argument later, one has something there. This looks like that sort of appeal. It appears to be the type of appeal where every possible question has

been asked and it is for the lawyers and judges to sort out. I do not pretend to pre-empt anything except to say that the Government does not accept the decision. That was made clear the day after the decision was handed down.

The Australian Democrats have a number of questions to ask on various clauses during the committee stage. We have a number of issues to consider and two amendments which currently stand in my name. We do not accept that the amendments proposed by the Australian Labor Party are necessarily the best way to go. Members should not be under any illusion that those propositions will not come in for close scrutiny, as will the Government's amendments.

Hon Greg Smith interjected.

Hon HELEN HODGSON: I do not care if Hon Greg Smith votes for them.

Hon Greg Smith: I am asking if you will be voting for them.

Hon HELEN HODGSON: I have yet to make up my mind. It depends if they pass our tests of scrutiny and on whether the answers I receive from the Leader of the House pass my scrutiny.

Hon GIZ WATSON: I reiterate that the Greens (WA) oppose this Bill in total. As we discuss the clauses we will raise numerous questions about the details of what leases we are dealing with and the uncertainty surrounding the amount of compensation payable. These questions remain unanswered.

Hon N.F. Moore: Did you want to us write the compensation into the legislation?

Hon GIZ WATSON: I have a problem with contemplating legislation with open-ended compensation attached to it.

Hon N.F. Moore: Do you want us to put a limit on it?

Hon GIZ WATSON: It is beholden on us to have some idea of what compensation we are signing off on behalf of the taxpayer. As the Greens (WA) made clear in the second reading stage, this Bill is fundamentally an obnoxious proposition. It is legislating to extinguish native title. The amendments I have proposed have been ruled out of order before they could be presented. I made every effort to amend this Bill but those amendments were ruled out of order by the Clerk and I am unable to move them. The amendments on the Supplementary Notice Paper in the names of Hon Helen Hodgson and the Leader of the Opposition will be considered in detail. We are not yet convinced that any amendments can make this Bill palatable, especially to Aboriginal people. It is important that all members be aware that we do not need to follow the course of legislating to extinguish native title; that is, legislating to remove people's rights. We have an alternative to this legislation and to the continuation of the legal battles and the huge expenditure in the courts. That alternative is to pursue negotiation and reach agreements.

Hon Derrick Tomlinson: How do you ratify the agreement?

Hon GIZ WATSON: One has a treaty to start with.

Hon Derrick Tomlinson: The answer is in the courts.

Hon GIZ WATSON: The only saving grace of this Bill is the provision to pursue indigenous land use agreements. That particular aspect needs to be emphasised very strongly. The rest of the Bill is to extinguish people's rights and, therefore, I merely wish to reiterate the position of the Greens (WA) on the short title.

Hon MARK NEVILL: The Yorta Yorta decision by Justice Olney today demonstrates that people cannot place too much emphasis on the Miriuwung-Gajerrong decision as it applies to current statute law. I will read a small section of Justice Olney's decision into this debate, because his judgment differs quite distinctly from that of Justice Lee. I quote from the judgment as follows -

> 132. The ***Native Title Amendment Act 1998*** deals extensively with matters relating to the extinguishment of native title. Section 23B now defines the concept of "a previous exclusive possession act". Section 23C confirms the extinguishment of native title by previous exclusive possession acts attributable to the Commonwealth while s 23E authorises States and Territories to adopt similar provisions in respect of previous exclusive possession acts attributable to the State or Territory. The effect of the extinguishment of native title is dealt with in s 237A which provides:
>
> 237A The word extinguish in relation to native title, means permanently extinguish the native title. To avoid any doubt, this means that after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect.
>
> 133. New sections 47A and 47B require that in some circumstances the prior extinguishment of native title is to be disregarded. One of the circumstances which triggers the operation of each section is that when the application is made, one or more members of the native title claim group occupy the area in question. It is unnecessary to recite the provisions of these sections as the only purpose in making reference to them is to draw attention to a note following subsection (2) of each section, which states:

> Note: The applicant will still need to show the existence of any connection with the land or waters concerned that may be required by the common law concept of native title.
>
> The clear intention of ss 47A and 47B is to ameliorate the effect on native title of acts which would otherwise have an extinguishing effect. Neither section provides a basis for the creation of native title rights which either did not previously exist in relation to the land or which by reason of a circumstance other than an extinguishing act had ceased to exist. In the present case there is no scope for either section to have any application.

Justice Olney's conclusion is -

> For the reasons expressed above the Court determines that native title does not exist in relation to the claimed land and waters.

Point of Order

Hon DERRICK TOMLINSON: The member identified the document from which he quoted as Justice Olney's judgment. May I request that the paper be tabled.

Hon MARK NEVILL: There are plenty of copies in the library.

The CHAIRMAN: The request has been made that the copy be tabled.

Hon MARK NEVILL: I will table a copy as long as the House gives me a photocopy in return.

Debate Resumed

Hon MARK NEVILL: Sections 47A and 47B relate to reserves and vacant crown land. That is quite important. The point I make is that the two judgments of the Federal Court are quite different and it is dangerous to assume what the potential effects will be of Federal Court judgments, with one judge sitting alone, on the legislation with which the committee is dealing. Members must look to the statute law before them to deal with any certainty, if there is such a thing. Last night I commented that the courts and the National Native Title Tribunal have consistently found in favour of the claimants. I did make the exception of the Fejo case in the Northern Territory. It demonstrates that we are all human, because within 12 hours of making that statement I am proved disastrously wrong.

Hon N.F. MOORE: I hope members will not treat this as a second reading debate. It is an unedifying spectacle to watch the opposition parties compete with each other for the same constituency and try to be greener or pinker than each other. It will be interesting to see the end result of this debate, when members contemplate the other amendments.

I will not argue about the merits or otherwise of the Miriuwung-Gajerrong case and the appeal, other than to say the Government does not support the findings and it believes they are contrary to previous High Court decisions. As Hon Mark Nevill pointed out, in the Yorta Yorta case there is also a different point of view from Justice Olney who, I indicate for the benefit of members, used to sit in this Chamber until he was promoted to the Supreme Court. I thought it was a good decision at the time. There are differences of opinion between two Federal Court judges on extinguishment of native title and the grounds to be established for native title to be conferred. This situation makes it imperative for Parliaments to make decisions about this and to stop leaving it to the courts to make the laws. That is another good argument for proceeding with this Bill, because it clarifies the position in Western Australia. I hope that the first clause will be passed some time today.

Hon TOM STEPHENS: I have been taking the opportunity to read the Yorta Yorta determinations and the points referred to by Hon Mark Nevill. I am not a lawyer; I am struggling with this issue and have been for a number of years. Insofar as I can share my ignorance or knowledge of the law, I will press on to see whether it sheds any light on the issue. Justice Olney concluded in his determination that the application of the Yorta Yorta Aboriginal community is being thrown out because of its failure to prove native title on the land in question on the basis that the people have not continued to maintain traditional native title interests in accordance with their traditional laws and customs. Section 129 of the judgment states that -

> The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs. The foundation of the claim to native title in relation to the land previously occupied by those ancestors having disappeared, the native title rights and interests previously enjoyed are not capable of revival. This conclusion effectively resolves the application for a determination of native title.

It is a vastly different issue from that faced by Justice Lee with the Miriuwung-Gajerrong people about which I spoke earlier. I refer to that section of the determination which starts at section 132. Justice Olney is dealing here with an additional part of the argument that was put on behalf of the Yorta Yorta people, following the passage in that jurisdiction of the exact same Bill that is now before this Chamber. Justice Olney was not faced with the same situation with which Justice Lee was faced; that is, he was not dealing with a determination prior to the passage of state legislation. He was dealing with a determination subsequent to the passage of state legislation.

Hon Mark Nevill: The passage of the federal legislation?

Hon TOM STEPHENS: Justice Lee was dealing with a determination prior to the passage of this Titles Validation Amendment Bill, which might have the effect, if it were passed unamended, of extinguishing native title on those areas of land contained within the schedule to the federal Native Title Act. Justice Olney states in the second part of his determination that native title has also been extinguished, if it has not been otherwise extinguished by virtue of the earlier determination, by the statutory extinguishment that is consequent upon the passage of the equivalent validation and extinguishment Bill by the Victorian Parliament. That is very interesting, and I hope all members will take on board the quote from Mr Justice Olney that Hon Mark Nevill has already given to the House, which is as follows -

> ***The Native Title Amendment Act 1998*** deals extensively with matters relating to the extinguishment of native title. Section 23B now defines the concept of "a previous exclusive possession act". Section 23C confirms the extinguishment of native title by previous exclusive possession acts attributable to the Commonwealth while s 23E authorises States and Territories to adopt similar provisions in respect of previous exclusive possession acts attributable to the State or Territory . . .

That is a very important argument in support of the amendments that the Labor Party has put on the Supplementary Notice Paper, in opposition to the argument that has been put by others that we are somehow obligated to deal with extinguishment in a uniform way. Justice Olney refers in his determination to the possibility that States and Territories will adopt similar provisions - not the same, not uniform, but similar. That is the basis upon which the Labor Party has, with confidence, in anticipation of that type of decision by Justice Olney, proposed its amendments.

Hon J.A. SCOTT: I am concerned about the proposition put by Hon Mark Nevill when he asked why it was necessary to have permanent extinguishment over the temporary use of an area for mining purposes, or whatever -

Hon N.F. Moore: There is no extinguishment with regard to mining leases. The Bill states that the area will be available to the mining operator until such time as the lease is no longer used for mining.

Hon J.A. SCOTT: It does not extinguish the title in any way?

Hon N.F. Moore: The non-extinguishment clause applies to mining leases. It is not extinguished. It means that the mining operator can use it for the duration of the mining operation, as is the case with freehold land now.

Hon J.A. SCOTT: That increases my knowledge, because I did have some problem with jumping between the state Act and the federal Act and finding out exactly what they mean and exactly what is covered. My concern is about the likely liability of the State. A huge variety of leases are covered in the second schedule, and it is very difficult for members of Parliament to get their heads around exactly what sort of area we are looking at. It is also difficult for Aboriginal groups to have a full understanding of that matter, particularly when there has been such a small amount of consultation. It is a shame that the Government did not undertake a lot more consultation and attempt to ensure that a lot of leases and other types of landholdings are not subject to the effect of this Bill, because that may be totally unnecessary and has made it far more confusing for a lot of people.

Hon HELEN HODGSON: We heard yesterday that the Land (Titles and Traditional Usage) Act was invalidated on the basis that it was contrary to the federal Racial Discrimination Act. Has the Crown Solicitor's Office provided any legal advice to the Government about whether the Titles Validation Amendment Bill will offend against the Racial Discrimination Act, and has it provided any legal advice about the validity of the Bill as a whole; and, if so, can that advice be tabled?

Hon N.F. MOORE: There has been no suggestion by anyone that this legislation will offend against the federal Racial Discrimination Act. The federal Act in effect rolls back the Racial Discrimination Act to allow this legislation to operate. It also provides for compensation on just terms.

Hon J.A. Scott: That is unethical.

Hon N.F. MOORE: That is beside the point. Hon Jim Scott said yesterday that the Government should own all the land. That is where he is coming from. Let us forget about the politics and talk about the issue the member has raised. To the best of my understanding - and I have not heard of it from anywhere, other than now - this legislation does not offend against the Racial Discrimination Act.

Hon GREG SMITH: As Hon Jim Scott has said that he does not agree with the Bill at all and does not want to validate any titles, I will refer to the part of the schedule which gives the titles that are being validated. This schedule was made available to the committee. Many of the titles involve residential blocks. The member's electorate of Fremantle contain lots 1354, 1755, 1947, 1948, 1963, 1964, 2101, 2103 and 2104. Will he say to those constituents of his in Fremantle who are affected that he voted against a Bill that would validate a title which they believe is legitimate?

