SPEECH NOTES

Acknowledgements

- The Chairperson, The Hon. Ian Viner AO, QC;
- The Hon. Justice Michael Barker, Federal Court of Australia;
- Ladies and Gentlemen.

Introduction: Improving the native title system

- I thank the Chair, the Hon Ian Viner QC, and the organising committee for the opportunity to address the 3rd Annual Native Title Law Conference.

- I also acknowledge my professional colleagues working in this important area of law and public policy.

- The world of native title, as you will all be very aware, is a complex mixture of the law, government policies and cultural, social and economic factors.

- I wish to commence today with a brief outline of where the Government considers native title is going in Western Australia, and then move to some particulars of government native title policy.

- I will conclude with some comment on strategic matters that will be highly influential in terms of what might be achieved from the native title process.

A speech delivered by the WA Attorney General, (Hon) Michael Mischin MLC, at the third annual Native Title Conference, Parmelia Hilton Perth, Friday the 14th of June 2013.
Part 1 - The Future

- First, to the future. Within ten years there may be between 60 and 80 Prescribed Bodies Corporate (or PBCs) holding native title rights to more than 80% of the Western Australian mainland and over certain areas of coastal water.

- All other issues aside, there will be identified PBCs for most of the State with a perpetual interest in land access and land use within individual determination areas.

- This represents, by any estimate, a radical shift since 1992 in Western Australian property interests, land management and, ideally, in Indigenous opportunities.

- Ideally, over the next decade relationships between native title holders and all tiers of government, the private sector and other land holders with an interest in the same land and waters will evolve progressively.

- The development of more effective relationships is a critical issue.

- It may be the difference between there being a plethora of PBCs with recognised native title rights but little else, or PBCs with a diverse set of partnerships that can go some way towards making native title recognition a meaningful platform for Indigenous economic and social development.

- I will return to this issue later in this presentation.
Part 2 - The Present

- Let me move onto the current native title environment. At present, there are 101 registered native title claims in Western Australia and there have been 37 native title determinations.

- The State is currently mediating in more than half the claims in Western Australia and over the last eight years there have been about 2.5 consent determinations per annum.

- In this term of government, it is anticipated that there will be between 20 and 30 native title determinations, even if we exclude the proposed South West Settlement which involves 11 claims.

- By the end of August there will have been nine determinations this year.

- As usual, multiple variables come into play in native title mediation and the capacity to maintain a high rate of claim outcomes remains to be seen.

- In the last two years, the State has made a number of formal and informal statements on native title policy, including correspondence between the Western Australian Attorney General and Justice Barker at the Federal Court.

- The fundamental elements of the Government's approach to the management of native title claims are well established.

- In brief, the State:
supports the Court’s commitment to the timely resolution of native title claims, preferably by agreement;

supports active case management by the Court provided that the confidential and without prejudice nature of mediation is preserved;

does not support open-ended mediation and urges the Court to give greater attention to striking out unmeritorious claims;

accepts that not all claims are amenable to a mediated outcome and will litigate wherever appropriate;

expects applicant parties in mediation should be in a position to present a relatively detailed outline of their case to respondents; and

has invested heavily in expediting land tenure analysis as part of the claims process but will not proceed otherwise than with certainty about the effect of current and historical land and mining tenure on a native title determination.

On the latter point, the State carries a significant burden in the analysis of current and historical tenure in both mediated and litigated matters. The task is important for:

meeting the requirements for a determination of native title under s 225 of the Native Title Act 1993 (Cth) ("NTA") and, in particular the extent to which native title does or does not exist within an area;
− in the consent determination context, in satisfying the Court that a proposed consent determination is both within power and appropriate;

− given the *in rem* nature of a determination, settling the position accurately for the benefit of both native title holders, Government and third parties into the future;

− identifying those areas where native title claimants assert the benefit of ss.47, 47A and 47B for the purposes of meeting the requirements of those sections, as well as the relevant acts whose removal will cause native title to again have effect;

− ascertaining the extent of any entitlement to compensation for native title holders and liability of the State for compensation for any loss, diminution, impairment or other effect or relevant acts on native title rights and interests.

- Those ends are not met by the provision of current tenure alone.

- For the State to meet its due diligence requirements it must ascertain where native title has been extinguished or otherwise affected in circumstances in which give rise to a compensation liability on behalf of the State, or not.

