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**The Native Title Debate:  
Background and Current Issues**

by

**Gareth Griffith**

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## EXECUTIVE SUMMARY

This paper presents an account of the main developments in the native title debate in Australia since the 1992 *Mabo* decision. There the High Court held that the common law of Australia recognises a form of native title which reflects the entitlement of the indigenous inhabitants, in accordance with their laws and customs, to their traditional lands. A particular feature of the paper is that it presents an overview of the Commonwealth *Native Title Act* as amended in 1998. The paper's main findings are as follows:

- under the common law, extinguishment of native title may occur in some cases: (a) by an act of the Crown or legislature; (b) by loss of connection with the land; or (c) by voluntary surrender to the Crown;
- under the Commonwealth *Native Title Act 1993*(NTA), as first enacted, native title can only be extinguished or impaired in one of three ways: (a) by the occurrence of a past act that has been validated; (b) by an agreement on the part of the native title holders; or (c) the doing of a permissible future act;
- all the Australian jurisdictions have passed legislation in some form or other relating to native title. Western Australia eventually adopted a minimalist approach, legislating only to validate pre-1994 titles. A similar approach was adopted in Tasmania, Victoria, the ACT and the Northern Territory. South Australia, on the other hand, adopted a more comprehensive native title regime, as envisaged in the Commonwealth NTA. Queensland and NSW have also adopted a comprehensive model, although in NSW at least only selective parts of the legislation have been proclaimed to commence. In effect, the Parts of the NSW Act that are commenced deal mainly with validation of past acts attributable to the State and the effects of validation;
- the immediate background to the 1996 *Wik* case was the uncertainty, following both the *Mabo* decision and enactment of the Commonwealth NTA in 1994, over the relationship between pastoral leases and native title;
- it was decided in *Wik* that: the pastoral leases under consideration in the case did not confer exclusive possession on the pastoralist; that the leases therefore did not necessarily extinguish all native title rights and interests; whether there was any extinguishment or impairment of native title can only be determined by considering the nature of the native title rights and interests which the indigenous people can establish in relation to the land; where native title rights and interests can coexist with the statutory rights of the pastoralist then they survive, but, to the extent of any inconsistency the rights of the pastoralist prevail;
- the reactions of the main stakeholders in the native title debate to *Wik* were very different. In particular, a different slant was placed on the question of the 'uncertainty' arising from it. The Federal Government's legislative response was based on its Ten Point Plan, first released on 1 May 1997, then released in a revised

version on 8 May 1997;

- these proposals proved to be very controversial and only a last minute compromise reached between the Federal Government and Senator Harradine allowed the Native Title Bill to pass through the Senate on 8 July 1998. The commencement date for the amended Native Title Act is 30 September 1998; and
- particular features of the amended NTA are: a new emphasis on resolving native title issues by agreement, for which purpose it includes detailed provisions on the making of what are called Indigenous Land Use Agreements; the validation of intermediate period acts which occurred between 1 January and 23 December 1996 (the date of the *Wik* decision); the confirmation that certain previous exclusive possession acts have extinguished native title; the exclusion of certain activities from the right to negotiate; and the introduction of a stricter registration test which, among other things, operates as a gateway to the right to negotiate. The amended Act also redefines the roles of the Federal Court and the National Native Title Tribunal in a way that is consistent with the High Court's decision in the *Brandy* case (1995) 183 CLR 245.



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## 1. INTRODUCTION

This paper seeks to offer a guide to the central issues in the current debate about native title in Australia. It should be emphasised that the paper does not purport to offer anything like an original account of the complex issues involved. It relies to a very great extent on the body of secondary literature which exists in this field.

The paper starts with a section discussing key concepts and issues in the native title debate. It then presents an account of the *Mabo*<sup>1</sup> and *Wik*<sup>2</sup> decisions and the legislative responses to these. A particular feature of the paper is that it presents an overview of the amended Commonwealth Native Title Act.

## 2. KEY CONCEPTS AND ISSUES IN THE NATIVE TITLE DEBATE

**What is native title?** Since *Mabo* the common law of Australia recognises native title. However, although the common law recognises native title, this does not mean that native title originates from the common law. The origin of native title is the connection with land of the indigenous peoples of Australia, a connection which is in accordance with their traditional laws and customs.<sup>3</sup> The source of native title is the traditional Aboriginal occupancy of and connection with the land by the people as a community or society.<sup>4</sup> In this way, the indigenous property rights and interests of Aboriginal and Torres Strait Islanders, which go by the name of native title, pre-date and survive the colonisation of Australia.

Many commentators say that in recognising native title the common law of Australia was only catching up with what had been for many years the accepted legal doctrine in several other former British colonies, including New Zealand, Canada and the United States. In those countries two systems of land tenures had been long recognised, namely: the system introduced on colonisation, from which freehold and leasehold titles arise; a pre-existing indigenous system, from which indigenous property rights derive.<sup>5</sup> In Australia, on the other hand, indigenous property rights were not recognised before 1992 because here the whole land tenure system was based on the concept of *terra nullius*.<sup>6</sup>

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<sup>1</sup> *Mabo and others v The State of Queensland [No 2]* (1992) 175 CLR 1; 107 ALR 1. The case will be referred to henceforth as *Mabo*.

<sup>2</sup> *Wik Peoples v The State of Queensland* (1996) 187 CLR 1; 141 ALR 129. The case will be referred to henceforth as *Wik*.

<sup>3</sup> G Neate ed, *Native Title Service*, Butterworths 1996 [1556].

<sup>4</sup> *Ibid* at [1413].

<sup>5</sup> *Fejo v Northern Territory* [1998] HCA 58 (10 September 1998). Note Kirby J's view that 'care must be exercised in the use of judicial authorities of other former colonies and territories of the Crown because of the peculiarities which exist in each of them arising out of historical and constitutional developments, the organisation of the indigenous peoples concerned and applicable geographical or social considerations' (para 101).

<sup>6</sup> National Native Title Tribunal, Questions and Answers, <http://www.nntt.gov.au>

**What is meant by the doctrine of *terra nullius*?** *Terra nullius* is referred to as a legal fiction which is deemed by law to apply to 'a land belonging to no one'. This was part of a package of concepts and doctrines applied by the colonising powers in the eighteenth and nineteenth centuries to decide whether the laws of indigenous peoples should continue to have application in a colonised territory. A distinction was made for this purpose between a 'settled' colony, on one side, as against a colony that was 'conquered' or 'ceded', on the other. In a conquered or ceded colony, where prior sovereignty was found to exist together with an identifiable system of law, then the law of the indigenous inhabitants remained in force until altered. In a settled colony, however, the English laws applicable to the colony were immediately in force. This was because the land was deemed to be 'desert and uncultivated'. Further, the term 'settled colony' was applied to those territories without a sovereign power in which 'live uncivilised inhabitants in a primitive state of society'.<sup>7</sup> It was in this sense that Australia was deemed to be land belonging to no one, in that it was thought to be a land without a recognisably settled system of law or habitation. As the Privy Council held in *Cooper v Stuart*, New South Wales was 'a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law...'.<sup>8</sup>

It was this legal theory which was overturned in *Mabo*. In that case the High Court founded the concept of native title at common law on the equation of the rights of the 'indigenous inhabitants of a settled colony with the inhabitants of a conquered colony',<sup>9</sup> as well as on the proposition that 'the British Crown intends that the rights of property of the inhabitants are to be fully respected'.<sup>10</sup>

**Who holds native title?** Native title is held by Aboriginal or Torres Strait Islander people who have maintained a continuing connection with the land or waters, according to their traditional law or customs, and where this connection continues from the time of first European settlement to the present day.<sup>11</sup> Native title is generally a communal title (although in rare cases it may be held by an individual). In *Mabo* the High Court was careful not to impose a requirement on the type of group who may hold and, therefore, claim native title.<sup>12</sup> Under the Commonwealth Native Title Act as amended in 1998 applications for a determination of native title must be endorsed by what is called the 'native title claim group', thus eliminating the possibility of individuals making their own claims without the support of their claim group.

**Where does native title exist?** Although *Mabo* did not say which parts of Australia are subject to native title, the accepted view is that native title may still exist on:

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<sup>7</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 201.

<sup>8</sup> (1889) 14 AC 286 at 291.

<sup>9</sup> *Mabo* at 57.

<sup>10</sup> *Ibid* at 56.

<sup>11</sup> National Native Title Tribunal, Questions and Answers, <http://www.nntt.gov.au>

<sup>12</sup> G Neate ed, *Native Title Service*, Butterworths 1996, [1604].

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- vacant Crown land
  - State forests
  - national parks
  - public reserves
  - beaches and foreshores
  - land held by government agencies
  - land held in trust for Aboriginal communities
  - any other public or Crown lands.<sup>13</sup>

Following *Wik*, it is also the case that native title may co-exist with pastoral leases.

An area of uncertainty has been whether native title may exist over offshore waters. Both the common law and the Commonwealth Native Title Act (NTA) contemplate that native title can exist over waters which are above the high tide water mark, such as a tidal inlet, an estuary or a harbour, but it has been less clear whether native title can be claimed over offshore waters. This was clarified in the recent Croker Island case (*Yarmirr v Northern Territory*) in which it was found that native title did exist over the sea and inter-tidal zone around Croker Island. However, Justice Olney conceded only limited rights to the native title claimants, ruling that native title rights and interests do not confer 'possession, occupation, use and employment of the sea and seabed within the claimed area to the exclusion of all others'. Also, in case of inconsistency, offshore native title rights must yield to valid State, Territory and Federal laws.<sup>14</sup> As in the *Wik* decision, therefore, native title rights were found to co-exist with other rights conferred by legislation, but must yield to those statutory rights to the extent of any inconsistency.<sup>15</sup>

**Does the grant of freehold title extinguish native title?** Yes. In the recent case of *Fejo v Northern Territory of Australia*<sup>16</sup> the High Court confirmed that the grant of freehold title (referred to as the grant of a fee simple) extinguishes native title. The argument that such a grant did not extinguish native title was rejected unanimously, as was the contention that a grant of this sort merely suspends native title which may be revived at a later date. Thus, where the land in question was re-acquired by the Crown at some later time, no native title rights and interests could then be recognised by the common law. In this way the High Court dismissed an appeal by the Larrakia people who were seeking to establish that native title existed over substantial areas around Darwin which had reverted to Crown land after being granted as freehold land in 1882 under the *Northern Territory Land Act 1872* (SA).

**Does native title affect access to public places?** On this question the National Native Title Tribunal states: 'State and Territory governments have passed laws confirming continued

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<sup>13</sup> National Native Title, Questions and Answers, <http://www.nntt.gov.au>

<sup>14</sup> Editorial comment, 'Native title and the sea', *The Sydney Morning Herald*, 8 July 1998.

<sup>15</sup> N Henwood, 'The Croker Island case - a landmark decision in native title' (August 1998) 3 *Native Title News* 146.

<sup>16</sup> *Fejo v Northern Territory* [1998] HCA 58 (10 September 1998).

public access to places such as beaches, foreshores, waters and other public areas where native title may exist. Native title agreements may include joint management of public areas without preventing continued public access'.<sup>17</sup>

Note that there are several native title claims over national parks in NSW, including the Royal National Park south of Sydney. Note, too, that in NSW the *National Parks and Wildlife Act 1974* was amended in 1996 to enable selected reserved lands of Aboriginal cultural significance to be revoked and ownership vested on behalf of Aboriginal owners in an Aboriginal Land Council. The land is then to be leased back to the State Minister to be reserved as a national park.<sup>18</sup>

**What is the difference between native title and land rights?** In NSW as elsewhere in Australia, the native title legislation passed in response to *Mabo* operates alongside a pre-existing regime of land rights and Aboriginal heritage legislation.<sup>19</sup> Unlike the land rights regime, native title is not a grant or right created by governments to compensate indigenous people for the consequences of colonisation. Instead, native title derives from traditional law and customs and recognises that indigenous people did not necessarily lose their land when the Australian colony was established. It is enough to add that, whereas native title rights and interests are recognised by the common law and can therefore be pursued in the courts independently of the provisions of the Commonwealth NTA and its counterparts in the States and Territories, the land rights regime on the other hand is purely a creature of statute. The *Wik* case is a good example of the difference between the two, as this was a common law action relating to a claim for native title which began before the enactment of any native title legislation.

**What is a pastoral lease?** A pastoral lease generally allows the use of Crown land for pastoral and other related purposes. Pastoral purposes include raising livestock, establishing fences, bores and accommodation. A pastoralist's rights and obligations, which may differ from State to State, are set out in the lease and relevant statute. In Western Australia a pastoralist does not have general rights to soil and timber on the leased land but can use these resources for roads, buildings and other improvements on the land, consistent with the pastoral purposes of the lease. In Queensland a pastoralist is subject to rights granted under mining, petroleum and forestry legislation and the government has the power to allow non-pastoralists to enter the land. A pastoral lease may also be subject to statutory access rights of indigenous peoples.<sup>20</sup>

### 3. THE MABO DECISION

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<sup>17</sup> National Native Title Tribunal, Questions and Answers, <http://www.nntt.gov.au>

<sup>18</sup> S Smith, *Aborigines, Land and National Parks in New South Wales*, NSW Parliamentary Library, Briefing Paper No 2/1997, p 16.

<sup>19</sup> *Aboriginal Land Rights Act 1983* (NSW); Part 4A of the *National Parks and Wildlife Act 1974* (NSW).

<sup>20</sup> HREOC, *The Racial Discrimination Act and native title*, <http://www.hreoc.gov.au>

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**What did the high court decide in Mabo?** The decision of the High Court in *Mabo* has been variously described as: a ‘landmark decision’ which constitutes either a ‘judicial revolution’ or ‘a cautious correction to Australian law’; as a decision creating ‘a legal and political constitutional crisis’; and as a decision that ‘must be seen, not as a threat, but as a breakthrough offering enormous promise’.<sup>21</sup>

In *Mabo* the High Court held that the common law of Australia recognises a form of native title which reflects the entitlement of the indigenous inhabitants, in accordance with their laws and customs, to their traditional lands.<sup>22</sup> Moreover, although the case itself related to the Murray Islands, the High Court appeared to suggest that the concept of native title was applicable to mainland Australia, a suggestion which was confirmed in later cases.<sup>23</sup>

The departure in Australian land law introduced by *Mabo* can be summed up under the following headings:

***Pre-Mabo land law:*** Before *Mabo*, the prevailing doctrine of land law in Australia said that the acquisition of sovereignty by the Crown was the ultimate basis of all the interests and rights to land in this country. As the lands of Australia were successively annexed to the Crown they became ‘in law the *property* of the King of England’. Interests in land were thereafter enjoyed only as, or under, grants made by the Crown. As for the indigenous peoples, their legal interest in, and relation to, the annexed land were considered to be extinguished.<sup>24</sup> The doctrine that Australia was *terra nullius* (land belonging to no one) was rejected in *Mabo*. That doctrine was explained earlier in this paper.

***Mabo and the Crown’s radical title:*** The doctrine that when the Crown asserted sovereignty over Australia it acquired absolute beneficial ownership to the territory was rejected. It was held instead that, on the acquisition of sovereignty over a particular part of Australia, the Crown acquired what is called ‘a radical title’ to the land in that part,<sup>25</sup> but

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<sup>21</sup> G Neate, ‘Determining native title claims - learning from experience in Queensland and the Northern Territory’ (1995) 69 *ALJ* 510.

<sup>22</sup> *Mabo* at 15.

<sup>23</sup> *Western Australia v Commonwealth* (1995) 183 CLR 373; 128 ALR 1. See also *Re Waanyi People’s Application* (1995) 129 ALR 118.

<sup>24</sup> *Wik* 141 ALR 129 at 249-250 (per Kirby J).

<sup>25</sup> In *Mabo* Brennan J described radical title thus: ‘The Crown was invested with the character of Paramount Lord in the colonies by attributing to the Crown a title, adapted from feudal theory, that was called radical, ultimate or final title...The Crown was treated as having the radical title to all the land in the territory over which the Crown acquired sovereignty. The radical title is a postulate of the doctrine of tenure and a concomitant of sovereignty’: *Mabo* (1992) 175 CLR 1 at 48.

that it did not become the universal and absolute beneficial owner of it.<sup>26</sup>

***The survival of native title:*** In particular, native title to land survived the Crown's acquisition of sovereignty and radical title. Native title was said to be recognised by the common law as a 'burden' on the radical title of the Crown.<sup>27</sup> Native title existed in accordance with the laws and customs of indigenous people where those people have maintained their traditional connection with the land, but only where their title has not been extinguished by governmental acts.

***The variable nature of native title:*** It was said in *Mabo* that the indigenous people continue to hold the same types of interests in land as they had before the Crown's acquisition of sovereignty. What this means is that there can be no definitive account of what constitutes native rights, for the reason that these rights are determined by the particular traditional laws and customs of the indigenous inhabitants and will therefore vary from one case to another. It is said that 'native title takes its content from the traditional laws and customs of the native title holders'.<sup>28</sup> Brennan J thus referred to the 'variable nature of native title to land capable of recognition by the common law'.<sup>29</sup> Native title can support a range of interests in land, from rights of access to land, at one end of the spectrum, to rights of exclusive possession, at the other.

***The common characteristics of native title:*** At the same time some common characteristics of native title can be noted. First, it has been said already that generally speaking native title is possessed by a community or group, although in rare cases, depending on the content of the traditional laws and customs, it may also be possessed by an individual. Secondly, it is inalienable (that is, it cannot be transferred) other than by surrender to the Crown or pursuant to traditional laws and customs. Thirdly, it is a legal right that can be protected, where appropriate, by legal action.<sup>30</sup>

***Extinguishment of native title by act of the Crown or the legislature and the question of pastoral leases:*** Native title could be extinguished by valid governmental acts (of the Imperial, Colonial, State, Territory or Commonwealth governments), but only where a clear and unambiguous intention to do so has been demonstrated. Thus, native title could be

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<sup>26</sup> *Halsbury's Laws of Australia*, Volume 1, [5-10]. The Crown's title would be universal and absolute in the case of those lands (if any) over which no pre-existing native title interests existed.

