

ECONOMIC DEVELOPMENT AND INFRASTRUCTURE COMMITTEE
Inquiry into greenfields mineral exploration and project development in Victoria

Melbourne — 7 November 2011

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Mr B. Powell, Member, Victorian Traditional Owners Land Justice Group,
Mr P. Simmons, Senior Solicitor, Future Acts Coordinator, Native Title Services Victoria,
Mr D. Yarrow, Legal Advisor, Victorian Traditional Owners Land Justice Group, and
Ms J. Webb, Policy Officer, Native Title Services Victoria.

The DEPUTY CHAIR — Good afternoon and thank you very much for coming along. This is a public hearing for submissions of the Parliament of Victoria's Economic Development and Infrastructure Committee. My name is Martin Foley, I'm the Deputy Chair of the Committee. Unfortunately, our Chair, Mr Neale Burgess, is not well, so he is a late scratching. We have Mr Wade Noonan, the Member for Williamstown, and Mrs Inga Peulich, who is the Member for South-Eastern Metropolitan.

This all-party committee is hearing evidence today on the Inquiry into greenfields mineral exploration and project development in Victoria, which I'm sure you have had a look at the terms of reference on, which are pretty wide-ranging terms. The evidence that we will take today is subject to parliamentary privilege, but any comments that you may choose to make outside of the hearing are of course not afforded such privilege. In a minute, those who are going to give a presentation, I will ask you to state your name and your business address and whether you are participating today in a private capacity or representing the organisations that you are here on behalf of. All evidence will be recorded and in due course will be made available to you. So whilst we have received your submissions — which we are very grateful for — and considered those, what we try to do is to have you speak to those relatively briefly, but not wanting to cut off you from the important points that you need to make, and then leave the rest of the time for us to have discussion around how that relates to the terms of reference.

So could I perhaps ask you to indicate names, addresses and organisations, and then we'll get stuck into it.

Mr POWELL — My name is Bryon Powell, I'm a Wadawurrung traditional owner. My address is 6 Nicole Avenue, Dandenong, and I'm representing my people and here on behalf of the Victorian Traditional Owner Land Justice Group.

Mr SIMMONS — My name is Paul Simmons, I'm a solicitor at Native Title Services Victoria, address 642 Queensberry Street, North Melbourne.

Mr YARROW — My name is David Yarrow, member of the Victorian Bar, and I act for the Victorian Traditional Owner Land Justice Group. My address is Level 5, 530 Lonsdale Street, Melbourne.

Ms WEBB — I'm Jill Webb, Policy Officer at Native Title Services Victoria, again 642 Queensberry Street, North Melbourne, and I'm Secretary to the Land Justice Group.

The DEPUTY CHAIR — We're in your hands, how would you like to proceed?

Mr POWELL — I think I got dobbed in to be first one. As a Victorian traditional owner, I'm part of the Land Justice Group, which is a group which came about because of dissatisfaction with the Native Title Act over years and came about because of a community meeting in 2005. We wanted a better process to deal with native title issues and better representation and one where all traditional owners could be afforded the opportunity to speak and be heard, as has happened for thousands of years.

The idea behind the Victorian Traditional Owner Land Justice Group was we could sit together as Aboriginal people, discuss our ideas, argue about things, and come to an agreement which everyone would support. One of the things that came out of the Traditional Owner Land Justice Group was the Traditional Owner Settlement Act, and that took quite a few years to sort of develop up, but it was supported by all traditional owner groups in Victoria, and it gave us a way to satisfy our cultural and legal requirements.

Culturally, we have to look after the land; we have a cultural responsibility to do that. It doesn't matter whether the land is under freehold title, the sites that are on it, the places that are sacred to us, we have a responsibility to look after that: the plants, the animals, we look after that. We have done for thousands of years, we continue to do it today, even though we live in a modern society, it makes it a little bit hard when we are trying to adhere to modern law and also follow traditional law. We did have a complex set of laws, much as we have today, and we try to adhere to those as best we can.

One of the things that is important to Aboriginal people is that we sit down and talk and we agree on what to do, which is why we have a Council of Elders, because then everyone can have a voice and whatever decision is made is the best decision for communities, and we need to support that. This is why it is important that we present to this committee because for thousands of years we have agreed on certain ways of doing things and to us an agreement-based process for the mining industry and traditional owners, through both native title and the

Traditional Owner Settlement Act, is an important aspect. We continue to do it and we see it as the best opportunity for us.

