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by

Talina Drabsch

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ISSN 1325-4456

ISBN 0 7313 1764 5

July 2004

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Indigenous Australians and Land in New South Wales

by

Talina Drabsch

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EXECUTIVE SUMMARY

The right of Indigenous peoples to access land they traditionally occupied and, in some cases, continue to occupy, has for many years sparked a debate that has produced a passionate response across the political spectrum. It is now some time since the initial phase of land rights legislation and native title law emerged in Australia. It is over twenty years since the *Aboriginal Land Rights Act 1983* (NSW) was enacted. More than twelve years have passed since the landmark decision of *Mabo*, in which the High Court overturned the belief that Australia was terra nullius at the time of colonisation and recognised the existence of native title in Australia. The *Native Title Act 1993* (Cth) has applied for more than a decade and it is six years since the controversial amendments were made to the *Native Title Act*. Various decisions in the courts in recent years have sought to clarify native title law. This paper accordingly provides an overview of the current status of the relationship between Indigenous Australians and land in New South Wales, as expressed in legislation and in recent decisions of the High Court.

Section 2 (pp 2-10) outlines some of the avenues by which Indigenous Australians are able to access land in ways other Australians cannot. The main avenues include native title, land rights, and a land acquisition scheme. However, this section also explores the arguments based on possessory title and fiduciary duty that have been advanced in the courts on behalf of Indigenous parties.

The *Native Title Act 1993* (Cth) is the primary statute regarding native title law in Australia. Section 3 (pp 11-38) examines some recent decisions of the High Court that have clarified various provisions of the Act. This section notes how the Court has defined native title rights and interests, including those that exist over water. It also looks at the circumstances in which native title is deemed extinguished. The 1998 amendments altered the future acts provisions of the *Native Title Act*. One such change was the introduction of Indigenous Land Use Agreements. The growth in the negotiation of Indigenous Land Use Agreements is explored, with particular attention given to the Arakwal Agreement (concerning land near Byron Bay in New South Wales) as an example of the form the negotiation process may take. This section notes the determinations of native title that have been made in relation to land in New South Wales. It also highlights some aspects of the Act viewed by various commentators as problematic.

The *Native Title (New South Wales) Act 1994* (NSW) represented the first legislative response of the NSW Parliament to the decision of *Mabo* and the introduction of the *Native Title Act 1993* (Cth). A brief overview of the *Native Title (New South Wales) Act* is included in section 4 (p 39).

Section 5 (pp 40-48) examines the *Aboriginal Land Rights Act 1983* (NSW) in its current form. It summarises the land claims process and some of the difficulties that may be encountered by claimants. Details of the structure of Local Aboriginal Land Councils, Regional Aboriginal Land Councils and the NSW Aboriginal Land Council are included. The impact of numerous corruption and mismanagement allegations that have been levelled at the land councils and the subsequent investigations by the Independent Commission Against Corruption is noted. This section also attempts to measure some of the achievements of the Act.

Indigenous Australians in New South Wales can also access land under the *National Parks and Wildlife Act 1974* (NSW). An overview of the relevant provisions is included in section 6 (pp 49-51). An Aboriginal Cultural Heritage Advisory Committee is established by the Act. The Act enables certain Aboriginal areas to be reserved, as well as acknowledging the cultural significance of particular parcels of land in New South Wales to Indigenous persons.

1 INTRODUCTION

The relationship between Indigenous Australians and land is complex and differs markedly from the Western understanding of property. The right of Indigenous peoples to access land they traditionally occupied, and in some cases continue to occupy, has for many years sparked a debate that has produced a passionate response across the political spectrum.

This paper examines the relationship between Indigenous Australians and land in New South Wales. It explores the various legal avenues by which rights to land may be recognised or acquired. These avenues include native title, land rights, land acquisition schemes and arguments based on the establishment of possessory title or a fiduciary duty owed by the Crown to Indigenous peoples. It notes the strengths and weaknesses of these options, with particular attention paid to the native title and land rights processes. Details of land in New South Wales to which Indigenous Australians have rights are also included.

It has been argued by some that the provision of land to Indigenous communities will provide long-term economic benefits. According to Larissa Behrendt:

Urbanised and dispossessed Indigenous communities stress that they need land as an economic base. The acquisition of land by an Indigenous community is seen as a step towards being independent and therefore not having to be answerable to the government. Housing in urban communities is also seen as a land rights issue. Communities believe that land acquisition will allow for long-term planning and development that will eventually raise the status of Indigenous people.¹

However, whether the grant of land, or enabling access to traditional land, will in fact achieve this aim has been questioned by some. Rosemary Neill has highlighted how:

Some of the worst social and economic problems – petrol sniffing among primary school children, high school graduates who are so illiterate they cannot write their dates of birth, medical staff being attacked while treating patients – are occurring on remote communities located on Aboriginal owned lands. There is no evidence that land rights have caused such problems; but nor have they been the panacea that many hoped they would be and still blindly insist they are.²

This paper attempts to provide an overview of the current legal environment. By doing so, it is hoped that the extent to which various avenues have been successful in providing land to Indigenous Australians will become clear, as will the barriers that remain.

¹ Behrendt L, *Achieving Social Justice: Indigenous Rights and Australia's Future*, Federation Press, Sydney, 2003, p 35.

² Neill R, *White Out: How Politics is Killing Black Australia*, Allen & Unwin, Crows Nest, 2002, p 24.

2 ACCESSING LAND

There are various means by which Indigenous Australians can gain land other than by the general property acquisition avenues available to most persons. The most well known of these paths are arguably the native title and land rights schemes that exist under various legislation at the state and federal level. However, there is also a national land acquisition scheme that was set up in response to *Mabo*.³ Arguments based on the concepts of possessory title and fiduciary duties have been advanced in court on behalf of some Indigenous groups when attempting to gain access to traditional lands, and may secure additional rights in the future.⁴ This section outlines each of these avenues, with greater detail provided on native title and land rights in sections three to five of this paper.

2.1 Native title

Native title is ‘a *right or interest* over land or waters that may be owned, according to traditional laws and customs, by Aboriginal peoples and Torres Strait Islanders’.⁵ The origin and content of native title is found in the traditional laws and customs that are acknowledged and observed by Indigenous peoples.⁶ It is therefore not a creation of the common law, but is recognised by it.⁷ Noel Pearson has described native title as the space between the common law and Aboriginal law, as it ‘is neither a common law nor an Aboriginal law title but represents the recognition by the common law of title under Aboriginal law’.⁸ The relevant legislation for New South Wales is the *Native Title Act 1993* (Cth) and the *Native Title (New South Wales) Act 1994* (NSW).

The following list includes some examples of the types of interests that may constitute native title:⁹

- The right to possess, occupy, use and enjoy an area.
- The right to be acknowledged as the traditional owners of an area.
- The right to speak for and make decisions about the use and enjoyment of an area.
- The right to reside upon and have access to an area.
- The right to use and enjoy the resources of an area.

³ *Mabo v Queensland (No 2)* (1992) 175 CLR 1

⁴ McRae H, Nettheim G, Beacroft L & McNamara L, *Indigenous Legal Issues: Commentary and Materials*, 3rd ed, Lawbook Co, Sydney, 2003, p 182.

⁵ Nygh P and Butt P (eds), *Butterworths Concise Australian Legal Dictionary*, 2nd ed, Butterworths, Sydney, 1998, p 2999.

⁶ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58 (per Brennan J).

⁷ *Fejo v Northern Territory* (1998) 195 CLR 96 at 128.

⁸ Pearson N, ‘The concept of native title at common law’, in Yunupingu G (ed), *Our Land is Our Life: Land Rights – Past, Present and Future*, University of Queensland Press, St Lucia, 1997, p 159.

⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, HREOC, Sydney, 2003, p 121.

- The right to maintain and protect areas of importance under traditional laws and customs.
- The right to determine and regulate the membership of the group entitled to the land.

An overview of some of the recent developments in native title law can be found in sections three and four of this paper. Briefing Paper No 15/98, *The Native Title Debate: Background and Current Issues* by Gareth Griffith provides detailed information on the history of native title law in Australia, including the *Mabo* and *Wik*¹⁰ decisions. It also includes an overview of the *Native Title Act 1993* (Cth) as originally enacted and an outline of the changes that were implemented by the *Native Title Amendment Act 1998* (Cth).

2.2 Land rights

In contrast to native title, land rights schemes centre upon the grant of statutory title to land. In New South Wales, the *Aboriginal Land Rights Act 1983* (NSW) enables an Aboriginal Land Council to claim land on behalf of its members. Unlike native title, the claimants are not required to have a traditional connection to the land. According to the NSW Aboriginal Land Council, land rights are concerned with ‘*compensating* Aboriginal people in NSW for past dispossession, dislocation and removal of land’ whereas native title is ‘about Australian law *recognising* Indigenous peoples’ connection with and rights to land and water, in accordance with traditional law and custom’.¹¹ An overview of the land rights scheme in NSW can be found in section five of this paper.

2.3 Land acquisition

A third means by which Indigenous Australians can gain access to land is through acquisition schemes such as that managed by the Indigenous Land Corporation (ILC). The ILC was established in 1995 by the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* (Cth) which added Part 4A (Indigenous Land Corporation and Aboriginal and Torres Strait Islander Land Fund) to the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (ATSIC Act). It formed part of the legislative response to *Mabo* and is designed to benefit Indigenous Australians whose native title has been extinguished or cannot be demonstrated because of a failure to maintain continuous attachment to land as a result of dispossession.¹²

The purpose of the ILC is to assist Indigenous Australians with acquiring and managing land.¹³ The ILC has accordingly developed four programs for this purpose:¹⁴

¹⁰ *Wik Peoples v Queensland* (1996) 187 CLR 1

¹¹ NSW Aboriginal Land Council, ‘Fact Sheets’, www.alc.org.au Accessed 13 May 2004.

¹² Indigenous Land Corporation, *2001-2006 National Indigenous Land Strategy*, p 9. Available from www.ilc.gov.au Accessed 12/5/04.

¹³ Section 191B.

¹⁴ Indigenous Land Corporation, ‘What is the Indigenous Land Corporation?’. www.ilc.gov.au Accessed 11 May 2004.

1. The *cultural acquisition program* in which culturally significant land is acquired.
2. The *social acquisition program* where land is obtained for its social benefit.
3. The *environmental program* – together with State, Commonwealth and other environmental authorities and agencies, land is acquired for its environmental benefit.
4. Land obtained through the *economic acquisition program* is to be economically beneficial through the establishment of sustainable land-based businesses.

Section 191N requires the ILC Board to prepare a national indigenous land strategy. The *2001-2006 National Indigenous Land Strategy* identifies the acquisition of culturally significant land as its priority. Culturally significant land is that to which Indigenous groups have: ‘traditional links based on the customs and laws of the group; historical links which result from the impact of Indigenous or non-Indigenous settlement of the country; or contemporary links based on more recent recognition of Indigenous rights and Indigenous identity’.¹⁵ The ILC prioritises the acquisition of land that is not subject to a native title claim, or is unlikely to be successful if a claim is made. However, the ILC will acquire other land when no alternative means is available at the federal or state/territory level.¹⁶

The Aboriginal and Torres Strait Islander Commission Amendment Bill 2004 (Cth) was introduced to the Commonwealth Parliament on 27 May 2004. The main purpose of the Bill is to abolish the Aboriginal and Torres Strait Islander Commission (ATSIC). As the Indigenous Land Corporation is established under the ATSIC Act, the abolition of ATSIC will have some impact on the ILC. One of the changes to be made, if the Bill is passed, is the transferral of the Regional Land Fund to the ILC. It would also insert section 191EA into what is to be known as the Aboriginal and Torres Strait Islander Act 2004 (previously the ATSIC Act) to enable the ILC to make payments to Indigenous Business Australia. The purpose of this is to ‘allow Indigenous Business Australia to promote economic development on land the Indigenous Land Corporation granted to indigenous people’.¹⁷

Over 185,311 hectares of land have been acquired by the ILC in NSW. The following table provides details, as recorded by the ILC, of the 42 properties obtained in NSW:

¹⁵ Indigenous Land Corporation, *2001-2006 National Indigenous Land Strategy*, p 7.

¹⁶ Ibid, p 15.

¹⁷ Aboriginal and Torres Strait Islander Commission Amendment Bill 2004, *Explanatory Memorandum*, p 6.