<sup>27</sup> *Mabo* at 51 (pre Brennan J); at 82 (per Dean and Gaudron JJ). Justice Dean and Gaudron explain that native title reduces or qualifies the interest of the Crown to the extent necessary to give effect to native title: G Neate ed, *Native Title*, [1407].

<sup>28</sup> G Neate ed, *Native Title*, Butterworths 1996, [1556].

<sup>29</sup> *Mabo* at 49.

<sup>30</sup> Native Title Amendment Bill 1997 [No 2], *Explanatory Memorandum*, p 23.

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extinguished by such means as legislation or by an inconsistent Crown grant.<sup>31</sup> It was said that freehold grants to settlers, that is grants in fee simple, and leases conferring exclusive possession extinguish native title. On the other hand, grants of lesser interests, such as authorities to prospect for minerals, may not necessarily have extinguished native title. An area of difficulty relates to pastoral leases. This is because such leases commonly included a clause protecting traditional Aboriginal rights of sustenance and, it could be argued, are not inconsistent with native title. As one commentator has noted, the issue remained unsettled after *Mabo* because, although the majority favoured the conclusion that pastoral leases extinguished native title, the reasoning was ‘unconvincing’.<sup>32</sup> Professor Richard Bartlett wrote in 1993: ‘The clauses in pastoral leases spring from Imperial and historic concern to protect the Aboriginal people in the traditional use of their land, and a regard for their history and circumstances is likely to deny the requisite “clear and plain” intention’.<sup>33</sup>

A clear example, according to the *Mabo* decision, of where native title would not be extinguished is where the appropriation and use of waste lands by the Crown is consistent with the continuing concurrent enjoyment of native title over land, for example, land set aside as a national park.<sup>34</sup> Various issues relating to extinguishment are discussed in more detail later in this paper.

***Extinguishment of native title by other means:*** Native title may also be extinguished if the clan or group which is entitled to it loses its connection with the land by ceasing to acknowledge or observe the relevant laws and customs, or on the death of the last member of the group or clan.<sup>35</sup>

***Extinguishment by the voluntary surrender of native title:*** Moreover, native title may be surrendered to the Crown voluntarily by any clan or group who, by their traditional laws and customs, have a relevant connection with the land. As soon as native title is extinguished in

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<sup>31</sup> Ibid at 68.

<sup>32</sup> In fact the preamble to the Commonwealth *Native Title Act 1993* stated that the High Court has ‘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’. However, it was said in *Wik* at 183 that the statement in the preamble ‘reads too much into the judgments in *Mabo* so far as reference to leasehold estates is concerned unless particular attention is given to what is meant by them’ (per Toohey J). Professor Garth Nettheim has said that the statement ‘leaves open the question whether the grant of *particular* leasehold estates are inconsistent with native title’: ‘Wik: on invasions, legal fictions, myths and rational responses’ (1997) 20 *UNSW Law Journal* 495 at 497.

<sup>33</sup> RH Bartlett, *The Mabo Decision*, Butterworths 1993, p xxii.

<sup>34</sup> *Mabo* at 70 (per Brennan J). For an authoritative statement of the principles of the *Mabo* case see - *Pareroultja v Tickner* (1993) 117 ALR 206 (per Lockhart J).

<sup>35</sup> Ibid at 59-60, 70 (per Brennan J), at 109-110 (per Dean and Gaudron JJ), at 192 (per Toohey J); *Halsbury’s Laws of Australia*, Volume 1, [5-118].

this way, the Crown acquires absolute beneficial ownership of the land in question.<sup>36</sup>

***Extinguishment, compensatory damages and the Commonwealth Racial Discrimination Act:*** By a bare majority it was held in *Mabo* that extinguishment of native title by a Crown grant, which is inconsistent with the retention of native title, does not give rise at common law to a claim of compensatory damages. Note that the finding was expressed to be subject to the operation of the Commonwealth *Racial Discrimination Act 1975* [RDA].<sup>37</sup>

***The ruling:*** In the light of the above principles and the facts of the *Mabo* case, it was held that the Meriam people of the Murray Islands are entitled to possess, occupy, use and enjoy those Islands.<sup>38</sup> However, it was also decided that the State of Queensland has the power to extinguish the Meriam people's title, as long as it exercises that power validly and in a manner consistent with Commonwealth laws.

**What questions did *Mabo* leave unanswered?** The *Mabo* decision is probably best seen as a first step towards the recognition of native title in Australia. Important though it undoubtedly was, it still left many questions unanswered, for example: how were indigenous people to prove that they had native title to land? where does native title exist? and what is the nature of native title? There were also the questions of how native title could be protected from future extinguishment,<sup>39</sup> as well as how past acts of extinguishment could be validated without breaching the Commonwealth *Racial Discrimination Act 1975*.

#### 4. OVERVIEW OF THE FEDERAL NATIVE TITLE ACT 1993 AS FIRST ENACTED - AND HOW THE STATES RESPONDED TO IT

**What was the Commonwealth's legislative response to *Mabo*?** Subsequent to the *Mabo* decision, in order to address some of the issues noted above, all the Australian jurisdictions passed legislation in some form or other relating to native title. As a result, it is now the case that all the legislation in the States and Territories is designed to complement the

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<sup>36</sup> *Mabo* at 60 (pre Brennan J), at 110 (per Deane and Gaudron JJ).

<sup>37</sup> The relationship between native title and the *Racial Discrimination Act 1975* (Cth) is discussed later in the paper (page 44). In *Mabo v Queensland [No 1]* (1998) 166 CLR 186 it was held that it was a breach of the Racial Discrimination Act [RDA] to single out the rights of native title holders for extinguishment while leaving the rights of other people in the Murray Islands intact. It has been said since *Mabo [No 2]* that 'The precise extent of the protection afforded by the RDA to native title is not yet known...': G Neate ed, *Native Title*, [1386]. In *WA v Commonwealth* (1995) 183 CLR 373 the whole of the *Land (Titles and Traditional Usage) Act 1993* (WA) was held to be inoperative because it contravened the RDA.

<sup>38</sup> The High Court left open the position regarding certain land that had been leased, and other land used for governmental administrative purposes.

<sup>39</sup> As the High Court observed in *WA v Commonwealth* (1995) 183 CLR 373 at 452, the enjoyment of native title is 'precarious under the common law: it is defeasible by legislation or by the exercise of the Crown's (or a statutory authority's) power to grant inconsistent interests in land or to appropriate the land and use it inconsistently with enjoyment of the native title'.



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Commonwealth *Native Title Act 1993* (NTA) which formed the centrepiece of this legislative response to *Mabo*.<sup>40</sup>

It is important to bear in mind that the Commonwealth NTA has been amended recently and that, while some comment is made about these changes in this section, the 1998 amendments are considered in more detail after the implications of the *Wik* decision have been explained.

Before presenting an overview of the Federal native title legislation in its original form, it must be noted that, even when read in conjunction with the relevant State and Territory legislation, the NTA does not amount to a codification of native title law. The concerns of this statutory regime are relatively specific and need to be understood in conjunction with the operation of the common law. Inevitably, this makes for a complex and sometimes confusing legal situation. One example is in relation to the issue of the extinguishment of native title by Crown grants of titles in land made before 1 January 1994: such extinguishment may occur in some cases under the common law (by an act of the Crown or legislature, by loss of connection with the land, or by voluntary surrender to the Crown); and in other cases under the legislative regime (notably where the titles are invalid due to inconsistency with the Commonwealth RDA). Note that under the Commonwealth NTA, as first enacted, native title can only be extinguished or impaired in one of three ways: the occurrence of a past act that has been validated; an agreement on the part of the native title holders; or the doing of a permissible future act.<sup>41</sup> These are explained below.

As first enacted, the main purposes of the Commonwealth NTA, which came into force on 1 January 1994, can be discussed under the following headings:<sup>42</sup>

***How did the NTA recognise and protect native title rights and interests?*** That native title is ‘not able to be extinguished contrary to this Act’ is declared in section 11 (1) of the Commonwealth NTA. Also, the Act’s preamble notes the dispossession of the indigenous peoples of Australia and the consequences of that dispossession, and states that the Federal Parliament intends the Act to constitute a ‘special measure’ within the meaning of the *Racial*

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<sup>40</sup> The exception was the Western Australian *Land (Titles and Traditional Usage) Act 1993* which purported to extinguish any surviving native title in that State and replace it with statutory rights to traditional usage of land. As noted, in *WA v Commonwealth* (1995) 183 CLR 373 the High Court declared the Act to be invalid and inoperative by reason of inconsistency with section 10 of the Commonwealth *Racial Discrimination Act 1975*. The *Titles Validation Act 1995 (WA)* was enacted subsequently to provide for the validation of past dealings inconsistent with native title.

<sup>41</sup> *WA v Commonwealth* (1995) 183 CLR 373 at 459. Under the *Native Title Amendment Act 1998* extinguishment can also occur further to what are called intermediate period acts. Moreover, the operation of the past act regime has been modified by the inclusion of the new statutory categories of previous exclusive possession acts and previous non-exclusive possession acts (see page 61).

<sup>42</sup> An overview of the legislation and its operation is found in *WA v Commonwealth* (1995) 183 CLR 373 at 453-459.

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*Discrimination Act 1975* (Cth).<sup>43</sup>

The terms ‘native title’ and ‘native title rights and interests’ are defined in section 223(1) of the Commonwealth NTA to mean:

- ‘the communal, group or individual rights and interests of Aboriginal peoples and 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, have a connection with the land or waters; and
  - (c) the rights and interests are recognised by the common law in Australia’.<sup>44</sup>

By incorporating the common law concept of native title in this way into the statutory definition, the NTA recognised that the law of native title will continue to be developed by the courts. What this means is that, in applying the NTA itself, the common law must be referred to for matters such as the definition of native title, including the content, nature and incidents of native title.<sup>45</sup> Another point to note is that the NTA recognises that native title may exist in relation to waters, an issue on which the decision in *Mabo* is silent.

All these features remain in place under the *Native Title Amendment Act 1998*, which adds in new section 4 (1) the statement that ‘This Act recognises and protects native title. It provides that native title cannot be extinguished contrary to the Act’.

***How did the NTA validate past acts invalidated by native title and provide for any entitlements to compensation arising from such acts?*** Clearly the legislation had to provide some mechanism for validating those past titles to land which could now be declared invalid. An area of particular concern were those ‘past acts’ affecting native title which occurred after the passing of the Commonwealth *Racial Discrimination Act 1975*. As Associate Professor Peter Butt wrote in 1994, in the light of the *Mabo* decision it could be argued that the Commonwealth RDA ‘has invalidated Crown grants made and leases granted since 31 October 1975, on the ground that they purported to extinguish native title

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<sup>43</sup> ‘Special measures’ are defined under section 8 of the Commonwealth RDA 1975 in terms of paragraph 4 of Article 1 of the *International Convention on the Elimination of All Forms of Racial Discrimination* which provides: ‘Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved’.

<sup>44</sup> Hunting, gathering and fishing rights and interests are included in the definition, as are those native title rights and interests which are, or have been, compulsorily converted into, or replaced by, statutory rights and interests held by or on behalf of Aboriginal people or Torres Strait Islanders (section 223(2) and (3)).

<sup>45</sup> G Neate ed, *Native Title Service*, [1553] and [1565].

without compensation and so were discriminatory'.<sup>46</sup> Under the NTA, validation of extinguishment must be accompanied by compensation to the traditional owners for what they have lost as a result of that validation.<sup>47</sup> The criteria for compensation are 'just terms' where the requirements of the Commonwealth Constitution operate,<sup>48</sup> or otherwise in accordance with the principles set out in laws relating to compensation for the impact on 'ordinary title'.<sup>49</sup> In relation to validated past acts, compensation is payable by the relevant government.<sup>50</sup> Compensation will only be given after an approved native title determination has been made, a process which, as experience has shown, may take many years.

Validation is achieved by what is called the 'past act' regime under the Commonwealth NTA.<sup>51</sup> That scheme has been described as 'Perhaps the most confusing aspect' of the legislation.<sup>52</sup> Basically, the legislation validates past acts attributable to the Commonwealth,<sup>53</sup> the States and Territories.<sup>54</sup> Moreover, provision is made for the extinguishment of native title for certain categories of past acts validated under the legislation.<sup>55</sup> Thus, a category **A** past act, which includes the grant of a freehold estate and the grant of commercial, agricultural, pastoral or residential leases, extinguishes native title; a category **B** past act will also extinguish native title but only to the extent of any inconsistency. On the other hand, the 'non-extinguishment principle' applies to category **C**

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<sup>46</sup> P Butt, 'The Native Title Act: A property law perspective' (1994) 64 *ALJ* 285 at 287.

<sup>47</sup> Section 17, Commonwealth NTA (compensation payable by the Commonwealth); section 20 (compensation payable under a corresponding law of a State or Territory).

<sup>48</sup> Section 18. This applies where the invalidity of a past act of the Commonwealth involved the acquisition of property other than on just terms as required by section 51(xxxi) of the Commonwealth Constitution.

<sup>49</sup> Sections 51(3), 240 and 253. Compensation for past and future acts must only consist of the payment of money unless the person seeking compensation requests that some or all of it should consist of the transfer of property or the provision of goods or services, in which case the court (etc) may recommend accordingly (section 51).

<sup>50</sup> It is not payable by third parties. On the other hand, the future act regime contemplates that compensation may be recovered from third parties.

<sup>51</sup> An 'act', whether past or future, is defined broadly to include 'the making, amendment or repeal of any legislation, the exercise of any executive power of the Crown in any of its capacities (whether or not under legislation) and the grant, creation, variation or extinguishment of interest in land or other rights by the Crown in any of its capacities or by any other person' (section 226).

<sup>52</sup> G Neate ed, *Native Title Service*, [3.130.2].

<sup>53</sup> Section 14.

<sup>54</sup> Section 19. The section contemplates for this purpose the operation of complimentary legislation in the States and Territories. As the High Court said in *WA v Commonwealth* (1995) 183 CLR 373 at 455 'The validation of past acts attributable to a State is effected by a State law which, at the time of its enactment, is not subject to an overriding law of the Commonwealth'.

<sup>55</sup> Section 15.

(mining leases) and category **D** past acts.<sup>56</sup>

These arrangements are complicated enough, but where real confusion can arise is in respect of the definition of ‘past act’ under section 228. This is because the principle of extinguishment in section 15 only refers to those past acts which were invalid before validation under the NTA. The legislation does not validate every grant of land made in the past or every piece of legislation which may have impaired or extinguished native title. Moreover, the NTA does not tell us which past acts are invalid and which are not. As the *Butterworths Native Title Service* explains, it is reasonable to assume that native title may be extinguished by a valid statutory mechanism outside the NTA, but the question of whether a particular statutory title extinguishes native title must be determined by the common law principles foreshadowed in *Mabo*.<sup>57</sup> In this way the question of determining if a pastoral lease granted before enactment of the NTA was valid (where it did not constitute a ‘past act’ as defined by the NTA) and whether that valid grant of land extinguished native title in full or in part was left to the courts to decide.

In substance, this past act regime remains in place under the *Native Title Amendment Act 1998*. The main modification to it is that the new statutory categories of ‘previous exclusive possession act’ and ‘previous non-exclusive possession act’ add, in the words of the Federal Government, ‘certainty’ and ‘clarity’ to the effect of previous government acts on native title. For example, whereas the original NTA does not state what effect a validly granted freehold title or residential lease has on native title, the 1998 amendments make it clear that, as ‘previous exclusive possession acts’, these acts do extinguish native title. Issues of this kind, therefore, are no longer left to the courts to decide. What is left to the common law is the question of whether a non-exclusive pastoral lease extinguishes or merely suppresses native title (see page 62). Further, native title may also be extinguished now by what are called ‘intermediate period acts’, that is, the validation of acts or grants in relation to non-vacant Crown land between 1 January 1994 and 23 December 1996 (the date of the High Court’s decision in *Wik*).

***How did the NTA establish ways in which future dealings affecting native title could proceed and how did it set standards for those dealings?*** To achieve this the Commonwealth NTA established a ‘future act’ regime based on such inter-related concepts as ‘act’,<sup>58</sup> ‘act affecting native title’,<sup>59</sup> ‘future act’<sup>60</sup> and a distinction between ‘permissible

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<sup>56</sup> Elaborate definitions of these four categories of past acts are set out in sections 229-232. A category **D** past act is any act which does not fall in categories **A**, **B** or **C**. Section 238(8) presents an example of the operation of the ‘non-extinguishment principle’. The example relates to a category **C** mining lease that confers exclusive possession over an area of land or waters in relation to which native title exists. Native title continues while the lease is in force but has no legal effect. However, native title will have legal effect once the lease expires. Compensation to the native title holders is payable by the Commonwealth under section 17.

<sup>57</sup> G Neate ed, *Native Title Service*, [3,135.3].

<sup>58</sup> Section 226. An ‘act’, whether past or future, is defined broadly to include ‘the making, amendment or repeal of any legislation, the exercise of any executive power of the Crown in any of its capacities (whether or not under legislation) and the grant, creation, variation or

and impermissible future acts'.<sup>61</sup> With certain exceptions,<sup>62</sup> the 'future act' regime provides that such an 'act' as the making of legislation which affects native title holders does so in the same way that it affects ordinary (freehold) title holders, or in a way that puts native title holders in no worse a position than ordinary title holders.<sup>63</sup> It is said that the future act regime is 'designed to strike a balance between the protection of native title and economic development'.<sup>64</sup>

Under this regime native title could only be extinguished or affected in one of three ways:

- *by agreement*, where native title holders on a regional or local basis agree with the relevant government that their rights and interests may be surrendered or that a future act affecting their native title is authorised. The first successful agreement of this sort was the Crescent Head Agreement between the NSW Government and the Dughutti People, under which the Dughutti People surrendered native title to the State on 7 April 1997.<sup>65</sup>
- where either *section 24 or 25 of the NTA apply*;<sup>66</sup> and
- if the dealing is a '*permissible future act*'. In section 235 the range of permissible future acts are defined to include the renewal, re-grant or extension of commercial,

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extinguishment of interest in land or other rights by the Crown in any of its capacities or by any other person'.