Clause put and a division taken with the following result -

Ayes (26)

Hon Kim Chance	Hon N.D. Griffiths	Hon Mark Nevill	Hon Tom Stephens
Hon J.A. Cowdell	Hon John Halden	Hon M.D. Nixon	Hon W.N. Stretch
Hon Cheryl Davenport	Hon Ray Halligan	Hon Simon O'Brien	Hon Bob Thomas
Hon Dexter Davies	Hon Tom Helm	Hon Ljiljanna Ravlich	Hon Derrick Tomlinson
Hon E.R.J. Dermer	Hon Barry House	Hon B.M. Scott	Hon Ken Travers
Hon B.K. Donaldson	Hon Murray Montgomery	Hon Greg Smith	Hon Muriel Patterson *(Teller)*
Hon Max Evans	Hon N.F. Moore		

Noes (5)

Hon Helen Hodgson	Hon Christine Sharp	Hon Giz Watson	Hon Norm Kelly *(Teller)*
Hon J.A. Scott			

Clause thus passed

Clauses 2 to 6 put and passed.

Clause 7: Parts 2A, 2B and 2C inserted -

Hon HELEN HODGSON: The first amendment on the Supplementary Notice Paper stands in my name. I will not move it in the exact form in which it appears as I have discovered a technical deficiency in it. I will be moving on page 4, line 1 to page 5 line 7, to delete those words.

The CHAIRMAN: Are you now moving that amendment or speaking prior to moving it?

Hon HELEN HODGSON: If I may seek a point of clarification, at this stage clause 7 comprises a number of new sections which are to be incorporated into the legislation. Are we intending to speak to each new section separately or how do you intend to proceed, Chairman?

The CHAIRMAN: We can deal with it in components if that is the requirement of the Chamber. I notice that there are amendments to particular sections affecting parts 2B and 2C, so we can deal with the clause in segments.

Hon HELEN HODGSON: I intend to speak to new section 12A alone at this stage because I have some questions in respect of intermediate period acts and their validity.

Hon N.F. Moore: Why do you not move the amendment?

Hon HELEN HODGSON: Because I am speaking to new clause 12A and the amendment comes in at new clauses 12B and 12C. Has the Government carried out tenure searches to establish the parcels of land affected by this intermediate act provision; and if not, why not?

Hon N.F. MOORE: I understand that since 1994 before any land grant has been issued a full tenure search has been instigated.

Hon GIZ WATSON: How many titles has the Government issued that may be illegal under this proposed section?

Hon N.F. MOORE: The Government has issued 11 000 land titles over that period. It is our view that they are all legal. I should add that if somebody wishes to challenge them, he is perfectly entitled to go to court to do so.

Hon GIZ WATSON: How many of these titles were issued after the High Court declared that the Land (Titles and Traditional Usage) Act was invalid?

Hon N.F. MOORE: I do not have the breakdown for that. I also do not carry it around in my mind. To the extent that it is relevant, the member should put it on notice.

Hon TOM STEPHENS: I refer to the applications by proponents to obtain particular treatment from the Government in regard to the seven projects. The Leader of the House said in this place today that the Government had been told that these projects would not have gone ahead if Cabinet approval had not been obtained, with presumably some indemnity arrangements being worked out between the projects and the proponents of those projects. Could the Leader of the House explain precisely the way in which that worked for those projects and those proponents? The Leader of the House said that it was put to the Government that various projects would not otherwise have an opportunity to go ahead. The Government took that on board and then did what? Would the Leader of the House explain that to the Chamber?

Hon N.F. MOORE: This issue is a red herring and a furphy. If the Leader of the Opposition or anybody in the big wide world has a problem with the granting of these titles, they can take the matter to court, and the court can decide whether they were granted properly or improperly. It is not for me to judge that. In all these cases, the Government has granted titles on the basis of its understanding of the underlying land tenure. The bottom line is that if they had been required to go through

a native title process, the Government believes that these projects would not have gone ahead because of the long delays that have been associated with a great number of projects in Western Australia. Because the Government believed that native title had been extinguished by virtue of the commonwealth legislation which was brought in by Mr Keating, it felt it was entitled to grant these titles. As I said during the second reading debate, if the Opposition has a problem with any of these titles and it thinks that the Government should not have granted them, it should say so; if it thinks the Government should stop these projects from proceeding any further, it should get somebody to take legal action against the holders of the title. Opposition members become pains in the neck.

Hon Tom Helm: We are not there yet.

Hon N.F. MOORE: No. Members are getting there, though.

Hon Tom Helm: Stick around, comrade. I can accommodate that.

Hon N.F. MOORE: If the member does not want the direct reduced iron process plant in Port Hedland, he should say so. If he thinks we should have put it in jeopardy, he should say so. He is entitled to say that if he wants to. Similarly, if he does not want the Pilbara gas pipeline, just say so. In the context of the legality of this, when the titles were issued, the Government believed that it was entitled to issue those titles because of the underlying land tenure, which was pastoral leasehold or historical pastoral leasehold, or whatever was the case in the particular circumstances. There were quite a number of different titles over which the pipeline traversed. The Government believes that what was done was legitimate and legal. However, if the court finds otherwise, assuming this Bill is passed today, compensation will be payable in respect of any invalid action that was undertaken by the Government.

Hon TOM STEPHENS: Dealing with those projects, who granted indemnities to whom, and why?

Hon N.F. MOORE: The indemnity is granted by the company to the Government.

Hon Tom Stephens: The second part of the question is why.

Hon N.F. MOORE: It is intended to protect the Government in the event that there is some question of invalidity in respect of the title being granted, and to prevent the companies from taking action against the Government, because it has in good faith sought to assist these companies. In the event that a problem arises, the companies are indemnifying the Government.

Hon TOM STEPHENS: Has the Government sought the Crown Solicitor's advice on the strength of those indemnities granted by these proponents for those projects if those proponents were to subsequently put the case that the indemnities could not be legally or validly granted because they involved indemnifying what it could be argued were illegal acts?

Hon N.F. Moore: I am advised that the Crown Law advice is that the indemnities are valid and enforceable.

Hon TOM STEPHENS: Is the Government prepared to make that advice available to the Chamber?

Hon N.F. Moore: The Leader of the Opposition knows very well that Crown Law advice is not tabled in the Parliament. I do not intend to change that rule now.

Hon TOM STEPHENS: Is the Leader of the House aware that Crown Law advice is tabled at industry functions held at the office of the Ministry of the Premier and Cabinet, to which its cheer squad on these native title issues is invited?

Hon N.F. MOORE: No, I am not aware of any advice being provided to the people whom the Leader of the Opposition describes as being the cheer squad. The cheer squad he refers to are the people who generate most of the wealth of this nation. However, that is beside the point. That is how he denigrates the mining industry, the pastoral industry and the agricultural industry. That is what is wrong with opposition members. That is why they will remain in Opposition for a long time. The fact is that it was not advice or an opinion; it was a summary of Justice Lee's decision in the Miriuwung-Gajerrong case. It was provided to people who have an interest in this matter.

Hon Giz Watson: Yes, money.

Hon N.F. MOORE: Yes, exactly right - money which pays for this State to go round, pays for the education of children and pays for the roads people drive on. It pays for all those things. Opposition members seem to forget about that. If they want to close this State down, they should say so.

Hon TOM STEPHENS: I was under the impression that a select group of people had been invited to that gathering. I understand that a question that was asked by Hon Giz Watson or Hon Helen Hodgson in another forum sought details of who had been invited to that function. I have not yet seen a response to that request from the select committee. I was chairman of the select committee. I do not want to go into the steps taken by other people, but is that list yet available regarding who was invited? I am sorry if I have offended somebody; that is, if someone was appropriately invited and should have attended. I understand that no indigenous representatives or anyone from the Muriuwung-Gajerrong people were invited to the tabling of the crown counsel's conclusions on the Muriuwung-Gajerrong case.

Hon N.F. MOORE: If the member knows who was not there, I suspect that he knows who was there. I do not know why he bothers asking these questions.

Hon Christine Sharp: Answer the question.

Hon N.F. Moore: I do not know who was there - I don't have a clue! Why should I know?

Hon TOM STEPHENS: I understand that the government officers gave an undertaking that they would table a list of who was invited to the tabling of the Crown Solicitor's advice. Can the Leader of the House now table that information?

Hon N.F. MOORE: It was not Crown Solicitor's advice, but a summary of the Muriuwung-Gajerrong decision. The Government is entitled to give that to whoever it likes. I do not know whether an undertaking was given to provide the list of who attended. I will find out whether an assurance was given, and whether it is appropriate to provide that information.

Hon TOM HELM: I should not let the opportunity pass as the Leader of the House invited us to indicate our position on support for developers.

Hon N.F. Moore: It was a rhetorical question.

Hon TOM HELM: Then it should have been asked in a less open forum. The Opposition does not lightly support the Government in its endeavours on this Bill. That support is provided because the ALP leadership believes that to be the best role we can play. The Leader of the House sits at the Table in this Committee, and when we ask some questions, he decides to give us legal advice. I remember time without number when questions without notice have been asked of ministers - the Leader of the House is probably the worst offender - and we have been told that ministers are not obliged to provide legal advice. I do not need legal advice to tell me how to go about my business, and I do not need legal advice to tell me that people can go to court to make claims. When members ask a question, they are entitled to the best answer the Leader of the House can provide without his facetious remarks and advice.

Hon N.F. MOORE: I do not know the member's problem.

Hon Tom Helm: You're the problem.

Hon N.F. MOORE: I said it is not the normal process for legal advice to be tabled in Parliament.

Hon Ljiljanna Ravlich: It is paid for by taxpayers' money.

Hon N.F. MOORE: With respect, history shows that previous Governments, going way back, did not table legal advice in Parliament.

Hon Ljiljanna Ravlich: Why not?

Hon N.F. MOORE: It is a practice in which Governments have not engaged; I do not intend to start doing so now. If members want an explanation of the legal advice, they should come and ask for it.

Hon GIZ WATSON: As a point of clarification on the question asked by the Leader of the Opposition, I indeed asked in the select committee hearing for a list of people attending that meeting. Ms Novak gave an undertaking to provide that list of attendees. I have not seen that list. I give that information so that the Leader of the House is clear on what we are discussing and when the undertaking was given. I have a further question which refers to evidence taken in the Select Committee on Native Title in evidence presented by Mr John Clarke. This was regarding the intermediate period titles issued by the Office of Traditional Land Use, while in existence. Page 18 of the select committee report reads -

> The probability is that somewhere in there there might be an invalid title but there is no suggestion that there is 10,000 invalid titles. The great bulk of them because they involve freehold land are perfectly valid but the validation legislation is umbrella legislation to cover the effect without having to identify or find what is invalid.

Why is it appropriate not to identify what is invalid? It seems an extraordinary proposition.

Hon N.F. MOORE: We are seeking through this legislation to validate action taken during the intermediate period. The Government's view is that the titles granted during that period are valid. We seek to validate that process. However, if anyone believes that a title was granted invalidly, that person can access the courts to sort it out. I do not know whether any titles were granted invalidly, just as the member does not know. If the member or anyone else has a concern about a particular title, the opportunity exists to take it to court to sort it out.

Hon HELEN HODGSON: I point out a little inconsistency. In the past people would have had an opportunity to attend court to sort it out. However, if the legislation is passed, the opportunity will be gone. We will validate those acts whether or not they were granted validly.

Hon N.F. Moore: We are not validating the act, but the title. If the act was invalid, compensation will be payable.

Hon HELEN HODGSON: The point is being missed. Processes which were not followed properly will be validated. Is the Leader of the House indicating that if it is found that any title issued invalidly during that period because the process was not followed, it will not be validated under this legislation?

Hon N.F. MOORE: No. They will be validated under the legislation because they are the type of tenure which extinguishes, or partially extinguishes, native title. However, if it was invalidly issued, compensation is payable to the extent of the invalidity. Following the passage of this legislation, bearing in mind we are validating the title not the act, the title will be valid; however, if it was granted invalidly initially, compensation will be payable.

Hon TOM STEPHENS: Will the Leader of the House please explain the distinguishing features of the seven projects treated differently from all other future acts carried out during that intermediate period?

Hon N.F. MOORE: I do not propose to continue to argue about this, as it is irrelevant to the ultimate effect of this measure.

Hon Tom Stephens: I am not looking for an argument.