Property	Area (ha)	Date granted	Title Holding Body
35 Cope Street*	0.0		
Balo Street Moree, 211*	0.1		Aboriginal Employment Strategy Limited
Beechwood Rd	19.8	15/12/1999	Aliera Heritage, Arts and Culture Aboriginal Corporation
Bellfields	297.3	26/6/1998	In-Ja-Ghoondji Lands Inc
Bollanolla Farm*	128.0		
Boorabee	1,662.2	29/10/1999	Boorabee Aboriginal Corporation
Bulgandramine Mission	158.8	27/1/2000	Bogan River Peak Hill Wiradjuri Aboriginal Corporation
Cangai Creek Station*	3,819.6		
Canoon & Rosemont	1,026.8	29/10/1999	Boorabee Aboriginal Corporation
Coburn	519.6	25/5/1999	Walhallow Murri Enterprise AC
Compton Downs	26,821.3	30/6/2000	Yatama Ngurra Land Enterprises Ltd
Cowga	9,376.5	9/11/1998	BALLOT Land Enterprises Ltd
Culpra Station*	15,884.0		
Cyprus Hellene	0.1	9/12/1998	Metropolitan Aboriginal Association Inc
Dorodong	80.5	27/8/1999	Dorodong Association Inc
Egerton	248.9	19/3/2001	Egerton-Kwiembal Aboriginal Corporation
Elimdale	508.8	20/10/2000	Larnangurag Aboriginal Association Inc
Eurool*	4,518.3		
Glenhope	4,579.6	15/12/2000	Nari Nari Tribal Council Inc
Highland Park*	75.5		
Hillford	689.0	25/5/1999	Yawarra Hillford AC
Illaroo	461.8	27/9/2001	Mia Mia Properties Inc
Jarwonga (Billa Downs)	5,954.2	12/11/2001	Billa Downs Aboriginal Corporation
Jinchilla Gardens*	12.1		
Kywong*	19.5		
Menera*	4,507.6		
Mogila	26,760.8	26/6/1998	Ngurampaa Ltd
Mooki & Bassendean	3,590.9	6/7/2000	Mooki & Bassendean Association Incorporated
Old Pooncarie Mission*	273.0		
Peachtree Centre*	0.1		
Poolamacca Stn	50,678.9	1/2/2002	Wilyakali Aboriginal Corporation
Seabush	2,139.7	16/4/1999	Minyumai Land Holding Co Ltd
St Clair Mission	33.6	28/6/1999	Wonnarua Nation Aboriginal Corporation
The North	85.2	27/8/1999	Dorodong Association Inc
Tomerong	2.3	10/7/1998	Doonyahagahl Aboriginal Elders Council
Tom's Gully / Toorooka	102.9	3/5/1999	Wunduayn Gunggu Barrunggin (Big River Dreaming) Inc
Toogimbie and Lorenzo	1,016.1	15/12/2000	Nari Nari Tribal Council Inc
Valley Arm	73.7	28/6/1999	Wonnarua Nation Aboriginal Corporation
Wattleridge	630.7	24/2/1999	Banbai Land Enterprises Ltd
Weilmoringle & Orana*	16,851.0		It will eventually be the Weilmoringle Land Holding Company
Winterton's	725.5	22/10/1999	Jubal Aboriginal Corporation
Wondaby	976.8	3/9/1999	Gallangabang Aboriginal Corporation
42 properties	185,311.1		

* The property has been acquired by the ILC but has yet to be granted to the applicant group. The ILC usually grants title to an Aboriginal or Torres Strait Islander Corporation or a corporate body controlled by Indigenous interests within three years of buying the property.

Source: Indigenous Land Corporation, 'Indigenous Land Corporation Property Acquisition', www.ilc.gov.au Accessed 11/5/04.

2.4 Possessory title

McRae et al suggest that Indigenous Australians may be able to secure an additional avenue by which rights can be obtained by building an argument based on possessory title.¹⁸ Possessory title is 'a title to land obtained by adverse, undisturbed possession for the required statutory period... The legislation allows a person in adverse possession to make application to the Registrar-General for the issue of title which extinguishes the interests of the previous registered proprietor'.¹⁹ If the owner of the land does not seek to recover their land within the relevant period, then they forfeit the right to evict the person in adverse possession.²⁰

An argument based on possessory title was raised in *Mabo*.²¹ The plaintiffs argued, as an alternative to their claim of native title, that they held possessory title as a result of long possession. This claim was considered by Toohey J.²² He noted that for the plaintiffs to successfully establish possessory title, they had to demonstrate that the title arose immediately after annexation and continued until the present time, with the Crown never having title to land. Toohey J did not reach a definite conclusion on the matter, as the plaintiffs were successful in establishing that they held native title. Nevertheless, he acknowledged that 'the Meriam people may have acquired a possessory title on annexation'.²³ He identified that for possessory title to be established, three issues would need to be considered:

1. The validity of the proposition that possession gives rise to a presumption of a fee simple title against all but a better claimant.
2. The validity of the claim that the Crown was not, at the time of annexation, a better claimant to possession.
3. The question of what, as a matter of law, amounts to possession of land.

¹⁸ McRae et al, n 4, p 191.

¹⁹ Nygh P & Butt P (eds) *Butterworths Australian Legal Dictionary*, Butterworths, Sydney, 1997, p 893.

²⁰ 'Adverse possession', *The Laws of Australia*, vol 28, p 19.

²¹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1

²² At 206-214

²³ At 214

Toohy J, when explaining the consequences of losing possession of land, highlighted that ‘if no other factors come into play, then, regardless of the length of time, as between mere possessors prior possession is a better right. Possession is protected against subsequent possession by a prima facie right of entry’.²⁴ Whilst a plaintiff may have lost the rights associated with possession, ‘nothing has upset the presumption that the plaintiff’s possession, and therefore his or her fee simple was lawfully acquired and hence good against all the world’.²⁵

The possibility of possessory title was again raised in *Wik*.²⁶ In this case, the Wik Peoples argued that they held title to land that was the subject of a number of pastoral leases in Far North Queensland. The Wik Peoples argued that they had ‘been in long uninterrupted possession of such land and, in particular, had continuously used, occupied, inhabited and possessed such land; maintained a traditional connection with such land; and enjoyed their Aboriginal title to such land’.²⁷ The High Court held that native title was not necessarily extinguished by the grant of pastoral leases. However, in the event of any inconsistency between the native title rights and the rights of the pastoralists, then the rights of the pastoralists are to prevail.

Nonetheless, Brennan CJ considered the argument based on possessory title. He concluded that the Wik peoples had not acquired a possessory title as it ‘arises from possession that is adverse to the title of the true owner. Until the Crown lessees acquired their respective titles, the holders of native title held the land by virtue of that title. After the Crown lessees acquired their titles, the continued occupation by the erstwhile holders of native title is explicable by lessors’ consent rather than by possession adverse to the lessors’ possession’.²⁸

In NSW, it is virtually impossible to obtain possessory title against the Crown.²⁹ Section 170 of the *Crown Lands Act 1989* (NSW) provides that title to Crown land cannot be asserted or established against the Crown on the basis of adverse possession.

2.5 Fiduciary duty

Another possible avenue for securing additional rights is establishing a fiduciary duty owed by the Crown to Indigenous Australians. McRae et al note that should such a relationship be found to exist, ‘it may greatly increase the scope for Indigenous groups whose title was extinguished in the past to seek redress, and for current native title holders to control the use of their land and its resources’.³⁰

²⁴ At 210

²⁵ At 210

²⁶ *Wik Peoples v Queensland* (1996) 187 CLR 1

²⁷ At 4

²⁸ At 88

²⁹ ‘Adverse possession’, *The Laws of Australia*, vol 28, p 23.

³⁰ McRae et al, n 4, p 191.

A ‘fiduciary’ is ‘a person who is under an obligation to act in another’s interest to the exclusion of the fiduciary’s own interest. A fiduciary cannot use his or her position, knowledge or opportunity to the fiduciary’s own advantage, or have a personal interest in, or inconsistent engagement with, a third party, unless fully informed and free consent is given’.³¹ Mason J in *Hospital Products Ltd v United States Surgical Corporation*³² identified the critical features of a fiduciary relationship. These features are:

that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.³³

The possibility of a fiduciary duty being owed to Indigenous Australians was raised in *Mabo*. The plaintiffs sought a declaration that the Government owed a fiduciary duty to the Meriam people to recognise and protect their rights and interests in the Murray Islands. It was argued that this duty arose from:

- the annexation of the Murray Islands;
- the relative positions of power of the Meriam people and the Crown regarding their interests in the Islands; and
- the course of dealings between the Crown and the Meriam people and the islands since annexation.

Both Toohey and Dawson JJ considered the issue, and Brennan J also briefly discussed the matter. Whilst Brennan J accepted the possibility of the Crown having a fiduciary duty if native title had been surrendered in expectation of a grant of tenure, he deemed it unnecessary to consider the existence of a duty in this case.³⁴

However, Toohey J considered the matter in more detail. He found that the Crown owed a fiduciary duty to the Meriam people. This was the consequence of its power to destroy the traditional title of the Meriam people by disposing of land that was an integral part of their traditional rights and interests. Another important factor was the limitations on the title of the Meriam people in that it was inalienable except to the Crown. Toohey J noted that, ‘The fiduciary relationship arises, therefore, out of the *power* of the Crown to extinguish traditional title by alienating the land or otherwise; it does not depend on an exercise of that power’.³⁵ It was further noted that this fiduciary obligation was in the nature of a

³¹ Nygh and Butt, n 19, p 471.

³² (1984) 156 CLR 41

³³ At 96

³⁴ At 60

³⁵ At 203

constructive trustee.³⁶ The Crown was not to allow the title of the Meriam people to be destroyed or impaired without their consent. In any event, Toohey J found that the fiduciary duty had not been breached, as native title had not been extinguished.³⁷

In contrast, Dawson J found that the Crown did not owe a fiduciary duty to the Meriam people. This resulted from his conclusion that native title did not survive the annexation of the Murray Islands.³⁸ He noted that:

The Crown retains absolute control over the disposition of that land and the legislation does not prevent, but expressly enables, the Crown to revoke the reserve, whereupon it once again becomes Crown land within the meaning of s 5 of the *Land Act 1962* and so is available for disposal by the Crown as absolute owner just as it was before it was reserved. In dealing with reserved land in this way there is no legislative requirement imposed on the Crown to consider the interests of the inhabitants of the reserve at all.³⁹

An argument based on the existence of a fiduciary duty was pleaded by the native title claimants in *Wik*. It was argued that the Crown owed a fiduciary duty to the Indigenous peoples because of:

1. The vulnerability of native title.
2. The Crown's power to extinguish native title.
3. The relative position of the Indigenous peoples compared to the Queensland Government.

However, according to Brennan CJ, these factors were not sufficient to attract a fiduciary duty. He noted that it was also:

necessary to identify some action or function the doing or performance of which attracts the supposed fiduciary duty to be observed. The doing of the action or the performance of the function must be capable of affecting the interests of the beneficiary and the fiduciary must have so acted that it is reasonable for the beneficiary to believe and expect that the fiduciary will act in the interests of the beneficiary... to the exclusion of the interest of any other person or the separate interest of the beneficiary.⁴⁰

Therefore, he concluded that a fiduciary duty did not exist. It was not sufficient that the power of the Crown to alienate land could extinguish the native title in the land without the consent and contrary to the interests of the native title holder, as the power of alienation

³⁶ At 204

³⁷ At 205

³⁸ At 164

³⁹ At 168

⁴⁰ At 95

was ‘inherently inconsistent with the notion that it should be exercised as agent for or on behalf of the indigenous inhabitants of the land to be alienated’.⁴¹

⁴¹

At 97

3 NATIVE TITLE ACT 1993 (CTH)

The legislative response to the landmark decision of *Mabo* was embodied in the *Native Title Act 1993* (Cth) (NTA). The Act is now the primary source of law regarding native title in place of the common law. It commenced on 1 January 1994 and was significantly amended in 1998, with the amendments coming into force on 30 September 1998. The amendments have had a substantial impact on the native title process.

This section does not provide a comprehensive overview of the NTA. For further information on the NTA, as well as its historical context see Briefing Paper No 15/98 *The Native Title Debate: Background and Current Issues* by Gareth Griffith. This section is primarily concerned with the impact of a number of major High Court decisions in relation to native title since 1998. Particular attention is given to a trilogy of decisions in 2002 that considered the meaning of native title and the circumstances in which native title rights and interests are extinguished. The decisions of *Ward*⁴², *Wilson v Anderson*⁴³ and *Yorta Yorta*⁴⁴ emphasised the predominance of the *Native Title Act* over the common law, with previous cases deemed relevant in terms of the extent to which they shed light on various aspects of the Act. These decisions narrowed the rights recognised as native title, increased the difficulty of establishing native title, and broadened the circumstances in which it can be extinguished. Tehan believes that these three decisions have ‘turned native title into little more than a barren statutory right’ with native title now nothing more than ‘remnant land and remnant rights’.⁴⁵ This section also evaluates the impact of some of the changes made by the *Native Title Amendment Act 1998* (Cth) and notes some of the perceived weaknesses of the native title regime.

3.1 Preamble and objects

The preamble and objects of the *Native Title Act 1993* clarify the purpose of the Act. The Preamble recognises that Indigenous Australians have been progressively dispossessed of their land, often without compensation. It acknowledges that Indigenous Australians are the most disadvantaged group in Australian society. Finally, the Preamble notes that the High Court has:

- (a) rejected the doctrine that Australia was *terra nullius* (land belonging to no-one) at the time of European settlement; and
- (b) held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands; and

⁴² *Western Australia v Ward* (2002) 191 ALR 1 (Miriuwung Gajerrong)

⁴³ *Wilson v Anderson* (2002) 190 ALR 313

⁴⁴ *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 194 ALR 538

⁴⁵ Tehan M, ‘A hope disillusioned, an opportunity lost? Reflections on common law native title and ten years of the Native Title Act’, 27(2) *Melbourne University Law Review* 523 at 557 and 564.

- (c) held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.

The objects of the Act are:⁴⁶

- (a) to provide for the recognition and protection of native title; and
- (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
- (c) to establish a mechanism for determining claims to native title; and
- (d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.

3.2 Registration of native title claims

The provisions concerned with the Register of Native Title Claims are located in Part 7 of the NTA. It is one of three registers established by the Act.⁴⁷ An application for a determination of native title must satisfy a registration test before it can be placed on the register of native title claims and subsequently have access to a number of procedural rights. The previous registration test simply examined whether a claim was frivolous or vexatious and if a prima facie case could be made.⁴⁸ However, a key part of the *Native Title Amendment Act 1998* (Cth) was the introduction of a new registration test with a higher threshold.