<sup>59</sup> Section 227. An act 'affects' native title if it extinguishes the native title rights and interests or 'if it is wholly or partly inconsistent with their continued existence, enjoyment or exercise'.

<sup>60</sup> Section 233. A 'future act' is either the passing of legislation on or after 1 July 1993, or the doing of any other act on or after 1 January 1994.

<sup>61</sup> Sections 22, 23, 235 and 236.

<sup>62</sup> These include what are called 'low impact future acts' (section 234).

<sup>63</sup> Section 235 (2). The section refers to 'ordinary title' which is defined in section 253 to mean 'a freehold estate in fee simple'. A different definition operates with respect to the ACT and the Jervis Bay Territory.

<sup>64</sup> Commonwealth Parliamentary Research Service, *Native Title Amendment Bill 1997 [No 2]*, Bills Digest No 171 1997-98, p 3.

<sup>65</sup> National Native Title Tribunal, *Annual Report 1996/1997*, p 40.

<sup>66</sup> Section 24 provides that where land is the subject of a non-claimant application which is taken to be unopposed because no native title determination application has been made within the specified time, any future act done in relation to the land before it becomes the subject of an approved determination of native title is valid and, in so far, as that extinguishes or affects native title, compensation is payable. Section 25 provides that if a future act consists of the renewal of a legally enforceable right created before 1 January 1994, the act is valid, the non-extinguishment principle applies and compensation is payable if native title is affected - C MacDonald, 'A working guide to Australia Native Title Legislation in all jurisdictions' in *Commercial Implications of Native Title* edited by B Horrigan and S Young, The Federation Press 1997, p 70.

agricultural, pastoral or residential leases. Basically, such acts are permissible if they treat native title holders as if they were ordinary or freehold title holders and if the balance of rights and interests is maintained between the parties. To take one example, if the original lease contained a reservation or condition for the benefit of indigenous peoples so too must the renewed lease; likewise, the renewed lease cannot create a proprietary interest where the original created only a non-proprietary interest.

In some respects, therefore, the original NTA ensured that native title holders were treated in the same way as ordinary title holders. However, it also gave them some extra rights which ordinary title holders do not have.<sup>67</sup> Notably, the validity of certain future acts was made subject to the right of native title holders to negotiate. This right to negotiate applied only where a government proposed to create a right to mine that might affect native title, or proposed to compulsorily acquire native title rights and interests so as to confer rights in third parties.<sup>68</sup> The right was to negotiate with the government party and the ‘grantee party’ about the proposal.<sup>69</sup> If agreement was reached after negotiation, then any party could apply for a determination of whether the future act can go ahead and under what conditions. Where agreement could not be reached within specified time limits then a party could seek arbitration. However, if a government did not like the outcome of an arbitration, it could at the end of the day over-ride the result and make its own decision about the proposed mine or compulsory acquisition.

Under this scheme, native title holders were entitled to compensation where their rights or interests had been impaired, both in relation to acquisition under a Compulsory Acquisition Act<sup>70</sup> and in respect of other future acts, to which the non-extinguishment principle applies. In such situations compensation is recoverable from the government to which the act was attributable,<sup>71</sup> although recovery of compensation in relevant cases from third parties may also be possible under the NTA.<sup>72</sup>

This aspect of the native title legislation has undergone substantial reform under the *Native Title Amendment Act 1998*. For example, whereas the discussion of agreements in the original NTA is quite perfunctory, in the amended version there are very detailed provisions for the making of what are called Indigenous Land Use Agreements (see pages 42 and 62).

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<sup>67</sup> P Butt and R Eagleson, *Mabo: What the High Court Said and the Government Did*, 2nd ed, The Federation Press 1996, p 94.

<sup>68</sup> Section 26(2)(a-d).

<sup>69</sup> Section 26(1) and section 29(2)(d) respectively.

<sup>70</sup> Section 23(3).

<sup>71</sup> Section 23(5).

<sup>72</sup> Section 23(5). This is where, if a future act is carried out at the request of another person, liability for compensation may be transferred to that person: Commonwealth Parliamentary Research Service, *Native Title Amendment Bill 1997 [No 2]*, Bills Digest No 171 1997-98, p 18.

More controversially, many amendments have been made to the right to negotiate: various activities are excluded from the process, including where the renewal of a mining lease confers the same or lesser rights as the existing mining lease (page 47). In fact, the amended Act contemplates that the right to negotiate may be by-passed entirely in some circumstances where a satisfactory State or Territory regime is in place (see pages 49).

***How did the NTA establish a mechanism for determining claims to native title?*** In its original form the Commonwealth NTA placed the National Native Title Tribunal at the centre of its scheme for the processing of applications, negotiation, mediation, in determining compensation and in the making of approved determinations of native title. For example, in the absence of relevant State bodies, the National Native Title Tribunal was to act as an arbitral body to determine where negotiation must take place and where, if any, a permissible future act may be performed without negotiation ('expedited').<sup>73</sup> Also, the Tribunal was one of the bodies which could make an 'approved determination'<sup>74</sup> as to the existence or otherwise of native title, although this power could only be exercised where the application was unopposed<sup>75</sup> or the parties agreed.<sup>76</sup> Any approved determination made by the Tribunal would have been registrable in the Federal Court and enforceable as an order of the Court. Originally, therefore, the Tribunal had a mixture of decision-making and mediating functions.

The validity of important aspects of this scheme, notably those relating to the Tribunal's decision-making functions, were placed in doubt by the High Court's decision in *Brandy*.<sup>77</sup> As a result of that case, which held that only a judicial body such as the Federal Court can make a binding determination, the Tribunal's power to make native title determinations was never exercised. In fact, on 14 March 1995 the Tribunal's President, Justice French, had already issued a discussion paper canvassing various proposals for reform, including limiting the Tribunal's activities largely to the sphere of mediation, thereby eradicating the tension between its decision-making and mediating roles.<sup>78</sup>

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<sup>73</sup> Section 29(4).

<sup>74</sup> Approved determinations are set out in sections 13(3), (4) and (7).

<sup>75</sup> Section 70(2). An application is unopposed if the applicant is the only party, if each party notifies the Tribunal; in writing that he or she does not oppose the application, or if the application is taken to be unopposed by section 67.

<sup>76</sup> Section 71.

<sup>77</sup> *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. The High Court held, on the basis of the doctrine of the separation of powers as this has been applied to the Commonwealth Constitution, that provisions of the Commonwealth RDA relating to the enforcement of determinations by the Human Rights and Equal Opportunity Commission were invalid. That the scheme established by sections 166, 167 and 168 of the NTA were invalid was confirmed by the full Federal Court in *Fourmile v Selpan Pty Ltd* (1998) 152 ALR 294.

<sup>78</sup> CR Davie, 'Proposed changes to NTA: NNTT discussion paper' (1995) 1 *Native Title News* 77. In fact it is said that Justice French had recommended in 1994 that the Tribunal should operate mainly as a mediation service: C MacDonald, 'A working guide to Australia Native Title Legislation in all jurisdictions' in *Commercial Implications of Native Title* edited by B

Under the original NTA any court could make a determination of native title (for want of a better term, non-approved determinations). For example, determinations by State Courts and tribunals which are not 'recognised State bodies' under the legislation may be non-approved determinations of this sort.<sup>79</sup> Their decisions only bind the parties to the claim, not the public at large. On the other hand, an 'approved determination' of native title could only be made by the Federal Court or a recognised State or Territory body.<sup>80</sup> A determination of native title by the High Court is also an approved determination. Details of both 'approved' and non-approved determinations must be entered into the National Native Title Register.<sup>81</sup>

A determination of native title was defined originally to be a determination of whether native title exists in relation to a particular area of land or waters and, if it does exist: (a) who holds it and; (b) whether the native title rights and interests confer possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others and; (c) those native title rights and interests that the maker of the determination considers to be of importance and; (d) in any case - the nature and extent of any other interest in relation to the land or waters that may affect the native title rights and interests.<sup>82</sup>

The procedures involved in arriving at a determination of native title were set out in detail in the original NTA. Under the Act anyone who claimed to hold native title could lodge a claim with the Native Title Registrar. Indeed, there was general agreement that one of the difficulties with the Act, was that the registration test, as this was interpreted by the courts,<sup>83</sup> had 'a very low threshold',<sup>84</sup> which meant that the same land was often the subject of

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Horrigan and S Young, The Federation Press 1997, p 79.

<sup>79</sup> An approved determination of native title operates *in rem*, that is, against the whole world. Other determinations of native title operate *in personam*: *The Laws of Australia*, Volume 1, [63]. The distinction was explained by Drummond J who said that approved determinations are 'public acts affecting the status of the lands and not mere determinations of rights with respect to those lands recognised by the general law as arising out of private arrangements between citizens': *Wik Peoples v Queensland* (1994) 120 ALR 465 at 472..

<sup>80</sup> Section 251 provides that a State or Territory Minister may nominate a court, office, tribunal or body established by or under a State or Territory law to the Commonwealth Ministers who may, in writing, that it is a 'recognised State or Territory body'.

<sup>81</sup> Section 193(1), Commonwealth NTA.

<sup>82</sup> Section 225 of the Commonwealth NTA.

<sup>83</sup> It is said that the intention behind the Act was to limit registration to those claims which were accepted by the Registrar of the National Native Title Tribunal, but that the value of this screening process was reduced by the decision in *Northern Territory v Lane* (1995) 138 ALR 544 to the effect that applications are to be registered upon receipt by the Registrar. Also, in *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 the High Court decided that whenever an application raised an issue of law that was 'fairly arguable' it must be accepted by the Registrar. As many issues in native title are 'fairly arguable' the result was to increase the number of applications claiming native title that could be accepted for determination: Native Title Amendment Bill 1997, Explanatory Memorandum, p 28.

<sup>84</sup> P van Hattem, 'Demystifying Native Title' (September 1997) 4 *Murdoch University Electronic Journal of Law* at web site: <http://www.murdoch.edu.au/elaw/issues/v4n3/van43.html> .



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conflicting native title claims, some of which were of dubious merit. If, after two months, the only parties in relation to the claim were the claimants, the claim was unopposed and it could be referred to the Federal Court for determination. On the other hand, opposed claims proceeded to mediation in the National Native Title Tribunal. In the event of all parties agreeing as a result of mediation, the claim could be referred to the Federal Court. Mediation of contested claims continued until the matter was referred by the Registrar of the National Native Title Tribunal to the Federal Court for determination. A claim had to be lodged with the Federal Court by the Registrar when the Tribunal was satisfied that no useful purpose would be served by further mediation. The Federal Court was not obliged to uphold either an unopposed or mediated claim, but was likely to do so unless it would be 'inappropriate' in a particular case.

The *Native Title Amendment Act 1998* introduced several important changes into this scheme. Notably, it re-defined the roles of the Federal Court and the National Native Title Tribunal in a way that reflected the *Brandy* decision, which means that the Tribunal's role has been wound back mainly to the provision of assistance with mediation (page 59). Moreover, the 1998 amendments introduced a more stringent registration test for native title claimants (page 45). A new definition of 'determination of native title' is also included under new section 225 which, among other things, requires a determination of the relationship between, on one side, the native title rights and interests over the land or waters in question and, on the other side, any other interests. In this way, a determination of the competing interests of native title holders and a mining company, to take one example, will have to be made.

**What was the legislative response to *Mabo* in the States, notably NSW?** As noted, subsequent to the *Mabo* decision all the Australian jurisdictions passed legislation in some form or other relating to native title. It has also been said that the Commonwealth NTA at several points contemplates the making of complementary legislation. On one example is in respect to State and Territory legislation which validates past acts in accordance with the regime established under the Commonwealth legislation.

The complementary legislation varies between the States. Western Australia eventually adopted a minimalist approach, legislating only to validate pre-1994 titles. A similar approach was adopted in Tasmania, Victoria, the ACT and the Northern Territory. South Australia, on the other hand, adopted a more comprehensive native title regime, as envisaged in the Commonwealth NTA. Queensland and NSW have also adopted a comprehensive model, although in NSW at least only selective parts of the legislation have been proclaimed to commence.<sup>85</sup> In effect, the Parts of the NSW Act that are commenced deal mainly with validation of past acts attributable to the State and the effects of

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<sup>85</sup> To date Parts 1,2, 3, 10 and 11 and (with certain exceptions relating to the *Land and Environment Court Act 1979*, the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991*) Schedule 1 of the *Native Title (NSW) Act 1994* have been proclaimed to commence (*NSW Government Gazette*, 25 November 1994, p 6868).

validation.<sup>86</sup>

This means that although the *Native Title (New South Wales) Act 1994* contemplates a system of native title registration, mediation and determination comparable to that established under the Commonwealth legislation, the reality is that the NSW native title regime has never been fully implemented. Those Parts of the NSW Act which contemplate that the Land and Environment Court and the Warden's Court should be 'recognised State/territory bodies' and, therefore, perform similar arbitral and other functions as exercised by the National Native Title Tribunal and the Federal Court have not been activated. The result is that since 1994 NSW native title claims have been dealt with by the relevant federal institutions. Indeed, the only approved determination to date of native title (other than the *Mabo* case itself) referred to land at Crescent Head on the NSW Central Coast; the determination was made by the Federal Court in 1996.

To date, only South Australia has introduced its own arbitral body, the Environment and Resources Development Court.

## 5. THE WIK CASE - BACKGROUND, DECISION AND IMPLICATIONS

**Why were pastoral leases at issue in the Wik case?** The immediate background to the *Wik* case was the uncertainty, following both the *Mabo* decision and enactment of the Commonwealth NA in 1994, over the relationship between pastoral leases and native title. The suggestion in *Mabo* was that all Crown leases, including pastoral leases which cover about 42 per cent of mainland Australia, had extinguished native title. As noted, the principle of extinguishment by the grant of leases was reflected in the preamble to the Commonwealth NA which stated:

The High Court...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.

Under the past act regime of the NTA, in which invalid leases were grouped with invalid freeholds and commercial, agricultural and residential leases, the intention appears to have been 'to bring invalid pastoral leases into line with what was understood to be the position with all valid leases, including pastoral leases'.<sup>87</sup> In other words the principle of extinguishment was to apply in all these cases. However, as Peter van Hattem has observed, although both the National Native Title Tribunal and the Federal Court both assumed that pastoral leases extinguished native title, neither *Mabo* nor the NTA said this in explicit terms:

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<sup>86</sup> Preliminary matters, confirmation of certain rights, interim provisions and miscellaneous matters are also included.

<sup>87</sup> P van Hattem, 'Native Title after Wik: where to now?' (March 1997) 4 *Murdoch University Electronic Law Journal*, at web site: <http://www.murdoch.edu.au/elaw/issues/v4n1/vanhatt.html>.

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Consequently, there was a degree of uncertainty on the issue. The Keating and Howard Governments both took the position that valid pastoral leases did extinguish native title, but that any uncertainty was to be resolved by the High Court, not the Parliament.<sup>88</sup>

**How did the State Governments proceed in the light of the uncertainty over pastoral leases?** The varied responses of different State governments to this uncertain situation were outlined in the following way by the National Native Title Tribunal:<sup>89</sup>

The [WA] Government party has decided to follow the [right to negotiate] procedures of the [NTA] in order to ensure that grants of its mining tenements are valid. As a matter of policy it has decided to do so in all cases where it considers that native title might exist, including where the proposed tenement is over pastoral lease land...The [WA] Government party has done this despite being of the view that pastoral leases...have extinguished native title. Other governments in Australia have taken a different position. They are not giving notice of intention to grant mining tenements in circumstances where they believe that native title has been extinguished. It is not for the Tribunal to comment on the correctness or otherwise of these different approaches. If the High Court finds that pastoral leases do extinguish native title, then the WA government will have put itself and the Tribunal to considerable administrative inconvenience and cost to no effect. On the other hand, if the High Court finds that pastoral leases do not extinguish native title, the WA government's practice will have been well founded.

During the period mid-1995 to mid-1996, the National Native Title Tribunal received 5,114 section 29 notices in respect of Western Australia (these apply where a government proposes to issue mining interests or to acquire land under compulsion for others).<sup>90</sup> For the other States, the Tribunal received only 16 section 29 notices in NSW and 3 in Queensland.

In the light of the *Wik* decision, whatever the motives of the WA Government in adopting the more cautious approach, its practice did indeed prove to be well founded.

**What was the Wik case about?** On 30 June 1993 (before the enactment of the Commonwealth NTA), the Wik peoples started a common law action in the Federal Court in which they sought to establish the existence of native title rights over an area of land in North Queensland. Of the land claimed by the Wik (and later the Thayorre) peoples, one parcel subject to lease was known as the Holroyd River Holding Lease and the second

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<sup>88</sup> Ibid.

<sup>89</sup> *WA v Thomas* (National Native Title Tribunal Applications WF96/12, unreported decision of Members Sumner, O'Neill and Neate, 17 July 1996 at p 49); G Neate ed, *Native Title Service* [3,095.10].

<sup>90</sup> National Native Title Tribunal, *Annual Report 1995/96*, p 77. Of the 5,114 section 29 notices received in WA, 98% related to the proposed grant of mining tenures.

parcel the Mitchellton Pastoral Holding Lease. Both leases were first granted under the *Land Act 1910* (Qld), with the Holroyd lease being renewed for 30 years from January 1974 under the *Land Act 1962* (Qld).<sup>91</sup> Unlike the original Holroyd lease, which was granted in 1945 and was expressed to be for ‘pastoral purposes only’, the new lease of 1974 was not expressed as being limited to pastoral purposes, but it was subject to various reservations, including a reservation of rights in gold and minerals for the Crown.