Hon N.F. MOORE: They were companies which wished to proceed with some major projects or, in some cases, to avoid closing down and putting off workers - I believe 300 workers were involved in one case. The companies were prepared to provide the indemnity requested by the Government, so a course of action was taken to assist the companies. It was the right thing to do, and I hope the Opposition agrees with the Government. We accept that if the courts rule that the provision of these titles was invalid, it will require the payment of compensation for that invalid action. I know of no-one who thinks the action is invalid, and no-one to my knowledge has taken a matter to court.

Hon HELEN HODGSON: The Leader of the Opposition and I view this matter differently, or the Leader of the House is misinterpreting the questions. My concern is not with only the seven projects to which the Leader of the Opposition referred specifically, but the whole systemic way in which land titles were processed in the intermediate period. I question whether proper processes were followed. Many people are not satisfied by compensation for the following reasons: First, compensation is inadequate; second, the process will be too slow; and third, often people do not want money - people do not want to trade away for money things with a spiritual, heritage or family connection. Often, all people want is to retain some access to and some control and say over what is going on. Money does not provide that. It would be similar to somebody coming to us and saying, "We'll give you compensation to resume Karrakatta cemetery." We would say, " I'm sorry, it's not just the money. A lot more is involved in that piece of land than just dollars."

Hon N.F. MOORE: If Hon Helen Hodgson does not want to validate what has happened in the intermediate period, she should vote against that proposition. During the intermediate period the Government used the Office of Traditional Land Usage legislation to assess particular title applications to ensure they went through a process of consultation with Aboriginal people. That did not happen anywhere else in Australia. Every other State ignored the Native Title Act and validated titles all over the place. At least Western Australia had a process in place, so that anyone who wanted a title over land which had no exclusive possession had to go through the OTLU process. When that was ruled out of order in 1995 we required every application to go through the native title process, with the exception of seven projects, where we believed there was a compelling argument to process them on the basis of the Government's belief that the underlying land tenure had extinguished native title. If Hon Helen Hodgson does not like that provision, she can vote against it, but she should not spend all day telling me she does not like it. Compensation does not have to be made.

Hon J.A. SCOTT: Is the indemnity provided over these lands written in such a way that it will prevail in the event of the insolvency of any of the companies involved? Have any of the new landholders become insolvent in the intermediate period?

Hon N.F. MOORE: It is an indemnity of the Government by the company. If the company becomes insolvent, it cannot take any action.

Hon TOM STEPHENS: What was the largest land tenure, in acreage, granted by the Government that will be validated by the Bill?

Hon N.F. MOORE: I do not know, and I suspect we are getting into a classic filibuster. The Select Committee on Native Title Rights in Western Australia was provided with a list of the 11 000 titles that were allocated. If the Leader of the Opposition wants to go through that and work out which is the biggest, I invite him to do so.

Hon HELEN HODGSON: I spent last night doing that. It is a list of title numbers. I do not deny that is the form in which it is most accessible. However, the committee had only 10 days in which to receive evidence, to review it, to look at it, and to assess it. The information is not there. It is a list of title numbers and lease numbers. Apart from indicating the lot and the location, which gives one an idea of the area, the list was not adequate. The committee needed a lot longer to get that information. Now we are asking the Leader of the House for the information. That is what the committee process of this Chamber is all about. Whether it is through a select committee or in this place, we are entitled to ask questions to inform us before we pass this legislation. If we need information about the size and parcels of land, we are entitled to ask for it. If the Leader of the House cannot provide it, he should adjourn debate on the Bill.

Hon TOM STEPHENS: I agree with Hon Helen Hodgson that we are entitled to the information. I do not want to press the Leader of the House for too much information, because he is not in command of all the detail.

Hon N.F. Moore: I do not know the sizes of 11 000 leases.

Hon TOM STEPHENS: No, but fortunately the Leader of the House is accompanied by a skilled and talented officer.

Hon N.F. Moore: Who also does not carry around the detail of 11 000 leases.

Hon TOM STEPHENS: I know that if the adviser is given a few moments he will be able to assist the Leader of the House. Is it correct that the largest form of land tenure granted in this intermediate period was a pastoral lease? If so, how many pastoral leases were granted in the intermediate period, and where were they granted?

Hon N.F. MOORE: I cannot be expected to have in my mind the detail of 11 000 titles so that I can tell members off the top of my head which is the biggest. Members were provided with a list of title names. I will see whether it is appropriate to advise members who owns them, where they are, datum points and locations. I understand there was an addition to a pastoral lease in the Kimberley on the Drysdale River. I do not know how big the addition was. However, I am advised that that was probably the largest area of land within the list of 11 000. I understand also there were a number of smaller additions to pastoral leases in that intermediate period. I do not know which ones they are.

Hon TOM STEPHENS: Was the addition to the Drysdale River pastoral lease put through under the future acts regime that existed in OTLU?

Hon N.F. MOORE: It did not go through that process. Under the OTLU legislation at the time, it was not necessary because it was replacement land; it was already under an historical pastoral lease.

Hon TOM STEPHENS: Will this legislation validate the granting of the additional part of the Drysdale River pastoral lease?

Hon N.F. Moore: Yes.

Hon TOM STEPHENS: Did the granting of that pastoral lease follow an invitation for expressions of interest in the granting of that area of land?

Hon N.F. MOORE: It was done by negotiation with the existing pastoral leaseholder of Drysdale River. In the event there is some invalidity with respect to what has been done, it is within the capacity of anybody to take legal action.

Hon TOM STEPHENS: That is prior to the passage of this legislation, but what about afterwards?

Hon N.F. MOORE: I have been explaining that all day: If anything done in the intermediate period were invalid, those involved can take action in the courts against that potential invalidity.

Hon TOM STEPHENS: Am I correct in saying that this Bill will validate that act so that any litigation -

Hon Derrick Tomlinson: No, you are wrong.

Hon TOM STEPHENS: Perhaps the Leader of the House can explain.

Hon Derrick Tomlinson: He has said it 10 times.

Hon TOM STEPHENS: If the Labor Party were to move an amendment to this clause specifically to exclude the granting of the additional pastoral lease on Drysdale River, what would be the effect on the Bill?

Hon N.F. MOORE: I do not want to speculate on what might and might not be. If the member wants to move an amendment, he should do so and we will argue about it then. If we exclude that addition to Drysdale River from the validation aspect of this Bill, the granting of that title would not be validated. If it could then be proved that it was granted invalidly, there would be no such title.

Hon J.A. SCOTT: The Leader of the House said that in the event that any of the new landholders became insolvent, clearly that indemnity would not be able to be accessed by the Government. Who then is liable for compensation if it is payable? What happens to that land? Does it revert to its original status, or is native title extinguished?

Several members interjected.

Hon N.F. MOORE: I take exception to that comment. I am getting tired of Hon Ljiljanna Ravlich's interjections along those lines. This is a very complex Bill. I am sitting here as though I am in the dock of the Supreme Court being grilled by 33 lawyers. The member expects me to carry this information around in my head. Occasionally it takes a few moments to find out the answer. I ask the member to show a little respect for the process we are going through.

I am not sure, but I gather the member is asking what happens if any company that has indemnified the Government against any problems the Government might create for it in the context of granting titles should go bottom up.

Hon J.A. SCOTT: The Leader of the House is saying that compensation is payable on this land if native title is proved. I understand that the indemnity the Government has been given is that if the act were proved to be illegal, the company would carry the can for that compensation. If that is not the case, I have misunderstood.

Hon N.F. MOORE: The company is indemnifying the Government for any action which the Government might take in respect of the title and which might cause the company difficulty. In the event that compensation is payable as a result of invalidity or the success of the native title claim, the compensation is paid by the Government.

Hon GIZ WATSON: I refer to property dealt with under the Government's asset disposal program. The response I received to a question I asked on notice suggests that 162 former reserves were transferred to freehold lease under that program. Those transfers were made without an assessment of the native title status. I also understand that those transfers will be validated as they were in the intermediate period. What compensation is due to native title holders who may have had their rights in those properties removed, which will be validated by this Bill?

Hon N.F. MOORE: This question was asked by the member in the Select Committee on Native Title, which considered this Bill. I understand the member has been provided with the answer. I will not waste the time of the committee going through it again.

Hon HELEN HODGSON: A few moments ago the Leader of the House indicated to me that compensation would not necessarily need to be in money terms. I gather that compensation must be determined in accordance with division 5 of part 2 of the Native Title Act, which refers to property, goods or services. Is the Leader of the House aware of the arrangement that was recently reached in the Northern Territory with the Jarwoyn people? I understand that they received a kidney dialysis machine in compensation for their native title rights. Is the Leader of the House suggesting that the provision of basic infrastructure and medical facilities might be considered adequate compensation for native title rights?

Hon N.F. MOORE: My learned colleague who is asking questions like a Queen's Counsel has asked me whether am I aware. No, I am not aware. However, compensation generally is determined by the courts in the event that it is payable. I also understand that under the Native Title Act, it is possible for there to be a negotiated settlement ahead of the claim going to court. That can involve the provision of something other than money. However, if there is no agreement in respect of the negotiated settlement, it goes back to the court, which will then make a decision.

Hon HELEN HODGSON: Does the Leader of the House think it is appropriate for basic health facilities to be considered part of the native title negotiation?

Hon Derrick Tomlinson interjected.

Hon HELEN HODGSON: This is a very important point.

Hon Derrick Tomlinson: You are arguing for a negotiated settlement, but the moment you get it you say it is not fair.

Hon HELEN HODGSON: The problem is that there are many cases in which people are in a remote community in a disadvantaged situation. I am not saying that that applies only to indigenous people, but it does more often than not. They will often do much to get access to facilities to which they are entitled but which are not provided. These people did accept a kidney dialysis machine, and that is a decision for them to make. This Government should be putting on record that it does not intend -

Sitting suspended from 1.01 to 2.00 pm

Hon HELEN HODGSON: Before the lunch break I was in the process of asking the Leader of the House a question about the situation in the Northern Territory where the Jawoyn people entered into an agreement under which they received a kidney dialysis machine in exchange for their native title rights. I seek an assurance from the Government that that is not the sort of goods and services it considers appropriate to exchange for native title rights. Everybody in the community has these rights and most people would consider it totally inappropriate for this basic service to be available only by trading off native title rights.

Hon N.F. MOORE: This is an absolute waste of time. It is clear to anybody that it is possible for people to negotiate compensation, and it is entirely up to them. If members opposite think that taking a dialysis machine was a dopey decision, they should tell the people who were involved in making that decision, but they should not waste the time of this place. If people cannot reach agreement, the matter can go to the courts and they can decide whether it will be monetary or some other form of compensation. It is beside the point whether I think a dialysis machine is a good thing or a bad thing. Those people chose to do it, and every citizen in Australia is entitled to the same medical care.

Hon GIZ WATSON: In relation to the compensation which the Leader of the House has said will be available if people want to go through the process of applying for it, the reality is that the people likely to be affected by the removal of native title are often in exceedingly difficult circumstances. Does the Leader of the House accept that they do not have ready and easy recourse to legal remedies once their native title rights have been reversed?

Point of Order

Hon GREG SMITH: The question of compensation is raised in another Bill which we will consider at a later stage - the Native Title (State Provisions) Bill. Is it relevant to raise the question of compensation in relation to this Bill?

Hon HELEN HODGSON: Compensation is addressed specifically in the Bill before the committee, under proposed section 12G, and it was raised by the Leader of the House. If the member were aware of the contents of the legislation, he would know that compensation is quite within the scope of not only this Bill, but also this clause. The matter was raised in response to an issue on which the Leader of the House commented.

The CHAIRMAN: There is no point of order.

Debate Resumed

Hon GIZ WATSON: This Bill will reverse the onus of proof, in that it will extinguish people's native title rights and say it is up to them to take action.

Hon Derrick Tomlinson: It is not. Do not confuse rights with native title.

Hon N.F. MOORE: I will not continue arguing about this because it is a total waste of time. I move -

That the question be now put.

The CHAIRMAN: Does that refer to proposed section 12A or clause 7?

Hon N.F. MOORE: I am not sure I can differentiate.

The CHAIRMAN: I indicated earlier that I was dealing with a number of proposed sections separately.