I noticed some of the comments in this paper talk about a cooperative approach to land access, considerations between the MCA and the Victorian Farmers Federation. That is an agreement-based process. The best way to deal with Aboriginal issues, native title and cultural heritage, is to sit down and talk and that's what this presentation is all about.

We want land justice. We have been looking after this land for nearly 60,000 years, we will continue to look after it, but we need to work in conjunction with all landowners, all stakeholders, to be able to achieve that, because without it, without that agreement, we feel we are lacking or we're letting down our people as far as our cultural responsibilities are concerned. We live within the environment, we don't try to master it, we don't try and change it. We are part of it and it's that overriding principle that really sets us apart. I think I'm going to chuck to the others here.

Mr SIMMONS — Thanks, Bryon. I'm a solicitor at NTSV. I have been involved in this industry for about 10 years now, which is quite a while for a native title lawyer in this country. I just wanted to briefly outline our engagement, what our organisation does, and how we engage with the industry. Our clients get involved in industry when they have lodged a native title claim that passes various registration test purposes. Once that claim is registered, they attract certain procedural rights, one of them being the right to negotiate with exploration and mining companies. Our clients engage with the industry usually when an applicant goes to DPI and lodges an exploration application and that application includes Crown land, there is a requirement under the Native Title Act that they negotiate in good faith with the traditional owner group.

We have a number of native title claims throughout Victoria, where groups exercise those procedural rights. We have approximately 100 licenses, but not all of those would be exploration, probably two-thirds, the vast majority would be exploration activities, which is subject to native title negotiations. The process would usually be that the company would inform us of their intention to negotiate; sometimes that can take a while. As you're probably aware, some companies lodge applications and aren't all that keen on progressing things straightaway, people would be familiar with the term 'warehousing'. So although we have 100 negotiations, roughly, on the book, we don't hear from all of them straightaway, they are at various stages. But the ones that are forthright and wish to get on with business, they let themselves be known and we set up meetings and processes to negotiate with those companies. One would say that exploration is obviously vastly different to mining, so the issues are less complex and the sorts of issues and timelines that are usually involved in exploration negotiations are quite confined as opposed to a large-scale mining operation.

In this state, we have tried to streamline processes, we have developed a very good relationship with the Minerals Council of Australia Victorian Division. There are a number of landmark agreements which were finalised in 2005 between the Dja Dja Wurrung people and the Wadi Wamba Barapa people, Dja Dja Wurrung being the central Victoria area near Bendigo, Wadi Wamba Barapa along the Murray River, Swan Hill.

Essentially, those agreements allow for the streamlining of negotiations. They are not binding. Essentially what they do is they allow an exploration proponent who has a licence including Crown land to look at that agreement with the particular native title group and the Minerals Council and say, 'I am pretty happy with those sorts of benefits. I'll sign a deed of assumption, I'll opt into that'. Then they get their licences granted in a very expeditious way, without engaging in one-on-one negotiation. It's not mandatory; it is an OE and opt in process, but we have found it has been used readily by the industry. So there are a couple of groups that have that in place. Definitely, we would be looking at doing more of them with the Minerals Council in the future.

Our experience is that exploration companies that are really keen on getting on the ground and doing work are usually the ones ringing us up, letting us know that they want to proceed fairly quickly, and they are able to get their licences negotiated and finalised in a reasonable time period.

I guess there is a fair degree of myth about the Native Title Act and native title processes. One myth might be that native title stops things or slows things down. The Native Title Act is quite clear and it says that once an exploration applicant lodges their application, they have a period of up to six months whereby if they can't reach an agreement with the traditional owner group, they can go to the National Native Tribunal and seek the Tribunal to make a decision about whether an application proceeds.

The experience in Victoria is that the vast majority of people and companies who are keen to progress actually get their outcomes. Since the Native Title Act came into operation in 1993, there have only ever been 10 applications that have gone to the National Native Title Tribunal for decision. So that process is always there.

Mr NOONAN — In Victoria?

Mr SIMMONS — In Victoria.

Mr NOONAN — Sorry, 10 in Victoria?

Mr SIMMONS — I would say less than 10; somewhere between six and 10. I don't have an exact number, but definitely less than 10.

The jurisprudence in this area is that there has never been an application which has been knocked back by the Tribunal in Victoria. So native title is not an impediment. I think the relationship between traditional owner groups and industry is very good, and we would probably like to see more of the regional sort of agreements put in place.