The conditions that are now required to be satisfied before the Registrar will register a native title claim are set out in sections 190B and 190C. These conditions are that:

- The area of land and/or waters subject to the claim is sufficiently identified.
- The persons constituting the native title claim group are sufficiently described or named.
- The description of the claimed native title rights and interests allows them to be readily identified.

⁴⁶ Section three.

⁴⁷ There is also a National Native Title Register, established under Part 8 of the Act, which contains information about approved determinations of native title. Details regarding the Register of Land Use Agreements are found in Part 8A.

⁴⁸ Commonwealth, Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Effectiveness of the National Native Title Tribunal*, December 2003, p 17.

- The factual basis for claiming native title is sufficient to support the assertion that: the claimant group have an association with the area; there are traditional laws and customs acknowledged and observed by the group that give rise to the claim; and the claimant group have continued to hold native title in accordance with those traditional laws and customs.
- There must be a prima facie case that at least some of the native title rights and interests claimed could be established.
- At least one member of the claimant group has or had a traditional physical connection with the area.
- The application is not made in regard to an area with an approved determination of native title, or is in a previous exclusive possession act area, or other restrictions specified in section 61A.
- The Registrar is not aware of the native title rights having been extinguished.
- The application includes information required by sections 61 and 62 of the NTA.
- No member of the claimant group was a member of another claimant group with a registered native title determination for the same area.
- The applicant is authorised by all other persons in the claimant group to make the application, or a representative Aboriginal or Torres Strait Islander body has certified the application.

An inability to pass the registration test does not prevent a determination of native title being made. However, the claimant group is unable to access such important procedures as the right to negotiate and other aspects of the future acts scheme. Accordingly, the native title rights and interests of claimant groups who fail to have their claim registered are in a vulnerable position until a final determination is made.⁴⁹

3.3 Native title rights and interests

Section 223(1) explains what is meant by the term ‘native title’:

The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs,

⁴⁹ McRae et al, n 4, p 309.

have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

The starting point is to consider the rights and interests that are possessed under traditional laws and customs acknowledged and observed by the claimant group.⁵⁰ The content of native title will depend on the rights and interests of the particular group. Native title rights and interests may include hunting, gathering and fishing.⁵¹ Native title can be possessed by a community, group or individual and is generally inalienable. It is a legal right that can be protected.

The High Court in *Fejo v Northern Territory of Australia*⁵² explained the origin of native title and its relationship with the common law:

Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law. There is, therefore, an intersection of traditional laws and customs with the common law. The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title.⁵³

3.3.1 *Western Australia v Ward*

The claimants in *Ward*⁵⁴ sought a determination of native title over land in the East Kimberley region in Western Australia and the Northern Territory. In the appeal to the High Court, the issue of how section 223 is to be applied was considered. Whilst the majority of the Court accepted the artificiality of describing the connection between an Indigenous group and land in legal terminology, they confirmed that the NTA requires the spiritual or religious connection to be translated into the legal.⁵⁵

The Court acknowledged the need under section 223(1)(a) to identify the traditional laws and customs as well as the rights and interests derived from those traditional laws and customs (not the common law).⁵⁶ The majority also considered the meaning of ‘connection’ as expressed in section 223(1)(b). They noted:

⁵⁰ *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 39 (per Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁵¹ Section 223(2).

⁵² (1998) 195 CLR 96

⁵³ At 128 (per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

⁵⁴ *Western Australia v Ward* (2002) 191 ALR 1

⁵⁵ At 15

⁵⁶ At 17

In its terms s 223(1)(b) is not directed to how Aboriginal peoples use or occupy land or waters. Section 223(1)(b) requires consideration of whether, by the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a ‘connection’ with the land or waters. That is, it requires first an identification of the content of traditional laws and customs and, secondly, the characterisation of the effect of those laws and customs as constituting a ‘connection’ of the peoples with the land or waters in question. No doubt there may be cases where the way in which land or waters are used will reveal something about the kind of connection that exists under traditional law or custom between Aboriginal peoples and the land or waters concerned. But the absence of evidence of some recent use of the land or waters does not, of itself, require the conclusion that there can be no relevant connection.⁵⁷

However, the majority left open the question of whether a spiritual connection with the land is sufficient.

3.3.2 *Yorta Yorta*

The High Court in their decision in *Members of the Yorta Yorta Aboriginal Community v State of Victoria*⁵⁸ discussed section 223 of the *Native Title Act* at length, especially the meaning of ‘tradition’. The case concerned the unsuccessful application by the Yorta Yorta people for a determination of native title in relation to land on the New South Wales and Victoria border. Gleeson CJ, Gummow and Hayne JJ noted that ‘native title is not a creature of the common law’ but ‘is what is defined and described in s 223(1) of the Native Title Act’.⁵⁹ They noted further that:

the requirement for recognition by the common law may require refusal of recognition to rights or interests which, in some way, are antithetical to fundamental tenets of the common law... recognition by the common law is a requirement that emphasises the fact that there is an intersection between legal systems and that the intersection occurred at the time of sovereignty. The native title rights and interests which are the subject of the Act are those which existed at sovereignty, survived that fundamental change in legal regime, and now, by resort to the processes of the new legal order, can be enforced and protected. It is those rights and interests which are ‘recognised’ in the common law.⁶⁰

Gleeson CJ, Gummow and Hayne JJ stressed that native title rights and interests have their origin in pre-sovereignty laws and customs. They explained:

Because there could be no parallel law-making system after the assertion of

⁵⁷ At 32

⁵⁸ (2002) 194 ALR 538

⁵⁹ At 560

⁶⁰ At 560

sovereignty it also follows that the only rights or interests in relation to land or waters, originating otherwise than in the new sovereign order, which will be recognised after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom.⁶¹

They acknowledged that it might be difficult to demonstrate the content of pre-sovereignty laws where the current laws and customs have been adapted in response to European settlement.⁶² Nonetheless, they accepted that developments that are of a kind contemplated by traditional law and custom might be taken into account.⁶³ The Court stated:

What is clear, however, is that demonstrating some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not *necessarily* be fatal to a native title claim... The key question is whether the law and custom can still be seen to be traditional law and traditional custom.⁶⁴

Whilst some alteration of these traditional laws and customs is not necessarily fatal to a claim, it must be demonstrated that the traditional laws and customs have continued to be observed in a substantially uninterrupted way since sovereignty. However, it can cause difficulties in terms of providing evidence of the existence and content of those rights. Therefore, ‘acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed *now* could not properly be described as the *traditional* laws and customs of the peoples concerned’ because they would not have been transmitted from generation to generation, constituting a normative system which regulates and defines the rights and interests.⁶⁵

The Court held that the rights and interests referred to in the *Native Title Act* originate from traditional laws and customs, not the Act or common law. However, McHugh J disagreed with this narrow interpretation of rights and interests, arguing that it differed from parliament’s intention that the content of native title would depend on the common law as it developed.⁶⁶

Sean Brennan has criticised the decision, claiming that:

Freezing social structures and the essential state of traditional law and custom as at 1788 makes proof of native title extremely difficult for Indigenous groups across

⁶¹ At 552

⁶² At 561 (per Gleeson CJ, Gummow and Hayne JJ)

⁶³ At 552

⁶⁴ At 562 (per Gleeson CJ, Gummow & Hayne JJ)

⁶⁵ At 562-3

⁶⁶ At 572

Australia. More than that, it suggests that the rights which are recognised may not include those arguably best adapted to the contemporary needs of the most disadvantaged sector of the Australian population, that is those laws developed by systems of internal Indigenous governance to cope with post-colonisation realities.⁶⁷

Peter Seidel, who was the solicitor for the Yorta Yorta people in their native title claim, recently reported that the Yorta Yorta peoples intend to lodge a complaint with the United Nations Human Rights Committee.⁶⁸ They allege that native title law as it currently stands breaches a number of human rights.

Nevertheless, on 3 May 2004, it was announced that the Yorta Yorta people had made an agreement with the Victorian Government in relation to their traditional lands.⁶⁹ The agreement enables five members of the Yorta Yorta people to join with three government representatives to form an advisory body. This body will have input into the management of the Barmah State Forest, Kow Swamp and public land along the Murray and Goulburn rivers. The Yorta Yorta people are seeking to make a similar agreement with the NSW Government. The response to the announcement has been mixed.⁷⁰

3.3.3 *Native title over waters*

The courts have recently considered the extent to which native title is recognised over waters.

3.3.3.1 *Yarmirr*

The case of *Commonwealth v Yarmirr*⁷¹ tested the extent to which native title rights and interests would be recognised over seas. It concerned an application for a determination of native title in relation to the seas and sea-beds around Croker Island, located in the territorial sea above the Northern Territory. The native title claimants argued that their native title rights and interests conferred exclusive possession, occupation, use and enjoyment of the relevant seas and sea-beds.

Gleeson CJ, Gaudron, Gummow and Hayne JJ noted that for the rights and interests to be recognised by the common law, it needed to be determined whether any inconsistency existed between the native title rights and interests and the common law. In the event of an

⁶⁷ Brennan S, 'Native title in the High Court of Australia a decade after Mabo', *Public Law Review*, 14(4) December 2003, p 213.

⁶⁸ Seidel P, 'Native title: The struggle for justice for the Yorta Yorta Nation', *Alternative Law Journal*, 29(2) April 2004, p 96.

⁶⁹ 'Yorta Yorta reach historic agreement', *Talking Native Title*, Issue 11 June 2004, p 5.

⁷⁰ 'Yorta Yorta land deal shonky', *Indigenous News*, ABC News, www.abc.net.au/message/news/ 10 June 2004; 'Indigenous land agreement said to be first', *Indigenous News*, ABC News, www.abc.net.au/message/news/ 10 June 2004.

⁷¹ (2001) 208 CLR 1 (the Croker Island case)

inconsistency, the common law was to prevail. Gleeson CJ et al confirmed that native title could be recognised over the waters in the area. However, these rights and interests did not include a right to exclusive possession. This was the consequence of:

a fundamental inconsistency between the asserted native title rights and interests and the common law public rights of navigation and fishing, as well as the right of innocent passage. The two sets of rights cannot stand together and it is not sufficient to attempt to reconcile them by providing that exercise of the native title rights and interests is to be subject to the other public and international rights.⁷²

3.3.3.2 *Lardil*

The Federal Court also considered the issue of native title rights and interests in relation to seas in 2004. The case of *Lardil Peoples v Queensland*⁷³ concerned the rights of the Lardil, Yangkaal, Kaiadilt and Gangalidda groups to fish and hunt in the seas around the Wellesley Islands in Queensland. The Court held that the claimant groups had the right, in accordance with, and for the purposes allowed under their traditional laws and customs, to:

1. access the land and waters seaward of the high water line;
2. fish, hunt and gather living and plant resources, including the right to hunt and take turtle and dugong, in the inter-tidal zone and the waters above and adjacent thereto for personal, domestic or non-commercial communal consumption;
3. take and consume fresh drinking water from fresh water springs in the inter-tidal zone;
4. access the land and waters seaward of the high water line for religious or spiritual purposes and to access sites of spiritual or religious significance in the land and waters within their respective traditional territory for the purposes of ritual or ceremony;
5. particular rights were provided for the Gangalidda peoples in respect of their use of the Albert River.

However, like the claimants in the Croker Island case, they were not given exclusive rights to the area.

3.3.3.3 *NSW Indigenous Fisheries Strategy*

The *Fisheries Management Act 1994* (NSW) and the NSW Indigenous Fisheries Strategy provide some support to the exercise of traditional rights in relation to waters in NSW. According to section 34C of the *Fisheries Management Act* Aboriginal persons are not required to pay a fishing fee in relation to recreational fishing in fresh water. They are also

⁷² At 68

⁷³ [2004] FCA 298 (23 March 2004)

exempted if they are taking fish from other waters pursuant to a native title right or interest the subject of an approved determination of native title or claim entered on the Register of Native Title Claims.

The NSW Indigenous Fisheries Strategy was released in December 2002.⁷⁴ The aim of the strategy is ‘to protect and enhance the traditional cultural fishing activities of Aboriginal communities, and ensure Aboriginal involvement in the stewardship of fisheries resources’. The strategy is based on the following four key platforms:

1. **Respect:** A philosophic and practical recognition of the traditional and cultural fishing heritage of Aboriginal people and communities, including their access to and use of the fisheries resource.
2. **Engagement:** Involvement of Aboriginal communities with management and custodianship of resources in keeping with their traditional cultural roles.
3. **Social and Economic Development:** Aboriginal people and communities having access to economic opportunities in established and emerging fishing industries.
4. **Employment:** Aboriginal people and communities accessing employment and training opportunities in resource management and in the fishing and aquaculture industries.

3.4 Extinguishment

Native title can only be extinguished in accordance with the Act.⁷⁵ The extinguishment of native title is permanent and cannot be revived ‘even if the act that caused the extinguishment ceases to have effect’.⁷⁶ Acts of previous exclusive possession extinguish native title.⁷⁷ Therefore, the grant of an estate in fee simple extinguishes native title, as the rights under a freehold estate are wholly inconsistent with native title rights and interests.⁷⁸ The native title rights and interests cannot be revived even if the land reverts back to the Crown. However, if the relevant acts are previous non-exclusive possession acts, then the native title rights and interests may be partially extinguished.

3.4.1 *Ward*

The High Court considered the concept of extinguishment in *Ward*.⁷⁹ The majority of the

⁷⁴ Information on the NSW Indigenous Fisheries Strategy is sourced from: NSW Fisheries, ‘Indigenous Fisheries Strategy and Implementation Plan’, www.fisheries.nsw.gov.au/gen/ifs/html-ifs.htm Accessed 2/6/04.