Hon N.F. MOORE: In that case, I move -

That the question in relation to proposed section 12A be now put.

The CHAIRMAN: The Leader of the House must apply the motion to clause 7. The question is that clause 7 be now put.

Point of Order

Hon N.F. MOORE: Are you, Mr Chairman, saying that the question must relate to the whole of clause 7 and not just to proposed section 12A? If that is the case, I seek leave to withdraw the motion. I indicate that I am happy to contemplate the rest of clause 7, but I will not sit in this Chamber for the next seven weeks talking about proposed section 12A, which is the beginning of a number of proposed sections under clause 7. It is quite apparent to me, and to everybody else listening to this debate, that a filibuster is going on. Time is being wasted deliberately to avoid making a decision on this matter. If the debate continues in this way, I will move that the question be put in relation to clause 7 and the Committee of the Whole will make its judgment about that.

The CHAIRMAN: I have a discretion under the standing orders not to put the question relating to the whole clause at this stage, so I exercise that discretion and there is no need for the Leader of the House to withdraw the motion.

Debate Resumed

The CHAIRMAN: The question is that proposed section 12A stand as printed.

Question put and passed.

Proposed sections 12B and 12C -

Hon HELEN HODGSON: I move the amendment that was previously handed to the Chairman as follows -

Page 4, line 1 to page 5, line 7 - To delete the lines.

Point of Order

Hon N.F. MOORE: Mr Chairman, is this amendment in order? In my view it is outside the scope of the Bill and I seek your ruling.

Ruling by the Chairman

The CHAIRMAN: I rule that it is not in order. Clause 4 of the Titles Validation Amendment Bill 1998 proposes to repeal and substitute the long title to the 1995 parent Act. The Bill provides for the validation of certain acts that extinguish or affect native title but only to the extent "permitted" by the commonwealth Native Title Act 1993. Accordingly, any state legislation purporting to rely on the sections of the commonwealth Act cited in the Bill must observe the regime imposed

by the Commonwealth if the State's provisions are to have legal effect. Part of that regime is to categorise relevant acts according to their effect, or when they were done, or because they belong to a particular class such as public works. The effect is different according to the category. In some cases native title rights are extinguished outright; in others there is a partial extinguishment. Importantly, the effects flow from the operation of the commonwealth Act as and when they are activated by the State law.

The amendment would subject category A acts - those that extinguish native title outright - to the partial extinguishment provisions for category B acts. That is a variation of the scheme permitted under the commonwealth Act, which requires conforming state legislation to enact the validation scheme in the same manner. Had it also contained words that required state enactment to be "to the same extent", the next amendment on the Notice Paper would have been in jeopardy as well. The amendment contravenes the scope and purpose of the Bill and its reliance on the commonwealth regime. I rule the amendment to be out of order.

Hon TOM STEPHENS: I ask for your advice, Mr Chairman. I have not seen a copy of that ruling, but I take it that you have considered the next amendment on the Notice Paper and that there is nothing within that ruling to indicate that the subsequent amendment is out of order.

The CHAIRMAN: That is a correct interpretation; the subsequent amendment is not out of order.

Dissent from Chairman's Ruling

Hon HELEN HODGSON: I move -

To dissent from the Chairman's ruling.

[The President resumed the Chair.]

The PRESIDENT: Under the standing orders I am to invite Hon Helen Hodgson and any other member, if he or she wishes, to make any submissions on the Chairman's ruling.

Hon HELEN HODGSON: I received a copy of the ruling only within the past couple of minutes so I have not had an opportunity to work through it as thoroughly as I would have liked. However, the intent of the amendment that I moved was indeed to shift certain category A intermediate period acts into another part of the regime. There would be no point in saying that that is not the intention of it. However, I believe that by doing so we are not negating the scheme of the commonwealth legislation. It is my understanding that the commonwealth legislation allows some variations from State to State and that those variations have in fact been handled in other States, so that it is not in fact an identical scheme. This is not uniform legislation, and we have had that proposition explored thoroughly at different stages. It is not uniform legislation; that is not in the title. Therefore, it seems to me that the State has sufficient sovereignty to make some decisions like this on the way in which a category A, B, C or D act is to be handled without being totally tied to the commonwealth legislation. It is essentially to the same effect. The issue of freehold was raised in an aside, but the point is that it would extinguish native title to the extent of inconsistency, and that does not place any titles at any greater risk than they would be in other circumstances.

The distinction between category A and category B interim period acts is not consistent with the way in which the law stands at the moment, because it relies on an artificial construction that is not consistent with the current state of the common law. Therefore that construction is open to be challenged and it is up to this Parliament to be able to say that it does not believe that there is sufficient distinction between the two to treat them differently.

The key point is that it is not uniform legislation. There is no requirement that the State be part of a uniform scheme across the whole nation. It is possible for us to enact variations to deal with circumstances that this Parliament believes are appropriate. It should be put to this Parliament to decide whether it is appropriate to treat category A acts differently from category B acts.

Hon TOM STEPHENS: After the ruling was made by the Chairman of Committees, I asked him whether his ruling would have a similar effect in reference to the subsequent amendment that stands in my name on the Notice Paper. The Chairman indicated in his reply, which I take to be a ruling, that it would not and that my amendment was in order. Your imminent ruling on the Chairman's ruling on the amendment moved by Hon Helen Hodgson would also need to take into consideration the Chairman's ruling on the amendment standing in my name. I would not want to be in a situation in which, as a consequence of your decision on the amendment moved by Hon Helen Hodgson it were taken as the basis upon which you might subsequently rule that my amendment would also need to be struck down as being out of order. I ask you, Mr President, to consider both rulings that have come from the Chairman.

Hon N.F. MOORE: I support the ruling by the Chairman of Committees. In his ruling he talked about the necessity for the Bill to observe the regime imposed by the Commonwealth. Generally I do not go along with that, but those are the rules as they are now, whether we like it or not. It is important to know the inconsistencies in the regime that would be created by Hon Helen Hodgson's proposition. Basically, it would mean that freehold and exclusive leases granted between 1 January

1994 and 23 December 1996 and validated by the Bill do not extinguish native title. We are talking about freehold and exclusive leases during that period not extinguishing native title. Such titles, however, granted between 1975 and 1994 do extinguish native title under the previous validation legislation that we are now amending, and previously valid freehold titles extinguish native title under common law as found by the High Court in the Fejo case. That would mean that freehold, residential, commercial and other types of leases conferring exclusive possession on the lessee granted after 1 January 1994 could be claimed and the owners would have to defend their rights in court at potentially great cost.

This is particularly inappropriate in view of the fact that the High Court has already determined that grants of freehold extinguish native title.

Ruling by the President

The PRESIDENT: Order! I have had the opportunity of listening to the Chairman of Committee's ruling in respect of this matter, and I now have a copy of that ruling. I have heard from Hon Helen Hodgson, the Leader of the Opposition and the leader of the Government. It is clear from a close reading of the amendment proposed by Hon Helen Hodgson that in order to insert "A or" at page 5, line 10, there is a need in the first instance, as a matter of procedure, to delete certain words. The argument at the moment is not whether we should delete certain words but is in substance what will be the effect of "A or" should it be agreed to. In my view, the Chairman of Committees is quite right in his ruling. Clause 4 of the Bill states -

> The long title is repealed and the following long title is inserted instead . . .

It then states that the long title will be, if agreed to -

> **An Act to make provision in relation to native title as permitted -**

the words "as permitted" are critical words that must be considered -

> **- by the *Native Title Act 1993* of the Commonwealth** . . .

It then specifies the relevant sections of the Native Title Act 1993 of the Commonwealth.

Further on in the Bill, under the heading "Part 2A - Validation of intermediate period acts", reference is made to section 232B and certain other sections of the Native Title Act. Section 232B contains specific classifications of land that are referred to as "category A". Further on in the Bill, under new section 12D, which is headed, "Effect of validation - inconsistent category B intermediate period acts", specific categories of land are again mentioned. Hon Helen Hodgson by her amendment wants to insert "A or", which, if agreed to, would provide an alternative. The commonwealth legislation does not provide that an alternative can be offered. It is very specific about the categories and the types of land that relate to those categories. As such, if the State were to agree to that amendment, the State would be quite outside the parameters set by the commonwealth Act. Therefore, the amendment clearly contravenes the regime as laid down in the commonwealth Act. It is important for members to note that this Bill is the subject of the commonwealth Act. It is closely aligned with the commonwealth Act. There is, therefore, perhaps no need for me to discuss the constitutional ramifications of a section 109 inconsistency if we in our state Act were to attempt to move outside the absolute parameters set down by the commonwealth Act. Having said that, I rule that the Chairman's ruling should stand and that the amendment is out of order.

Hon TOM STEPHENS: I did ask you, Mr President, in that ruling -

The PRESIDENT: Order! Yes, and if the Leader of the Opposition is asking me now why I have not referred to his amendment, it is because the ruling that I have been asked to consider is based on the amendment moved by Hon Helen Hodgson, which is the amendment that is before the Chair at the moment. It is not for me to preempt any decision that may be made when the Leader of the Opposition moves, or does not move, his amendment later during the committee stage. I also recognise that under Standing Order No 289, the decision of the President is final on these matters.

Committee Resumed

[The Chairman resumed the Chair.]

Proposed sections 12B and 12C -

The CHAIRMAN (Hon J.A. Cowdell): In the light of amendments A7 and B7 being ruled out of order, the question now before the Chair is that proposed sections 12B and 12C stand as printed.

Hon HELEN HODGSON: Proposed sections 12B and 12C apply to category A intermediate period acts. The difference is that proposed section 12C applies to category A intermediate period acts involving public works, and basically what it does is completely extinguish native title over those acts. The notes in the legislation refer to freehold, scheduled interests, certain leaseholds, and construction or establishment of a public work, and they refer us back to indigenous land use agreements as overriding any of this. I have been provided with a number of lease documents. I have a special lease in South Boulder under section 117 of the Land Act in respect of light industry issued on 2 August 1994. What will be the impact of this legislation in this circumstance?

Hon N.F. MOORE: The member has referred to a lease that was granted in Boulder in 1994. If that lease was granted invalidly, this legislation would validate the grant of that lease. As I have been saying for the past three hours, a person who wanted to take some legal action in respect of a title that had been granted invalidly in 1994 could take action in the courts.

Hon HELEN HODGSON: I understand that when the federal legislation was drafted, a process was undertaken of looking at the factors that might be taken to provide exclusive possession. What are those factors, and what weight was given to those factors in making that determination?

Hon N.F. MOORE: As the member was seeking to know the factors considered in determining whether the lease confers a right of exclusive possession, I have a list of factors with me. I am sure the member wants to know what they are, therefore I will read them out. It will suit her purpose to delay the Committee for another five minutes or so. The factors are -

1. The extent to which the lease differs in its terms and conditions from the Wik leases.
2. Whether the land over which the lease can be granted is located in settled areas such as a town rather than remote areas.
3. Whether the land over which the lease can be granted is suitable or unsuitable for particular purposes.
4. Whether the statute under which the lease is granted limits the area of land that can be held under the lease.
5. The average area of land actually held under the lease.
6. Purpose set out in statute for which lease can be granted.
7. Purpose for which lease given where statute silent on purpose.
8. Whether the purpose of the lease necessitates a right of exclusive possession or is such that it is reasonable to conclude that exclusive possession must have been intended.
9. The degree of intensity of use of, and construction on, the land covered by the lease which it is reasonable to conclude would occur by reason of the purpose of the lease.
10. The size of the land that would be needed to carry out the purpose of the lease.
11. Whether the lessee has a right (legally enforceable or otherwise) to convert to freehold or to a tenure with a freeholding right and whether that right is an incident of the lease tenure or is a general right given under the statute governing the lease tenure.
12. The type of rights, if any, that third parties (including the Crown) have over the land covered by the lease.
13. Whether the terms and conditions of the lease are set out in the statute under which the lease is given or are prescribed by regulations made under such statute.
14. Whether the statute under which the lease is given is silent on terms and conditions and gives the grantor the discretionary power to determine the terms and conditions.
15. The type of obligations imposed on the lessee under the lease such as to cultivate, reside, fence, destroy vermin and noxious weeds, erect substantial and permanent improvements.
16. The type of restrictions imposed on the lessee under the lease such as restrictions on development.
17. Historical information about the origin of the lease.
18. Whether the lease has undergone a legislative upgrade after the grant of the lease.