One thing we would like to mention is that there is complexity around the issue of native title and Aboriginal cultural heritage. The two are dealt with sometimes separately because the native title agreement is negotiated at the licence stage. It is only at the stage where the exploration applicant wants to get on the ground and their work plan involves certain ground-disturbing activities that might trigger a cultural heritage consideration that has to be dealt with that at that stage. In other jurisdictions, such as Western Australia, they have put into place procedures whereby there have been regional agreements negotiated for the representative traditional owner groups and the State of Western Australia, which allow the native title agreements to incorporate cultural heritage considerations and have them registered and recognised under the cultural heritage legislation, so essentially a one-stop-shop. That doesn't exist here, there is no ability for native title agreements, which will at times include heritage issues, to be registered and have standing under the Cultural Heritage Act.

The other thing I briefly want to mention is that in our industry, we don't have a lot of resources, we progress a lot of negotiations but without a lot of resources. Other states around the country, namely Queensland and Western Australia, do put resources into the native title representative bodies to assist them to directly fund positions to progress licence applications, and from what I understand it has proven to be quite successful.

Essentially, the more resources you put into it, the more resources you have to work on the outcomes. But our general feeling is that companies who want to get on the ground, who are keen on negotiating in good faith, get their outcomes within the timelines that usually work for them. I'll leave it at that for now.

Mr YARROW — I might briefly make a short comment related to your term of reference that talks about managing potential conflict between industry and other land users.

Bryon mentioned to you the Traditional Owner Settlement Act and the long process of negotiation that led to that. The Traditional Owner Settlement Act is an agreement-based solution for land justice in Victoria and it provides a mechanism to resolve all native title issues for a particular area, agreement based. An individual traditional owner group agrees with the State of Victoria on the settlement of native title issues on a geographical basis.

That is a kind of agreement-based consensus between government and traditional owners that allows for clarity around rights and responsibilities and minimises, mitigates or prevents conflict between land users and traditional owners. For example, under Part 4 of the Traditional Owner Settlement Act, there is an arrangement for what is called the land use activity agreement and that land use activity agreement would set out the responsibilities of explorers and producers, the whole mining or petroleum tenements. That kind of agreement-based clarity offers significantly more risk management for industry than the present state of affairs in Victoria, where we have a patchwork of native title claim, native title determination and no activity; I suppose you could call it: no claim and no determination, no agreement.

The difficulty with the status quo is that there is an incentive: the only means by which traditional owners can get meaningful input on resource activity is to lodge a native title claim. The native title process for Victoria has

been unhelpful, to put it at its best; it's expensive, it draws a large amount of resources into the technical requirements, lawyers, advisers, researchers, and doesn't deliver on the ground for both land users and for traditional owners.

The logic behind the Traditional Owner Settlement Act was to encourage people to step away from the court and get agreements. The Land Justice Group wrote to the Victorian Government, in addition to welcoming them to government in December last year, calling on them to endorse the Traditional Owner Settlement Act. That has not occurred to date. I should qualify that: not merely to endorse the Traditional Owner Settlement Act, but the native title settlement framework that underpins that legislation, the Dodson committee report that came out at the end of 2008.

The Victorian Government has indicated they are prepared to engage with the Traditional Owner Settlement Act in their negotiations with both the Wadi Wamba Barapa peoples and also the Dja Dja Wurrung peoples, two native title claims. But traditional owners in the rest of Victoria are left in a position of uncertainty: do they have access to the Traditional Owner Settlement Act, is the Government prepared to do an agreement-based outcome rather than should they make a native title claim, with all of the inefficiency, delay and uncertainty that that brings?

I would submit to the Committee that it would be appropriate to recommend that the Victorian Government encourage land justice agreements under the Traditional Owner Settlement Act as a way for delivering justice to traditional owners, but also certainty to land users, particularly the resources sector. I do note that the submission of the Minerals Council of Australia, Victorian Division, does touch on this issue of agreement-based processes with traditional owners and I think there is a high degree of consensus that they are a better way to go. Obviously, details have to be worked out, but compared to the uncertainties of the native title process, they do offer a lot of efficiencies.

Mr NOONAN — Can I get clarification.

The DEPUTY CHAIR — Are you happy for us to ask questions?

Ms WEBB — I wasn't planning to make any submissions.

The DEPUTY CHAIR — What we might do, whilst we're hot on the topic, is ask some questions.

Mr NOONAN — Just a quick clarification. Are you essentially seeking this committee to recommend that the new government support obviously the Act which was passed recently in the last parliament plus the principles that underpin it? Is that all you are seeking?

Mr YARROW — I suppose I wouldn't couch it in those terms, but essentially yes; that the Government support land justice agreements under the Traditional Owner Settlement Act for all traditional owners in Victoria, as a way of delivering certainty.