⁷⁵ Section 11

⁷⁶ Section 237A

⁷⁷ Section 23C

⁷⁸ *Fejo v Northern Territory of Australia* (1998) 195 CLR 96

⁷⁹ *Western Australia v Ward* (2002) 191 ALR 1

High Court (Gleeson CJ, Gaudron, Gummow and Hayne JJ) identified two issues as central to the case.⁸⁰

1. whether there could be partial extinguishment of native title rights and interests;
2. what principles should be adopted in determining whether native title rights and interests have been extinguished in whole or in part?

The Court indicated its preference for characterising native title as a ‘bundle of rights’. As a result, native title rights and interests can be partially extinguished where the native title rights and interests are inconsistent with other rights. As native title rights and interests can be partially extinguished, the rights and interests of both parties need to be identified before it can be determined which rights are inconsistent.

The trial judge applied the ‘adverse dominion’ test to determine whether the native title rights and interests of the claimants were inconsistent with the rights of third parties. The ‘adverse dominion’ test consists of three parts:

First, that there be a clear and plain expression of intention by parliament to bring about extinguishment in that manner; secondly, that there be an act authorised by the legislation which demonstrated the exercise of *permanent* adverse dominion as contemplated by the legislation; and thirdly, unless the legislation provides the extinguishment arises on the creation of the tenure inconsistent with an aboriginal right, there must be *actual use* made of the land by the holder of the tenure which is permanently inconsistent with the continued existence of aboriginal title or right and not merely a temporary suspension thereof.⁸¹

The ‘adverse dominion’ test was rejected in the appeal to the Full Federal Court, an outcome approved by the High Court. The majority of the High Court warned that reference to whether there was a clear and plain intention to extinguish native title could be misleading.⁸² The Court made it clear that:

The subjective thought processes of those whose act is alleged to have extinguished native title are irrelevant. Nor is it relevant to consider whether, at the time of the act alleged to extinguish native title, the existence of, or the fact of exercise of, native title rights and interests were present to the minds of those whose act is alleged to have extinguished native title.⁸³

The High Court indicated their preference for an ‘inconsistency of incidents’ approach – that is ‘whether the rights [of third parties] are inconsistent with the alleged native title rights and interests’.⁸⁴ Whilst it was accepted that the ‘operational inconsistency’ test might

⁸⁰ At 11

⁸¹ Lee J quoted in *Western Australia v Ward* (2002) 191 ALR 1 at 35.

⁸² At 35

⁸³ At 35

⁸⁴ At 35

provide assistance ‘by way of analogy’, it was noted by the majority that, ‘Generally, it will only be possible to determine the inconsistency said to have arisen between the rights of the native title holders and the third part grantee once the legal content of both sets of rights said to conflict has been established’.⁸⁵

The Court also made it clear that there are no degrees of inconsistency of rights, they are either inconsistent or not, ‘If they are inconsistent, there will be extinguishment to the extent of the inconsistency; if they are not, there will not be extinguishment’.⁸⁶

The outcome of the *Ward* decision, which concluded that the native title rights and interests in particular reserves had been extinguished, was criticised by the Aboriginal and Torres Strait Islander Social Justice Commissioner. He viewed the decision as unexpected and disappointing from a human rights perspective, as it was ‘contrary to the principle of non-extinguishment in conservation areas within the NTA; contrary to human rights standards of cultural protection and self-determination; and contrary to contemporary international conservation approaches and sustainability principles supported by the Western Australian Government’.⁸⁷ He argued that the Court should have embraced the possibility of co-existence.⁸⁸

3.4.2 *Wilson v Anderson*

The case of *Wilson v Anderson*⁸⁹ concerned an application for a determination of native title in the Western Division of New South Wales. The land for which the claim was made was subject to a perpetual lease that had been granted in 1955 for grazing purposes only by the Minister for Lands under s 23 of the *Western Lands Act 1901* (NSW). Section 23B of the *Native Title Act* defines an exclusive possession act as the grant of freehold estates or certain lease before 23 December 1996. The majority of the court (Kirby J dissenting) held that the grant of the lease conferred a right of exclusive possession. Therefore the Court found that the grant of the lease was a previous exclusive possession act as defined by the *Native Title Act* and all native title rights and interests in the land were extinguished under section 20 of the *Native Title (New South Wales) Act 1994* (NSW).⁹⁰

The decision has enormous implications for native title in NSW as grazing leases cover most of the Western Division of NSW, an area constituting 42% of NSW. Therefore, it is

⁸⁵ At 55 (per Gleeson CJ et al)

⁸⁶ At 37

⁸⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, n 9, pp 92-93.

⁸⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, HREOC, Sydney, 2004, p 7.

⁸⁹ (2002) 190 ALR 313

⁹⁰ Section 20 of the *Native Title (New South Wales) Act 1994* (NSW) provides that a previous exclusive possession act under section 23B of the Commonwealth *Native Title Act* that is attributable to the State, extinguishes at the time of the act, any native title in relation to the land or waters covered by the freehold estate, scheduled interest or lease concerned.

likely that any native title rights and interests in the area have been extinguished. It was predicted that it would affect 15 of the 20 native title applications then filed with the Federal Court in relation to land in the Western Division.⁹¹ Consequently, it is possible that the role of Indigenous Land Use Agreements will be enhanced (see section 3.5.1 – Indigenous Land Use Agreements).

The Aboriginal and Torres Strait Islander Social Justice Commissioner has been critical of the Court's decision as:

It was hoped that the spirit and purpose of native title recognition in *Mabo* and the enactment of the NTA would stem the dispossession of Indigenous rights and interests in land and provide a lasting agreement concerning the use of those lands. The finding of extinguishment in *Wilson v Anderson* ends these expectations and renews the dispossession of Aboriginal people in Western New South Wales.⁹²

Article 27 of the *International Covenant on Civil and Political Rights* expresses the right of minority groups 'to enjoy their own culture, to profess and practice their own religion, or to use their own language'. The Aboriginal and Torres Strait Islander Social Justice Commissioner claims that the decision in *Wilson v Anderson* impairs this right as:

Following *Wilson v Anderson* many Aboriginal people in western NSW do not have rights under the NTA to go to country and collect food, look after areas of importance, or just be on country. They are not acknowledged as the native title holders of country, based on their traditional law and custom and do not have rights to talk about the future of their country or to participate in caring for country.⁹³

3.5 Future acts

Division 3 of Part 2 of the *Native Title Act* contains provisions concerned with future acts. 'Future acts' are defined in section 233 to mean an act that either makes, amends or repeals legislation after 1 July 1993, or any other act from 1 January 1994 onwards, that affects native title in relation to the land or waters. However, the validation of past or intermediate period acts is excluded. The *Native Title Amendment Act 1998* (Cth) significantly altered the future acts regime. Amongst other things, the amendments provided for the negotiation of Indigenous Land Use Agreements (ILUAs).⁹⁴

With some exceptions, section 25 requires parties to negotiate with the aim of reaching an agreement about a future act. However, section 25(5) empowers states and territories to make their own laws as an alternative to the right to negotiate provisions. Sections 26A to 26C also exclude certain acts from having to follow the right to negotiate procedures.

⁹¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, n 9, p 120.

⁹² *Ibid*, pp 112-113.

⁹³ *Ibid*, pp 121-122.

⁹⁴ For details of the changes made to the future acts regime see Briefing Paper No 15/98 *The Native Title Debate: Background and Current Issues* by Gareth Griffith, pp 63-65.

Section 26A empowers the Commonwealth Minister to determine that an act is an approved exploration act provided that four conditions have been met. These conditions are:

1. The act, or acts included in the class, consist of the creation or variation of a right to mine, where the right as so created or varied is a right to explore, a right to prospect or a right to fossick.
2. The act or acts are unlikely to have a significant impact on the particular land or waters concerned.
3. The public and any relevant representative Aboriginal and Torres Strait Islander body have been notified of the proposed determination and invited to make submissions.
4. Relevant native title bodies or representative Aboriginal and Torres Strait Islander groups have been consulted regarding the protection of areas of significance, access to the area and the exercise of rights.

Two determinations under section 26A have been made in relation to NSW:⁹⁵

- Native Title (Approved Exploration etc Acts – New South Wales) (Mining) Determination 2000.
- Native Title (Approved Exploration etc Acts – New South Wales) (Petroleum) Determination 2000.

Consequently, the right to negotiate provisions do not apply in NSW in relation to low impact prospecting titles and petroleum exploration.

In accordance with section 26C the Commonwealth Minister may determine that a particular area is an approved opal or gem mining area. Consequently, the right to negotiate provisions do not apply. Two determinations have been made in relation to NSW:⁹⁶

- Native Title (Approved Opal or Gem Mining Area – Lightning Ridge (Area 1) New South Wales) Determination 2000
- Native Title (Approved Opal or Gem Mining Area – Lightning Ridge (Area 2) New South Wales) Determination 2000

3.5.1 Indigenous Land Use Agreements

Sections 24BA to 24EC are concerned with Indigenous Land Use Agreements (ILUAs) and were inserted into the Act by the *Native Title Amendment Act 1998* (Cth). The National

⁹⁵ Australian Government Attorney-General's Department, 'New South Wales Alternative Native Title Regimes', www.nttf.gov.au Accessed 4/5/04.

⁹⁶ Ibid.

Native Title Tribunal defines an ILUA as, ‘A voluntary agreement about the use and management of an area of land or waters, made between one or more native title groups, and others (such as miners, pastoralists, governments). A registered ILUA is legally binding on the people who are party to the agreement, and all native title holders for that area’.⁹⁷

There are three different types of ILUAs including:⁹⁸

1. *Body corporate agreements* – agreements made with all registered native title bodies corporate for the area after a determination that native title exists in relation to all of the area.
2. *Area agreements* – agreements made with registered native title claimants or bodies corporate for parts of the land in the area, so long as there are no registered native title bodies corporate for all of the area concerned.
3. *Alternative procedure agreements* – an agreement made with at least one registered native title body corporate or representative Aboriginal or Torres Strait Islander body for the area, but not where there are registered native title bodies corporate for the whole of the area.

All of the agreements registered in NSW are area agreements. ILUAs can be made in relation to many subjects including: future developments; the coexistence of native title rights with the rights of others; access to an area; the extinguishment of native title; and compensation.⁹⁹ An ILUA that is entered on the Register of Indigenous Land Use Agreements acts as though it were a contract between the parties to the agreement, but it also binds persons who are not party to the agreement yet hold native title in relation to any of the area covered by the agreement.¹⁰⁰

The States and Territories have generally been willing to negotiate issues of native title, rather than proceed with litigation as, aside from the potential savings in time and money, agreements may enable the parties to better account for the development needs of the native title claimant group.¹⁰¹ The Aboriginal and Torres Strait Islander Social Justice Commissioner believes that the process enables the parties to consider the social and cultural context of the native title claimants and thus the future needs of the group.¹⁰² Consequently, the policy goals may be broader than in a native title determination, in

⁹⁷ National Native Title Tribunal, ‘Indigenous Land Use Agreements’, www.nntt.gov.au/about/glossary.html Accessed 6/5/04.

⁹⁸ Perry M and Lloyd S, *Australian Native Title Law*, Lawbook Co, Pyrmont, 2003, p 178.

⁹⁹ National Native Title Tribunal, ‘Indigenous Land Use Agreements’, www.nntt.gov.au/ilua/index.html Accessed 4/5/04.

¹⁰⁰ Section 24EA.

¹⁰¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, n 88, p 103.

¹⁰² *Ibid*, p 104.

which the court is primarily concerned with whether the native title claimant group can meet the requirements for the legal recognition of native title rights and interests.

The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund identified the following as six advantages of ILUAs:¹⁰³

1. legal certainty;
2. lower cost;
3. maintenance of good relationships between parties;
4. detailed coverage of agreements;
5. solutions at a local level; and
6. flexibility.

Maureen Tehan believes that an agreement-making culture has emerged. Whilst she accepts that agreement-making in itself is not new, she notes that:

What is new are [sic] the parties that now engage in agreement-making, the process and willingness to negotiate, the numbers engaged and the scale and subject matter of agreements. Many agreements are made outside formal native title processes. However, the role of native title as an enforceable right in bringing about this change cannot be understated as a trigger to engagement and negotiation.¹⁰⁴

However, Tehan has warned of an increase in the difficulty of achieving recognition of native title rights and interests as a result of recent decisions of the High Court and amendments to the *Native Title Act*. Consequently, ‘the impetus to negotiate has been diminished and removed in some areas. Agreements made as risk-management tools to take account of native title rights may not be so easily reached now that the possibility of native title existing is so diminished’.¹⁰⁵

The NSW Government has indicated that it supports the use of ILUAs as they provide ‘a flexible and cooperative means of resolving native title issues to achieve fair and equitable outcomes for all parties’ and ‘an opportunity also to avoid costly and divisive litigation’.¹⁰⁶ The Crown Land Division of the Department of Lands manages claims for native title that affect land in NSW. It negotiates ILUAs on behalf of the Government. The NSW Government does not require the registration test to be passed before they will commence negotiations. However, they do require a determination application to be lodged and for credible evidence of the continued existence of native title to be produced prior to discussions.¹⁰⁷ Nevertheless, the Aboriginal and Torres Strait Islander Social Justice

¹⁰³ Cth, Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Second Interim Report for the s206(d) Inquiry Indigenous Land Use Agreements* (Senator J Ferris Chair), Cth Parliament, 2001, p 141.

¹⁰⁴ Tehan, n 45, p 569.

¹⁰⁵ *Ibid*, p 570.

¹⁰⁶ Land NSW, ‘Native Title’, www.dwlc.nsw.gov.au/landnsw/lisd/ladant.html Accessed 23/4/04.