Point of Order

Hon TOM STEPHENS: The Leader of the House was quoting from a document. Would he mind tabling the document? I know that it is entirely at his discretion. However if he is prepared to table it, I could have a copy made available to me.

Hon N.F. MOORE: I seek leave to table the paper.

Leave granted. [See paper No 658.]

Debate Resumed

Hon HELEN HODGSON: In a case like this where the lease was issued during the intermediate period, would an analysis have been done of the terms of this lease against those conditions in determining whether it should be in the category that will be extinguished by these provisions?

Hon N.F. MOORE: The lease is a commercial lease and as far as we are concerned it comes within the definition of a commercial lease.

Hon GIZ WATSON: I believe we are addressing proposed section 12C relating to public works. Does the Government consider that the definition of "public works" in the Native Title Act and adopted in this Bill extends to land adjacent to the construction, establishment or operation of the public works?

Hon N.F. Moore: To my understanding it does not.

Hon GIZ WATSON: Given that Justice Lee in the Miriuwung-Gajerrong case held that public works extinguish native title where the use of the land is inconsistent with native title and permanent, but the extinguishment does not extend to surrounding land or incidental areas, how does the Government justify the extinguishment of native title in such surrounding or incidental areas?

Hon N.F. Moore: I am sorry, you are bringing out these questions at a thousand miles an hour. Can you go through them slowly? This is like an interrogation.

Hon GIZ WATSON: Perhaps I misinterpreted the Leader of the House's response. Is the Leader of the House saying it does not affect adjacent areas?

Hon N.F. Moore: That is what I said.

Hon HELEN HODGSON: As I said earlier when I asked a couple of questions, I have a couple of leases with me, one of which is a current lease.

Hon N.F. Moore: Come on! We can go through the whole 11 000 if you want to take up the time of the Chamber.

Hon HELEN HODGSON: There is a point to this question. The lease that I have here is a surrendered lease. Again, it is a commercial lease in Kalgoorlie which was granted in the intermediate period, on 16 November 1995. It is stamped "surrendered". In what circumstances would this lease have been surrendered?

Hon N.F. Moore: In what circumstances would it have been surrendered? What does that have to do with me?

Hon HELEN HODGSON: Perhaps I need to use a little more time to explain the argument here. There is a schedule of conditions and these are the apparent conditions to be weighed up against the factors considered in determining whether a lease confers a right of exclusive possession. A commercial lease has a condition that says the lessee shall occupy the land and put it to use for the purpose specified within nine months of the commencement of the lease and thereafter shall continue to use it for that purpose to the satisfaction of the minister. It would appear prima facie that where a lease has been surrendered, there has been a breach of a condition; and that is most likely to be the condition. That is one of the factors that the Leader of the House has said is relevant in determining whether exclusive possession has been granted. What is the impact here? There is a lease which has been surrendered, which means presumably that it has not in fact met the conditions which the Leader of the House has said are relevant to determine exclusive possession.

Hon N.F. Moore: Why is that?

Hon HELEN HODGSON: It has been surrendered and there is obviously a reason for that.

Hon N.F. Moore: There is a difference between surrendered and forfeited. Perhaps they just gave it back voluntarily.

Hon HELEN HODGSON: In that case it seems likely that the land has not been developed. Would the Leader of the House give back a property that he had developed within a couple of years of getting the lease?

Hon N.F. Moore: I don't know what you are talking about.

Hon HELEN HODGSON: If the Leader of the House wishes, I can give him a copy of the lease and he can take time to identify the circumstances surrounding this case. I am trying to establish a few principles here. If a lease has been surrendered because conditions have not been complied with, and those conditions are the ones that are relevant to the determination of exclusive possession, that creates a situation where the fundamental premise is wrong in a particular case because the exclusive possession has not occurred. My understanding of this Bill is that this lease would be validated and native title would be extinguished. The extinguishment of that native title means the Aboriginal people do not have any native title rights. This is a lease that is in the schedule and, on the face of it, the purpose for which the lease was granted has never been followed. That is my interpretation of the effect and I would like to know whether my interpretation is correct. I would like to know also whether the Leader of the House thinks that is appropriate.

Hon N.F. MOORE: The member is getting herself confused over the words "surrendered" and "forfeited". Normally, a lease would be forfeited if the conditions of the lease were not complied with. Surrender suggests that the person does not want it any more. It is possible that if it has been surrendered, it does not exist any longer; if it does not exist any longer, it cannot be validated. This debate is just going around in circles. Why do members not start thinking about the people in Kalgoorlie

who want this Bill passed. They should think about those people who live on leasehold land where their house sits alongside someone who has a freehold block. The freehold person is certain that he is okay but the person on the leasehold block does not know where he stands; yet if one looks at the two houses, they do not look any different. Members should worry about them for five minutes and let us get this Bill passed and give people like that person living on a freehold block in Kalgoorlie certainty instead of the member going on about every second lease she can find where there might be a problem, getting the words "forfeited" and "surrendered" mixed up and trying to take up the time of the Chamber unnecessarily.

Hon HELEN HODGSON: With all due respect, I understand that there is a legal difference between forfeiture and surrender. It does not make a difference to the basic principle, which is that a form of title has been granted; that the use of the land is no longer what it was intended to be; and that this legislation will in fact extinguish native title over that land. This question does not relate to a particular instance, but does the Government consider that leases conferring a right of exclusive possession generally extinguish native title or that they merely suspend it?

Hon N.F. MOORE: Extinguish.

Hon HELEN HODGSON: The Federal Court in the Miriuwung-Gajerrong decision said that such leases only suspend native title. How can the Leader of the House justify his answer?

Hon N.F. MOORE: We believe that Justice Lee got it wrong and that the High Court has made a different determination. That is one of the reasons that we are appealing against his determination.

Several members interjected.

The CHAIRMAN: Order!

Point of Order

Hon TOM STEPHENS: All members are obliged to keep and maintain standing orders. I am trying to listen to this debate and the points being made by Hon Helen Hodgson, but I am unable to do so when there are unruly interjections from the government benches.

The CHAIRMAN: There is no point of order. I thank the Leader of the Opposition for his assistance in this regard and hope it continues in other matters.

Debate Resumed

Hon HELEN HODGSON: If there is an example of a freehold grant made in October 1994, will the Bill operate to extinguish native title without the need to comply with the future act provisions of the Native Title Act?

Hon N.F. MOORE: Yes.

Hon HELEN HODGSON: I think I can anticipate the answer to this question. The situation I outlined a moment ago was based on the facts of a particular parcel of land in the Miriuwung-Gajerrong decision where the Federal Court held that native title was not extinguished. On what basis does the Government believe it can extinguish native title in this case?

Hon N.F. MOORE: It will be extinguished as a result of this legislation.

Several members interjected.

The CHAIRMAN: Order! If we have to wait for a round-table conversation every time before the member who has the call starts, we will be here longer than 3.45 pm.

Hon HELEN HODGSON: I have a fundamental problem with the way this debate is shaping. I have not yet heard from the Australian Labor Party on its position on the extinguishment of native title in respect of intermediate period acts. I gather from Labor amendments on the Supplementary Notice Paper that some debate is to come on its attitude to past acts. I have not heard the Leader of the Opposition explain why the ALP has not proposed a single amendment in respect of intermediate period acts. I say that deliberately because my amendment that was recently ruled out of order was put forward in the absence of any proposals from the Opposition. I was not sure that it achieved my ends, quite apart from the technical difficulty that it has been ruled out of order. I want to hear from the Opposition the reasons that it is distinguishing between past intermediate acts in this way.

Point of Order

Hon RAY HALLIGAN: Mr Chairman, a short while ago you mentioned round-table discussions. We certainly appear to be having one at present. Questions are not being directed to the Leader of the House, who is in charge of the Bill, but to the Leader of the Opposition.

The CHAIRMAN: There is no point of order.

Debate Resumed

Hon HELEN HODGSON: It seems that for some political purpose the Opposition has decided to proceed with a form of amendment for past acts but it is not prepared to propose an amendment for intermediate period acts. I repeat what I said on the short title: I am not yet convinced of the merits of the ALP's position on that clause. I am interested to know why no such proposition has been put in respect of intermediate period acts and why the Opposition is not pursuing a possible form of amendment that could be ruled in order as my amendment was recently ruled out of order.

Hon TOM STEPHENS: Mr Chairman, I hope you will understand why I was trying to listen so carefully to the series of questions Hon Helen Hodgson was putting to the Leader of the House and why I was most anxious to hear the reasons for the questions and the explanation being given by the Leader of the House. Hon Helen Hodgson indicated that she had endeavoured to get an amendment dealt with by this Committee but the Chair ruled it out of order. She understands how and why that has happened and why I was listening and paying great attention to the ruling of the Chair and then of the President, and why I was particularly keen to make sure that no-one felt able to extrapolate from the Chairman's ruling, or the President's decision on the Chairman's ruling, that there would be consequential flaws in the Opposition's amendment.

The best I can say in reply to Hon Helen Hodgson is this: As the Labor Party has pursued the opportunity for amending the government's legislation, it has gone through a process of wide consultation with industry groups, stakeholders and indigenous groups. We were faced with strong argument from indigenous groups who asked us to reject this Bill in toto, while industry groups have argued for its acceptance in toto. We have tried to map out a path for ourselves, insofar as we were able, with the meagre resources at our disposal, to strike a balance between what we thought was a reasonable approach to proceed with the validation; and then, in reference to extinguishment, to see whether we felt it was appropriate, in view of the decisions of the court, to extinguish native title by statutory provision where it was most likely to have been successfully extinguished by the type of act involved. We looked at this question of the intermediate period acts and did not find an easy solution to it. Again and again in discussions, we looked at whether we could find a way of easily doing that which Hon Helen Hodgson asked about. I think Hon Helen Hodgson would recognise that we have not found an adequate way of doing it. We thought we had to do what we knew and were confident we could do. We also recognised that we were trying to do something that was quite difficult. First, our party is broad based and is trying to accommodate -

Point of Order

Hon N.F. MOORE: We are not talking about the history of the Labor Party, but about proposed sections 12B and 12C. I wonder whether the member would stop telling us why his party has a made a particular point to satisfy the question of Hon Helen Hodgson, and just get on with the Bill.

The CHAIRMAN: The Leader of the Opposition should address the point more precisely.

Debate Resumed

Hon TOM STEPHENS: The Labor Party is supporting this clause unamended. We have endeavoured to try to achieve the best and most reasonable contribution for the community by balancing the legitimate and compelling arguments put by the indigenous peoples and by those of industry and other stakeholders. We have put forward a package of amendments on which we will need to attract the support of a majority of members on the floor of this Chamber. If we are unsuccessful in that regard, as a party we will be left with the awful prospect of having to pass that Bill unamended. All I can say to the Greens (WA) and to the Australian Democrats is that this is the result of our best efforts. If our amendment is unsuccessful, the interests of indigenous people will be placed at further risk by a future decision of the Labor Party in this regard. I cannot put it more plainly than that. It is self-evident that we are trying our best to achieve that balancing act. Some inconsistencies have been pointed out, and we have tried to tackle them. We did not find the appropriate mechanism to do that. We anticipated the ruling that would be made on the way we had constructed our efforts, and we did not find a way to accommodate all the issues within that framework. That is why we are supporting the proposed subsections unamended, and have focused our efforts on an area where we are most anxious to obtain the support of the Greens and the Democrats for this amendment.

Question put and passed.

Proposed sections 12D, 12E and 12F put and passed.

Proposed section 12G -

Hon HELEN HODGSON: I appreciate that we have already had some discussion on compensation. Has the Government made any estimate of the compensation that may be payable under the validation of intermediate period acts?

Hon N.F. MOORE: No, we have not made an assessment, but the Government would expect it to be quite minimal, bearing in mind that we believe all of the title grants are valid.