- Typically that involves inquiry as to whether the relevant extinguishment or other effect occurred before or after the commencement of the *Racial Discrimination Act 1975* (Cth) on 31 October 1975.
• It is therefore necessary to identify the earliest extinguishing act (or at least the most recent wholly extinguishing act prior to 31 October 1975). This task will assist in the resolution of the next wave of native title litigation: compensation claims.

• The State is exploring every option for streamlining tenure analysis but it would be wrong to assume that the State’s commitment to tenure analysis is a negotiable feature of claim mediation.

• Western Australia, more than any other jurisdiction, has taken a progressive approach to the resolution of native title claims.

• In the main, successive State Governments have had a sound grasp of the balance between the symbolic and social implications of native title and the State’s overarching legal responsibilities.

• In that context it is critical that any native title claim resolution strategy in which the State participates does not understate or compromise the State Government’s obligation to act in the interests of all for whom it is responsible.

• That responsibility involves not only an obligation to be satisfied as to the cogency of the evidence on which applicants rely but, as with all claims against the State, to protect the interests of the State and the community generally.
Native Title Evidence

- With reference to native title evidence, the State's fundamental approach has not altered over many years and I don’t think it is necessary to restate our connection policy here today. The State does wish to note that:

  (i) under the Federal Court's new case management approach the State has not seen a commensurate increase in connection reports being submitted to the State;

  (ii) the State does not have a backlog of connection reports awaiting assessment, which implies that there could be a hiatus in consent determinations if the rate of research is not increased and connection deadlines adhered to;

  (iii) while the State has supported the use of Statements of Issues, Facts and Contentions in the case management process, these do not serve as a substitute for primary evidence and the provision of connection material to the State. That is, a Statement of Issues, Facts and Contentions process is not of itself going to narrow the issues without satisfactory cogent evidence being submitted to the respondents, and the respondents being given adequate time to review it; and

  (iv) the negotiation of a consent determination is not a bilateral process, it will usually involve other respondent parties with interests in the claim area. The interests of those other
parties, whether they are represented or not, must be accommodated in the claim resolution process in a transparent and open way in order for there to be confidence in the process.

- In general, the State welcomes the adoption of appropriate measures to streamline the process of evidence gathering.

- However, it should be appreciated that we are now facing what might be described as the more 'problematic' claims especially in and around more settled areas.

- Those claims presents difficulty for both connection (especially where claims for exclusive possession are pressed) and the analysis of land and mining tenure.

- The State has a legitimate interest in testing those claims, including by litigation if necessary. Like all native title claims they represent a potential compensation liability to the State and to other parties, and demand the fullest scrutiny.

**Whole-of-Government Policy**

- The other significant stream of native title policy for the State is how the Government manages its own business under the NTA.

- In 2011, the State adopted a whole-of-government approach to native title to ensure all State Government agencies now apply the same standards and methods in native title and Aboriginal heritage negotiations.
• As part of that process the Government also established a number of intra-government forums to assist native title and Aboriginal heritage policy development.

• All State agencies now refer to the same general advice on, for example:

  (i) applying due diligence under the *Aboriginal Heritage Act 1972*;

  (ii) applying standard terms for Aboriginal heritage surveys;

  (iii) identifying the legal rights and obligations of public officers on land where native title rights have been recognised;

  (iv) managing different government future acts;

  (v) identifying native title compensation liabilities and administering future act benefits; and

  (vi) observing the highest standards of public sector accountability in native title negotiations.

• The whole-of-government approach also extends to native title claim negotiations.

• As a native title claim moves towards resolution, all relevant State Government agencies are consulted about:

  (i) their interests in the claim area; and

  (ii) how they might value-add to any claim resolution agreement.
This process has revealed a great deal of goodwill within government about how to enrich the claims process, with substantial bearing on the scope for post-determination partnerships between PBCs and Government agencies.

Part 3 – Key Strategic Issues

In looking forward, I wish to focus on two particular matters that, on current knowledge, will significantly influence what emerges from native title determinations in the next decade and thereafter.

The Future Direction of Commonwealth Native Title Policy

The first strategic issue is to consider the Commonwealth Government’s involvement in native title policy and resourcing the native title process.

The regrettable fact is that in the last ten years, there has been limited policy engagement on native title between the Commonwealth Government and the State and Territory Governments.