¹⁰⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, n 88, p 47.

Commissioner has criticised the NSW Government for requiring the production of credible evidence before it will participate in negotiations. The Commissioner argues that:

Native title should be seen as an opportunity for both parties to satisfy important objectives: the State to engage with Indigenous people in a way which recognises and respects their traditional structures in order to satisfy important policy objectives; and the native title group to negotiate with the State in relation to securing rights and outcomes that address the particular needs of the group. Instead, the assessment model focuses the negotiations around the settlement of a legal claim. While the resolution of the native title claim may be one element of the negotiation process, the assessment model allows it to dominate the negotiation process.¹⁰⁸

The NSW Government has indicated that it is willing to negotiate the following:¹⁰⁹

- (a) the recognition of native title and a consent determination depending on the nature of the evidence;
- (b) a co-management agreement with respect to national parks, Crown reserves and other Crown lands under the *Crown Lands Act 1989* (NSW), which would provide for:
 - (i) an advisory committee role
 - (ii) jobs and training positions for Aboriginal people
 - (iii) special rights in respect to land, eg right to conduct eco-tourism
 - (iv) cultural protection measures
- (c) consideration for the naming or co-naming of sites of significance;
- (d) eligibility for appointment to boards and committees as the indigenous representative for the area;
- (e) possible transfer of vacant Crown land to a corporation representing the native title group;
- (f) the undertaking of future acts and compensation issues;
- (g) the withdrawal of the native title application if not determined by the court.

¹⁰⁸ Ibid, p 120.

¹⁰⁹ Ibid, p 48.

As at 3 May 2004, 120 ILUAs had been registered in Australia. Four of these were relevant to NSW, the details of which are provided below:

Tribunal file no	Name	Type	Reg date	Subject matter
NIA2001/001	Bundjalung of Byron Bay (Arakwal)	Area agreement	28 August 2001	Development
NIA2000/001	Powercoal Pty Ltd, Victor Perry, Stephen Seiver & NSW ALC ILUA Area Agreement	Area agreement	29 August 2001	Mining
NIA1998/001	Tumut Brungle Area Agreement	Area agreement	21 June 1999	Mining
NI2001/003	Twofold Bay	Area agreement	29 April 2002	Infrastructure

Source: National Native Title Tribunal, 'Registered ILUAs by state or territory', www.nntt.gov.au/ilua/bystate_index.html Accessed 6/5/04.

*Case Study: Arakwal Agreement*¹¹⁰

On 22 December 1994, an application was filed for the determination of native title in relation to Crown land around Byron Bay and for five kilometres out to sea from the high water mark. The National Native Title Tribunal subsequently prepared and provided information to the local community as well as potential parties. 38 individuals and organisations became parties to the application, with mediation meetings and public information sessions held.

The negotiation process was split into two parts in order to facilitate an agreement. An ILUA to which the Byron Bay Bundjalung People, the NSW Minister for Land and Water Conservation, NSW National Parks and Wildlife Service, the Cape Byron State Recreation Area Trust, the Tweed Byron Local Aboriginal Council and the NSW Aboriginal Land Council were party was registered on 28 August 2001. The agreement is a partial settlement of the application for a determination of native title in this area. It did not formally recognise native title, and actually required it to be surrendered. However, land was transferred to the claimants who are also involved in the management of Arakwal National Park.

The second stage of the negotiations is still in progress. It is planned that the second stage will resolve the land issues that remain, with an agreement to include:

- The final settlement of the native title applications filed by the Byron Bay Bundjalung People;
- Recognition of native title by consent;
- A simplified future act scheme;
- The future management of land and waters in which native title continues to exist;

¹¹⁰ Information on the Arakwal agreement is sourced from: National Native Title Tribunal, Submission, Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Inquiry into the Effectiveness of the National Native Title Tribunal*, November 2002, p 128ff.

- The doing of future acts in respect of the land and waters in which native title exists; and
- The settlement of other matters, such as compensation.

Some of the factors thought to have contributed to the success of the negotiations include:

- The goodwill of the parties;
- The support of the representative body and willingness to provide assistance for legal representation, funding and organising;
- The devotion of considerable resources by the Tribunal to enhance the quality of negotiations;
- The role of the Tribunal in overseeing the process and providing leadership in this respect;
- Keeping the local community informed; and
- The two-stage approach to negotiations.

Nonetheless, it was also recognised that some aspects of the process delayed the progress of the negotiations including:

- The need for substantive connection material to be prepared;
- The time and energy required of participants, especially taxing for those for whom it was not paid work;
- The need of the state government to resolve new policy positions when specific issues were raised in the negotiations that required a policy decision;
- The need for a new application to be filed for the second stage of the negotiations; and
- The complicated tenure history of the land covered by the applications and the need for the state agency to carry out tenure searching.

3.6 Determinations of native title

The following table lists all native title determinations to have been made in relation to land in NSW as at 4 May 2004:

Date	Short name	Case name	State/Territory	Outcome	Legal process
7 April 1997	Dunghutti People	Buck v New South Wales (NG6002/96, unreported)	New South Wales	Native title exists in the entire determination area	Consent determination
31 March 1998	Metropolitan Local Aboriginal Land Council (Duffy's Forest)	Metropolitan Local Aboriginal Land Council [1998] 402 FCA	New South Wales	Native title does not exist	Unopposed determination
18 December 1998	Yorta Yorta	Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606	New South Wales & Victoria	Native title does not exist	Litigated determination

11 October 2000	Darkinjung Local Aboriginal Land Council (2000)	Darkinjung Local Aboriginal Land Council v NSW ALC (N6023/99, unreported)	New South Wales	Native title does not exist	Unopposed determination
23 May 2001	Deniliquin Local Aboriginal Land Council	Deniliquin Local Aboriginal Land Council [2001] FCA 609	New South Wales	Native title does not exist	Unopposed determination
23 May 2001	Metropolitan Local Aboriginal Land Council (Forestville)	Metropolitan Local Aboriginal Land Council [2001] FCA 605	New South Wales	Native title does not exist	Unopposed determination
10 August 2001	Darkinjung Local Aboriginal Land Council (2001)	Darkinjung Local Aboriginal Land Council v NSW ALC [2001] FCA 1124	New South Wales	Native title does not exist	Unopposed determination
23 October 2001	Byron Bay	Kelly v NSW Aboriginal Land Council [2001] FCA 1479	New South Wales	Native title does not exist	Consent determination
12 April 2002	Metropolitan Local Aboriginal Land Council (Municipality of Ku-Ring-Gai)	Metropolitan Local Aboriginal Land Council (N6004/01, unreported)	New South Wales	Native title does not exist	Unopposed determination
12 April 2002	Metropolitan Local Aboriginal Council (Shire of Hornsby)	Metropolitan Local Aboriginal Council (N6003/01, unreported)	New South Wales	Native title does not exist	Unopposed determination
3 May 2002	Darkinjung Local Aboriginal Land Council (2002)	Darkinjung Local Aboriginal Land Council (N6008/01, unreported)	New South Wales	Native title does not exist	Unopposed determination
19 June 2003	Bahtahbah Local Aboriginal Land Council	Bahtahbah Local Aboriginal Land Council	New South Wales	Native title does not exist	Unopposed determination
17 December 2003	Darkinjung Local Aboriginal Land Council	Darkinjung Local Aboriginal Land Council	New South Wales	Native title does not exist	Unopposed determination
16 February 2004	Barkandji (Paakantyi) People # 11	Barkandji (Paakantyi) People #11	New South Wales	Native title does not exist	Litigated determination

Source: National Native Title Tribunal, 'Native Title Determinations by State or Territory', www.nntt.gov.au/ntdetermination/bystate_index.html Accessed 6/5/04.

There have been 50 determinations of native title in Australia, with 33 determinations that native title does exist and 17 findings that it does not. In NSW, native title has only been held to exist in the area of Crescent Head near Kempsey in relation to the Dughutti people.

The following table highlights the developments in relation to native title as at 11 December 2003 and is useful for comparing the situation in New South Wales with Australia as a whole:

	NSW	National total
ILUAs (registered: in notification or awaiting reg decision)	4:0	105:16
Determination that native title exists (litigated: consent)	0:1	7:24
Determination that native title does not exist (litigated: consent)	9:1*	13:2
Native title claimant applications not finalised (registered: not registered)	43:16	508:111
Claims for the determination of native title heard by Federal Court in calendar year 2003 (no of hearing: no of claims)		11:22

* 9 Local Aboriginal Land Council unopposed non-claimant determinations that native title does not exist pursuant to s40AA Aboriginal Land Rights Act 1983 (NSW) and 1 consent determination that native title does not exist to confirm a surrender of native title through Arakwal ILUA.

Source: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, Human Rights and Equal Opportunity Commission, 2004, p 44.

There were 626 active claimant applications for a determination of native title as at 11 March 2004.¹¹¹ 59 of these claims were relevant to NSW. The majority of current applications for a determination of native title are in relation to Queensland, the Northern Territory and Western Australia, with 197, 187 and 135 applications respectively.

3.7 What aspects of the native title regime are seen as problematic?

There are many views as to whether or not the native title scheme has been successful. This section outlines some of the arguments that have been put forward regarding the perceived weaknesses of the scheme.

3.7.1 *The Act only assists those in remote locations*

The strictness with which ‘traditional’ and ‘connection’ have been interpreted, such as in *Yorta Yorta*, has made it extremely difficult to establish native title, especially in those areas that have borne the brunt of colonisation. As a result, it is generally easier to establish a traditional connection to land in remote parts of Australia as opposed to urban areas. This contributes to inequality between Indigenous groups as ‘the most comprehensively dispossessed Indigenous people living in urban and other built-up areas, derive little benefit from the legislation’.¹¹² McRae et al have estimated that only 10% of Indigenous Australians have any chance of establishing native title as the rest have lost the necessary connection to land.¹¹³ The Aboriginal and Torres Strait Islander Social Justice Commissioner has noted that:

The sad irony of native title is that where the dispossession of Indigenous people through colonial and modern development has been most thorough, brutal and

¹¹¹ ‘Current cases’, *Native Title News*, 6(8) April 2004, p 148.

¹¹² McRae et al, n 4, p 199.

¹¹³ *Ibid*, p 320.

systematic, the less likely it is that the traditions and customs practiced today by the descendants of those affected will be recognised and protected as native title rights. The legal tests for the recognition and extinguishment of native title ensure this result.¹¹⁴

However, native title legislation, at the time of its development, was not seen as providing a complete answer. It only formed one part of the legislative response to *Mabo*. The land acquisition scheme, managed by the Indigenous Land Corporation, seeks to restore land to those Indigenous groups who do not have access to land under the *Native Title Act*. See section 2.3 – land acquisition.

3.7.2 *The native title regime imposes western structures on indigenous concepts*

Western and indigenous concepts of land and property are fundamentally different. The artificiality of expressing the relationship between Indigenous peoples and their traditional lands using legal constructs and terminology was acknowledged by the High Court in *Ward*. Native title law, including the *Native Title Act*, has been criticised for imposing a western understanding of land onto Indigenous Australians. Noel Pearson has argued that:

The equating of Aboriginal titles with normal titles obscures the very nature of Aboriginal title. Aboriginal title arises out of the customs and laws of the Aboriginal titleholders; nothing in mainstream titles is comparable. The High Court in *Mabo* clearly stated that indigenous title is *sui generis* (of its own kind) and that it is misleading to define the title by resort to English property law concepts.¹¹⁵

Some view fundamental aspects of the native title regime as inherently flawed. Michael Dodson is critical of the way native title has been characterised. He defines ‘native title’ as ‘the recognition of remnant rights over our land’. He believes the construction of native title in the Australian legal system continues ‘the arrogance and power imbalance of colonisation by failing to acknowledge the validity of indigenous law other than by reference to the law of conquest’.¹¹⁶ Susan Phillips also explores this idea. She notes that, at its core, the *Native Title Act* is simply concerned with the survival of native title:

It must be remembered that if native title is recognised it is because it has survived. Those who succeed in demonstrating that survival will, during the process, in fact *have* native title that simply lacks formal legal recognition. The entire system that has been described is the structure created to recognise something that already exists.¹¹⁷

¹¹⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, n 88, p 8.

¹¹⁵ Quoted in Behrendt, n 1, p 51.

¹¹⁶ Dodson M, ‘Land rights and social justice’, in Yunupingu G (ed) *Our Land is Our Life: Land Rights – Past, Present and Future*, University of Queensland Press, St Lucia, 1997, p 159.

¹¹⁷ Phillips S, ‘“Like something out of Kafka”: The relationship between the roles of the National Native Title Tribunal and the Federal Court in the development of native title practice’, *Land, Rights, Laws: Issues of Native Title*, 2(14) April 2002, p 7.