The DEPUTY CHAIR — But that is essentially what the Act is predicated on.

Mr YARROW — The Act opens the opportunity, but the present government has not made any statement of commitment.

The DEPUTY CHAIR — Because it requires the agreement-based approach, it's not a mandatory approach.

Mr YARROW — Exactly right.

Mrs PEULICH — So that involves a shift from the sort of native title resolution process, which we have received a lot of evidence to indicate that as being very lengthy and adding a very substantial amount of time to getting licences, to this, and you contend that that would be more efficient and deliver better outcomes. So does that also then mean those outcomes flow on to a greater number of traditional owners?

Mr YARROW — Absolutely correct, yes.

Mrs PEULICH — So it's a different way of delivering?

Mr YARROW — Agreement-based mechanisms for traditional owners to have input into land use decision making, that's right.

Mrs PEULICH — So in terms of the flowing of those benefits, does it flow further to a greater number of owners?

Mr YARROW — Of course, it depends on the number of agreements, but it has the potential to do so, absolutely.

Mrs PEULICH — Could you just explain to me how and why?

Mr YARROW — Yes. The Native Title Act is predicated on some quite technical requirements. One is the test that arises from the Yorta Yorta case in the High Court: the continuity of connection between a group and the country it claims in the form of a continuous observation of traditional owner custom. That test is very difficult to meet in the areas of intense early European settlement in Australia, the south-east and the east coast. That is not to say it's not possible, there have been three successful determinations in Victoria, but that one unsuccessful determination demonstrates that it is very difficult to prove native title in settled parts of Australia, early settled parts of Australia.

There is also the issue of extinguishment. Native title rights essentially can't exist on private land, but also they can't exist on areas that are presently public that were once private, and that was my comment about the cost of researches. My understanding is in the Gundit Jmara native title determination, which happened in November last year, the Government spent — or the Department of Sustainability and Environment spent — many millions of dollars in archival research assessing every individual parcel of public land in that claim to determine whether it was once private at all. If so, native title had been extinguished. The Traditional Owner Settlement Act and the policy recommendations that underpin it, from the Dodson report, allow direct negotiations between the State and the traditional owner group that avoid all of that legal complexity.

In your question before, you asked me about the difference between delays occasioned by native title in the issue of licensing versus delay in the native title process. I think Paul's evidence to you shows that the reports are apocryphal that claim that delay is occasioned in the permitting system. There has never been a permit rejected in Victoria because of the existence of native title — never, not one. However, it is true that the court process, the claims process, where individuals claim native title, has taken an inordinate period of time, more than 10 years, and that means there has been uncertainty about whether native title exists or not.

So it is true to say that land users who want to negotiate with claimants are not sure whether they will succeed at the end of the day in a claim — either succeed at all, for Yorta Yorta reasons, or succeed as regards a parcel of land for the extinguishment reasons I have talked about. So I would say the biggest cause of uncertainty and delay is the claims process, not the permit process.

Mrs PEULICH — If I may just follow on, you said that no single permit has been denied.

The DEPUTY CHAIR — On a native title application.

Mr YARROW — On a native title basis.

Mrs PEULICH — Whereas we have heard substantial evidence from mining applicants in tenements — largely exploration tenements — and particularly those who have gained an exploration tenement and then wanting to take the next step under the appropriate cultural heritage legislation to then turn that into a normal agreement with a registered Aboriginal traditional party. We have heard substantial evidence that there are delays and frustrations on a number of issues ranging from inability to recognise any native title traditional owner group, to competing owner groups, to difficulty in getting the private landholders, because we're talking areas that have been, in terms of native title, extinguished in that regard, not wanting to cooperate — in my words, not theirs, I wouldn't wish to verbal them — on the basis that, once found evidence of traditional cultural links, that that is somehow or another seen as a negative towards that private landholder's use of the land.

So in all of that context, we have heard from mining participants that whilst they all subscribe to the principles of negotiation with traditional owners in seeking to reach agreement, there are substantial practical — their words — delays that exclude them from the frame of the native title discussions but in the private land

tenements exploration area or development exploration that caused them substantial frustrations in terms of investment, jobs, all the rest of it, whilst wanting to do the right thing.

Mr YARROW — I should apologise, if I haven't been clear: native title, of course, is dealt with in parallel to cultural heritage. So the concerns of the kind you have been describing are issues arising from the Aboriginal Heritage Act, which is presently under review by the Minister for Aboriginal affairs.