By the time the matter reached the High Court, the central question to answer was whether the leases in question conferred ‘necessarily extinguished’ the native title rights claimed by the Wik and Thayorre peoples

The validity of two special mining leases granted under ratified State Government agreements was also questioned by the claimants.

**What did the High Court decide in the Wik case?** The decision in *Wik* was handed down on 23 December 1996. In it the High Court examined the historical development of pastoral leases in Australia from colonial times, the two Queensland Acts under which the leases concerned in the case were granted, as well as the relevant lease instruments. By a majority of four to three the High Court decided that, in respect to the particular leases at issue, there was no legislative intention to confer exclusive possession on the lessees (the holders of the pastoral leases).

The majority (Justices Toohey, Gaudron, Gummow and Kirby) held that the pastoral leases in question were not really ‘leases’ in the common law sense, that is, interests in land which confer a right of exclusive possession. In this respect, Australian land law had diverged from the English model. In Justice Toohey’s words, the pastoral leases:

reflected a regime designed to meet a situation that was unknown to England, namely, the occupation of large tracts of land unsuitable for residential but suitable for pastoral purposes. Not surprisingly the regime diverged significantly from that which had been inherited from England. It resulted in ‘new forms of tenure’.<sup>92</sup>

Because of this, the pastoral leases were the creatures of statute and the rights they conferred on the holders of such leases were to be determined, not by reference to the general principles of the common law, but by reference to the terms of the particular leases and the statutes under which they were granted. The majority found that the right of exclusive possession was not expressly conferred in either the leases or the statutes under consideration. Nor could the total exclusion of indigenous people from the land be implied

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<sup>91</sup> The Mitchellton lease was reserved in 1922 by Order-in-Council for the use of Aboriginal inhabitants of Queensland.

<sup>92</sup> *Wik Peoples v Queensland* (1996) 141 ALR 129 at 172 (see also Gaudron J at 204; Gummow J at 224; and Kirby J at 266). For a critique of the majority’s use of history see - J Fulcher, ‘Sui Generis History: The Use of History in Wik’ in *The Wik Case: Issues and Implications* edited by G Hiley, Butterworths 1997, pp 51-56.

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because that would result in the extinguishment of native title without there being a clear and plain intention to do so. Instead, members of the majority looked to the history of the granting of pastoral leases in NSW and Queensland and concluded, on the evidence of the circumstances surrounding the enactment of the pastoral lease legislation, that it was not the legislature's intention to enable the holders of such leases to exclude traditional owners from leasehold properties. Their conclusion was that the granting of the pastoral leases did not 'necessarily extinguish native title'. Stated in another way, the pastoral leases at issue did not confer rights of exclusive possession and could not be said 'necessarily' to be inconsistent with all the incidents of native title.

In summary, the following principles flowed from the *Wik* decision:<sup>93</sup>

- that the pastoral leases under consideration in the case did not confer exclusive possession on the pastoralist;
- that the leases therefore did not necessarily extinguish all native title rights and interests;
- whether there was any extinguishment or impairment of native title can only be determined by considering the nature of the native title rights and interests which the indigenous people can establish in relation to the land;
- where native title rights and interests can coexist with the statutory rights of the pastoralist then they survive, but, to the extent of any inconsistency the rights of the pastoralist prevail;
- on the other hand, what happens where the native title rights and interests cannot co-exist with the rights of the pastoralist under the lease was not clearly decided. It may be that those native title rights are extinguished or it may be that they are only unenforceable and therefore suppressed for the term of the lease. In other words, the High Court left open the possibility that that full native title rights might revive if the lease came to an end; and
- importantly, the majority *did not find* that pastoral leases in Queensland or elsewhere could not extinguish native title, or that native title did in fact exist over the leases at issue in the case (that was left to be determined by the Federal Court). Instead, the majority found only that the question of the extinguishment of native title by a pastoral lease is something that must be answered on a case by case basis.

As for the minority view, relying on traditional property law authorities, Chief Justice Brennan (Justices Dawson and McHugh agreeing), argued that the common law system of land law does apply to Australia and that, on the question of a grant of a pastoral lease under the Queensland *Land Act 1910*, there existed a right to exclusive possession. Further, Brennan CJ was of the opinion that the granting of such a lease constituted an act of

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<sup>93</sup> J Kildea, *Native Title: A Simple Guide*, undated, p 16.

alienation by the Crown, which means that native title on the land in question is extinguished once and for all. The fact that a lease had not been taken up was considered irrelevant in these circumstances, for the question of extinguishment of native title by a grant of inconsistent rights must be resolved as a matter of law, not of fact. The crux of the minority argument was that the idea that native title was only suspended under a grant of this sort, or that native title and pastoral title could coexist, would create intractable difficulties. As the Chief Justice stated:

It is only by treating the Crown, on the exercise of the power of alienation of an estate, as having full legal reversionary interest that the fundamental doctrines of tenure and estates can operate. On those doctrines the land law of this country is largely constructed. It is too late now to develop a theory of land law that would throw the whole structure of land titles based on Crown grants into confusion.<sup>94</sup>

As for the two special mining leases granted under ratified State Government agreements, the High Court rejected the arguments as to their invalidity,<sup>95</sup> stating that the agreements derived ultimately from the valid exercise of legislative power under the *Commonwealth Aluminium Corporation Pty Ltd Agreement Act 1957* (Qld).

**What were the issues arising from Wik?** Following the account presented in the Tenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Fund, the issues arising from *Wik* were as follows:

- *Wik* undermined important and fundamental assumptions upon which the Commonwealth NTA was drafted in 1993. One was that native title on mainland Australia would exist mainly in relation to vacant Crown land, that is, the approximately 36 per cent of Australia where there has been no significant grant of private rights, or public reservation or use. *Wik* added another 42 per cent or so of the Australian land mass to the area on which native title might be found to exist.
- in its original form, the NTA assumed that the issues arising from native title claims would be between the claimants and governments. *Wik* confirmed that the rights and interests of pastoralists also had to be included in the equation.
- as first enacted, the NTA does not deal in any comprehensive way with the situation in which native title rights coexist with those of pastoralists. As a result of this and of the broad definition in the NTA of an ‘act affecting native title’, uncertainties have arisen over what acts and activities can be carried out on pastoral leases without having to follow the ‘future act’ provisions of the NTA.

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<sup>94</sup> *Wik Peoples v Queensland* (1996) 141 ALR 129 at 158 (Brennan CJ).

<sup>95</sup> These arguments were based on claims of alleged breach of fiduciary duty on the part of the Queensland Government and Comalco, as well as a failure to accord natural justice

- the NTA had provided to native title holders the same procedural rights as freeholders, as well as a special right to negotiate in some circumstances. In this way the Act assumed that the rights of native title holders in respect of Crown land could approximate to ownership of the land. Does *Wik*, in allowing the possibility of coexisting titles with the native title rights yielding to the pastoral lease rights in the event of inconsistency, contemplate that native title rights may often be much less than rights to full ownership?
- *Wik* put in doubt the validity of grants by governments and actions by others taken between 1 January 1994 and 23 December 1996.

**What were the reactions of the major stakeholders to the Wik decision?** Any account of the issues arising from *Wik* is open to competing interpretations. Indeed, the decision and its implications have been the subject of much heated debate, with the analysis varying considerably from one stakeholder to another. In particular, a different slant is placed on the question of the ‘uncertainty’ arising from the decision.

On one side, Mark Love a representative of the pastoralists in *Wik*, has argued that while it may be strictly true to say that the legal rights enjoyed by pastoralists under the relevant land legislation have not altered, it is the case that ‘doubt now exists as to what those rights are’.<sup>96</sup> From these doubts concerns have flowed about the effect of uncertainty on the value of pastoral leasehold properties, as well as about the limiting consequences for lease holders who in future may have to negotiate with native title holders before doing anything that lies outside the strict scope of their leases.<sup>97</sup> At least two areas of uncertainty are discussed in this respect. First, the question of the ability of the holders of pastoral leases to engage in pastoral related activities not necessarily covered by their leases. Secondly, the question of the use of that land for other commercial (non-pastoral) activities.<sup>98</sup> The NSW Farmers Federation said that approvals for developments not contemplated under the terms of the lease:

are now stalled until further decisions are made about native title. In addition, landholders face protracted negotiations, and possibly royalty or compensation payouts in the event that Native Title is established at some stage in the future.<sup>99</sup>

Moreover, because so much mining occurs on pastoral leases, it has been argued that *Wik*

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<sup>96</sup> M Love, ‘The farmgate effect’ in *The Wik Case: Issues and Implications* edited by G Hiley, Butterworths 1997, p 40.

<sup>97</sup> J Woodford, ‘The meaning of Wik - a user friendly guide’, *The Sydney Morning Herald*, 3 May 1997.

<sup>98</sup> S Beckett, ‘The impact of Wik on pastoralists and miners’ (1997) 20 *UNSW Law Journal* 502 at 504.

<sup>99</sup> *NSW Farmers Media Release*, ‘DLWC concerns highlight Wik uncertainty’, 12 March 1997.

has a potential to disrupt and delay development in this sector.<sup>100</sup> The validity of those mining and exploration titles granted by State Governments after the enactment of the NTA was another cause for concern, with the point being made that ‘Thousands of mineral titles have been granted over pastoral land since 1 January 1994 without complying with the requirements of the Native Title Act in the belief that native title rights had been extinguished’.<sup>101</sup>

On the other hand, the Aboriginal and Torres Strait Islander Commission (ATSIC) has been more concerned to emphasise the ‘uncertainty’ facing indigenous Australians, under the recognition of co-existing rights introduced by *Wik*, noting that ‘Where pastoral rights are inconsistent with co-existing native title rights, they prevail over them but do not extinguish the underlying native title’.<sup>102</sup> ATSIC has also said that, while the perceptions of pastoralists regarding their rights under their leases may have changed as a result of *Wik*, in fact they retain the same legal interest and there is no ‘legal impact’ on either the value of the pastoral lease, or the value of the security which the pastoral lease may provide for borrowing money.<sup>103</sup> Against the assertions of the National Farmers Federation, ATSIC claims that the Federation agenda ‘was to protect many of its members who wanted to perform activities beyond the terms of their lease - or had already done so - and were angered at any notion that they may have to deal with native title holders when changing the nature of their activities’.<sup>104</sup> Further, the Commission argued that there were ‘no compensation obligations on pastoralists flowing from the *Wik* decision’.<sup>105</sup>

**What were the implications of *Wik* for the major stakeholders?** From the above comments it is clear that there is no agreed answer to that question. From its standpoint, on 23 January 1997 the Commonwealth Attorney-General’s Legal Practice issued a detailed discussion of the implications of *Wik*. In that document the implications for the major stakeholders were summarised in the following terms:<sup>106</sup>

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<sup>100</sup> KD MacDonald, ‘Commercial implications of native title for mining and resources’ in *Commercial Implications of Native Title* edited by B Horrigan and S Young, The Federation Press 1997, p 125.

<sup>101</sup> S Williamson, ‘Implications of the *Wik* decision for the minerals industry’ in *The Wik Case: Issues and Implications* edited by G Hiley, Butterworths 1997, p 45. For example, the Queensland Minister for Mines and Energy stated that 4600 mining tenures were issued in that State between 1 January 1994 and 23 December 1996: G Nettheim, ‘*Wik*: on invasions, legal fictions, myths and rational responses’ (1997) 20 *UNSW Law Journal* 495 at 499.

<sup>102</sup> ATSIC, *Native Title Report July 1996--June 1997*, September 1997, pp 9-10.

<sup>103</sup> ATSIC, *A Plain English Guide to the Wik Case*, <http://www.atsic.gov.au/native/wik.html>

<sup>104</sup> ATSIC, *Native Title Report July 1996--June 1997*, September 1997,

<sup>105</sup> ATSIC, *A Plain English Guide to the Wik Case*, <http://www.atsic.gov.au/native/wik.html>

<sup>106</sup> The Commonwealth Attorney-General’s Legal Practice, *Legal Implications of the High Court Decision in the Wik Peoples v Queensland: Current Advice*, 23 January 1997.



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***For indigenous people:***

- native title rights and interests may exist over land which is or has been subject to a pastoral lease. Any surviving native title will co-exist with the rights of the pastoralists under the lease;
- indigenous people can make native title claims over pastoral lease land, and perhaps over land which is subject to other forms of Crown lease.

***For pastoralists:***

- holders of pastoral leases do not necessarily have a right to exclusive possession. Native title may co-exist with the rights of the pastoralist under the lease;
- existing pastoral leases and the rights granted under them are valid. The rights of the pastoralist prevail over native title rights to the extent of any inconsistency;
- however, there may be uncertainty in particular cases as to the extent of a pastoralist's rights, and as to the extent to which native title rights are inconsistent with such rights;
- there is also a possibility that activities of a pastoralist in the exercise of rights under the lease may now be restricted by the NTA, particularly where such activities are conditioned on further governmental approval (the fact that native title rights may co-exist with the rights of a holder of a pastoral lease means that the 'future act' regime of the NTA - which relates to acts which 'affect' native title - may restrict and regulate many acts by governments and others in relation to pastoral lease land).<sup>107</sup> Although at common law the rights of a pastoralist prevail over native title rights, the NTA may restrict activities which are inconsistent with the enjoyment or exercise of any co-existing native title rights;
- the NTA may also restrict the variation of pastoral lease conditions or the grant of additional permits required by the pastoralist before engaging in non-pastoral activities on the leased land.

***For governments:***

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<sup>107</sup> The Australian Government Solicitor has offered the example that, where the rights of native title holders co-exist with those of a pastoral lease holder, there is a risk that activities undertaken by the pastoralist under the lease (say, the construction of a shed), as well as permits granted by a government to the lease holder or to a third party to undertake activities on the pastoral lease land (say, a permit granted to the pastoralist to clear land for the purpose of constructing the shed) may 'affect' native title. If so, the activity or permit will be invalid under the NTA unless it satisfies the 'freehold test' contained in the NTA (that is, the activity could have been done or the permit could have been granted if the native title holders instead held freehold title) or it is otherwise permissible, for example, as a 'low impact future act'.

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- because native title may survive over pastoral leases, the NTA may: restrict government acts (eg the grant of permits) in relation to pastoral lease land where such acts affect native title and could not be done over freehold land; require native title holders to be given procedural and compensation rights in relation to most future acts over pastoral lease land: require compliance with the ‘right to negotiate’ provisions of the NTA for the grant of mining titles over pastoral lease land, or the compulsory acquisition of pastoral lease land in order to make a grant to a third party;
  - there may also be implications for activities on Crown land where native title may co-exist;
  - acts done since 1 January 1994 in relation to pastoral lease land which did not comply with the NTA may turn out to be invalid (eg the grant of a mining title over pastoral lease land without following the ‘right to negotiate’ procedure).

***For other lease holders:***

- whether the lease confers exclusive possession will depend on a construction of a lease and the statute under which it was granted (on the other hand, as the Attorney-General’s Legal Practice goes on to explain, it needs to be borne in mind that the High Court emphasised the special nature of pastoral leases, as well as the historical background against which they were developed. For this reason, the reasoning of the majority in *Wik* may not be directly applicable to other statutory leases);
- some leases (such as residential leases) may be held to confer exclusive possession and therefore would extinguish all native title. If the lease does not confer exclusive possession, similar issues arise to those set out above in relation to pastoralists (citing the views of Gaudron and Gummow JJ, it was noted that perpetual leases are purely statutory creations and are unknown to the common law).

***For miners:***

- to ensure validity, the grant of renewal of mining titles over pastoral lease land will probably need to follow the ‘right to negotiate’ procedure under the NTA;
- the grant of a mining lease may not confer exclusive possession of the leased area, and may not completely extinguish any native title that may exist in relation to that area.

**6. THE COMMONWEALTH GOVERNMENT’S RESPONSE TO WIK - AMENDING THE NATIVE TITLE ACT**

**What moves have been made to amend the Commonwealth NTA?** On 29 November 1995 the Keating Government introduced the Native Title Amendment Bill 1995 which proposed amendments to deal with the implications of the High Court’s decision in the

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*Brandy* case (as well as other miscellaneous matters). The Bill therefore would have reflected the view that the National Native Title Tribunal, as a non-judicial body, could not make binding determinations of native title; that would be for the most part the province of the Federal Court. The Bill lapsed with the dissolution of the House of Representatives on 29 January 1996.

In May 1996 the Howard Government released a paper entitled *Towards a More Workable Native Title Act. An Outline of Proposed Amendments*. On 27 June 1996 the Government then introduced the Native Title Amendment Bill 1996,<sup>108</sup> which was followed on 17 October 1996 by the introduction of a second round of amendments (called the 'Exposure Draft'). In the event this proposal was overtaken by the *Wik* decision in December 1996 and was set aside in favour of a comprehensive reform package in the form of the Native Title Amendment Bill 1997, which was introduced into the House of Representatives on 4 September 1997. That 1997 Bill was itself based on the Howard Government's much-discussed Ten Point Plan, which is reproduced in the Explanatory Memorandum to the Bill. A Native Title Bill 1997 [No 2] was introduced on 9 March 1998. As well as incorporating the *Brandy* related amendments into the NTA, this second Bill also sought to give effect to the Ten Point Plan.