Hon J.A. SCOTT: I will make an analogy to try to explain my major problem with this clause: A salesman turns up at the

door of the Leader of the House and says, "I want you to buy this package deal that I have; I'm not telling you whether it is land or a car or anything else, and I will not tell you how much it will cost, but I want you to sign on the bottom line for this deal of a life time." That is what we are being asked to do here. We do not know what it will mean for the State, either in the total land we will see involved or the amount of compensation the taxpayers will be asked to pay.

Hon Greg Smith: Or to whom is it to be paid.

Hon J.A. SCOTT: That is right. We are asked to make a decision on all of those points without knowing any of that information.

Hon N.F. MOORE: I may be able to help the member. The Land Administration Act provides for compensation if land is resumed. When that Bill was passed nobody asked how much it would cost. People said, "We need that power in the land administration law to enable us to resume land in the event it is needed for some purpose, such as a road, or a railway to Rockingham." It was not knocked out because people said that they did not know how much would be paid in the future. We are validating the grant of titles in this intermediate period. We are saying that we believe the titles have all been granted properly, and in the event they have not been, compensation will be payable. Because we believe they have all been granted properly and validly, no compensation will be payable anyway.

Question put and passed.

Proposed section 12H -

Hon HELEN HODGSON: My question specifically relates to proposed section 12H(1)(a)(iii), which refers to intermediate periods attributable to the State consisting of the creation, vesting or amendment of a reserve under the Land Act 1933 during the intermediate period. My understanding is that, basically, where there is a vesting of a reserve, there will be an extinguishment of native title. Is that correct?

Hon N.F. Moore: It depends on the nature of the reserve. I guess the best way to handle that is to say it will be extinguished to the extent of the inconsistency. It would depend on the circumstances of the reserve.

Hon HELEN HODGSON: It is an extinguishment to the extent of inconsistency; it is not subject to the non-extinguishment principle.

Hon N.F. Moore: You are right.

Hon HELEN HODGSON: Once again, the Miriuwung-Gajerrong decision said that native title was not extinguished in an identical situation. On what basis does the Government justify extinguishment in this situation?

Hon N.F. MOORE: I repeat: There are some findings in the Miriuwung-Gajerrong case with which the Government does not agree and is appealing the decision. Interestingly, this proposal was inserted in the Legislative Assembly to clarify the need to notify certain peoples in regard to actions taken under this legislation. It is a notification clause. When these things happen, someone must be notified. We are not here to argue whether the creation, vesting or amendment of a reserve extinguishes native title; rather, we are saying that when a decision is made in respect of a title, people must be notified that it happened. That is all we are doing.

Question put and passed.

The CHAIRMAN: Members, we will now consider part 2B.

Proposed section 12I -

Hon TOM STEPHENS: I speak to proposed section 12I, and I address the questions which Hon Helen Hodgson asked me earlier, which are relevant in the consideration of this proposed section. The Australian Democrats' amendment to the earlier clause was ruled out of order on the grounds that section 22F of the Native Title Act states that if a law of a State contains provisions to the same effect as sections 22B and 22C, the law may provide that intermediate period acts are valid. Section 22B of the NTA refers to the effects on the various categories of intermediate period acts. The discretion for the State is whether to pass a law which validates intermediate period acts. However, if it wants to do that, the law of the State must contain provisions to the same effect as the NTA provisions. Section 22B(a) states that if it is a category A intermediate period act, the act extinguishes native title.

The distinguishing feature of our amendment to proposed section 12I is that the relevant section of the Native Title Act is section 23E, which allows States, including Western Australia, to pass a law which makes provision to the same effect as section 23C. Section 23C states that if an act is a previous exclusive possession act under subsection 23B(2), then the act extinguishes native title. The important difference for us is that section 23E states that the State "may make provision to the same effect as section 23C". It is important to realise, firstly, that the word "may" is used. The State is not obligated, by virtue of the decisions of the Federal Parliament, to go down the path that it is currently following. The word used is "may" not "must". However, it gives the State the opportunity of going down that path, or so far down that path as it chooses

to go in respect of "all or any previous exclusive possession acts attributable to the State". The Labor Party is choosing the latter option. As it is making provision in relation to some of the previous exclusive possession acts referred to in section 23B which are referred to in the long title of the Bill, it is doing what is permitted by the Native Title Act.

Members will recall how indebted I was to Hon Mark Nevill for quoting at length this morning the Yorta Yorta decision of Justice Olney. He drew upon section 23E and talked about similar provisions, rather than just simply being left with no discretion. Here we have a discretion. We could effectively pick up all the extinguishment opportunities that are on offer from the decisions of the Howard-Harradine 10-point plan amendment package that have been put through the Federal Parliament, or we could decide what parts of the package we could make use of in this part of the Bill.

The Opposition has opted for that separate method. A member from the minor parties said that the Labor Party had gone from a big schedule to its own mini schedule. At first I thought that was unkind. However, it is about right. The Labor Party has produced a mini schedule that it is offering to put through the House and put into statute. The Labor Party is not offering the Government the opportunity to pass its big schedule. The Government has a huge schedule attached to the Native Title Act. It could have had that schedule if the Labor Party was prepared to agree to it but it is not on offer from us. We are only offering a mini schedule for extinguishment. If we are successful, that is what the Government will get.

The ostensible purpose of proposed section 12I is to confirm in statute where native title has been extinguished by operation of the common law. Common law contains some justification to confirm that native title has been extinguished by the grant of valid freehold interest or other interest which provides exclusive possession to the grantee. I noted with interest the argument of Peter van Hattem in evidence to the select committee inquiring into this native title legislation. He told that committee that there was potentially an ongoing opportunity for argument about some areas of freehold title. We are proposing to remove that argument in this statute. I was surprised by Mr van Hattem's argument but that might be due to my lack of skill and talent in the area rather than any deficiencies in his observations. The exercise of confirming extinguishment of native title by reference to schedule 1 of the Native Title Act is imprecise and flawed. It is riddled with flaws comprehensively highlighted in the decision of Justice Lee. The schedule may include interests which do not necessarily extinguish native title at common law.

I watched with interest the submissions the State Government put to Justice Lee. I was in the north east of the Kimberley when the arguments were put before Justice Lee on behalf of the State Government. I later read the transcripts of the submissions that attempted to stay his decision. I have seen how flawed the Government's arguments were and how comprehensively they were trounced in Justice Lee's decision. Therefore, it is the Labor Party's view that this Bill is not only a validation and confirmation of extinguishment Bill but also a substantial extinguishment Bill. If any doubt existed about this position, it should be removed by two things. The first is the decision of Justice Lee in the Miriuwung-Gajerrong case which held that a number of scheduled interests which this Bill is trying to extinguish are not extinguished at common law. I am specifically referring to the community purpose leases but Justice Lee found that native title has survived and co-exists with other forms of leasehold.

Proposed section 12P is modelled on section 23J of the Native Title Act. This proposed section provides for compensation but only for extinguishment which does not occur outside of this Bill. If this Bill only confirmed extinguishment - that is, extinguishment which had already taken place at common law - there would be no need for such compensation. However, it is totally appropriate that this provision contains reference to compensation provisions because that allowance indicates some uncertainty, if not actual knowledge, of the extinguishing effect of this Bill. The validity of all interests in land against native title has effectively been secured by the operation of the validation provisions we dealt with in part 2A of the Bill. Validation ensures that all such interests will prevail over native title. We potentially face very significant costs by risking mass extinguishment of native title and confirming the scheduled interests.

The Government was advised that all items in part 4 of schedule 1 of the Native Title Act were included on the basis that it was clear that they extinguished native title at common law. Hon Helen Hodgson has drawn out a little of that commentary again in this debate, as it was drawn out in various parts of the committee work in which we were engaged. That is clearly not the case. The Government should acknowledge that and, on its own test, amend this Bill. It has not gone down that path. The Government has indicated that it may disagree with the decision of Justice Lee. Nonetheless, until such time as his decision is overturned, his interpretation is effectively law. Until that decision has been appealed and ultimately determined by the High Court, it represents the common law position in Australia. If the Government is right and an appeal is successful, non-indigenous tenure holders will not be disadvantaged. Even if this amendment and the amendment to proposed section 12J are passed, their interests will have prevailed over native title interests and will remain intact. Amendments can then be made to this Bill and we will seek to amend it. If the Government is wrong and this Bill is passed unamended, native title rights will be extinguished where they have not been at common law and native title claimants will forever be prevented from claiming native title.

I have not worked out exactly how some of this works. I have tried to get on top of it for a long time. However, I have not got on top of how a native title interest would eventually receive compensation for the extinguishment of native title without having successfully applied for the granting of a native title determination in an area in which it is clearly extinguished and

then to be able at law to subsequently have a compensation claim addressed. I do not understand exactly how it would work, but I assume that the interested party would obtain a court determination that the party had native title but it has been extinguished by virtue of the passage of this legislation. As I think about it, that is exactly how it would work. It would be like the Yorta Yorta case. If Justice Olney had found that native title had existed by the earlier determination, he would have found that it had been extinguished by this Act and therefore compensation was inevitably payable. That is quite clearly what happens in the Miriuwung-Gajerrong case. Justice Lee found that some forms of title in that case extinguished the native title right because the right had been validly extinguished by the passage of the previous validation Bill. In my own way I have answered my question.

Hon N.F. Moore: It saves me a lot of trouble.

Hon TOM STEPHENS: If I am wrong, will the Leader of the House let me know?

Hon Simon O'Brien: Do you have to be patient to get through to yourself?

Hon TOM STEPHENS: It is hard work to convince myself of the way it might work. The object of the proposed amendments is to limit the operation of the confirmation provisions of the Bill to common law extinguishment, including only certain classes of interest contained in the schedule. Proposed section 12I(1)(a) confirms the grants of freehold or lease which in themselves extinguish native title; that is, they confirm the common law position. Proposed section 12I(1)(b) specifically provides for extinguishment of native title in areas where currently there is no common law position, but where it is considered highly likely that it would have been extinguished at common law as the tenures involved almost certainly grant exclusive possession. They include conditional purchases in agricultural areas under the Land Regulations 1887, the Land Act 1898 and the Land Act 1933, under which a condition of the lease was that the lessee had to reside on the lease subject to certain exemptions which were also caught and perpetual leases under the War Service Land Settlement Scheme of 1954. The exemption is limited to conditional purchase leases for agricultural purposes rather than pastoral purposes as there was no requirement that lessees reside on the latter. The decision of Justice Lee in the Miriuwung-Gajerrong case indicates that the former would extinguish native title but the latter probably would not. That proposed paragraph also confirms that certain previous exclusive possession acts, under section 23B(2)(a), (b) and (c)(ii) to (v), (vii) and (viii) of the Native Title Act, also extinguish native title provided that any lease described was in force as of 23 December 1996, the date of the Wik decision. Although no decision has been made at common law on all these forms of leases regarding whether they have extinguished native title, it is considered that these forms of previous exclusive-possession acts would do so.

Paragraph (c)(vi) of section 23B(2), community purposes lease, has deliberately been excluded from the list of exclusive-possession acts in response to the decision of Justice Lee, which indicates that such leases do not extinguish native title at common law. The definition of exclusive agricultural-pastoral lease in subparagraph (c)(iv) is deliberately limited so it does not contain any reference to the scheduled interest. That reference would again allow in the back door the scheduled interests which are not extinguished at common law. In all other cases, non-native titles rights and interests are confirmed to prevail over native title interests and rights to the extent of any inconsistency.

Future act consequences arise through including the scheduled interests. A purpose of this amendment is to ameliorate the otherwise significant consequences for future native title claims which may involve a claim over a historic schedule interest. Here I think of section 61A of the Native Title Act which clearly states that any such claim must be specifically identified areas which cannot be included in the claim due to native title being extinguished over them. This argument was tackled inadequately by the minister in the other place. The Government has indicated previously that it is unable to identify all the interests contained in the schedule. Therefore, it is unlikely that native title applicants, with far fewer resources than government, will be able to do so, and applicants will risk having their claims rejected or struck down in claiming areas to which they are permitted.