On the native title side, which applies largely only to public land, it is correct to say there has never been a permit refused; no licences have been refused in Victoria for native title reasons. However, to talk about the Cultural Heritage Act, which applies on private and public land, it is true that there have been some difficulties for proponents. Bryon has a lot of experience in this area, so I might turn to him, but can I first say that in my experience with the Aboriginal Heritage Act, the areas I'm aware of with the most difficulty are the areas outside the Registered Aboriginal Party areas where there is no Aboriginal organisation appointed to go to, and proponents find it very difficult to identify who they should talk to.

The DEPUTY CHAIR — That has certainly been one of the lines of evidence that has been made clear to us.

Mr POWELL — As a Wadawurrung representative, I am also Chairperson of the Wadawurrung Aboriginal Corporation, which is a registered Aboriginal Party. As such, we have strict timelines that we have to comply with under the legislation.

The DEPUTY CHAIR — Six months.

Mr POWELL — As far as doing anything. Some of the delays that we have found have been not through our part in the process, because our part in the process is basically we get a notice of intent; we have 14 days to respond to it. We then go through the assessment process of the Cultural Heritage Management Plan, then we have a 30-day timeline to evaluate it and approve it. The assessment process can take a hell of a long time. That can also be very dependent on Aboriginal Affairs Victoria and their interpretation of archaeological practices, it can be dependent on work practices as far as being able to resource the work. There are examples where we have gone out and actually done the work on the ground, done the assessment, and the process has been fairly straightforward.

The difficulty arises when we have to spend time doing further investigation because what seems like just an innocuous couple of stone tools on the surface turns out to be a rather intense occupation site that shows evidence of being there for thousands of years. That needs careful examination. That can take time, but we can still sit down with the sponsor or the organisation and negotiate around how the work can proceed without any large delays. It's process-driven rather than Aboriginal-driven.

The DEPUTY CHAIR — What about the areas, Bryon — or anyone else — where there is either no recognised — under the heritage legislation — traditional owner group, or there are competing claims from groups, which has also been suggested to us, how do you see those being resolved?

Mr POWELL — From an Aboriginal perspective?

The DEPUTY CHAIR — Yes.

Mr POWELL — Being able to sit down with your neighbours and come to an agreement. We are currently talking with our neighbours, we have an overlap on boundaries on our northern boundary — just so you're aware, my traditional lands are from Aireys Inlet up to the head of the Werribee River, across to Beaufort near Ararat and down around Cressy, quite a large area around Port Phillip Bay and down to Aireys Inlet. A large growth area, a lot of development happening down there, and we are constantly negotiating with sponsors.

To be able to sit down with the two groups or three groups, whichever, and be able to work out a boundary and an agreement between them can be a process, but it would ensure certainty. Rather than just argue about which group is right for that country, sit down with them and talk.

The DEPUTY CHAIR — Just on that theme, a bit broader, I suppose: given that the Minerals Council have developed those two agreements with the two groups that you referred to, how do you see the prospects of a

state-wide agreement being brokered between traditional owner groups and the Minerals Council, and would it stick?

Mr YARROW — I would think it would be unlikely to have a single state-wide agreement because traditional owners' decision making doesn't happen that way and the Native Title Act doesn't permit agreements like that, at least not easily. But I would say that I think it is highly likely that that model could be replicated elsewhere. It's working well, the relationship is good, by and large users are satisfied with it. I think there is every prospect that other traditional groups would adopt a similar thing.

The MCA submission does talk about how there have been discussions between the Justice Group, NTSV, industry groups and DPI about trying to reproduce or learn from that experience with those two ILUAs — Indigenous Land Use Agreements — for crafting a new agreement, a land use activity agreement, under the Traditional Owner Settlement Act. So that's very much the direction I think things are heading.

Mrs PEULICH — You are talking about a process?

Mr YARROW — Yes.

Mrs PEULICH — How about some characteristics of those agreements, are you able to flesh that out a little bit so we understand, what is the quantum, what are the conditions in terms of land use, what sort of money is involved, how many people? For example, out of those two, how many people are the beneficiaries of those agreements?

Mr SIMMONS — With the Dja Dja Wurrung agreements, it is identical to the Wadi Wamba Barapa agreement. They're fairly low-level benefits and they are public, so I don't have a problem in disclosing them. There is an annual exploration fee of \$1500 per year.

Mrs PEULICH — Per?