#### **What was the Ten Point Plan and how did the Government seek to give effect to it?**

An initial version of the Ten Point Plan was released on 1 May 1997, followed by the release of a revised version on 8 May 1997. In a press release the Prime Minister confirmed that the only amendment was to the wording of the second point (concerning extinguishment on exclusive tenures). The following account of the Ten Point Plan and the Government's attempt to give effect to it is based on the Native Title Bill 1997 [No 2]. The amendments to the Bill (the NTA Bill), eventually agreed to by the Senate, are summarised in the next subsection to this paper. This account of the Ten Point Plan incorporates some of the responses made by indigenous groups, notably ATSIC, to these proposals:

***Point 1: validation of acts/grants in relation to non-vacant Crown land between 1 January 1994 and 23 December 1996.*** This would be achieved by the validation of what the NTA Bill called 'intermediate period acts'.<sup>109</sup> These would supplement the NTA's past act regime by permitting the validation of otherwise invalid acts in the specified time period, but only where certain conditions applied before the act was done. In particular, there must have been a grant of a freehold estate or a lease (other than a mining lease), or a public work over any of the land or waters concerned. Thus, a mining title issued on what was already pastoral lease land would be validated; a mining title on land subject to a mining lease would

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<sup>108</sup> For an analysis of the Bill's main provisions see - Commonwealth Parliamentary Library, *Native Title Amendment Bill 1996*, Bills Digest No 25 1996-1997. As well as addressing the issues associated with the *Brandy* case, thereby focussing the work of the National Native Title Tribunal on mediation, the Bill proposed to introduce a more stringent test for the registration of native title claims, as well as to ensure that the funding of native title claims is provided by representative Aboriginal and Torres Strait Island bodies (and not through legal aid).

<sup>109</sup> Proposed sections 21 and 232A and generally new Division 2A of Part 2 of the NTA.

not. The past acts concerned would be those attributable directly to the Commonwealth, but also to those States and Territories which have passed complementary legislation.

As with the past act regime generally, the intermediate period acts are divided into four categories - A, B, C and D. Category A includes any lease (other than a mining lease) which confers exclusive possession and any 'scheduled interest' as defined by section 249C, a reference which is explained under point 2 of the Ten Point Plan. Category A intermediate period acts extinguish all native title on the land or waters concerned, with public works extinguishing native title on the land or waters where they are (or were) situated. Category B intermediate period acts include non-exclusive pastoral leases and these extinguish native title to the extent of any inconsistency between the act and the continued existence of native title. A Category C intermediate period act is the grant of a mining lease and Category D includes those acts which do not fall into any of the other categories. The non-extinguishment principle applies to both Category C and D acts, which means that native title is not extinguished to the extent of any inconsistency, but that native title is effectively suppressed while the effects of the act in question continue to operate. With some modification, these proposals found expression under the *Native Title Amendment Act 1998*.<sup>110</sup>

The response to this new scheme of validation from indigenous groups was decidedly hostile. For its part, the National Indigenous Working Group on Native Title rejected what it called 'blanket validation' of potentially invalid interests granted in land since 1 January 1994. Before the NTA Bill was released, the Group commented that the 'basic unfairness is that blanket validation damages native title rights' and, while providing up-front solutions to non-native title parties, it leaves 'compensation for native title holders to slow and expensive processes, possibly taking years'.<sup>111</sup> ATSIC followed this by stating:

Unlike the validation agreed to by indigenous representatives in 1993, the Government's Bill amounts to blanket validation in a situation where Governments were on notice. It is inherently unfair. It offers little to native title holders whose rights have been side-stepped and rewards those States which have ignored or defied the provisions of the Native Title Act. Despite this, the Commonwealth will provide 75 per cent of the compensation costs to native title holders, with the States to fund the other 25 per cent.<sup>112</sup>

Continuing, ATSIC said that the proposal was discriminatory in that 'it purports to validate acts and to provide for extinguishment or impairment *only* in relation to native title and not

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<sup>110</sup> For example, as discussed under point 2 of the Ten Point Plan, changes were made in July 1998 to what constitute exclusive possession acts.

<sup>111</sup> National Indigenous Working Group, *Coexistence - Negotiation and Certainty*, April 1997, p 13.

<sup>112</sup> ATSIC, *Native Title Amendment Bill 1997*, p 13.

in relation to other causes of potentially invalid title'.<sup>113</sup> Generally, ATSIC argued, 'the validation proposals are open to constitutional challenge because of the negative effect they will have on native title and the basic unfairness of a blanket validation'.<sup>114</sup>

***Point 2: confirmation of extinguishment of native title on 'exclusive tenures'***. The NTA Bill proposed that certain acts done by Commonwealth, State or Territory governments before 23 December 1996 will have completely or partially extinguished native title.<sup>115</sup> If the acts were '*previous exclusive possession acts*' (involving the grant or vesting of things such as freehold estates or leases that conferred exclusive possession, or the construction of public works), then the acts would extinguish native title completely. Again, complementary State or Territory legislation was contemplated for the purpose of confirming that a previous exclusive possession act attributable to it extinguished native title to the area of the lease. Among other things, the effect would be to confirm that the back yards of Australia were free from the threat of native title claim, although its implications would also be much wider than that.<sup>116</sup> In addition, a previous exclusive possession act might also include an agricultural or pastoral lease, but only where the terms of the lease in question can be said to have conferred exclusive possession.<sup>117</sup> The Government suggested that, as a result of this proposal which reflected the current state of the common law, 'it will be possible to identify extensive areas in a number of States where claims will no longer be able to affect pastoralists, miners and other non-government holders of land'.<sup>118</sup>

Schedule 4 to the NTA Bill (Schedule 1 of the amended Act) sets out those 'Scheduled interests'<sup>119</sup> which the relevant Commonwealth, State, or Territory government think have conferred exclusive possession and have therefore extinguished native title. Included are specific types of residential, commercial and community purposes leases. The Federal Government took the view that exclusive agricultural leases should be included in the Schedule, for the reason that generally agricultural leases confer exclusive possession and so extinguish native title. The Government's policy was that it is 'counterproductive for there to be ongoing uncertainty with regard to the effect of such leases on native title'.<sup>120</sup> Further, the Schedule contains 'historic' leases, that is, leases which are no longer in effect

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<sup>113</sup> Ibid.

<sup>114</sup> ATSIC, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, p 8.

<sup>115</sup> Proposed section 23B(previous exclusive possession ac); proposed section 23F (previous non-exclusive possession act).

<sup>116</sup> As noted, in *Fejo v Northern Territory* [1998] HCA 58 (10 September 1998) the High Court decided that the grant of a freehold title extinguishes native title.

<sup>117</sup> Previous non-exclusive possession acts are discussed under Point 4 of the Ten Point Plan.

<sup>118</sup> The Department of the Prime Minister and Cabinet, *Wik: The 10-Point Plan Explained*, p 3.

<sup>119</sup> The term 'scheduled interest' is defined in section 249C of the amended NTA.

<sup>120</sup> Native Title Amendment Bill 1997 [No 2], *Explanatory Memorandum*, p 402.

but which conferred exclusive possession in the past and therefore extinguished native title. On the other hand, no pastoral leases are included in the Schedule and mining leases are expressly excluded.<sup>121</sup>

The introduction of this new statutory category of a 'previous exclusive possession act' proved to be controversial. The general concern was that it would allow too much scope for the statutory extinguishment of native title and that, in so doing, it would maintain the tradition of terra nullius by operating as if indigenous peoples and their interests did not exist.<sup>122</sup> Also, the inclusion of historic tenures could mean that some types of leases listed in the Schedule could extinguish native title 'even though the land is no longer used for such purposes and the leases are defunct'. Here the concern was that at some time in the past vast areas had been the subject of Crown grants but that, for one reason or another, the grant had not been taken up or had ceased to operate and yet those historic tenures would still extinguish native title. Another comment made by ATSIC was that the NTA Bill went beyond Point 2 itself by including in its definition of 'previous exclusive possession acts' categories of leases which, at common law, may not extinguish native title. For example, it is said that 'community purpose leases may not in common law give exclusive possession and, following the *Wik* decision, may allow for native title to coexist'.<sup>123</sup> The more general criticism was that, to the extent that these amendments confirm what was decided in *Mabo* and *Wik*, they are 'unnecessary' and provide 'to rural Australia no greater certainty than they have now'; to the extent that the amendments go beyond *Mabo* and *Wik*, they will 'result in extinguishment of native title with a consequent liability to pay compensation'.<sup>124</sup> For ATSIC, by confirming that a vast array of previously granted titles have extinguished native title, the NTA Bill pre-empted the development of the common law and 'deemed' that extinguishment had occurred in countless situations: 'There is great potential for the Bill to wrongly anticipate the development of the common law relating to extinguishment, causing native title to be extinguished in circumstances where it would have survived under the common law'.<sup>125</sup>

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<sup>121</sup> Also, under the compromise agreement of July 1998 further exclusions were made from the definition of 'Scheduled interests', including: grants under 'indigenous land rights' type legislation created expressly for the benefit of indigenous peoples; the creation of national parks; acts done by or under legislation that expressly provides that such acts do not extinguish native title; a Crown to Crown grant or vesting that has not extinguished native title at common law; and anything the grant of which has been excluded by regulation under subsection 23B(10) from the definition of 'previous exclusive possession act' (section 249C and sections 23B(9), (9A), (9B), (9C) and (10) of the *National Native Title Amendment Act 1998* (Cth)).

<sup>122</sup> ATSIC, *Native Title Report July 1996-June 1997*, p 66; Professor Garth Nettheim cited in M Bachelard, *The Great Land Grab*, Hyland House 1997, p 94.

<sup>123</sup> ATSIC, *Native Title Amendment Bill 1997*, p 14.

<sup>124</sup> J Kildea, *Native Title: A Simple Guide*, undated, p 19.

<sup>125</sup> ATSIC, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Island Land Fund*, p 2.

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**Point 3: removal of impediments to provision of government services.** According to the Federal Government, *Wik* placed the capacity for government and local government to provide and maintain normal municipal services without the agreement of native title holders ‘in doubt’, particularly in some rural areas and remote areas of South Australia, Queensland, Western Australia and the Northern Territory. There was a perceived need, it was said, to ensure that such activities can be undertaken without impediment from native title.<sup>126</sup>

For a number of commentators, exactly what the problem was in this regard was not entirely clear.<sup>127</sup> Under the original version of the NTA, where the construction of new government facilities to the public was proposed on land subject to native title, the Act required native title holders to have the same procedural rights as those holding freehold or ‘ordinary’ title. Use of a Compulsory Acquisition Act to carry out public works did not attract the right to negotiate; only where the compulsory acquisition was made for the benefit of third parties was the government concerned required to follow the right to negotiate process.

In any event, the idea behind Point 3 seems to be that native title should not inhibit the construction, repair etc of basic services (such as roads, railways and pipelines). Further, that rule should apply equally when the construction is undertaken by or on behalf of the Crown, or indeed by or on behalf of any person, just as long as the facility is to be operated for ‘the general public’. To achieve this, two categories of procedural rights were proposed: first, if the land is covered by a non-exclusive agricultural or pastoral lease, then the native title holder has the same procedural rights they would have if they held a lease of that kind; secondly, in any other case, the native title holders would have the same procedural rights as someone holding freehold or ordinary title.<sup>128</sup> This scheme would only apply to ‘onshore places’, the non-extinguishment principle would operate in relation to all acts, and native title holders would be entitled to compensation to be paid by the relevant government or any designated person. Reasonable access rights to native title holders must also be in place. In addition, there has to be a law of the Commonwealth, a State or a Territory for preservation or protection of areas or sites which are of particular significance to indigenous peoples.

For its part, ATSIC had no difficulty in finding that the operation, maintenance and repair of existing public facilities are valid future acts under the original NTA. Its concern was that the proposal was intended ‘to allow certain public facilities to be constructed without acquisition processes being required in relation to native title holders’. ATSIC’s counter proposal was that the construction of new public facilities on native title land should only take place by way of agreement, with the consent of native title holders, rather than by way of the wholesale validation of such acts. ATSIC was also of the view that the word

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<sup>126</sup> The Department of the Prime Minister and Cabinet, *Wik: The 10-Point Plan Explained*, at web site - <http://www.dpmc.gov.au/child2.html>

<sup>127</sup> National Indigenous Working Group, ‘Critique of the 10 Point Plan’ (June 1997) 4 *Indigenous Law Bulletin* 10; G Nettheim, ‘Nailing down native title’ (June 1997) 4 *Indigenous Law Bulletin* 13.

<sup>128</sup> Section 24KA.

‘construction’ should be deleted from the provision.<sup>129</sup>

***Point 4: removing uncertainty in relation to native title and pastoral leases.*** The assumption underlying *Wik* was that most pastoral leases (and possibly agricultural leases) do not confer exclusive possession on the lease holders and would not, therefore, be covered by the extinguishment regime under Point 2. One response in the NTA Bill to this perceived difficulty, concerning certain past acts, was to propose that if the acts were ‘*previous non-exclusive possession acts*’ (involving grants of non-exclusive agricultural leases or non-exclusive pastoral leases), these would have extinguished native title to the extent of any inconsistency. Thus, where pastoral leases are concerned there would be no question of the revival of native title after the lease had expired. At least in those areas where the lease was inconsistent with native title, the latter would be extinguished. Again, the acts concerned would be those attributable directly to the Commonwealth, but also to those States and Territories which had passed complementary legislation.

The counter argument to this was that *Wik* said that, where pastoral leases and native title co-exist, the rights of pastoralists prevail. The High Court did not say that native title was necessarily extinguished by a pastoral lease and it left open the question of revival of native title rights.<sup>130</sup> Again, critics said that the NTA Bill was ‘misconceived’ in this regard and that it pre-empted ‘the development of the common law to the potential disadvantage of native title holders’.<sup>131</sup> In fact, this was an area where the Federal Government was prepared to compromise in July 1998 in order to get its legislation through the Senate. As explained later in this paper, under the *Native Title Amendment Act 1998* it is left to the courts to decide whether non-exclusive pastoral and agricultural leases extinguish or merely suspend native title (page 62).

A second aspect of Point 4 related to the perceived need to remove the right to negotiate where the holder of a pastoral lease wanted to engage in ‘*primary production*’ activities, or in activities incidental to ‘primary production’. The example offered of an incidental activity in the 10 Point Plan itself was that of farmstay tourism, which would be permitted as long as the land was still used mainly for primary production. One purpose of this was to permit a range of activities to occur on pastoral leases, thereby overcoming the criticisms made of *Wik* in some quarters that it would stifle development and result in general uncertainty as to what could or could not be done on pastoral lease land. From this standpoint, the difficulty with pastoral leases is that they generally only refer to a limited range of activities, usually associated with raising livestock and establishing fences, yards, bores, mills and

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<sup>129</sup> ATSIC, *Native Title Report July 1996-June 1997*, p 112.

<sup>130</sup> National Indigenous Working Group, ‘Critique of the 10 Point Plan’ (June 1997) 4 *Indigenous Law Bulletin* 10.

<sup>131</sup> ATSIC, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, p 12.



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accommodation.<sup>132</sup> ‘Primary production’, on the other hand, has broader connotations and is defined in that way in the taxation legislation. The NTA Bill adopted that definition of ‘primary production’. Note that it expressly excludes mining from its primary production scheme.

To understand how the NTA Bill gave effect to Point 4, a distinction needs to be made between ‘future acts’ which are legal in nature, such as the grant of licences or permits, on one side, and activities which are physical in nature, such as the construction of a dam, on the other. The distinction is one between the legal right to do something and the actual doing of it. Under proposed section 24GB the NTA Bill ensured the validity of future acts of a legal nature, including those that permit or require primary production activities or farmstay tourism on valid, non-exclusive agricultural or pastoral leases granted on or before 23 December 1996. The non-extinguishment principle applies to these acts and compensation is payable to the native title holders. In other words, the granting of a licence to undertake forestry operations, for example, on pastoral lease land would be valid, but that licence would not extinguish native title and it would be subject to the payment of compensation by the relevant government. On the other hand, under proposed section 24GC the 1997 Bill ensured the validity of future primary production related activities of a physical (non-legal) nature on valid, non-exclusive agricultural or pastoral leases granted on or before 23 December 1996. Again the non-extinguishment principle applies. However, native title holders would not be entitled to compensation. Thus, the planting of trees for forestry purposes on a pastoral lease, for the sake of argument, would be valid; native title would not be extinguished; and there would be no obligation to pay compensation.

ATSIC, for its part, expressed grave concerns about this proposal, stating among other things that it could result in the ‘de facto extinguishment of native title’. It took the view that native title holders should have the procedural rights of ordinary (freehold) title holders where diversification was planned, but noted that only ‘lesser rights’ were on offer under the NTA Bill: ‘Responding to the demands of pastoralists and governments from around the country, the Commonwealth has produced a package that seriously erodes the benchmark of equality that is central to the NTA. It paves the way for a tremendous expansion of pastoralists’ rights while removing the legitimate procedural rights of native title holders’.<sup>133</sup> ATSIC stated:

The amendments will allow a considerable expansion of what may be done on pastoral and other leases by leaseholders where native title co-exists, without reference to the holders of the underlying native title, or with minimal consultation when resources are taken by a third party. Whilst the need for reasonable diversification to maintain farm viability is recognised, the scope of the provision is so wide that it will allow radical transformation

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<sup>132</sup> Relevant State statutes define the rights of pastoralists in different but still quite specific ways.

<sup>133</sup> ATSIC, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, p 13.

of land use and significant impairment of native title rights.<sup>134</sup>

For the National Indigenous Working Group, the Government's intention to legislate to extinguish conflicting native title rights is 'unnecessary and unjust' and was contrary to the Government's own legal advice published on 23 January 1997. It concluded: 'The combined effect of this misrepresentation of *Wik* and the lifting of native title considerations from all "primary production" is that native title will potentially be progressively extinguished permanently as pastoralists' rights expand'.<sup>135</sup>

**Point 5: statutory access rights for registered native title claimants.** Under the NTA Bill persons with registered claims for native title would have certain access rights to non-exclusive agricultural and pastoral lease land. This would be for the purpose of conducting traditional activities (such as hunting, performing ceremonies or visiting sites of significance) and the access rights would include the descendants of those who had regular physical access to the land. The extent of access and the nature of traditional activities would be confined to whatever had been enjoyed regularly as at 23 December 1996. Provision was also made for agreement to be reached between leaseholders and native title claimants as to how these access rights are to be carried out or varied. It was also made clear that the rights of the lease holder prevail; and, further, that statutory access rights do not amount to native title rights.