One of the outcomes of using western concepts to develop the law of native title is the inherent fragility of the result. Malbon has expressed concern in relation to the reasoning of Brennan J in *Mabo* because of the arbitrariness with which native title can be extinguished:

The consequence of this reasoning is that it serves to emphasise that the source of native title is from the *outside*; it is from a place located externally to the exclusive club of citizenry. The outsider source of native title renders it less worthy, and therefore more vulnerable to being taken than non-native title. The Court did not make it clear as to why native title was inherently less worthy than a Crown grant, although Deane and Gaudron JJ claimed that native title was still a valuable entitlement, despite its vulnerability. Perhaps native title is peculiarly vulnerable because the holders of the title are themselves less worthy than the colonisers, or the use they make of their lands is less worthy than the colonisers' use.¹¹⁸

3.7.3 *Native title law is extremely complex*

The *Native Title Act* is lengthy and complex. Kirby J expressed his frustrations with native title law in *Wilson v Anderson*:

That impenetrable jungle of legislation remains. But now it is overgrown by even denser foliage in the form of the Native Title Act 1993 (Cth) (the NTA) and companion state legislation (relevantly the Native Title (New South Wales) Act 1994 (NSW) (the State Act)). It would be easy for the judicial explorer to become confused and lost in the undergrowth to which rays of light rarely penetrate. Discovering the path through this jungle requires navigational skills of a high order. Necessarily, they are costly to procure and time consuming to deploy. The legal advance that commenced with *Mabo v Queensland (No 2)* or perhaps earlier, has now attracted such difficulties that the benefits intended for Australia's indigenous peoples in relation to native title to land and waters are being channelled into costs of administration and litigation that leave everyone dissatisfied and many disappointed.¹¹⁹

The Aboriginal and Torres Strait Islander Social Justice Commissioner highlighted the barrier that is erected by native title law. He examined the trend of recent High Court decisions and noted, 'Emerging from the High Court is a concept of recognition as not simply the law providing a vehicle for Indigenous people to enjoy their cultural and property rights, but rather one where the law becomes a barrier to their enjoyment and protection'.¹²⁰

Nevertheless, whilst it might be argued that the *Native Title Amendment Act 1998* and recent decisions of the High Court have limited the circumstances in which native title will be recognised, they have in some respects provided greater certainty in relation to difficult

¹¹⁸ Malbon J, 'The extinguishment of native title: The Australian Aborigines as slaves and citizens', *Griffith Law Review*, 12(2) 2003, p 321.

¹¹⁹ (2002) 190 ALR 313 at 345

¹²⁰ Aboriginal and Torres Strait Islander Social Justice Commissioner, n 9, p 11.

aspects of the native title regime. Some of these aspects include: how a traditional connection to the land is identified; what native title rights and interests will be recognised; and in what situations are native title rights and interests extinguished.

3.7.4 The 1998 amendments increased the formality of the process and caused procedural difficulties

Section 82 of the NTA originally provided that the court was not bound by ‘technicalities, legal forms or rules of evidence’. The proceedings were to take account of the cultural and customary concerns of Indigenous peoples and be ‘fair, just, economical, informal and prompt’.

However, the *Native Title Amendment Act* altered the emphasis of section 82. It now states that:

1. The Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders.
2. In conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings.

Accordingly, it is now presumed that the Federal Court will apply the rules of evidence. Whilst the Court may consider the cultural and customary concerns of the Indigenous parties, it is no longer required to do so. The objective of ‘fair, just, economical, informal and prompt’ proceedings has also been removed.

These changes have been criticised by the Aboriginal and Torres Strait Islander Social Justice Commissioner:

The difficulty of building a base for the court to draw inferences on the content of traditional laws and customs prior to sovereignty, their ongoing transmission from generation to generation by oral form and their present possession is, under these amendments, almost insurmountable.¹²¹

Such difficulties, especially in relation to the relative weight to be given to oral as opposed to written evidence, arose in *Yorta Yorta*.¹²²

The shift of responsibilities between the National Native Title Tribunal and the Federal Court has also caused difficulty. Following changes made by the *Native Title Amendment Act*, applications are now lodged with the Federal Court rather than with the National Native Title Tribunal. Whilst the Tribunal applies the registration test and informs the relevant people about the native title application, the Federal Court considers whether mediation is suitable and is responsible for native title determinations. Susan Phillips identified the difficulties that have arisen as a result of these changes when she noted that:

¹²¹ Ibid, p 34.

¹²² For a discussion of this aspect of the *Yorta Yorta* decision see: Seidel, n 68, p 70ff.

The shift from tribunal based case management to judicial case management has had an impact on the levels of formality with which issues are dealt, the remoteness of the procedural steps from the claimants and other parties and has emphasised the notional opposition of parties on which a litigious model is predicated. Difficulties are being caused because the Court is, in a practical sense, required to play an administrative not a judicial role, leading to considerable judicial frustration. The shift of management is also problematic for the aims of the legislation. Vesting the managerial role within the jurisdiction of the Court imports the structural hazard of parallel procedures adding to the difficulty and expense of reaching the goal of settling the matters by agreement.¹²³

The Aboriginal and Torres Strait Islander Social Justice Commissioner has also noted that:

It is now clear that the standard and burden of proof required to establish the elements of the statutory definition of native title are so high that many Indigenous groups are unable to obtain recognition of the traditional relationship they continue to have with their land. In turn, their cultural, religious, property and governance rights, recognised at international law and embodied in this relationship, fail to be recognised and protected under Australian law.¹²⁴

3.7.5 The costs associated with a native title claim are large

According to Senator Aden Ridgeway, more than \$600 million has been spent in relation to native title since 1993 (\$63 million on native title matters in the Federal Court, \$167 million on funding for the National Native Title Tribunal, and \$370 million provided through the Aboriginal and Torres Strait Islander Commission to fund Native Title Representative Boards and general support for native title claims).¹²⁵ It took ten years to resolve the *Yorta Yorta* matter, which is both the longest running and most expensive native title case in Australian history.¹²⁶ Ridgeway questions what this spending has achieved. He concludes that:

The cost of *proving* native title is prohibitive and wasteful. A system that is predicated on the idea that continuing attachment to land must either be proven, or assumed to be extinguished is taking entirely the wrong approach. Placing the burden of proof on Indigenous communities who have faced two centuries of dispossession and disadvantage is as unworkable as it is racist'.¹²⁷

¹²³ Phillips, n 117, p 9.

¹²⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, n 9, p 21.

¹²⁵ Ridgeway A, 'Making the Future of Native Title', Paper presented at the Australian Institute of Aboriginal and Torres Strait Islander Studies Conference: *Native title on the ground*, Alice Springs, June 2003, p 3.

¹²⁶ Ibid, p 5.

¹²⁷ Ibid, p 3.

Pearson has similarly urged that:

The opportunity and transaction costs of the Native Title Act must be the subject of careful and urgent consideration. The administration of the legislation, the costs of preparing and prosecuting claims and following the procedures of the Native Title Act, versus the returns in terms of title determinations and economic and social advantages for Aboriginal people – do not add up and do not make sense. When the costs and lost opportunities are considered for all parties (including governments and industry parties) then the opportunity and transactions costs problems seem to be a universally shared problem: all sides, including Aboriginal people, are paying high costs for small or no returns.¹²⁸

The Aboriginal and Torres Strait Islander Social Justice Commissioner concluded that the difficulty and cost of establishing native title substantially outweigh the benefits associated with the limited recognition of native title:

The standard of proof and the burden it places on Indigenous applicants seeking recognition of the contemporary expression of their culture and identity is very high. They must prove a normative system of laws and the seamless transition of these laws from one society to the next to the present day. Yet what do Indigenous people get from this recognition process once they have overcome these legal hurdles? They don't get recognition of the laws and customs that generate rights and interests. They don't get recognition of the systems that keep their culture vital and developing. They don't get recognition of their spiritual connection with the land or their governance structures... From native title law, Indigenous people get recognition of a bundle of rights and interests that is extinguished completely or partially wherever their enjoyment is inconsistent with non-Indigenous peoples' enjoyment of their rights and interests.¹²⁹

3.7.6 *The relative weakness of Indigenous rights and interests in land*

It has been argued that for native title to be recognised, it must be 'small, flexible and harmless'.¹³⁰ The rights and interests of Indigenous Australians in relation to land are inherently weaker than other Australians, as where those rights are inconsistent, the rights of others usually prevail. Non-Indigenous title in land is certain and indefeasible whereas native title is only protected against hostile extinguishment.¹³¹

A number of commentators, including members of the High Court, have expressed the view that the *Native Title Act* does not sufficiently protect native title rights and interests. In

¹²⁸ Pearson N, 'Where we've come from and where we're at with the opportunity that is Koiki Mabo's legacy to Australia', Paper presented at the Australian Institute of Aboriginal and Torres Strait Islander Studies Conference: *Native title on the ground*, April Springs, June 2003, p 13.

¹²⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, n 9, p 42.

¹³⁰ Ibid, p 30.

¹³¹ Pearson, n 128, p 4.

Ward, both McHugh and Callinan JJ identified some of the weaknesses of the current native title regime. Callinan J highlighted the gap between the common law and native title when he stated:

I do not disparage the importance to the Aboriginal people of their native title rights, including those that have symbolic significance. I fear, however, that in many cases because of the chasm between the common law and native title rights, the latter, when recognised, will amount to little more than symbols. It might have been better to redress the wrongs of dispossession by a true and unqualified settlement of lands or money than by an ultimately futile or unsatisfactory, in my respectful opinion, attempt to fold native title rights into the common law.¹³²

McHugh J was of the opinion that the native title regime could not effectively rectify the mistakes of the past because of the inherent fragility of native title rights:

The dispossession of the Aboriginal peoples from their lands was a great wrong. Many people believe that those of us who are the beneficiaries of that wrong have a moral responsibility to redress it to the extent that it can be redressed. But it is becoming increasingly clear – to me, at all events – that redress can not be achieved by a system that depends on evaluating the competing legal rights of landholders and native-title holders. The deck is stacked against the native title-holders whose fragile rights must give way to the superior rights of the landholders whenever the two classes of rights conflict. And it is a system that is costly and time-consuming. At present the chief beneficiaries of the system are the legal representatives of the parties. It may be that the time has come to think of abandoning the present system, a system that simply seeks to declare and enforce the legal rights of the parties, irrespective of their merits. A better system may be an arbitral system that declares what the rights of the parties *ought to be* according to the justice and circumstances of the individual case.¹³³

Noel Pearson suggests that Indigenous peoples develop alternative strategies to native title, as it has become an industry delegated to lawyers and anthropologists. Nevertheless, he recognises that native title is still an important factor in, and often impediment to, the development of natural resource industries.¹³⁴ However, he questions the logic of granting third parties status regarding the determination of native title as their rights and interests are already protected in contrast to Indigenous parties.¹³⁵ As third parties do not need to risk anything, and they have their costs covered by the Commonwealth, it follows that they are not ‘going to be amenable to negotiated settlement of claims, and will resist recognition until the cows come home, or the native titleholders have surrendered most of their rights’.¹³⁶

¹³² At 281

¹³³ At 156

¹³⁴ Pearson, n 128, p 2.

¹³⁵ *Ibid*, p 4.

¹³⁶ *Ibid*, p 5.

3.7.7 *Many people do not understand the true position of native title rights and interests*

The rights and interests recognised as part of native title law have often been misunderstood since the High Court decision of *Mabo*. A combination of factors has contributed to this situation: the newness of this area of law; the complexity of legislation; and misinformation propagated by various stakeholders. Noel Pearson has questioned the bitterness with which native title issues have been fought in Australia, as the only one who can lose any of their rights is the Crown. He argues that, ‘We have never convinced anyone of the truth that native title is all about the balance, it is all about the remnants, it is all about what is left over – and no finding of native title can disturb the rights of any other parties other than the Crown’.¹³⁷

3.7.8 *Concerns about the native title regime have been expressed by international organisations*

Australia is the first western nation to be asked to explain its human rights position before the United Nations Committee for the Elimination of Racial Discrimination.¹³⁸ This was one of the repercussions of the amendments made to native title law by the *Native Title Amendment Act 1998*. The UN Committee on the Elimination of Racial Discrimination found that the following four aspects of the *Native Title Amendment Act* discriminate against native title holders:¹³⁹

1. Provisions regarding the validation of past acts that were otherwise invalid.
2. The confirmation of extinguishment provisions.
3. The primary production upgrade provisions.
4. Restrictions on the right to negotiate.

In March 2002 the United Nations Special Rapporteur on Racism reported that the *Native Title Act* needed to be amended so as to restore principles of equality and non-discrimination.¹⁴⁰ The Hon Alexander Downer MP, Minister for Foreign Affairs, and the Hon Philip Ruddock MP, then Minister for Immigration and Multicultural and Indigenous Affairs, issued a joint media release on 22 March 2002 that claimed the UN report had no credibility.¹⁴¹ Whilst the media release referred to a number of aspects of the report not

¹³⁷ Ibid, p 3.

¹³⁸ Healey J (ed), ‘Aboriginal land rights’, *Issues in Society*, vol 169, Spinney Press, Rozelle, 2002, p 17.

¹³⁹ McGlade H, ‘“Not invited to the negotiating table”: The Native Title Amendment Act 1998 (Cth) and Indigenous Peoples Right to Political Participation and Self Determination Under International Law’, *Balayi: Culture, Law and Colonialism*, 1(1) February 2000, p 97ff.

¹⁴⁰ Aboriginal and Torres Strait Islander Commission, *Annual Report 2002/2003*, p 94.

¹⁴¹ Hon A Downer MP, Minister for Foreign Affairs, and Hon P Ruddock MP, Minister for Immigration and Multicultural and Indigenous Affairs, ‘UN report has no credibility’, *Media Release*, 22/3/02.

related to native title, the Ministers ‘expressed regret at the poor quality of the report’ and ‘noted it contained a number of serious errors of fact that destroyed its overall credibility and authority’. The Aboriginal and Torres Strait Islander Social Justice Commissioner has condemned the failure of the Australian government to respond to international criticism, as ‘Australia has made it abundantly clear... that it does not consider itself morally bound by the decisions and observations of the United Nations’ human rights committees’.¹⁴²

3.7.9 *Other thoughts*

Despite its weaknesses, the native title regime has achieved much in terms of its impact on the Australian psyche. According to Black CJ, *Mabo* and the native title regime has increased the understanding of ordinary Australians in relation to Indigenous law and custom.¹⁴³ There have been 33 determinations in Australia that native title does exist and 120 Indigenous Land Use Agreements have been made. Therefore, the relationship between Indigenous Australians and certain land in Australia has been recognised. Graeme Neate, President of the National Native Title Tribunal has also highlighted that:

Aboriginal people, importantly, wherever their native title rights exist, are now recognised for who they are and what they have. It means that in the general law of Australia and through our legal institutions, the broader community recognises that under traditional law and custom people have maintained their links. That should be recognised or even celebrated. And there are procedures whereby those people are at the bargaining table when it comes to future developments in those areas. And hence the result is a much more inclusive Australia whereby we are genuinely sharing the country.¹⁴⁴

¹⁴² Aboriginal and Torres Strait Islander Social Justice Commissioner, n 9, p 44.