This is of more significance where section 29 notices are issued under the Native Title Act, which allows potential claimants only four months to register their interest. That is obviously a very short period and necessary searches may not be carried out completely within that time to ensure no historical exclusive-possession tenure exists within the area of the claim. Failure to carry out an exhaustive search means that any other party interest in the area may seek to strike out a claim, or at least delay the process beyond the four-month period. Therefore, the claimants would lose any right to negotiate over the carrying out of the section 29 act.

Reference was made to arguments claiming that the amendments are unconstitutional. Those arguments were put to us in committee and by other people who addressed the Labor Party on these questions. Of course, stronger opposing arguments indicate that the amendments are constitutional. These arguments are laid out more fully in the dissenting report I attached to the Select Committee on Native Title. It relates to the intertidal zone, but the same rationale applies to these amendments. For the sake of keeping debate to a minimum, I will not outline the arguments here in full. They are based on no direct or indirect inconsistency arising between our intention and the Native Title Act. The Commonwealth is not covering the field in this area, as it is clearly leaving room for state laws to supplement or complement a regime primarily laid down by the Commonwealth. We can pick and choose from any matter along the shelf which we feel should be appropriately included in the titles validation and extinguishment Bill provided it follows the commonwealth position.

I adopt the approach of the Attorney General who has some experience in this area of law: He advised the Opposition that his normal approach to passing legislation which is inconsistent with section 109 of the commonwealth Constitution is to pass it and see whether it is challenged. Any restriction which may apply to the state provisions Bill does not apply here; that is, this Bill is not subject to ministerial disallowance or Senate disapproval. If passed, the Bill will stand until it is challenged and struck down. If it is good enough for the Attorney General, it is good enough for us.

This approach should be endorsed by any states' rights member of Parliament. It asserts the authority of this Parliament to deal with this State's land as it considers appropriate without being intimidated by Canberra.

Hon N.F. Moore: People in Kalgoorlie are my constituents and yours too.

Hon TOM STEPHENS: I thought the argument might appeal to the Leader of the House. I have a large number of constituents and I want to provide legislation to balance competing interests of all sections of the Western Australian community.

As currently phrased, proposed section 12J would also need to be tackled, and I will deal with that later in the debate. I move -

Page 8, lines 15 to 20 - To delete the paragraphs and substitute the following -

(a) where the act comprising the grant of a freehold estate or lease, apart from this Act, extinguishes native title rights and interests, the native title rights and interests are extinguished in relation to the land or waters covered by the freehold estate or lease concerned; or

(b) where the act is —

(i) a conditional purchase lease in force as at 23 December 1996 in Agricultural Areas in the South West Division under clauses 46 and 47 of the *Land Regulations 1887* which includes a condition that the lessee reside on the area of the lease;

(ii) a conditional purchase lease in force as at 23 December 1996 in an Agricultural Area under Part V of the *Land Act 1898* which includes a condition that the lessee reside on the area of the lease;

(iii) a conditional purchase lease in force as at 23 December 1996 of cultivatable land under Part V, Division (1) of the *Land Act 1933* in respect of which habitual residence by the lessee is a statutory condition in accordance with the provisions of that Division;

(iv) a perpetual lease in force as at 23 December 1996 under the *War Service Land Settlement Scheme Act 1954*; or

(v) a previous exclusive possession act under section 23 B (2) (a), (b) and (c) (ii), (iii), (iv), (v), (vii) or (viii) of the NTA (including because of section 23 B (3)), provided that —

(A) in the case of any lease described in subparagraphs (iii), (iv), (v), (vii) or (viii) the lease concerned is in force as at 23 December 1996; and

(B) in the case of any lease described in subparagraph (iv) the terms "exclusive agricultural lease" and "exclusive pastoral lease" have the meanings respectively given to them by section 247 A (a) and 248 A (a) of the NTA,

the act extinguishes any native title in relation to the land or waters covered by the lease concerned, and the extinguishment is taken to have happened when the act was done; or

(c) in any other case, the non-native title rights and interests prevail over the native title rights and interests to the extent of any inconsistency, but do not extinguish them, while such non-native title right or interest made under the act, and any valid renewal, remaking, re-granting or extension of the non-native title right or interest, is in force.

Hon N.F. MOORE: I have serious difficulty understanding what the Leader of the Opposition is trying to achieve. Essentially, we are trying to confirm the extinguishment of native title in certain areas: The scheduled interests, freehold estates, certain leaseholds etc. The net effect of the Leader of the Opposition's amendment is to delete the scheduled interest. That lists everything anybody can think of that involves a particular title. It was done on the basis that the generic definition of the title covered all the scheduled interests. Those scheduled interests are not something that is in addition to what is already defined in a generic sense. The Leader of the Opposition has sought to take out the scheduled interests and to put some of them back in. In one sense I can see why he is doing this. In three cases he is seeking to put back conditional purchase leases to do with agricultural areas - that is, in (b)(i)(ii) and (iii); and in (iv), which is a perpetual lease which deals

with war service land. That will give certainty to those people's leases, and they will know that native title has been extinguished on their land. From a political point of view that makes sense, because the Labor Party is saying to all those people with conditional purchase leases who are not sure where they stand that the Labor Party is looking after them. The Labor Party is putting those people in the Bill, but is taking everything else out.

Hon Mark Nevill: That is only where they reside on the lease.

Hon N.F. MOORE: Yes. However, the Leader of the Opposition is saying that some of the other scheduled interests under (iv) may or may not be covered by the confirmation process. He is saying in effect that they must take their chances. The people in Kalgoorlie will now be subject to a determination as to whether they fit within new (b)(v) or (A) or (B). They will have to go through the processes of the Native Title Act to find out whether native title has been extinguished on their property. Would the Leader of the Opposition like me read out their names? Those properties are in Kalgoorlie-Boulder townsite.

Hon Tom Stephens: The list was kindly made available to the committee. The Leader of the House has indicated that he wants to deal expeditiously with the legislation.

Hon N.F. MOORE: Hon Mark Nevill wants to know who they are.

Hon Mark Nevill: I have not read the list.

Hon N.F. MOORE: W.E.D., R.D. and W.J. Phillips, M.F. McDonald, D.L. McGillivray, H. and J.I. Klung, M.B. and A.F. Lovitt, F.J. McNichol, Kalgoorlie Catholic Primary School - that is interesting; R.C. Coumbe, B.J. Plackett, W.A. Golding, E.W. Murkel, T. Berich, Westland Autos Pty Ltd, Miss A.F. Hann, R.J. Kean - that is interesting; and L.D. Frichot. I cannot get away from Mr Kean. I hope he gets onto the Greens (WA) about this. I should send him a copy of this. I had not read this before.

Hon Mark Nevill: It gets worse. One of your critics is a squatter.

Hon N.F. MOORE: The delicious irony of this will escape most members. The Department of Minerals and Energy and my office have been driven to total distraction by R.J. Kean. R.J. Kean writes an abusive letter a day to me, and I send back a nice reply every day. He also gets the Greens (WA) to go to Kalgoorlie after telling them that Kalgoorlie Consolidated Gold Mines, which employs most people in that town, is ruining the environment and it should be closed down. He also contacts Hon Tom Helm and takes him to Southern Cross to look at a dreadful mining site. The member then makes a speech in the adjournment debate about what this dreadful company is doing.

Mr Ray Kean has a special lease in Kalgoorlie-Boulder and he will have to go through the native title process thanks to Hon Tom Stephens, Hon Tom Helm and the Greens. I cannot believe it! At least he might stop writing me letters and start writing them to members opposite! Something good has come from this.

Hon Tom Stephens: Tell me about his tenure.

Hon N.F. MOORE: The purpose of the lease is to store his prospecting equipment. He will have to shift it off his lease or to KCGM.

Hon Tom Stephens: It is used to store his prospecting equipment and you think that should be -

Hon N.F. MOORE: I think it will be very fascinating indeed when Mr Kean discovers what the Leader of the Opposition has done. The list continues: R. and J.D. Hailey; Kalgoorlie Consolidated Gold Mines; J.V. Miller; Westralian Diamond Drillers Pty Ltd; T.E. Edge; A.M. Neilson; R. Lane; Ralph M. Lee Pty Ltd; Hahn Electrical Contracting Pty Ltd; N.W. McDonald; F. Holman; Boart Australia Ltd and so on. Those people are on leases -

Hon Tom Stephens: Legally or illegally? Is there a house on Mr Kean's block?

Hon N.F. MOORE: I have no idea. For the sake of the exercise, let us talk about F. Holman, who has a residence on his lease. The property next door might be a freehold block. I am surmising that Mr Holman's house is on one block and Mr Smith's house is on the block next door. Mr Smith has a freehold title and Mr Holman has a leasehold title. We are almost confirming the extinguishment of native title on freehold land, but we have come to accept that that is a fact. Mr Smith is okay, but as a result of what Hon Tom Stephens has done, Mr Holman's property may be subject to a native title claim. That is not to say it will succeed, but the claim would not be able to be lodged if Hon Tom Stephens had not gone down this path. It would have remained in the schedule of interests. The member is putting these people under serious pressure.

If one town in Western Australia has had serious native title problems, it is Kalgoorlie-Boulder and the surrounding area because of the nature of the area. That is a result of the goldmining tenements and the competitive relationship that exists between companies for those tenements and the nature of the town itself. It has a mixture of leasehold and freehold properties. This area is the powerhouse of the Western Australian economy and it desperately wants some certainty.

No wonder the people of Kalgoorlie-Boulder will vote Liberal at the next election: They have been let down by the Labor Party. It has always been a Labor town but it will not be for much longer. The townspeople are tired of what members opposite are doing about smoking, native title and everything else affecting their way of life.

In case members have not realised, the Government does not support this amendment. It introduces another element of uncertainty.

Hon Peter Foss: And litigation.

Hon N.F. MOORE: Members will take this down the litigation path. The only people who will benefit from that are the lawyers. The money spent on native title issues does not go to Aboriginal people, or those creating wealth. Perhaps lawyers create wealth, but it does not go to people in industry. Lawyers have a vested interest in making sure these sorts of amendments are made because it is another gravy train for them. All the poor people in Kalgoorlie will have to engage a lawyer. Perhaps it should be called the Megan Anwyl clause. People will go to see Megan Anwyl, who is their local member and also occasionally dispenses legal advice. Perhaps this is a provision to look after her future when she loses the next election. I cannot think of any other reason for it. It may be a post next election Megan Anwyl fund. I do not know why members opposite are doing it. There is no need for it.

Hon N.D. Griffiths: Stop delaying your legislation. The Leader of the Opposition will tell you about it.

Hon N.F. MOORE: The Leader of the Opposition took a long time to tell us why he proposed it. I am taking as long as I need to tell members why it is all wrong.

Hon N.D. Griffiths: You do not want this legislation to go through.

Hon N.F. MOORE: I do, and I have not spoken for any longer than members opposite. I have spoken briefly and quickly in response to each question asked of me today.

Hon Tom Stephens: I hope you will extend the sitting so that I can reply to you.

Hon N.F. MOORE: The House will sit on Tuesday. The Bill will not be passed today. The Labor Party wants to make a significant amendment to the clause and when I point out the implications of it, its members do not want me to continue talking. I can understand why.

Hon Tom Stephens: Sit down and I will explain it to you.

Hon N.F. MOORE: I will not sit down because I have not yet finished my answer.

Hon N.D. Griffiths: We think you are finished.

Hon N.F. MOORE: The net effect is to delete the scheduled interests and to put back those which the member thinks will curry favour for him, and put back some generic definitions that might or might not cover the people in Kalgoorlie. They will find that out only when they go through the process. If the clause is left as it is, it will give people certainty. Another part of the amendment relates to leases being in force at 23 December 1996, the time of the Wik decision. The net effect is that it excludes historical exclusive tenure from the confirmation process of this clause. That is contrary to the determination of the High Court. The Government does not support this. It has much difficulty understanding why the Labor Party is going down this path, and I ask the committee to throw out the amendment and get on with the Bill.