A criticism of this proposal from ATSIAC was that the right to access would be made conditional on the more stringent registration test (discussed under Point 6) and that it 'ignores the history of dispossession, displacement and obstruction of access which has led to native title holders being denied the opportunity to maintain regular physical contact with their traditional country'.<sup>136</sup> The 'physical' connection test was to prove controversial and was modified under the agreement of July 1998 (page 45).

**Point 6: future mining activity, registration tests and the right to negotiate.** There were three aspects to Point 6: that a more stringent registration test should apply to the right to negotiate; that there should only be one right to negotiate per mining project; and that the States and Territories should adopt their own procedures on pastoral leases and some other categories of land. These can be considered separately.

Note that Point 6 deals primarily with the right to negotiate as this affects mining activity; whereas Point 7 deals with other aspects of the right to negotiation scheme, including compulsory acquisition. However, in many ways these matters overlap and in the NTA Bill

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<sup>134</sup> ATSIAC, *Native Title Amendment Bill 1997: Issues for Indigenous People*, October 1997, p 21.

<sup>135</sup> National Indigenous Working Group, 'Critique of the 10 Point Plan' (June 1997) 4 *Indigenous Law Bulletin* 10 at 11.

<sup>136</sup> ATSIAC, *Native Title Amendment Bill 1997: Issues for Indigenous People*, October 1997, p 24.

they are dealt with together.<sup>137</sup>

*Registration test:* Under the NTA in its original form, registered native title claimants and those found by a court to hold native title have a ‘right to negotiate’ over the relevant land for proposed mining and exploration activity. Following certain judicial decisions,<sup>138</sup> the threshold test for registering a native title claim was weakened, the Federal Government argued, to the point that practically all claimants had a ‘right to negotiate’, a situation which undermined the efficiency and credibility of the native title regime itself. In its explanation of the Ten Point Plan, the Federal Government noted:

There are currently over 500 native title claims, some over large areas, many overlapping and often involving substantial numbers of respondents. It is not possible to know how many of these claims might succeed (though it is assumed that many will not). Further, government, pastoralists, mining companies and developers do not know who holds native title rights and what those rights might be.<sup>139</sup>

Unusually, there appears to have been some level of agreement among the stakeholders in the native title debate that a stronger threshold test should be introduced; however, there was no agreement as to how stringent the new test should be.<sup>140</sup> In any event, in the NTA Bill (as in its 1996 counterpart) a more detailed registration test was proposed to ensure, in the words of the Explanatory Memorandum, that ‘only claims which have merit are registered on the Register of Native Title Claims’.<sup>141</sup> The Bill sought to achieve this by setting out nine conditions which relate to the substantive merits of a claim, with these referring to the need for the Registrar of the National Native Title Tribunal to be reasonably<sup>142</sup> satisfied, among other things, that the land subject to native title and the native title claim group itself have been properly identified, that at least one member of the group

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<sup>137</sup> Subdivision P of Schedule 1 of the NTA Bill.

<sup>138</sup> In *North Ganalanja v Queensland* (1996) 135 ALR 225 the High Court said that a ‘prime facie’ claim for the purposes of section 63 of the NA occurs where ‘the claimant can point to material which, if accepted, will result in the claim’s success’ (at 239).

<sup>139</sup> The Department of the Prime Minister and Cabinet, *Wik: The 10-Point Plan Explained*, p 6.

<sup>140</sup> Parliament of the Commonwealth of Australia, *Tenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, The Native Title Amendment Bill 1997*, October 1997, pp 16-20. The ATSIC Commissioner’s comment on the registration test as it appeared in the first 1997 Bill was that it imposed an ‘exceptionally onerous’ test for ‘access to the right to negotiate, which will be applied retrospectively to knock out previously valid claims’ - ATSIC, *Native Title Report July 1996-June 1997*, p 15. For a similarly critical response see - National Indigenous Working Group on Native Title, *Coexistence - negotiation and certainty*, April 1997, p 9.

<sup>141</sup> Native Title Amendment Bill 1997 [No 2], *Explanatory Memorandum*, p 303.

<sup>142</sup> That the information is sufficient for the Registrar to be satisfied ‘with reasonable certainty’ was a Senate amendment to the first 1997 Bill (*Ibid*, p 305).

has or had a traditional physical connection with the land<sup>143</sup> and that, as in the original NTA, a prima facie case has been made out.<sup>144</sup> It is important to bear in mind that the registration test only determines which claimants have a right to negotiate; it does not act as a barrier to the determination of a native title claim through the Federal Court.<sup>145</sup>

*The right to negotiate:*<sup>146</sup> under the NTA Bill there was a comprehensive re-working of the entire right to negotiate scheme, something which reflected the Federal Government's general dissatisfaction with the way the original scheme had operated under the NTA. The Government's view was that the right to negotiate had impeded resource and commercial development without giving indigenous people substantial benefits in return.<sup>147</sup> As seen from the major policy disagreements between the Senate and the House of Representatives, this proved to be one of the most contentious areas in the whole post-*Wik* reform package.

The key issue in relation to Point 6 was that the NTA Bill sought to replace the position under the original NTA where the right to negotiate applied to both the exploration and production stages of a mining project, as well as separately in relation to each act attracting the right to negotiate. This resulted in separate negotiations for different stages or aspects of the project. Instead, under the NTA Bill mining projects would be covered by a single right to negotiate process. Significantly, however, extending beyond anything envisaged in the Ten Point Plan, exclusions to that right to negotiate were also stipulated in respect to:

- those future acts covered by Indigenous Land Use Agreements;
- with the approval of the Commonwealth Minister, the creation or variation of mining rights permitting what the Bill called low impact or small scale mining (this covered exploration,<sup>148</sup> prospecting, fossicking and quarrying, small scale opal or gem mining

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<sup>143</sup> A Senate amendment to the physical connection test was rejected by the House of Representatives. The amendment would have recognised the historical fact that indigenous people have in some cases been barred from access to their land. As discussed later, the eventual agreement reached between the Government and Senator Harradine includes a 'locked gates/stolen generation' exception.

<sup>144</sup> Proposed section 190B. Conditions for registration relating to procedural and other matters are set out in proposed section 190C.

<sup>145</sup> Note that the registration test does have implications for access rights to a pastoral lease.

<sup>146</sup> As noted, the NTA provides that for mining or the compulsory acquisition of native title for a grant to a third party, registered native title claimants have a right to negotiate, for a limited period, before such an act can take place. The right is not a veto. The NTA provides that where parties cannot agree to a proposed development, there is arbitration. The relevant Minister can then override an arbitrated outcome.

<sup>147</sup> The views of the Federal Attorney General cited in Commonwealth Parliamentary Library, *Native Title Amendment Bill 1997*, Bills Digest No 51, 1997-98, p 30.

<sup>148</sup> This is not a blanket exclusion of exploration from the right to negotiate processes, but an exclusion that is subject to the approval of the Commonwealth Minister where certain conditions are met. For ATSIC, a 'wide discretion' has been conferred here which 'is likely to be exercised to the effect that the exploration stage will largely no longer have RTN (right to negotiate) protection': ATSIC, *Native Title Amendment Bill 1997: Issues for Indigenous*

and alluvial mining for gold or tin); and

- the renewal of valid mining leases.<sup>149</sup>

Almost every facet of these reforms proved to be deeply problematic for those representing the interests of indigenous people. For example, ATSIC commented: ‘There will only be one RTN [right to negotiate] during the life of a mining project, not separate RTNs at exploration and mine development stage as now. This change represents a major diminution of the RTN negotiated with indigenous interests at the time of developing the present RTN’.<sup>150</sup> ATSIC was also critical of the procedural changes to the right to negotiate, including the new opportunities for the relevant (Commonwealth, State or Territory) Minister to intervene in the process in order to prevent stalemates in arbitration or to respond to urgent situations. ATSIC noted that the scope for intervention was such that it is ‘likely to undermine significantly the integrity and credibility of the RTN process. The RTN may come to be seen as potentially subject to political pressure and control’.<sup>151</sup> Other changes to the right to negotiate are discussed in relation to Point 7.

*State or Territory regimes and the exclusion of the right to negotiate on ‘non-exclusive tenures’*: another controversial aspect of the NTA Bill was its proposal to substitute State and Territory regimes for the right to negotiate in relation to both mining activity and (under Point 7) compulsory acquisition on ‘non-exclusive tenures’ (leased or reserved areas such as current or former pastoral leasehold land and national parks). However, such alternative regimes could only operate if the Commonwealth is satisfied that they provide native title claimants and holders with certain procedural rights: in the case of the compulsory acquisition of native title for the purpose of conferring grants on third parties, then the procedural rights would have to be the same as those given to holders of freehold title: in the case of mining activity on non-exclusive tenures, the procedural rights would be the same as those held by other parties with an interest in the land. For example, where appropriate a holder of native title may be treated as if he or she had an interest in the land which was equal to that of a pastoral leaseholder. Native title holders would also be entitled to compensation. In the words of the Explanatory Memorandum, ‘The new system for alternative State and Territory provisions in these circumstances ensures the workability of land management systems whilst treating co-existing native title holders in the same way as other persons who hold other interests in land’.<sup>152</sup>

The ATSIC view was somewhat different, stating that it is an inappropriate form of ‘equality’ and that it ‘is a major provision for nullifying the *Wik* decision. Its results will largely be to remove the ability of native title holders on pastoral land to have any real say

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*Peoples*, p 26.

<sup>149</sup> Proposed section 26(2).

<sup>150</sup> ATSIC, *Native Title Amendment Bill 1997: Issues for Indigenous Peoples*, p 26.

<sup>151</sup> *Ibid*, p 28.

<sup>152</sup> Native Title Amendment Bill 1997 [No 2], Explanatory Memorandum, p 219.

concerning major developments on their land'.<sup>153</sup> ATSIC also noted that leased areas could include areas which are or *were* pastoral leases, a formulation which permits the application of the historic tenures approach under which vast areas of land which were once subject to pastoral leases but are no longer used for those purposes are effectively removed from the right to negotiate process. It was also said that these proposed arrangements would allow the States and Territories to use compulsory acquisition as a means to 'upgrade' non-exclusive pastoral leases to exclusive leases or freehold estates.<sup>154</sup>

***Point 7: future government and commercial development.*** A range of issues were covered under Point 7, most of which add to the detail of the Government's proposed reform of the right to negotiate process. Again these can be considered separately.

*New registration test to access right to negotiate:* Point 7 begins 'On vacant crown land outside towns and cities there would be a higher registration test to access the right to negotiate...'. Thus, as formulated in the NTA Bill, the new registration test discussed under Point 6 and the right to negotiate would apply to the compulsory acquisition of native title rights and interests by a government on behalf of a third party.

*Exemption for the provision of infrastructure facilities:* according to the Ten Point Plan, the right to negotiate process would not apply to compulsory acquisition on behalf of a third party for what it called 'the purpose of government-type infrastructure'. On the other hand, the NTA Bill itself referred to 'an infrastructure facility', which would appear to have wider connotations.<sup>155</sup> Presumably, therefore, the Bill extended the exemption beyond the private development of public infrastructure to include private purpose infrastructure.

*State or Territory regimes, compulsory acquisition and the exclusion of the right to negotiate on 'non-exclusive tenures':* as noted, consistent with Point 6, the right to negotiate would continue for compulsory acquisition over such non-exclusive tenures as pastoral leases. However, under the NTA Bill this is made subject to the provision of an alternative State or Territory regime which would deliver procedural rights 'at least equivalent to other parties with an interest in the land'. Provision must be made for the payment of appropriate compensation.

*Removal of right to negotiate over the acquisition of land for third parties in towns and cities:* under the original NTA governments had to go through the right to negotiate process with registered claimants where the compulsory acquisition of native title rights was proposed for third parties in towns and cities. An example would be the compulsory acquisition of land in a town or city that is to be granted to a private sector party for the construction of a shopping centre or residential development. Another example is the removal of the right to negotiate in respect to the creation of mining rights in towns and

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<sup>153</sup> ATSIC, *Native Title Amendment Bill 1997: Issues for Indigenous Peoples*, p 29.

<sup>154</sup> ATSIC, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, p 15.

<sup>155</sup> Proposed section 26(1)(c)(iii)(B).

cities. The point to make is that, under the NTA Bill the removal of the right to negotiate in towns and cities was formulated in general terms, so as to include both mining activities and acts of compulsory acquisition.<sup>156</sup> Under the *Native Title Amendment Act 1998*, on the other hand, the right to negotiate is only removed from compulsory acquisitions (page 48). Compensation to native title holders and certain procedural rights would apply.

*Taking of timber etc from pastoral leases:* Point 7 ended, ‘A regime to authorise activities such as the taking of timber or gravel on pastoral leases would be provided’. In effect, this would allow governments to authorise non-primary production activities by third parties on non-exclusive tenures.<sup>157</sup>

Again, these proposals were the subject of some controversy. With respect to the exemption for the provision of infrastructure facilities, for example, ATSIC commented: ‘This is a major change to the RTN (right to negotiate) which will fundamentally alter its application. Compulsory acquisition for private infrastructure, such as roads and pipelines associated with mining projects, will be excluded from the protection of native title interests currently provided by the RTN’.<sup>158</sup> As for exempting towns and cities from the right to negotiate, the Royal Australian Planning Institute said it was ‘consistent with the outdated notion of Aboriginal Australians as displaced by or not belonging in urban areas’.<sup>159</sup>

**Point 8: management of water resources and airspace.** The intention behind this proposal was to enhance the ability of governments to control water resources and airspace. To this end, the NTA Bill authorises legislation, or the grant of a lease, licence, permit or authority under such legislation, relating to the management or regulation of: (a) surface and subterranean water; or (b) living aquatic resources; or (c) airspace. The non-extinguishment principle would apply, as would the entitlement of native title holders to compensation.

ATSIC commented that there is danger that this proposal would be about the de facto extinguishment of native title: ‘If government granted exclusive fishing rights over an area to a third party, native title holders would have no procedural rights in relation to this action. Although the non-extinguishment principle would apply, the exclusive rights of the grantee would prevail’.<sup>160</sup> Contrasting the Australian situation with that in New Zealand and Canada,

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<sup>156</sup> Proposed section 26(2)(f). The definition of ‘town or city’ varies between the States (proposed section 251C). Note that this proposed amendment was itself amended under the agreement reached between the Federal Government and Senator Harradine in July 1998. This is discussed later in this paper.

<sup>157</sup> The Department of the Prime Minister and Cabinet, *Wik: The 10-Point Plan Explained*.

<sup>158</sup> ATSIC, *Native Title Amendment Bill 1997: Issues for Indigenous Peoples*, p 26.

<sup>159</sup> Quoted in Parliament of the Commonwealth of Australia, *Third Minority Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Island Fund*, October 1997, p 95.

<sup>160</sup> ATSIC, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, p 18.

where the common law recognition of traditional water rights has led to negotiations about the use of those resources, ATSIC added that the NTA Bill ‘pre-empts any judicial finding of native title rights to waters under the Australian common law and ensures that there will be no need for any such rights to be taken into account by governments’.<sup>161</sup>

***Point 9: management of native title claims.*** For the Federal Government, the need to reform claim procedures arose out of what it perceived to be the inefficiencies of the existing scheme. Introducing a more stringent *registration test* (discussed under Point 6) was one aspect of the reform of claim procedures. In addition, it was said that the native title legislation would be amended to speed up the handling of claims, as well as to encourage the States to take advantage of existing provisions to manage claims within their own judicial and land management systems.<sup>162</sup> A sunset clause for making of new native title claims was also proposed. Again, the approach taken in the NTA Bill to these issues can be discussed separately.

*State and Territory bodies - section 207B:* as noted, under the original NA State or Territory courts or tribunals can operate as ‘recognised’ bodies for dealing with native title claims. This would continue under the NTA Bill, but it would also extend the potential role of these bodies to act as what is called ‘equivalent’ bodies to the National Native Title Tribunal or the Native Title Registrar. What seems to be envisaged here is that, where a State body of this sort exists, it will be responsible for mediating claims in that jurisdiction, even where the claim was commenced in the Federal Court, thereby effectively replacing the National Native Title Tribunal altogether. However, in the words of the Bill, in order to ensure that there is a nationally consistent approach to native title issues, certain criteria must be met by a State body before the Commonwealth Minister determines that it is to be an ‘equivalent body’. For example, the bodies must be properly resourced and equipped with the appropriate expertise. The operation of section 207B is discussed again in the context of the revised model of State involvement in native title issues found under the *Native Title Amendment Act 1998* (page 54).

ATSIC commented, ‘Generally it seems that these amendments contemplate a substantial transfer of powers from federal to State and Territory machinery. This is a matter of concern to indigenous people’.<sup>163</sup>

*Applications:* proposed section 61 of the 1997 Bill would replace provisions permitting the making of native title claims by individuals, with the need for claims to be made on a representative basis. A sworn statement that the claimant is authorised to proceed by others in the native title claim group would also be required. Further, proposed section 61A would prevent claims being made covering ‘previous non-exclusive possession act areas’, such as pastoral leases, but only where the native title rights and interests are claimed to ‘confer

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<sup>161</sup> Ibid.

<sup>162</sup> The Department of the Prime Minister and Cabinet, *Wik: The 10-Point Plan Explained*, p 6.

<sup>163</sup> ATSIC, *Native Title Amendment Bill 1997: Issues for Indigenous Peoples*, p 34.



possession, occupation, use and enjoyment of the area to the exclusion of all others'.<sup>164</sup> For ATSIC, this was an important provision which would use the historic tenures approach to frustrate claims.