¹⁴³ ‘A judicial revolution written in the sand’, *The Australian*, 7/6/02, p 9.

¹⁴⁴ ‘Recognising the right people’, *The Australian*, 7/6/02, p 9.

4 NATIVE TITLE (NEW SOUTH WALES) ACT 1994 (NSW)

The preamble to the *Native Title (New South Wales) Act 1994* (NSW) acknowledges that the doctrine of terra nullius has been overturned and a 'national scheme for the recognition and protection of native title, the regulation of future dealings with, and claims to, native title and the validation of past State acts invalidated because of the existence of native title' has been established by the *Native Title Act 1993* (Cth). The *Native Title (New South Wales) Act* was the first legislative response of the NSW Parliament to the decision of *Mabo* and introduction of the NTA.¹⁴⁵ The preamble expresses the intention of NSW to participate in the national scheme and for NSW to validate its past acts that are invalid because of the existence of native title. The Act was amended by the *Native Title (New South Wales) Amendment Act 1998* (NSW) to account for the changes made to the federal legislation by the *Native Title Amendment Act 1998* (Cth).

The objects of the Act, as expressed in section 3, are:

- (a) in accordance with the Commonwealth Native Title Act, to validate any past acts, and intermediate period acts, invalidated because of the existence of native title and to confirm certain rights, and
- (b) to ensure that New South Wales law is consistent with standards set by the Commonwealth Native Title Act for future dealings affecting native title.

The provisions of the Act are variously concerned with the effect on native title of the validation of past and intermediate period acts attributable to the state. Under section 17, the following are confirmed:

- The existing ownership of all natural resources owned by the State.
- The existing rights of the State to use, control and regulate the flow of water.
- The prevalence of existing fishing access rights under NSW law over any other public or private fishing rights.

The Act confirms that native title in NSW has been extinguished by previous exclusive possession acts, and partially extinguished by previous acts of non-exclusive possession. Land that has been transferred under the *Aboriginal Land Rights Act 1983* (NSW) is validated, as are acts covered by Indigenous Land Use Agreements.

¹⁴⁵

G West MP, *NSWPD*, 20/4/04, p 1552.

5 ABORIGINAL LAND RIGHTS ACT 1983 (NSW)

5.1 Preamble and purposes

The land rights of Indigenous peoples in New South Wales were first recognised on 10 June 1983 when the *Aboriginal Land Rights Act 1983* (NSW) (ALR) commenced. The preamble to the Act acknowledges four different aspects of the relationship between Indigenous Australians and land in NSW. It states that:

1. Land in the State of New South Wales was traditionally owned and occupied by Aborigines.
2. Land is of spiritual, social, cultural and economic importance to Aborigines.
3. It is fitting to acknowledge the importance which land has for Aborigines and the need of Aborigines for land.
4. It is accepted that as a result of past Government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation.

The purposes of the Act are expressed in section 3. However, they are a relatively new addition to the Act, having been inserted by the *Aboriginal Land Rights Amendment Act 2001* (NSW). One of the objects of the amending Act was to make the ALR as ‘clear, logical and accessible as possible’.¹⁴⁶ Section 3 sets out the purposes of the Act as being:

- (a) to provide land rights for Aboriginal persons in New South Wales,
- (b) to provide for representative Aboriginal Land Councils in New South Wales,
- (c) to vest land in those Councils,
- (d) to provide for the acquisition of land by or for those Councils and the allocation of funds to and by those Councils.

The Minister for Aboriginal Affairs, the Hon Dr Andrew Refshauge MP, also noted in his Second Reading speech for the *Aboriginal Land Rights Amendment Act 2001* (NSW) that ‘The purpose of the Act is to provide an asset base and economic self-sufficiency for Aboriginal people in New South Wales as compensation for the loss of their land and in recognition of the cultural and spiritual importance of land to Aboriginal people’.¹⁴⁷

5.2 Definitions

An Aboriginal person is defined in section 4 to mean a person who:

- is a member of the Aboriginal race of Australia;
- identifies as an Aboriginal person; and
- is accepted by the Aboriginal community as an Aboriginal person.

¹⁴⁶ Hon Dr A Refshauge MP, *NSWPD*, 28/11/01, p 19043.

¹⁴⁷ *Ibid*, p 19042.

5.3 NSW Aboriginal Land Council Account

Prior to its repeal by the *Aboriginal Land Rights Amendment Act 2001*, section 28 of the ALR provided for the annual payment of 7.5% of land tax into the NSW Aboriginal Land Council Account every year between 1984 and 1998. This was primarily for the purpose of enabling the purchase of additional land. Between 1984 and 1998, \$580 million was paid to the Aboriginal Land Council. Its current balance stands at \$500 million.¹⁴⁸

5.4 Claiming land

The procedure for claiming land is set out in section 36. It is noteworthy that considerations of traditional title are irrelevant to a claim. Land must satisfy a number of criteria to be claimable:

- It must be able to be lawfully sold or leased.
- It must not be lawfully used or occupied.
- It must not comprise land likely to be needed for residential use or for an essential public purpose.
- It must not be the subject of an application for the determination, or be an approved determination, of native title.

When a claim is successful, the land is granted as an estate in fee simple but is subject to any native title rights or interests that existed immediately prior to the transfer. However, a successful claim for land that is outside urban areas and forms part of the Western Lands Division results in the grant of a lease in perpetuity rather than an estate in fee simple. Again the grant is subject to any pre-existing native title rights and interests.

One of the obstacles to a claim for land is section 36(8). This section enables the Crown Lands Minister to issue a certificate stating that the land subject to the claim is needed as residential land or for an essential public purpose. Once a certificate is issued, it is to 'be accepted as final and conclusive evidence of the matters set out in the certificate and shall not be called into question in any proceedings nor liable to appeal or review on any grounds whatever'. The difficulties presented to potential claimants by section 36(8) have led to a small success rate, as highlighted by Behrendt¹⁴⁹ and McRae et al.¹⁵⁰

5.5 Local Aboriginal Land Councils

The provisions concerned with Local Aboriginal Land Councils (LALC) are found in Part 5 of the ALR. The object of a LALC is 'to improve, protect and foster the best interests of all Aboriginal persons within the Council's area and other persons who are members of the Council'.¹⁵¹ To satisfy the membership requirements of a LALC, a person needs to be an

¹⁴⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner, n 88, p 46.

¹⁴⁹ Behrendt, n 1, p 40.

¹⁵⁰ McRae et al, n 4, p 223.

¹⁵¹ Section 51

adult Aboriginal person who either resides within, or has an association with, the particular area, and has been accepted as a member by a meeting of the Council.¹⁵²

The functions of a LALC are currently set out in the Act in much more specific terms than when the Act was originally enacted. A LALC is required, amongst other things, to:¹⁵³

- Acquire land.
- Negotiate the acquisition of lands of cultural significance and the lease of those lands to the Minister.
- Implement the wishes of its members in regard to the acquisition, management, use, control and disposal of land.
- Consider mining applications.
- Make land claims.
- Improve accommodation for Aboriginal persons in the area.
- Protect the interests of Aboriginal persons in the area regarding the acquisition, management, use, control and disposal of its land.
- Negotiate with persons desiring to use or access the land.
- Promote the protection of Aboriginal culture and the heritage of Aboriginal persons in its area.

There are currently 122 LALCs in NSW.

5.6 Regional Aboriginal Land Councils

Part 6 contains provisions relevant to Regional Aboriginal Land Councils (RALC). Similar to a LALC, the object of a RALC is to ‘improve, protect and foster the best interests of all Aboriginal persons within the Council’s area’.¹⁵⁴ The RALC is to provide assistance and advice to LALCs and to the NSW Aboriginal Land Council (NSWALC). It is also to promote the protection of Aboriginal culture and the heritage of Aboriginal persons within its area.¹⁵⁵

There are currently 13 RALCs consisting of the following regions:

- North West
- Wiradjuri
- North Coast
- Central Coast
- Far South Coast
- Western
- Central
- Sydney/Newcastle

¹⁵² Section 54

¹⁵³ Section 52

¹⁵⁴ Section 87

¹⁵⁵ Section 88

- Northern Tablelands
- Northern
- Murray River
- South Coast
- Western Metropolitan.

5.7 New South Wales Aboriginal Land Council

Provisions concerning the NSWALC are located in Part 7 of the Act. The NSWALC is a body corporate whose objects are:¹⁵⁶

- (a) to improve, protect and foster the best interests of Aboriginal persons within New South Wales, and
- (b) to relieve poverty, sickness, suffering, distress, misfortune, destitution and helplessness of Aboriginal persons within New South Wales.

Some of the functions of the NSWALC are to:¹⁵⁷

- Administer the NSWALC Account and the Mining Royalties Account.
- Grant funds for the payment of the costs and expenses of Local and Regional Aboriginal Land Councils.
- Acquire and make land claims.
- Negotiate the acquisition of land of cultural significance in schedule 14 of the National Parks and Wildlife Acts.
- Submit proposals for the listing of lands of cultural significance and the lease of those lands to the Minister.
- Determine the terms and conditions of agreements allowing mining or mineral exploration.
- Manage the affairs of a LALC subject to its agreement.
- Mediate, conciliate and arbitrate disputes between Councils, Councils and members, or between members, that relate to the Act.
- Make grants or lend money to Aboriginal persons.
- Assist Local and Regional Aboriginal Land Councils to comply with the Act regarding accounts, budgets and financial reports.
- Assist with the conduct of elections for officers of Local and Regional Land Councils.
- Advise the Minister on matters relating to Aboriginal land rights.
- Compile a register of all land held by LALCs.
- Compile and maintain a roll of all members of LALCs.
- Promote the protection of Aboriginal culture and the heritage of Aboriginal people in NSW.
- Train members of Aboriginal Land Councils.

¹⁵⁶ Section 105

¹⁵⁷ Section 106

5.8 Registers of Aboriginal Land Claims and Aboriginal Owners

Part 9 of the ALR sets out the provisions concerning the Registrar and Registers of Aboriginal Land Claims and Aboriginal Owners. Section 170 requires the Registrar to establish and keep a register of Aboriginal owners. The register includes the name of every Aboriginal person with a cultural association to land in NSW, as well as detailing the location of the land and the nature of the cultural association.

This aspect of the Act has been criticised. Baird and Lenehan note that:

It is regarded by many as another government process that requires Aboriginal people to assert and prove what they already know regarding their rights and responsibilities in and for country: a process that forces them to mould their understanding of relationships with land to fit an artificially constructed one imposed by the Anglo Australian law.¹⁵⁸

5.9 Investigations by the Independent Commission Against Corruption

Numerous concerns regarding the alleged corruption and mismanagement of the various land councils have been raised over the last fifteen years. In April 1998, the Independent Commission Against Corruption (ICAC) published its report detailing the results of its investigation into ALCs in NSW.¹⁵⁹ Between March 1989 and June 1997, ICAC had received more than 200 complaints in relation to the Aboriginal Land Councils. The majority of the complaints were made by Aboriginal people and concerned:¹⁶⁰

- Maladministration
- Misuse of funds
- Favouritism
- Conflict of interest
- Irregularities in elections

The ICAC Commissioner, Barry O'Keefe, highlighted how the land council system is:

meant to help Aboriginal people overcome the effects of more than 200 years' dispossession from their land, but the hopes of many Indigenous Australians have not been met due to the actions of a few – most of whom are ripping off their own people... The system's benefits have not been spread equitably among Aboriginal people, and genuine need which should be the basis for allocating resources, has often been ignored. In many instances, the power that the system conferred on some was abused. Complaints [from Aboriginal constituents] were frequent, widespread,

¹⁵⁸ Baird W and Lenehan R, 'The process in NSW leading to joint management of Aboriginal owned land and the register of Aboriginal owners', *Environmental and Planning Law Journal*, 19(4) August 2002, p 281.

¹⁵⁹ Independent Commission Against Corruption, *Report on Investigation into Aboriginal Land Councils in New South Wales: Corruption Prevention and Research*, April 1998.

¹⁶⁰ *Ibid*, p 6.

and in many instances justified.¹⁶¹

ICAC concluded that many of these problems were caused by a lack of training and capacity in relation to running multi-functional organisations that control large amounts of money. It subsequently identified the following outcomes as being necessary to both prevent and counter corruption:¹⁶²

Increased accountability through:

- Appropriate community decision-making processes.