Mr SIMMONS — Per licence. There's an arrangement under cultural heritage arrangements whereby a member of the group will go out and have a look at the site before any ground invasive work is undertaken and suggest other areas which might be more appropriate or areas to avoid and so forth. Then the proponent would develop a work plan, settle the work plan, and they would be required to give notice to the traditional owner group. If the group felt that that was an area that they really wished to observe, then they would be there during those ground-disturbing activities up to a certain depth or duration.

Other financial benefits: there would be drill hole fees. There is what is called a drill hole fee, a fee per type of drill hole method. It can range from \$100 per hole down to about \$20 a hole, and that was based loosely on an agreement which the Minerals Council of Australia negotiated with the Victorian Farmers Federation going back into the early 2000s. Pretty much the group adopted very similar rates and that was endorsed by the Minerals Council as a way of saying to explorers, 'Offer something similar to the traditional owner groups as a way of progressing things'. The reality is that we very rarely see drill hole fees paid to the groups because a lot of companies just don't get to that stage. So the benefits are fairly low level. The real big ticket is obviously at the mining stage.

Mrs PEULICH — Obviously they are for exploration, those two?

Mr SIMMONS — That's right.

Mrs PEULICH — So what would you anticipate, how would that translate into a — —

Mr SIMMONS — It can really vary. There's no set standard as such. You would have to look at the project, the profitability, and it's just down to the negotiation, what the parties can agree to.

Mrs PEULICH — The modest amount that you have been able to negotiate, how many people are involved in each of those agreements, what is the total number?

Mr SIMMONS — The beneficiaries of those agreements are the number of people who are members of the group.

Mrs PEULICH — So number?

Mr SIMMONS — I couldn't tell you.

Mrs PEULICH — Five, 10, 15?

Mr SIMMONS — It would be many hundreds. The native title group is described under the native title claim as being descendants of certain ancestors which are traced back into the 1800s.

Mrs PEULICH — Does that then go into some sort of a central organisational fund or is it disbursed to individual descendants?

Mr SIMMONS — The record in Victoria so far has been that most of the moneys have been held by our organisation in trust. Groups have been fairly good savers; there have been very, very few disbursements at all in the 10 years that I have been involved. So groups are very particular, and they're small amounts of money.

There are 40 companies that have signed up to the Dja Dja Wurrung regional agreement with the Minerals Council and not all of them are still active, some people have already done their exploration and finished. They might be getting roughly \$20,000 per year. So we're not talking about sheep stations with this type of money; most of the moneys are quite low. Gippsland area is obviously more prospective — oil and gas. It depends on the region of Victoria as to where the minerals are, and some groups don't have any negotiations because there are just no resources in the ground that are currently being used.

Mrs PEULICH — One follow-up question: how long did it take to formulate those agreements from start to finish?

Mr YARROW — The agreements in place with Dja Dja Wurrung, Wadi Wamba Barapa?

Mrs PEULICH — Yes.

Mr YARROW — They have been in place since 2005. They're on the website of the MCA, Victorian Division. Paul would know better than anybody. My understanding is they probably took three years.

Mr SIMMONS — To negotiate?

Mr YARROW — To negotiate.

Mr SIMMONS — No. The group had already set standards based on arrangements which the Minerals Council had adopted with the Farmers Federation.

The DEPUTY CHAIR — You adopted that MOU with the VFF?

Mr SIMMONS — Yes, they tapped into that. So it was very easy for the MCA to accept those arrangements. My guess would be it would have taken less than six months from the first meeting to finalise.

Mrs PEULICH — Are you able to confirm that?

Mr SIMMONS — I could.

Mrs PEULICH — With our Executive Officer.

Mr SIMMONS — It was a very short period of time.

Mr YARROW — Can I just make a point about benefits. We were talking about the benefit of these model exploration agreements. We should not forget the benefit for the explorer: the benefit for the explorer is getting on the ground immediately when they sign the undertaking.

Mrs PEULICH — We're all mindful of that.

Mr YARROW — I do want to emphasise that the big factor in the right to negotiate, given that there has never been a licence refused, is because of its time, and often time factors are crucial to explorers for various

reasons. So the ability to sign on to what we could call a standard template agreement is you know immediately, as long as you comply with the conditions in that agreement, you can access the land.

Mrs PEULICH — Does that apply to private as well as public Crown land, or is it just Crown land?

Mr POWELL — No, private land comes under another clause.

Mr NOONAN — Some of the notes we have had prepared for us suggest that there are 20 of these agreements, two have been settled. What is the status of the 18 other Indigenous Land Use Agreements in terms of their status?

Mr SIMMONS — Sorry, I don't understand.