Hon TOM STEPHENS: I was indebted indeed to the Government for supplying me with a map of the Boulder townsite which came before the second Select Committee on Native Title. I subsequently decided I would ask the Department of Land Administration for a list of the tenures in Kalgoorlie-Boulder subject to special purpose leases that would not otherwise have native title extinguished as a result of the amendments before the committee for statutory extinguishment. I have spent some time trying to tackle the arguments rightly put to the Opposition and to address those arguments that have been very sensibly put by Hon Julian Grill, Hon Mark Nevill and, especially, Megan Anwyl. We have accommodated those concerns in the following way: The ALP has been watching what the National Native Title Tribunal is doing with reference to native title claims over similar tenure around this country. Claims that cover the type of tenure contained within the boundaries of the City of Kalgoorlie-Boulder are being struck out in the National Native Title Tribunal processes around this country, insofar as native title has been extinguished on that type of tenure because of the way it has been used with reference to residences and exclusive possession acts. That sort of scaremongering by the Leader of the House in reference to that type of tenure -

Hon N.F. Moore: You are in deep trouble.

Hon TOM STEPHENS: Not at all. If the Leader of the House will shut up and listen for a moment, he will have the opportunity of learning something. That type of tenure, and certainly the overwhelming bulk of it, if not all of it, is caught by inclusions within what I have called the mini schedule - that is, section 23B(2) of the national title Act and so on - as well as being protected by the fact that native title applicants must ensure that their claim does not include anything over which

native title has been extinguished. Two things have happened. Validation clearly is different from the issue of extinguishment. The Australian Labor Party's support for validation is absolutely unequivocal, as the Leader of the House can see by our support for the earlier part of the Bill. Under our amendments, validated titles will prevail over native title rights if there is any inconsistency. The new registration test will prevent claims over areas where there have been exclusive possession acts. The registration test is now being applied retrospectively.

All of us who understand Kalgoorlie know that some people in Kalgoorlie have a tenure form upon which they sometimes do other activities that are not appropriate for that tenure form. Is the Leader of the House seriously saying that the only people who have a valid legal right in reference to that tenure - native title interests, for instance - must have their rights extinguished for someone who, in effect, has converted his legitimate tenure into something that is an illegal occupation of that tenure? Is that what he is saying?

Hon N.F. Moore: You go and tell them.

Hon TOM STEPHENS: Aha! We have a minister of the Crown advocating that the -

Hon N.F. Moore: I have not advocated. I am telling you to tell the people up there what you are saying to me.

Hon TOM STEPHENS: The Leader of the House is a minister of the Crown; he is supposed to uphold the law of the land.

Hon N.F. Moore: This is your amendment.

Hon TOM STEPHENS: Members must listen to what the Leader of the House is saying. People who are illegally, perhaps -

Hon Peter Foss: Who says it is illegal?

Hon TOM STEPHENS: I am not familiar with all forms of tenure. Say, for instance, there were a large block of land, as depicted on the map I have with me; say it were a big block of land right in the middle of Kalgoorlie.

Hon Derrick Tomlinson: The green block?

Hon TOM STEPHENS: The green block. Let us say that someone were allowed to store prospecting equipment on one corner of that block. Would that mean that the native title interest in the whole of that block, by virtue of that form of tenure, had thereby been extinguished?

Hon Peter Foss: Yes.

Hon TOM STEPHENS: Of course it has not. It could be done only by virtue of the statute. That is why it is in the statutory provision. That is why the Government has attempted to include it within the statutory requirements of the schedule interest.

It is interesting as well to recognise what has gone on in the history of this country. Where did town boundaries come from in terms of our state law? Why did the native title report No 1 insist on our history being on display? What was it about? It was about keeping out Aboriginal people from the towns and cities of this State. That was a requirement at law that existed in this country, and in this State in particular, for an extended time. That is the reason that town boundaries exist in this State. We need only to look at what has just happened in the Yorta Yorta decision of Justice Olney. Members opposite have yet to understand what is taking place in this area of law. It is no wonder they are in such a pickle about it. They have only to see what will be the effect of that judgment on a town like Kalgoorlie, where the native title interests have been effectively given a disjuncture for that extended period of time by virtue of the operations of the statutes of this State. The Leader of the House should not try to raise these red herrings. He is the minister responsible for upholding the law with regard to the types of tenure upon which people are endeavouring to carry out operations other than those which are provided for by right, by statute or by their entitlements. It is inappropriate for the minister to pursue an attempt to statutorily extinguish what may be the only legitimate right to those areas of land in order to accommodate some illegal activity, if that is what he is on about.

The more important and fundamental argument is this: We have taken on board everything that has been raised with us. We are convinced that most of the categories of land that are contained within the map that has been supplied to us of the title searches as they have existed in this State will have successfully overturned native title on those blocks by virtue of the determination of common law with regard to those tenures.

Hon N.F. Moore: Then just agree with the Bill.

Hon TOM STEPHENS: If the Leader of the House believed that there was some way of improving on our amendment, he should put that proposition. His scheduled interest does not do it. We have explored the options, and we are confident that in the combination of what we have put before the Chamber, we have the right package. It is the best package that is on offer in town that will get through this Parliament. We know that the level of certainty that is required by these people is guaranteed by our amendment. For the Leader of the House to prance around in the way that he does and to try to suggest that there is any uncertainty for these people is to try yet again to use the goldfields as a sticking point. The goldfields area

has admittedly been a problem, but that matter is being resolved by virtue of the improved threshold test and the improved registration processes, and the National Native Title Tribunal in its current operation, or its successor, the State Native Title Commission, will very quickly, as it appropriately deals with native title applications over areas such as this, strike out claims over the types of tenures that have absolutely necessitated and guaranteed the extinguishment of native title. The Leader of the House knows that what I am saying is the case. He knows that our amendments have been deliberately crafted in response to the operations of the federal native title legislation. They have deliberately picked up those forms of commercial and residential leases and those categories of tenure about which there might otherwise be doubt, and under our amendments, there is no real prospect of doubt, as the Leader of the House well and truly knows. I appreciated the opportunity of being able to spend 18 months studying the possibilities, and of having the assistance of the minister's adviser.

Hon N.F. Moore: You are making a mistake.

Hon TOM STEPHENS: No. I have had the advantage of watching the Leader of the House on his side of the Chamber in reference to these questions over an extended period and I know how he has operated. The Leader of the House in this debate on native title has consistently tried to inflame artificially the concerns of the Western Australian community on Aboriginal issues for the entire period in which he has served with me in this Chamber. I know what he has been up to. All of his period of political office has been involved in trying to stir up these racial concerns.

Several members interjected.

The CHAIRMAN: The Leader of the Opposition might like to address himself more concisely to the amendment and the issue.

Hon TOM STEPHENS: We are confident of our amendment; it is an amendment that covers these circumstances. Members opposite need not have any fear nor should the people whose names the Leader of the House has raised in this debate have any fear.

Hon N.F. MOORE: I have two things to say. I have never endorsed any illegal use of a lease. If there are people in Kalgoorlie who are using leases illegally, they should have the lease terminated through some other process that has nothing to do with native title. If people have a lease for a particular purpose, whether residential or commercial, that is the purpose for which they must use it. If they are not using it for that purpose, there will be legal action to ensure they do. This has nothing to do with this debate.

I have listened to the Leader of the Opposition tell me that the people in Kalgoorlie and Boulder whose names I read out have nothing to worry about because, as he said, all around Australia there are native title tribunals which are saying that native title is extinguished on those particular leases. One of the reasons it is happening all around Australia is because other Parliaments have passed legislation which is along the lines of what we are seeking to pass in this place.

If the Leader of the Opposition seriously wanted to tell those people in Kalgoorlie that they had absolutely nothing at all to worry about, he would vote for the Bill unamended because there is no doubt then about their circumstances. However, there is doubt about what he is saying because they will be subjected to being part of a generic description and will have to go through the processes of native title. Of course, they may find at the end of the day that native title is extinguished and it may be, as the Leader of the Opposition said, that it will be extinguished on all of them. However, they will not know until that point is reached. He will, therefore, put them through all that trauma, pain and cost to reach that end if someone makes a claim over their lease. It would be far easier, if what the Leader of the Opposition believes is the truth, that native title has been extinguished, to just do it. That can be done by agreeing to the Bill rather than going ahead with his amendment which creates uncertainty.

I do not know why he is doing this because I listened to his speech. I am pleased that he is enthusiastically supporting the people in Kalgoorlie and saying to them, "Don't worry about it, as far as I am concerned it is all fixed. When it comes out the other end of the sausage machine native title will have been extinguished." However, the sausage machine is a very expensive and worrying process. I suggest to the Leader of the Opposition that by the time we come back on Tuesday, he puts to rest all their concerns by getting rid of his amendment and leaving the Bill as it is. That will remove any doubt in the minds of his constituents and mine.

Progress reported.

ADJOURNMENT OF THE HOUSE

Special

HON N.F. MOORE (Mining and Pastoral - Leader of the House) [3.49 pm]: I move -

That the House at its rising adjourn until 10.00 am on Tuesday 22 December.

I hope that we can make some more progress. I was very pleased at the rate of progress that we made today on the Titles Validation Amendment Bill - says he with his tongue firmly planted in his cheek. If we could make the same rapid progress

on Tuesday, we could pass this Bill by Tuesday night. I would like to start at 10.00 am instead of the normal 3.30 pm start so that we can have time to deal with this legislation.

HON HELEN HODGSON (North Metropolitan) [3.50 pm]: In the absence of the management committee this week, could we have some indication from the Leader of the House whether he expects to be sitting late next week? I know he will say that it will depend on progress.

Question put and passed.

Ordinary

HON N.F. MOORE (Mining and Pastoral - Leader of the House) [3.51 pm]: I move -

That the House do now adjourn.

In response to the matters raised by Hon Helen Hodgson, I expect that the House will sit late on Tuesday. I will be moving on Tuesday to sit beyond 10.00 pm. I say that so members are aware of it. I am very anxious to make some rapid progress on the Titles Validation Amendment Bill and also I would like to get started and complete next week the Native Title (State Provisions) Bill, Acts Amendment (Land Administration, Mining and Petroleum) Bill, and the Health Amendment Bill. There are two other Bills, the Occupational Safety and Health (Validation) Bill and the Commercial Tenancy (Retail Shops) Agreements Amendment Bill about which I will need to negotiate with the Leader of the Opposition and the responsible ministers. Certainly I see the other Bills as being a priority. I want to sit next week until such time as we have completed the native title legislation and the Health Amendment Bill.

Lot 17, Mindarie-Tamala Parkland - Adjournment Debate

HON KEN TRAVERS (North Metropolitan) [3.52 pm]: I do not want to take up much time of the House but I want briefly to place on record - I chose to do it today rather than last night - some facts concerning a petition containing four signatures that I tabled yesterday. I want to bring to the House's attention that the Towns of Cambridge, Victoria Park and Vincent have been collecting signatures on a petition which unfortunately did not conform with the standing orders of the House. The petition contained 2 204 signatures. The petition dealt with the issue of ownership of lot 17, the Mindarie-Tamala parkland, which was originally purchased jointly by the Cities of Perth, Stirling and Wanneroo for the purpose of a tip site and also as a future investment.

When the City of Perth was restructured, the full ownership of its share was left with the City of Perth and not equitably divided between the Towns of Cambridge, Victoria Park and Vincent. Those towns have been waiting for some four years for the Government to give a reasonable explanation of why that decision was made. Their view is that there is no reasonable justification, and that is why they have not heard it. If it is the case, they would like to see the matter rectified as early as possible. It places the councils at great disadvantage in their dealings with the owners of the land through the Mindarie Regional Council for their rubbish tipping. It puts them at a disadvantage for leasing arrangements. They believe that as their ratepayers contributed to the purchase of the asset, they should benefit as it gains in value over the years to come. I bring to the attention of the House the fact that this is a major issue of concern amongst the residents of my area. I am sure that now with the splitting of the City of Wanneroo into the Shire of Wanneroo and the City of Joondalup, it has potential implications for other members of the North Metropolitan Region. I hope that through the processes of this House a full and proper inquiry will be held and that the Government will take the opportunity to put before the inquiry the reasons it made the decision it did - as I say, I expect it will be the thing that should occur - so that the matter be rectified and the Towns of Cambridge, Victoria Park, and Vincent are given their fair share of the land.

Question put and passed.

House adjourned at 3.54 pm