*Representative bodies:* Changes would also be made to the representative bodies operating to assist indigenous peoples process claims under the original NTA. In effect the 1997 Bill would establish, after a transitional period, a new scheme where only one representative body will be recognised by the Commonwealth Minister for each area.<sup>165</sup> Proposed section 203B sets out the expanded functions of these representative bodies which are defined as follows: facilitation and assistance functions; certification functions; dispute resolution functions; notification functions; agreement making functions; and internal review functions.<sup>166</sup> These functions are in addition to others functions performed by the representative body under a law of the Commonwealth, State or Territory. As under the original NTA, some of these representative bodies may in fact be State statutory bodies (Aboriginal Land Councils, for example).<sup>167</sup> Further, the Explanatory Note explains that these representative bodies will not have a monopoly on representing indigenous people in native title claims: 'A person with a native title [claim] would remain free to engage representation elsewhere, but government funding to assist native title interest holders will be predominantly channelled through the representative body system'.<sup>168</sup> Legal aid will, therefore, be channelled predominantly through the representative body scheme.

*The Federal Court:* Other changes to note related to the expanded role of the Federal Court in the native title process. One is that applications lodged in the Federal Court will normally be referred to the National Native Title Tribunal for mediation. But this will be at the Court's discretion and the Court would have the power to end mediation if was unlikely to be successful. Another alteration is that the Court is to be 'bound by the rules of evidence, except to the extent that the Court otherwise orders' and that it 'may' (not 'must') take account of the cultural and customary concerns of indigenous peoples; proposed section 82(2) also adds the words, 'But not so as to prejudice any other party to the proceedings'. Of these reforms ATSIC commented, 'The changes as proposed detract from current arrangements intended to make the court process appropriate to native title determinations'.<sup>169</sup>

*Sunset clause:* proposed section 13 (1A) of the 1997 Bill provided that no application for

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<sup>164</sup> Proposed section 61A(3)(b).

<sup>165</sup> See generally proposed Divisions 2 and 3 of Part 11 of the NTA.

<sup>166</sup> Additional functions, such as consulting with indigenous peoples about matters with which the body is dealing, are set out in proposed section 203BJ.

<sup>167</sup> The term 'exempt State body' is used to refer to these State statutory bodies. This is because they would be for constitutional reasons exempt from some (but not all) of the accountability mechanisms foreshadowed in the 1997 Bill.

<sup>168</sup> Native Title Amendment Bill 1997 [No 2], Explanatory Memorandum p 343.

<sup>169</sup> ATSIC, *Native Title Amendment Bill 1997: Issues for Indigenous Peoples*, p 33.

a determination of native title could be made later than six years after the commencement of the provision. ATSIC's view was that the 'idea of a sunset clause is ill-conceived', in part because, while it may tidy up what are seen to be the problems in the right to negotiate process, it will not stop common law claims for the determination of title.<sup>170</sup> However, while common law claims could still be made after the six year time limit, claimants would not be entitled to the legal representation and other benefits available under the NTA.

A second sunset clause was also included in the NTA Bill, with proposed section 50(2A) setting a six year time limit on compensation claims for prior extinguishment.

**Point 10: Indigenous land use agreements.** On this point the Federal Government stated that the intention was to strengthen that part of the NTA dealing with negotiated agreements in order to encourage the resolution of native title issues 'through mutually beneficial agreements as an alternative to native title processes and the adversarial judicial system'.<sup>171</sup> Agreements were provided for under section 21 of the original NTA but, as the Explanatory Note to the 1997 NTA Bill states, it does so 'in very general terms'.<sup>172</sup> On the other hand, the new provisions of the Bill itself (and indeed of the amended NTA) are in much greater detail. The agreements contemplated under the revised scheme are 'designed to give security for agreements with native title holders, whether there has been an approved determination of native title or not, provided certain requirements are met'.<sup>173</sup>

The scheme would permit a wide range of native title issues to be resolved by negotiated agreements.<sup>174</sup> To achieve this Subdivisions B, C and D of the NTA Bill established three categories of indigenous land use agreements. The first category, 'body corporate agreements' are those where the whole area has been subject to determination of native title, for which one or more prescribed bodies corporate are established and all those bodies corporate are parties to the agreement.<sup>175</sup> Such agreements are entitled to almost automatic

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<sup>170</sup> Ibid, p 32.

<sup>171</sup> The Department of the Prime Minister and Cabinet, *Wik: The 10-Point Plan Explained*, p 7.

<sup>172</sup> Native Title Amendment Bill 1997 [No 2], *Explanatory Memorandum*, p 79.

<sup>173</sup> Ibid.

<sup>174</sup> The matters which an agreement may deal with are set out in Table 7.2 of the Explanatory Memorandum to the 1997 Bill (page 86). Future acts are included and native title may be extinguished by surrender under two categories of agreement, but not under an 'alternative procedure agreement'.

<sup>175</sup> Under the amended NTA passed in July 1998 there is the added stipulation that, if there are any representative bodies for the area concerned and none of them is to be a party to the agreement, the registered native title body corporate for the area must inform at least one of the representative bodies for the area of its intention to enter into the agreement. (Section 24BD (4) of the *Native Title Amendment Act 1998*). Amendments were also made to the range of matters with which an ILUA (body corporate agreement) can deal, notably future acts that have already been done other than intermediate period acts (see section 24BB (aa)). For example, if it is discovered that the grant of a mining lease should have been subject to the right to negotiate process, but was not, then this may be remedied by an indigenous land use agreement that meets certain conditions. Amendments were made in

registration. The second and third categories, ‘area agreements’ and ‘alternative procedure agreements’ respectively, are designed for those areas where native title has yet to be determined. This means that registered native title bodies corporate do not exist for the whole of the area concerned. For ‘area agreements’ all native title claimants and registered native title bodies corporate must be parties to the agreement. For ‘alternative procedure agreements’ all native title claimants for the area need not be parties to it (unlike the first and second categories it cannot therefore result in extinguishment of native title); but all registered native title bodies corporate and representative bodies (if any) for the area must be parties. Once registered, an agreement has the legal effect of a contract between the parties.

This is one area where the reform proposals of the Federal Government received ATSIC’s support. Indeed, ATSIC claimed that the scheme reflects proposals developed over two years by organisations representing indigenous peoples in consultation with industry groups and others. ATSIC did, however, question what incentive there was for governments and others to make negotiated agreements in the light of the other changes to the native title legislation, notably the right to negotiate itself.<sup>176</sup>

**What happened next?** From the above discussion of the Ten Point Plan and the NTA Bill it is clear that there was considerable scope for conflict and disagreement. Continued opposition to the Bill in the Senate in December 1997 and then again in April 1998 led to talk of a double dissolution of Federal Parliament and, in some quarters, of a divisive ‘race-based’ election. On 9 April 1998 the House of Representatives laid the Bill aside after agreeing to 110 Senate amendments, but disagreeing to the remainder. On 3 July 1998 that decision to lay the Bill aside was rescinded; the resolution agreeing to certain Senate amendments was amended; the resolution disagreeing to certain Senate amendments was amended; as well a further 88 Government amendments were made. This development was the product of a last minute compromise reached between the Federal Government and Senator Harradine, which allowed the Bill to pass through the Senate on 8 July 1998.<sup>177</sup> The commencement date for the amended Native Title Act is 30 September 1998.

**What were the four ‘sticking points’ and how were they resolved?** The compromise between the Federal Government and Senator Harradine was based on an agreement concerning what has been called the ‘four sticking points’ which, the Government said, prevented it from accepting amendments made by the Senate to the Bill in December 1997 and then again in April 1998. These four sticking points and their resolution were as follows:

***The interaction of the NTA and the Racial Discrimination Act:*** the Senate would have made the NTA ‘subject to’ the earlier Racial Discrimination Act, thereby raising the difficult

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the same terms in respect to area agreements (section 24CB) and alternative procedure agreements (section 24DB(aa)).

<sup>176</sup> ATSIC, *Native Title Amendment Bill 1997: Issues for Indigenous Peoples*, pp 19-20.

<sup>177</sup> For a good account of how this deal was struck, written by a participant in the process, see - J Kildea, *Native Title: A Simple Guide*, Revised Edition, July 1998, pp 25-27.

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issue of the complex interaction between these two pieces of legislation. As noted, one of the main purposes of the original NTA was the validation of ‘past acts’ which would otherwise be invalid due to their inconsistency with the *Racial Discrimination Act 1975* (Cth). Conversely, a second interaction between the two is in terms of the NTA complementing the RDA by offering a more specific and complex regime for the protection of native title. The legislation was clear on the first form of interaction, expressly validating past acts; but otherwise it only said that ‘Nothing in this Act [the NTA] affects the operation of the *Racial Discrimination Act 1975*’. As the High Court has remarked, ‘It is difficult to identify the legal purpose which this provision is intended to serve’.<sup>178</sup> It does not mean, for example, that the NTA is ‘subject to’ the racial discrimination legislation: thus, section 7(1) cannot operate to nullify the specific rules governing the adjustment of rights and obligations over land subject to native title under the NTA.<sup>179</sup> Put another way, the Racial Discrimination Act cannot affect the validity of an act that is valid under the NTA. On the other hand, section 7(1) does mean, at the least, that the NTA should not be construed as impliedly repealing any of the provisions of the racial discrimination legislation which, according to the High Court, ‘continues to operate on subjects outside the Native Title Act in precisely the same way as it operated before the Native Title Act came into operation’.<sup>180</sup>

Further to the agreement of July 1998, new section 7 of the NTA is intended, in the words of the Federal Attorney General, to ‘clarify any confusion’ over the interaction between the NTA and the Racial Discrimination Act.<sup>181</sup> Under the new subsection 7(1) the NTA is to be ‘read and construed subject to the provisions of the Racial Discrimination Act’ (as amended by the Senate). However, the effect of this is then explained by and limited to the matters set out in new subsection 7(2), which states that the racial discrimination legislation will only apply to powers and functions conferred or authorised by the NTA: ‘For example, the Native Title Registrar must not engage consultants and staff in a way that adversely discriminates on the basis of race’.<sup>182</sup> It also means that any State or Territory native title bodies must also exercise their powers in a non-discriminatory way. On the other side of the equation, however, the federal racial discrimination legislation will not apply to the substantive provisions made under State legislation governing native title.<sup>183</sup> Further, subsection 7(2) makes it clear that the Racial Discrimination Act is relevant to construing the meaning of any ambiguous terms in the NTA. For the sake of certainty, subsection 7(3) then ensures the validity of ‘past acts or intermediate period acts’ which would be invalid due to inconsistency with the racial discrimination legislation.

For ATSIC, the down side of this arrangement is that it leaves no doubt that ‘a clear

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<sup>178</sup> *WA v Commonwealth* (1995) 183 CLR 373 at 483.

<sup>179</sup> *Ibid* at 484.

<sup>180</sup> *Ibid* at 483.

<sup>181</sup> *Commonwealth Parliamentary Hansard (HR)*, 3 July 1998, p 6053.

<sup>182</sup> *Ibid*.

<sup>183</sup> Of course, to satisfy the requirements of section 109 of the Commonwealth Constitution, any State legislation on native title must be consistent with the federal NTA.

provision of the NTA will override protection available under the RDA, and will permit State and Territory laws to have a similar effect'.<sup>184</sup>

***The 'stolen generation/locked gates clause' and the registration test.***<sup>185</sup> Among several amendments made to the registration test, which operates as a gateway to the right to negotiate for mining on native title land and for certain compulsory acquisitions, the most significant was the modification of what has been called the 'traditional physical connection' test. Originally under the NTA Bill one of the conditions relating to the substantive merits of a claim was that at least one member of the native title claim group has or had a 'traditional physical connection' with the land. That stipulation was maintained under the compromise, although in a slightly modified form.<sup>186</sup> In addition, the 'physical connection' requirement could now be satisfied in a second way, namely, where at least one member of the claim group 'previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters' but for things done by a government or a lease holder or his or her agent.<sup>187</sup> This would not apply where the access was discontinued because a government created a valid interest in the area in question, thereby extinguishing native title (an exclusive agricultural lease or the granting of freehold title, for example).

This was less than Senator Harradine had hoped to achieve. His view was that there need only be a spiritual connection to satisfy the registration requirement. Under the compromise agreement the physical connection goes back two generations, thus allowing the stolen generation or indigenous people locked out from properties to make a claim.<sup>188</sup>

Note that the new and more stringent registration test is to be applied retrospectively to all claims made on or after 27 June 1996 (the starting date of the Native Title Act amendment process in the Federal Parliament), which may result in several claimants having their claims removed from the register. On one commentator has suggested that frustrated claimants are 'likely to appeal the decision to the Federal Court. This is likely to be a substantial source of future litigation'.<sup>189</sup> Passing the registration test allows a native title applicant to:

- access the right to negotiate;

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<sup>184</sup> ATSIC, *Analysis of the Howard/Harradine Agreement*, 5 July 1998.

<sup>185</sup> The revised claims process and the role of the registration test in this is outlined at page 59.

<sup>186</sup> Under the NTA Bill of March 1998 the physical connection had to be with 'the *area* covered by the application', whereas under the *Native Title Amendment Act 1998* the physical connection must be 'with *any part* of the land or waters covered by the application' (emphasis added).

<sup>187</sup> Section 190B (7).

<sup>188</sup> M Bachelard, 'Deal "unsticks" troubled Act', *The Australian*, 9 July 1998.

<sup>189</sup> J Renwick, 'The Native Title Amendment Act (No 2) 1997 - some comments' (August 1998) 3 *Native Title News* 140 at 141.

- oppose non-claimant applications over the same area;
- confirm pastoral lease access rights where these rights existed on 23 December 1996; and
- gain the benefit of certain other procedural rights (including the right to enter into a registered Indigenous Land Use Agreement).<sup>190</sup>

***Abandoning the sunset clauses:*** As noted, further to point 9 of the Ten Point Plan the Government had proposed a six year time limit on the right to apply for a determination of native title under the NTA, as well as for compensation claims for prior extinguishment. Both sunset clauses were earlier rejected by the Senate. Under the compromise agreement, both clauses were abandoned, an amendment which ATSIC described as a 'significant improvement'.<sup>191</sup>

***Amending the right to negotiate - renewal of mining leases, good faith negotiation and ministerial determinations:*** There are several aspects to this issue, one being the revision of the right to negotiate where the renewal of mining leases is concerned. A further issue, namely, the amended scheme for alternative State or Territory regimes is discussed separately.

In respect to the right to negotiate and the *renewal of mining leases*, it was noted above that the NTA Bill originally intended to exclude the renewal, re-grant, re-making or extension of the term of an earlier right to mine from the right to negotiate process. This is maintained under the amended NTA but in a revised form, that is, to ensure that section 26D(1) only exempts from the right to negotiate those renewals etc on mining leases that confer the same or lesser rights as the existing mining lease. It achieves this by imposing further conditions which have to be satisfied for the creation of the right to mine to be exempt from the right to negotiate. The additional conditions are that:

- the term of the renewed mining lease is not longer than the term of the earlier mining lease; and
- the renewed mining lease does not confer rights that were not conferred by the earlier mining lease.<sup>192</sup>

A second right to negotiate issue relates to the requirement for parties to negotiate in *good faith*. Under the NTA Bill the proposal was that 'negotiation parties must negotiate in good faith'<sup>193</sup>, but that the arbitral body (the National Native Title Tribunal or any State or Territory equivalent) must nonetheless make a determination 'even if the negotiation party

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<sup>190</sup> National Native Title Tribunal, *Understanding the Amended Native Title Act*, August 1998.

<sup>191</sup> ATSIC, *Analysis of the Howard/Harradine Agreement*, 5 July 1998.

<sup>192</sup> Section 24IC (4)(c) was amended to ensure that a future act which results in the conversion of a term mining lease into a perpetual mining lease is not a 'permissible lease etc renewal'.

<sup>193</sup> Proposed section 31(1)(b).

(other than the party who applied for the determination) did not negotiate in good faith'.<sup>194</sup> To prevent the possibility of what indigenous groups saw as the making of arbitral determinations even where, for the sake of argument, a mining company had negotiated in bad faith, section 36(2) now states that the arbitral body must not make a determination where any negotiation party satisfies the body that 'any other negotiation party (other than a native title party) did not negotiate in good faith'.

A third issue relates to the vexed question of *ministerial intervention* before the right to negotiation process had run its course. For example, under proposed section 34A of the original NTA Bill the relevant minister could make a determination in order to respond to urgent situations. That section does not appear in the amended NTA. However, under section 36A a relevant minister can still make a determination where certain conditions are met, notably, where the arbitral body has failed to make a determination within six months.<sup>195</sup> Consultation and notification requirements must be met by the relevant Minister and, in the case of a State or Territory Minister, there is a requirement to consult with the Commonwealth Minister about the determination.<sup>196</sup> According to the Explanatory Memorandum, 'The amendment can help ensure that consistent national standards will be applied when future act determinations under section 36A are made'.<sup>197</sup>

The amended NTA confirms, *in summary*, that the Commonwealth right to negotiate scheme over areas such as vacant Crown land may no longer apply to some proposed developments, including:<sup>198</sup>

- some types of mineral exploration;
- opal and gem mining;
- some gold and tin mining;
- renewal of some mineral tenements; and
- where the right to be consulted is established (see below).

Further, the amended NTA confirms that the Commonwealth right to negotiate no longer applies to:

- mining infrastructure;
- compulsory acquisition by governments of native title rights and interests for grant to a third party that involves the development of infrastructure;
- compulsory acquisitions by governments of native title for the benefit of third parties

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<sup>194</sup> Proposed section 36(2).

<sup>195</sup> Section 36(4). The relevant Minister must give a written notice to the arbitral body requesting a determination be made within a specified period. The notice can only be sent at least four months after the arbitral body has received an application under section 35.

<sup>196</sup> Section 36A(1A).

<sup>197</sup> Supplementary Explanatory Memorandum to Government Amendments Moved in July 1998, *Native Title Amendment Bill 1997 [No 2]*, p 26.