During that period, the Commonwealth has shown only cursory interest in the practical impact of the native title process on both State and Territory Governments and on native title holders.

The Commonwealth has favoured technical amendments to the native title process from the position of a party that does not have
to own the consequences or commit additional resources to the native title process.

- In WA, the Commonwealth has studiously avoided any involvement in agreements involving the State Government and native title holders, including the current negotiations towards a South West Settlement.

- The Commonwealth’s most recent forays into native title policy – the removal of respondent funding during claim mediation, and most of the proposed amendments to the NTA – have in common the effect of prolonging costly legal disputes or creating new grounds for litigation.

- Consultations between Commonwealth representatives and other governments on the amendments have been at best, superficial.

- On 14 May this year I wrote to the Commonwealth Attorney-General, Mark Dreyfus QC MP, and to all State and Territory Attorneys General and requested that we commence a new national native title policy dialogue.

- As there has not been a national meeting of Native Title Ministers since 2010, I also proposed that the Commonwealth convene a meeting this year to discuss, among other things, the future funding of Native Title Representative Bodies (NTRBs) and PBCs, native title compensation, native title benefit trusts, and funding support for non-government respondent parties.
I invited all governments to contribute to a national agenda. So far the Commonwealth has not replied to my letter.

The State’s view is that the Commonwealth Government must engage much more effectively with the States and Territories if we are to see sustainable outcomes from the native title process over time.

In my 14 May correspondence to Mark Dreyfus, I stated: “At a minimum, the Commonwealth should engage with the States and Territories on how to expedite the resolution of claims in each jurisdiction, including more effective use of existing Commonwealth funding programs. Ideally, the Commonwealth establishes a rolling fund to add value to significant native title agreements. The Commonwealth’s lack of material input to native title agreements limits the scope of agreements and is a disincentive for the States/Territories to adopt more progressive native title policies.”

The absence of the Commonwealth Government’s support in this regard should, I believe, be a concern for those in the native title arena who are seeking to deliver real outcomes for native title holders.

The Future Management of Native Title Rights

The second strategic issue that will have significant consequences is the management of native title rights post-determinations.

At the beginning of my address, I referred to a future in which most of the State is subject to native title rights and registered PBCs.
I noted that “The development of more effective relationships is a critical issue”. The State’s analysis is that the future rests in building capacity within PBCs.

The assumption is that, with a possible exception of a minority of PBCs that are financially self-sufficient, PBCs will need to form productive partnerships with government and with the private and non-government sectors.

Critically, this requires a more expansive view of doing business than simply the future act procedures defined by the NTA.

A fundamental question for PBCs will be whether they will rely predominantly on the future act system for revenue raising or whether they are interested in building a wider framework for future land use and potential economic and social returns.

Under the NTA, the future act system is the singular bridge between native title rights and economic benefits for traditional owners.

It has been effective in those claims where there are substantial resource development projects but in the majority of claims the resource industry will not be the panacea.

It is for this reason that some PBCs are now approaching the WA Government to ask “Is this all that there is from native title recognition?” and “How do we build from this?”

In any forward projection, the State’s view is that the productive management of land subject to native title rights requires more than a fee-driven, adversarial approach to future acts.
• In that context, forward thinking for PBCs includes building partnerships and not simply exploiting short-term opportunities.

• The State has commenced discussions of this nature with a number of established PBCs, centred on the use of the Government Indigenous Land Use Agreement as the vehicle for amendments to the future act system and to deliver particular benefits to native title holders.

• The State believes that we have so far only touched the surface of what might be achieved with better land use planning, claim-wide and regionally, with the involvement of PBCs.

• The State’s confidence in this has been lifted by the success to date of the 2012 State Activities Funding Agreement with the Kimberley Land Council, which streamlines government future acts across the entire region, and by the practical nature of land use negotiations in the South West with the South West Aboriginal Land and Sea Council.

• The State is also encouraged by the emergence of PBCs that are becoming more articulate in planning their own futures.

• The State does not agree that NTRBs should automatically become the agents for PBCs as that assumption could limit self-determination within traditional owner groups and potentially limit the growth of a more flexible approach to future land use.

**Conclusion**
• In closing I wish to thank you for the opportunity to add to the discussion today.

• As I indicated at the outset, the State Government’s position on native title is not simply driven by the state of native title law but involves a more complex set of considerations.

• I trust this provides an effective background for your discussions throughout the rest of the conference.