Improved decision-making through:

- Meaningful political participation
- Transparent decision-making by LALCs
- Proper corporate governance by the NSWALC
- Effective responses to misconduct and disputes

Proper management of resources through:

- Best practice management of LALCs
- Increased support for LALCs
- Clearer accountability relationships between LALCs and the NSWALC

Ongoing strengthening of the Aboriginal land council system through:

- Training for members, office-bearers and staff in their roles, responsibilities, rights and relationships
- Ongoing ICAC support for the reform process

The *Aboriginal Land Rights Amendment Act 2001* (NSW) sought to implement many of the recommendations made by ICAC. It was noted in the Second Reading speech that:

After nearly 20 years of land rights in New South Wales, almost all the available Crown land has been claimed. This has resulted in an operational shift for land councils, away from claiming land and toward managing assets responsibly and productively for the benefit of all Aboriginal people in New South Wales. The ICAC report emphasised the lack of accountability as the primary cause of corrupt conduct in Aboriginal land councils. In particular, the report emphasised the importance of internal accountability, rather than external accountability.¹⁶³

The amending Act therefore focused on improving internal accountability within Aboriginal Land Councils.

The *Aboriginal Land Rights Amendment Act 2001* rearranged the ALR and inserted parts 5 to 14. These parts are concerned with:

¹⁶¹ Quoted in Neill, n 2, p 63.

¹⁶² Independent Commission Against Corruption, n 159, p 8.

¹⁶³ Hon Dr A Refshauge MP, *NSWPD*, 28/11/01, p 19042.

- Local Aboriginal Land Councils – their constitution, membership, officers and representatives, meetings, staff, delegations, and rules.
- Regional Aboriginal Land Councils – their constitution, membership, officers, meetings and rules.
- The NSW Aboriginal Land Council – its constitution and functions, members, election of councillors, declaration of election, disputed returns, officers, meetings, rules, chief executive officer, staff, and delegations.
- Finance – the establishment and keeping of accounts and funding.
- Registrar and Registers of Aboriginal Land Claims and Aboriginal Owners.
- Honesty and Disclosure of Interests – honesty, care and diligence; codes of conduct; Aboriginal Land Councils Pecuniary Interest Tribunal; duties of disclosure; complaints concerning non-disclosure.
- The investigation and administration of Aboriginal Land Councils.
- Compliance directions.
- Dispute resolution.
- Certain other matters.

However, concerns about the conduct of Aboriginal land councils have continued to surface. In the past five years, administrators have been appointed to 21 of the 122 LALCs.¹⁶⁴ A report by Wayne Beauman of Bentleys MRI on the NSWALC was tabled in NSW Parliament in September 2003. The report found that:

NSWALC has taken an approach to dealings with ICAC that appears both arrogant and incompetent. Its repeated failure to adequately review the implementation of the recommendations exhibits a clear unwillingness of the councillors to drive through any significant change in the organisation and an abject failure by the Executive to exhibit any leadership in ensuring the organisation has developed appropriate policies and communicates those throughout the Land Council network.¹⁶⁵

The Board of the NSWALC was subsequently sacked and an Administrator appointed on 19 November 2003.¹⁶⁶

It was announced on 26 May 2004 that a taskforce, consisting of the Director-General of the Department of Aboriginal Affairs, the NSW Aboriginal Land Council Administrator and the Registrar of the *Aboriginal Land Rights Act*, was to be established for the purpose of overhauling the Aboriginal land council system in NSW.¹⁶⁷ According to the media release issued by the Minister for Aboriginal Affairs, the Hon Dr Andrew Refshauge MP, the taskforce is to report by the end of 2004 on:¹⁶⁸

¹⁶⁴ Hon Dr A Refshauge MP, 'Overhaul to NSW Aboriginal Land Council System', *Media Release*, 26/5/04.

¹⁶⁵ *NSW Aboriginal Land Council: Investigation Report*, Bentleys MRI, Sydney, 2003, p 10.

¹⁶⁶ 'Axe falls on "arrogant" land council', *Sydney Morning Herald*, 20/11/03, p 23.

¹⁶⁷ Hon A Refshauge MP, 'Overhaul to NSW Aboriginal Land Council System', *Media Release*, 26/5/04.

¹⁶⁸ *Ibid.*

- The three tiered structure of the land council system to see if there is a better way of delivering outcomes to Aboriginal people.
- Clearer separation of powers between the administrative and elected arms of local councils to avoid nepotism and conflicts of interest.
- Attracting more qualified people with relevant managerial and financial expertise.
- Improved intervention strategies to avoid the costly and often ineffective appointment of administrators and investigators to local land councils.
- An improved framework for managing, selling and developing land council assets.
- Clarifying the role of elected representatives.

5.10 What has the Act achieved?

The Crown Land Division of the Department of Lands conducts research, and prepares and issues titles regarding claims for land under the ALR Act. Since the ALR Act commenced, over 6,985 claims have been lodged and more than 78,500 hectares of Crown land valued at \$687.5 million have been granted.¹⁶⁹ Over 780 claims under the Act had been settled by 2001, covering 0.02% of NSW.¹⁷⁰ 161 determinations were made under the ALR Act in the 2002/2003 financial year and another 514 were in the final stages of investigation.¹⁷¹

The ALR Act might be seen as one means of overcoming the difficulties associated with the native title regime. The Aboriginal and Torres Strait Islander Social Justice Commissioner notes that, 'The grant of freehold land to Aboriginal people under the ALRA is seen by the government as a far better way of dealing with the injustices of dispossession than the Commonwealth's native title legislation which relies on traditional connection'.¹⁷² However the Commissioner argues that this is due to a number of factors including a lack of development in relation to native title policy in NSW, the isolation of native title from other policies concerned with economic and social outcomes, and the slowness with which native title applications in NSW are resolved.¹⁷³ The Commissioner also warns of the potential for the ALR Act to become another means of dispossession:

by seeing compensation as the only legislative response to dispossession the ALRA can become a further instrument of dispossession for those groups who continue to maintain a traditional connection to their land, and who seek restitution of their traditional rights. While the NTA may not be relevant for all Indigenous people in NSW, it may still provide a means for that State to engage with native title in a way which strives to achieve ongoing economic and social development for Indigenous people.¹⁷⁴

¹⁶⁹ NSW Department of Lands, *Annual Report 2002/2003*, p 53.

¹⁷⁰ Jupp J (ed) *The Australian People: An Encyclopedia of the Nation, Its People and Their Origins*, Cambridge University Press, Cambridge, 2001, p 130.

¹⁷¹ NSW Department of Lands, n 169, p 52.

¹⁷² Aboriginal and Torres Strait Islander Social Justice Commissioner, n 88, p 135.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

It has been claimed that the potential of the ALR Act to rectify the consequences of dispossession should not be overemphasised. The amount of land in NSW that may be claimed is minimal.¹⁷⁵ The process of making a claim has also been described as ‘complicated, political and, in practice, difficult’.¹⁷⁶

¹⁷⁵ McRae et al, n 4, p 223.

¹⁷⁶ Behrendt, n 1, p 40.

6 NATIONAL PARKS AND WILDLIFE ACT 1974 (NSW)

Briefing Paper No 2/97 *Aborigines, Land and National Parks in New South Wales* by Stewart Smith provides an overview of the process by which Indigenous persons became more involved in the control and management of national parks in NSW. This section examines the *National Parks and Wildlife Act 1974* (NSW) in its current form.

The *National Parks and Wildlife Act 1974* is concerned with ‘the establishment, preservation and management of national parks, historic sites and certain other areas and the protection of certain fauna, native plants and Aboriginal objects’. One of the objects of the *National Parks and Wildlife Act 1974* is ‘the conservation of objects, places or features (including biological diversity) of cultural value within the landscape, including but not limited to places, objects and features of significance to Aboriginal people’.¹⁷⁷

Part 3 of the Act contains sections in relation to the National Parks and Wildlife Advisory Council and various committees. An Aboriginal Cultural Heritage Advisory Committee is established by Division 3 of Part 3. The function of the Committee is to ‘advise the Minister and the Director-General on any matter relating to the identification, assessment and management of Aboriginal cultural heritage, including providing strategic advice on the plan of management and the heritage impact permit process’.¹⁷⁸

Part 4 of the Act provides for the reservation of land in NSW. Division 10 then specifically sets out the requirements for the reservation of Aboriginal areas. Section 62(4) clearly establishes that the purpose of reservation is to preserve, protect and prevent damage to Aboriginal objects or places.

Part 4A was inserted by the *National Parks and Wildlife Amendment (Aboriginal Ownership) Act 1996* (NSW) and is specifically concerned with Aboriginal land. It acknowledges the cultural significance to Indigenous peoples of certain lands detailed in schedule 14 and land under the *Aboriginal Land Rights Act*. The reservation of schedule 14 lands may be revoked and subsequently vested in an Aboriginal Land Council. The land is then leased to the Minister before being reserved.¹⁷⁹ Section 71C(3) also allows for land under the *Aboriginal Land Rights Act* to be leased by an ALC to the Minister so it can be reserved. Land is leased by the ALC to the Minister, subject to native title, for a term of at least 30 years, and can be renewed for further terms of at least 30 years.¹⁸⁰ Responsibility for the care, control and management of the lands subject to the lease is vested in a board of management. The lease is to acknowledge that the Aboriginal owners of the land may use the lands ‘for hunting or fishing for, or the gathering of, traditional foods for domestic purposes and for ceremonial and cultural purposes to the extent that that entry is in

¹⁷⁷ Section 2A(1)(b)(i)

¹⁷⁸ Section 28.

¹⁷⁹ Section 71C.

¹⁸⁰ The matters to be covered in a lease between an Aboriginal Land Council and Minister are set out in section 71AD.

accordance with the tradition of the Aboriginal owners'.¹⁸¹ The lease is also to acknowledge that the public has a general right of access to the land, subject to any plan of management.

For land to be deemed culturally significant it must be important to Indigenous peoples in terms of the 'traditions, observances, customs, beliefs or history of Aboriginals'.¹⁸² Schedule 14 lists land that has been characterised as culturally significant. The list is currently comprised of the following:

- Biamanga National Park
- Gulaga National Park
- Jervis Bay National Park
- Mungo National Park
- Mootwingee Historic Site, Mootwingee National Park and Coturaundee Nature Reserve
- Mount Grenfell Historic Site
- Mount Yarrowyck Nature Reserve

One of the benefits of Part 4A is that Indigenous groups who are the traditional owners of an area, but nevertheless cannot establish native title rights and interests under the *Native Title Act*, can receive a form of title to the land (an estate in fee simple).¹⁸³ However, the Aboriginal and Torres Strait Islander Social Justice Commissioner has noted in relation to Part 4A that, 'The practice of the NSW government in relation to national parks has been to use important sections of the National Parks and Wildlife Act 1974 (NSW) only to a very limited extent in their negotiation of native title claims'.¹⁸⁴

Part 6 of the Act is concerned with Aboriginal objects and places. Under section 84, the Minister has the power to declare a certain place to be an Aboriginal place if it is or was of special significance to Aboriginal culture. At the end of the 2002-03 financial year 42 Aboriginal places had been declared.¹⁸⁵ The following five places were declared in 2002-03:

- South Brother Mountain (Port Macquarie)
- Farquhar Park (Taree)
- Dark Point (Myall Lakes)
- Mount Mackenzie (Gloucester)
- Towra Point (Kurnell)

The Director-General is responsible for 'the proper care, preservation and protection of any

¹⁸¹ Section 71AD(i).

¹⁸² Section 71D.

¹⁸³ Aboriginal and Torres Strait Islander Social Justice Commissioner, n 88, p 131.

¹⁸⁴ Ibid.

¹⁸⁵ NSW National Parks and Wildlife Service, *Annual Report 2002-2003*, p 29.

Aboriginal object of Aboriginal place on any land reserved under this Act' as well as for 'the proper restoration of any such land that has been disturbed or excavated for the purpose of discovering an Aboriginal object'.¹⁸⁶ Under section 86 it is an offence to:

- Disturb or excavate any land for the purpose of discovering an Aboriginal object.
- Disturb or move an Aboriginal object.
- Take possession of or remove an Aboriginal object in certain areas.
- Erect or maintain a building or structure for the storage or exhibition of an Aboriginal object, unless authorised by the Director-General.

It is also an offence to knowingly destroy, deface or damage an Aboriginal object or place (or allow it to happen), with a maximum penalty of 50 penalty units or imprisonment for six months.¹⁸⁷

¹⁸⁶ Section 85.

¹⁸⁷ Section 90.

7 CONCLUSION

It is now more than 20 years since land rights legislation commenced in New South Wales and 12 years since the landmark decision of *Mabo*. This affords an opportunity to evaluate what has been achieved in the interim and to identify some of the ways the land rights and native title schemes have failed to meet expectations.

More than 78,500 hectares of land have been granted since the *Aboriginal Land Rights Act 1983* (NSW) commenced. However, this represents only 0.02% of land in New South Wales. The land rights scheme has also been marred by numerous allegations of corruption and mismanagement that have been directed towards the various Aboriginal land councils. A taskforce has now been formed with the mandate to overhaul the land council system in New South Wales.

According to Tehan, ‘ten years of the *NTA* has seen the common law of native title emerge, blossom, change and wilt’.¹⁸⁸ The success of the native title scheme in New South Wales seems limited. The potential for future determinations that native title exists would also appear to have been reduced following the decision of the High Court in *Wilson v Anderson*. However, it is possible that further opportunities may arise through the negotiation of Indigenous Land Use Agreements, as demonstrated by the Arakwal agreement.

Nine sites in New South Wales have been identified as being culturally significant to Indigenous peoples in accordance with the *National Parks and Wildlife Act 1974* (NSW). 42 Aboriginal places have been declared. The Indigenous Land Corporation has acquired over 185,311 hectares of land in New South Wales. However, arguments that Indigenous Australians are entitled to land by reason of possessory title or fiduciary obligations have met with limited success in the courts.

Therefore, whilst there are significant obstacles that remain in terms of Indigenous Australians owning, managing or accessing land in New South Wales, much has also been achieved.

¹⁸⁸

Tehan, n 45, p 571.

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