Mr NOONAN — It says:

As at 10 October this year, there were 527 registered Indigenous Land Use Agreements in Australia, 39 of which are based in Victoria. Twenty of the 39 agreements relate specifically to exploration and/or mining activities.

Then it goes on from there and talks about the two that have been negotiated. Are there others that are pending or outstanding in relation to settlements?

Mr SIMMONS — I think I understand your question to be: what outstanding Indigenous Land Use Agreements are in the process of being finalised for exploration mining?

Mr NOONAN — Yes.

Mr SIMMONS — Probably very few, and I need to sort of explain a bit about why. If you are an exploration company, you go to DPI and say, 'I have got an exploration licence which includes Crown land', you have essentially three ways to get that finalised. If you're in the Bendigo Dja Dja Wurrung area, you could sign up to that Minerals Council one. The other process is the normal Native Title Act right to negotiate process. Under that process, DPI is required to advertise your licence in the Courier Mail and newspapers. My understanding is that that costs approximately \$1000 or more just for advertising fees. The other option, which some companies, particularly the small hobby explorers, have done in the past is that in order to avoid paying that \$1000 advertising fee, they elect to negotiate an Indigenous Land Use Agreement because there is no requirement for advertising. They do that purely to save a bit of money, I believe. The disadvantage for them is that if they go down that track, they can't avail themselves to arbitration procedures under the Native Title Act. Very few companies do it these days. It used to be not just exploration companies, but a lot of small-scale hobby miners used to use it, they would save a thousand dollars in their pocket. They get the same outcome of the group, it just takes longer to negotiate a new ILUA because even after — same time to negotiate, but once you sign it, it takes approximately six months once it is submitted to the National Native Title Tribunal for it to become registered.

Mrs PEULICH — So that's a delay.

Mr SIMMONS — That is purely out of our hands, that is just what is a requirement. So most companies don't need to use that process and they don't decide to.

The DEPUTY CHAIR — One of the regular issues that different sectors of the greenfields exploratory market, I suppose, keep dishing up to us is the suggestion that there needs to be a much more concentrated effort to deal with greenfields explorations rather than this current diverse, difficult to manage, difficult to understand process, and we regularly have best practice pointed out to us as South Australia, for instance, and a one-stop-shop approach. What one-stop-shop constitutes seems to depend on who you are talking to.

You have also referred to the benefits perhaps of a more centralised approach, but based on an agreement-based approach. What is the LJG and the NTSV's view of how any such system might work and what would need to be part and parcel of such an approach?

Mr YARROW — Could I have a go at that? Obviously I'm going to say that we believe it should be an agreement-based approach, but one thing that is really apparent from Paul's description of the regulatory process to date is how passive the State is in ensuring regulatory compliance. I have to emphasise the State

Government takes no active role. In terms of the right to negotiate, it essentially delegates all the duties to the proponent, 'Have you done this, have you done that?' and you have to promise the State you have done the Stat Dec, then the State will give you your licence, 'Show us your agreement'. It is delegated.

So, too, in the cultural heritage management obligations, the State says, 'Here are the regulatory hurdles; you jump them, you will get your approval'. I think we would support a more proactive approach where if a region — and we would have to deal geographically, not in terms of tenure, just because traditional owner interests are geographical — but if the State were to identify a geographical space that was a greenfields site or an area of high prospectivity, the Victorian Government could take a page from those jurisdictions like Western Australia, South Australia, Queensland where those states actually encourage negotiations with traditional owners, not for a particular miner, not for a particular project, but on a regional basis. That then establishes a regional benchmark by which the State can actually give explorers, land users, a leg up and say, 'We have resolved on a regional basis the issues with the traditional owners, these are the standards and the only standards you need to comply with'. We are concerned that the State is passive because the burden shouldn't be on proponents or land users to answer some of these questions that are really best dealt with between the State and traditional owners.

The DEPUTY CHAIR — Even if the proponent is ultimately the beneficiary, in terms of taking a product to market and all that kind of end product from a development?

Mr YARROW — Absolutely.

The DEPUTY CHAIR — The preparation of that is a bigger role for the State to actively broker something.

Mr YARROW — Yes, very much.

The DEPUTY CHAIR — Frameworks, not site by site.

Mr YARROW — Absolutely, frameworks.

The DEPUTY CHAIR — You think that can work, in terms of a best practice model that you are aware of in other jurisdictions?

Mr YARROW — Very much so. This is human infrastructure. Just in the same way as physical infrastructure is the responsibility of the State — building a road, building a port — so too we would say good relations with traditional owners, establishing benchmarks and standards for dealing with traditional owner interests, is a form of public infrastructure that could be provided by the State.

The DEPUTY CHAIR — Have you made these representations to AAV, and would that need to be part of what you see as the public policy declaration of governments as to a general approach that you would seek at the start?

Mr YARROW — Absolutely. It would be very much welcomed by us if the State were able to say, 'We have a strategic approach to these issues'. I don't want to give you the impression that we don't have good relations with a lot of these agencies. We have given them these ideas before and the officials that we have dealt with have not just politely received them, they have been positively interested. But it is probably now time for some action to actually at least pilot some of these ideas. If there are ways that the State can deliver greater certainty to land users, to proponents, while at the same time balancing protection for cultural heritage and giving land justice to traditional owners, that would be a welcomed approach. An example is — you will see it in the MCA Victorian Division submission — that reference to schedule 6 of the Land Use Activity Agreement draft that has been discussed between us. That is the idea that you have a standard set of conditions that your proponent complies with and that is the end of their obligations; a clear certainty on a regional basis rather than project by project.

Mr POWELL — Just on that, one of the things I find very frustrating is that Aboriginal issues, Aboriginal values, Aboriginal heritage are viewed in an adversarial light by landowners, stakeholders, developers, miners. They see it as a hurdle, when really if you sit down with traditional owners and just talk about things and come to agreements, it removes all that bias, all those perceptions, and then it just becomes a standard practice, a best practice, that you can work to and just makes it easier, the whole process. Rather than look at it as something that you have to do because you don't like it, sit down and have a cuppa and talk about things.

Mr NOONAN — So that is why the Native Title Settlement Framework received such unanimous support from the state-wide traditional owner groups, because it's built on that principle.

Mr POWELL — Yes, it is. We've been doing it for thousands of years, been sitting down and talking, and it has been a series of compromises, where we have sat down and said, 'Okay, what's best for our group — not individuals — what's best, what is the good win-win outcome for everyone?' That is the principle we've been sort of dealing with for thousands of years, and that principle can still apply here.

Mr NOONAN — You put it in terms that: stick with that principle and it actually will be good for the mining industry, specifically if they want to invest in Victoria?

Mr POWELL — I would say yes.

The DEPUTY CHAIR — The evidence of a couple of agreements with the MCA Victorian Division, you would contend, supports that?

Mr SIMMONS — That's right. Schedule 6, which is part of the Land Use Activity regime, which is part of the Traditional Owner Settlement Act framework is built on the Minerals Council–Dja Dja Wurrung type arrangement — actually, it goes a little bit further because any group that enters into an agreement, at the negotiation stage have already negotiated their schedule 6 – type arrangement, so there are no negotiations with exploration proponents, unless they don't agree to those conditions.

So it should work equally as well as the Dja Dja Wurrung agreements. There are very few companies who haven't signed up to the Dja Dja Wurrung agreements who have got applications in their claim area.

Mr NOONAN — The issue of resources, I think you mentioned in your verbal submission. Does the issue of resources slow down your capacity to essentially ensure efficiency in the very process that we are having to review?

Mr SIMMONS — As I mentioned earlier, we have one and a half positions trying to assist groups across the State with progressing matters. Some groups already have native title, so they have the burden now of dealing with these matters themselves. I think it goes without saying that more resources is going to be able to assist more people to progress their matters.

Mr YARROW — I think it is true though, that on the native title side the vast majority of licences are dealt with by agreement. The resources issue is it's actually impairing a good news story, which is, 'If we could get the agreements out the door faster, that would just lead to that much faster access to getting on the ground'. So the product of lack of resources is not adversarialism, it's just getting a delay in getting that agreement.

The DEPUTY CHAIR — A pipeline process?

Mr YARROW — That's right.

The DEPUTY CHAIR — Can I thank you all very much for both your written submission and the extensive discussion we have had today, it has been very useful for us. As I think I indicated at the start, in about a fortnight's time you will receive a draft copy of the transcript from today. That's available for minor corrections and typos and that kind of thing, but not for major alterations. Subject to your feedback on that, that will in due course become publicly available evidence as part of our considerations. We hope in 2012 to address many of these issues in our final report to the Parliament.

Mr YARROW — If there are any further questions, we would be happy to provide a supplementary written response. I understand that we probably haven't responded to issues raised by other witnesses before your committee. We would be happy to help in any way we can.

The DEPUTY CHAIR — We might take you up on that offer. Thank you very much again.

Committee adjourned.