<sup>198</sup> Section 25 presents its own overview of the right to negotiate.

in towns and cities.<sup>199</sup> This is a narrower formulation than that found in the NTA Bill where (as discussed under Point 7 of the Ten Point Plan) a general exclusion of the right to negotiate in relation to future acts, including the right to mine, was proposed. Under the compromise position, the right to negotiate will now apply to the creation or variation of rights to mine in towns and cities, but the right to negotiate is removed for compulsory acquisitions that take place in a town or city.<sup>200</sup>

Note that, as part of a package upgrading the procedural rights of native title parties, a right to be consulted is established where compulsory acquisition confers rights on third parties and where a mining title granted for the purpose of infrastructure associated with mining is involved. Native title holders and claimants will have a right to consultation in these circumstances, as well as a right to object to an independent body, along the lines set out under section 43A for the alternative State schemes.<sup>201</sup>

**What exceptions can be made to the right to negotiate where satisfactory State or Territory regimes are in place under the amended Native Title Act?** As noted, under proposed new section 43A the NTA Bill allowed for the establishment of alternative State or Territory regimes for what it called a ‘leased or reserved area’, from which the right to negotiate would be excluded. These leased or reserved areas included current or former pastoral leasehold land and national parks. Under the compromise agreement section 43A was substantially re-written, although from the Government standpoint the intention remained the same; namely, what the Prime Minister described as the ‘restoration of the principle that all Australians should be equal before the law’.<sup>202</sup> Again, the right to negotiate would be removed in relation to claims over pastoral leases and substituted for or replaced by a State based regime ‘that gives an equivalent procedural treatment to the claims of both indigenous people and other Australians’.<sup>203</sup> Explaining the reasoning behind the amendments, the Federal Attorney General stated:

The right to negotiate was originally thought to apply only over vacant Crown land. The possibility that native title might coexist with other rights as exemplified in Wik requires a modification of the right to negotiate where third parties are involved... These modifications to the right to negotiate also give back to States and Territories their primary role in relation to land and resource management.<sup>204</sup>

As formulated under section 43A of the amended NTA, a State or Territory can legislate

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<sup>199</sup> National Native Title Tribunal, *Understanding the Amended Native Title Act*, August 1998.

<sup>200</sup> Section 26(2)(f).

<sup>201</sup> Section 24MD(6B); *Commonwealth Parliamentary Debates (HR)*, 3 July 1998, p 6052.

<sup>202</sup> *Commonwealth Parliamentary Debates (HR)*, 3 July 1998, p 6042.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*, pp 6051-6052.



to replace the right to negotiate on certain kinds of tenures with its own scheme, and that scheme will have effect instead of the right to negotiate if the Commonwealth Minister has given his or her approval to the scheme. Instead of 'leased or reserved areas', section 43A now refers to an 'alternative provision area', presumably because this expresses more clearly the fact that the land is to be covered by alternative State laws. These alternative provision areas still cover non-exclusive agricultural and pastoral leases, as well as national parks, but now future acts done 'wholly within a town or city' are also included.<sup>205</sup> What this means is that if, to take one example, mining activity is proposed over land that is (or was) covered by a pastoral lease, or on land within a town in NSW, then alternative arrangements to the Commonwealth right to negotiate could be made for reaching an agreement between the native title party and others, assuming of course that NSW had established its own scheme.

In summary, these alternative State provisions apply only to proposed new developments in certain areas covered by native title applications, including:

- freehold land held in trust for Aboriginal and Torres Strait Island people;
- Crown leaseholds (including pastoral leases);
- Crown reservations used for public purposes, such as national parks; and
- mining or mineral exploration in towns and cities.<sup>206</sup>

Note that section 43A refers to acts which '*to any extent*' relate to land or waters that are an alternative provision area, which means that the State scheme will apply to an act on land or waters that are wholly or partly an 'alternative area'. This would seem to mean that, while an alternative provision area must be 'wholly within a town or city', the future act in question need only be partially within that area to be covered by the alternative State scheme. To complicate matters, if this occurred on land under a pastoral lease or in a town, but in respect to the creation or variation of a right to mine, then the act would be treated as two separate acts. The effect is that the act outside the alternative provision area would still be subject to the right to negotiate.<sup>207</sup> Further, the State scheme would not apply where it involved certain compulsory acquisitions which involved the acquisition of native title rights and interests in land or waters both within and outside an alternative provision area.<sup>208</sup>

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<sup>205</sup> As noted, under section 26(2)(f) the right to negotiate no longer applies in any event to compulsory acquisitions that take place in a town or city. The right does apply, however, to the creation or variation of mining rights in towns and cities and it is this which would be subject to the provisions of an alternative State scheme.

<sup>206</sup> National Native Title Tribunal, *Understanding the amended Native Title Act*, August 1998. It would not apply, for example, to the compulsory acquisition of land in a city for the purpose of building a shopping centre. This is because the right to negotiate no longer applies to compulsory acquisitions by government of native title for the benefit of third parties in towns and cities.

<sup>207</sup> Section 43B.

<sup>208</sup> According to the Supplementary Explanatory Memorandum of July 1998, where the compulsory acquisition involved native title to land which is both inside and outside an alternative provision area, then, 'The alternative provisions do not apply to a compulsory acquisition that is for the purpose of conferring rights on a non-Government party and is not

In these circumstances, the right to negotiate would still apply.

Any alternative State scheme would have to satisfy certain requirements, including where the Commonwealth Minister is of the opinion that the State law contains:

- **notification:** appropriate procedures for notifying native title claimants, any registered native title body or corporate and any representative Aboriginal/Torres Strait Islander body;
- **consultation:** provisions for consultation (and mediation) about minimising the effect of the act in question on the land or waters concerned and, where relevant, consulting about the access of native title holders to the land or waters;
- **right to object:** any native title claimant, corporate body or representative body has a right to object about the doing of the future act, so far as it affects their native title rights and interests;
- **objection to be heard by an independent person or body:** thus, where the right to objection is used, the objection must be heard by an independent person or body. This could be a State tribunal which deals with acts of the kind concerned, for example, a mining warden where the act is a grant of a mining lease;
- **ministerial override:** a determination of an independent person or body can be overridden by the State Minister responsible for indigenous affairs if, among other things, it is in the 'interests' of the State not to comply with the determination. The term 'in the interests of the State is defined to include: (a) for the social or economic benefit of the State or the Territory (including of Aboriginal peoples and Torres Strait Islanders); and (b) in the interests of the relevant region or locality in the State or Territory;
- **judicial review:** provision for judicial review of the decision to undertake the act in question. A note to the legislation explains that this could be by the State Supreme Court, although there would appear to be no reason why the Land and Environment Court, for example, could not undertake the task of judicial review in NSW;
- **compulsory acquisition and procedural rights:** where certain compulsory acquisitions are concerned the law must provide claimants and bodies corporate with the same procedural rights as those enjoyed by those holding freehold title;
- **compensation:** the Commonwealth Minister must be satisfied that compensation is payable and that any disputes are to be settled by an independent person or body; and
- **preservation of heritage areas:** again, the Commonwealth Minister must be satisfied that areas of significance to indigenous peoples are preserved or protected 'in accordance with their traditions.'

Provision is also made, under section 43A (11), for a Commonwealth Minister to revoke a determination permitting an alternative State scheme. This would occur where that scheme is amended in such a way that it no longer complies with the requirements set out above. Further, any determination made by the relevant Commonwealth Minister sanctioning an

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alternative State scheme is a disallowable instrument, which means that agreement to the scheme can be rejected by either House of the Commonwealth Parliament.<sup>209</sup>

**What are the implications of the amended NTA for the States?** An initial question to ask is, do the States need to do anything by way of legislative reform further to the amended NTA? The answer is ‘yes’, certainly if they wish to enjoy the benefits of the amended Act and the Act itself contemplates the making of complementary State laws for that purpose. For example, complementary State legislation is contemplated to confirm that a previous exclusive possession act attributable to the State extinguished native title to the area of the lease.<sup>210</sup> State legislation is also contemplated to confirm the partial extinguishment of native title by previous non-exclusive possession acts of the State.<sup>211</sup> Another example is that the States would need to pass such legislation if they wanted to validate what the NTA calls ‘intermediate period acts’ between 1 January 1994 and 23 December 1996. Presumably, NSW would want to take advantage of this form of validation. This is because, prior to the *Wik* case, apparently operating on the assumption that native title was necessarily extinguished by valid pastoral leases, the NSW Government seems to have issued mining titles on land covered by pastoral leases without reference to the right to negotiate. Without amending legislation the validity of these past acts would now be in question. Of course it is open to the NSW Government to take the view that pastoral leases in this State do in fact extinguish native title and to leave it to the courts to decide the issue. However, legislative amendment which complements the Commonwealth NTA would be a safer and more likely option in the circumstances. The Crown Solicitor has advised the NSW Government that native title may still exist in pastoral leases granted in this State: pastoral leases, in turn, comprise up to 92 per cent of the Western Division, which itself constitutes 42 per cent of the State.<sup>212</sup>

As noted, at present it is mainly those parts of the NSW native title legislation dealing with precisely these kinds of matters, the validation of past acts attributable to the State, which

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<sup>209</sup> Section 214 and section 43A(1)(b). The granting by the Commonwealth Minister of an extension of time before a determination permitting an alternative State scheme is revoked is also a disallowable instrument (sections 214 and 43A(9)(c)(ii)).

<sup>210</sup> Section 23E. Previous exclusive possession acts involve the grant or vesting of things such as freehold estates or leases that conferred exclusive possession, or the construction or establishment of public works. The State laws would have to include provisions to the same effect as sections 23D or 23DA: the former deals with the preservation of reservations and conditions which are beneficial to indigenous peoples; the latter would confirm the validity of use of certain land by the Crown.

<sup>211</sup> Section 23I. The State law must provide for notification (section 23HA) and for the preservation of reservations and conditions which are beneficial to indigenous people.

<sup>212</sup> D Jopson, ‘NSW to go its own way on native title’, *The Sydney Morning Herald*, 21 April 1998. Some individual leases cover very large areas of land. At present, there are 4,354 pastoral leases in the Western Division of NSW.

have been proclaimed to commence.<sup>213</sup> Thus, although the *Native Title (New South Wales) Act 1994* contemplates a system of native title registration, mediation and determination comparable to that established under the Commonwealth legislation, the NSW native title regime has never been fully implemented. Those Parts of the NSW Act which contemplate that the Land and Environment Court and the Warden's Court should be 'recognised State/territory bodies' and, therefore, perform similar arbitral and other functions as exercised by the National Native Title Tribunal and the Federal Court have not been activated. It would be open to this or any other State or Territory to pursue a similarly minimalist approach in response to the amended NTA, thereby leaving the work of mediating and determining native title matters arising under the legislation largely in the hands of the National Native Title Tribunal and the Federal Court respectively.

On the other hand, the amended NTA does contemplate an expanded involvement for the States, notably under sections 43A and 207B, and the question is whether that opportunity will be grasped and, if so, in what way? In summary, the opportunities for State involvement in native title land management are as follows:

- **section 27 - arbitral body:** this re-enacts the same provision in the original NTA which permits recognised State or Territory arbitral bodies to be established, and stipulates that, in the absence of such bodies, the relevant functions are to be undertaken by the National Native Title Tribunal. It was this section (read with section 251 of the original NTA) which the NSW native title legislation referred to when providing that the Land and Environment Court and Warden's Court would be arbitral bodies for this State. These provisions of the NSW Act have not been proclaimed to commence. The criteria for establishing a recognised State body are discussed below in relation to section 207A of the NTA.
- **section 43 - modification of the right to negotiate subdivision if satisfactory alternative State or Territory provisions:** in a slightly modified form this section again re-enacts the same provision under the original NTA. It permits the States to establish their own right to negotiate scheme if certain requirements are satisfied. If they are satisfied, then the Commonwealth Minister makes a determination which, while in force, means that the NTA right to negotiate provisions are replaced by the State regime. That determination by the Commonwealth Minister is a disallowable instrument,<sup>214</sup> as is a decision to grant an extension of time to a State for any amendments to its scheme to comply with the requirements of the section.<sup>215</sup>

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<sup>213</sup> Legislation has been introduced for this purpose in Queensland - *Native Title (Queensland) State Provisions Act 1998*. The Act also deals with the confirmation of total or partial extinguishment of native title by previous exclusive acts and previous non-exclusive acts. Draft legislation of this kind has also been introduced in Western Australia - Titles Validation Amendment Bill 1998; a second Bill, Native Title (State Provisions) Bill 1998, is more wide-ranging and would establish a State based Native Title Commission. Both these WA Bills have been released for public comment.

<sup>214</sup> Section 214 and section 43(1)(b).

<sup>215</sup> Section 214 and section 43(3)(c)(ii).

Two modifications to section 43 can be noted. One is that, consistent with section 36A, a State Minister may now make a determination if the arbitral body's determination is delayed.<sup>216</sup> The second is that provision is made for the revocation of the Commonwealth Minister's original determination.<sup>217</sup>

- **Section 43A - exceptions to the right to negotiate where satisfactory State or Territory provisions apply:** as discussed above, a State or Territory can now legislate to replace the right to negotiate with its own scheme on land designated an 'alternative provision area'. That scheme will have effect instead of the right to negotiate if the Commonwealth Minister has given his or her approval to the scheme. These alternative provision areas cover non-exclusive agricultural and pastoral leases, as well as national parks and acts done 'wholly within a town or city'. Sections 43 and 43A are themselves, therefore, alternative options open to the States, at least with respect to land which is an 'alternative provision area'. This means that, potentially, for a non-exclusive pastoral lease (to take one example) at least four options are available to NSW: (a) as at present, the right to negotiate procedure could be left to the National Native Title Tribunal; (b) NSW could establish its own arbitral body, as envisaged under section 27 of the NTA and contemplated under the NSW Native Title Act; (c) under section 43 the State could establish an alternative right to negotiate regime which would deal with non-exclusive pastoral leases; and (d) under section 43A non-exclusive pastoral leases could be excluded from the right to negotiate under an alternative NSW scheme.
- **Section 207A - recognised State/Territory body:** again, this largely re-enacts a provision of the original NTA, but alters its place within the Act. What was section 251 is now new section 207A in new Part 12A of the amended NTA. As before, consistent with section 27 of the NTA, the section provides for the establishment of recognised State or Territory bodies to undertake the arbitral functions associated with the right to negotiate which would otherwise be undertaken by the National Native Title Tribunal. This is still to be done by a determination, in writing, made by the Commonwealth Minister after nomination of the body (typically a court or tribunal) by the relevant State Minister. In order 'to ensure that there is a nationally consistent approach to the recognition of native title' a determination can only be made if certain criteria are satisfied. These include the requirement that 'any procedures' in a State law relating to whether 'acts affecting native title may be done will be consistent' with those in the Commonwealth NTA,<sup>218</sup> and that there is compliance with the new registration test.<sup>219</sup> Section 207A(1), which provides for the making of a determination by the Commonwealth Minister, is a disallowable

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<sup>216</sup> Section 43(2)(k). Requirements similar to those in sections 36B and 36C must also apply.

<sup>217</sup> Section 43(3).

<sup>218</sup> Section 207A (2)(aa).

<sup>219</sup> Section 207A (2)(ab).

instrument.<sup>220</sup>

- **Section 207B - equivalent State or Territory bodies:** as with the relationship between sections 43 and 43A, new section 207B goes a step beyond section 207A to allow the establishment of equivalent State bodies to perform the whole range of functions exercised by both the National Native Title Tribunal and the Native Title Registrar. Such bodies will be nominated by the relevant State Minister and will be established by a determination, in writing, of the Commonwealth Minister, which again is treated as a disallowable instrument.<sup>221</sup> Again, to ensure a ‘nationally consistent approach’, certain criteria must be satisfied for a determination to be made, including: (a) the equivalent State body (or bodies) must have available to it expertise in matters relating to indigenous people; (b) the procedures used by the body will be ‘fair, just, informal, accessible and expeditious’; (c) the body will have adequate resources; (d) any register kept by the body ‘will be maintained in a nationally integrated and accessible manner’; (e) if the body exercises the powers or functions of the National Native Title Tribunal, then the State law will require at least one member of its equivalent body to be a Tribunal member; and (f) any other requirements the Commonwealth Minister considers relevant. Another feature to note is that the *Administrative Decisions (Judicial Review) Act 1977* will apply to the decisions of the State body or State Minister. In certain circumstances, the determination establishing the equivalent State body can be revoked by the Commonwealth Minister.

To date, it seems that only Western Australia has proposed to introduce a legislative scheme which would capitalise on the full range of opportunities for State involvement in land management under the amended NTA. In August 1998 the Western Australian Government released draft legislation, the Native Title (State Provisions) Bill 1998, for public comment which would establish: a Native Title Commission which would be an equivalent State body under section 207B, as well as an arbitral body under the future act provisions; consultation procedures for alternative provision areas under section 43A; and alternative right to negotiation procedures under section 43.

### **What are the implications for a nationally consistent approach to native title issues?**

An obvious question arising from the greater potential for State involvement in native title matters is whether this could result in quite different approaches from one jurisdiction to another? Could it, potentially, undermine the nationally consistent scheme the NTA was originally designed to foster? Obviously much depends, at one level, on how the different Australian jurisdictions respond to the amended NTA. It is also the case that, while the amended NTA contains certain elements which make for what might be called a federally diverse (centrifugal) scheme, in other ways this is countered by the strong centralist (centripetal) forces in it.

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<sup>220</sup> Its equivalent under the original NTA, section 251(1), was also a disallowable instrument.

<sup>221</sup> Section 214 and section 207B (3).

Making for diversity is the fact that, under section 43A, the State and Territories have significant discretion in designing the details of an alternative scheme. As the Supplementary Explanatory Memorandum of July 1998 states:

For example, it is left to the States and Territories to determine how notice is to be given; how, when and by which independent person or body objections are to be heard; and whether the independent person or body is required to make determinations or impose conditions in relation to the doing of the act. It is also left to the States and Territories to determine whether different alternative provisions should apply in relation to different kinds of alternative provision areas.<sup>222</sup>

Concerns about a proliferation of contrasting procedures and provisions under this new system led the mining industry to press for a summit of all States to formulate a uniform regime to replace the national right to negotiate, with Mr Campbell Anderson, the managing director of the Australian mining company, North Ltd, stating 'I would prefer to see the States act together - it won't be particularly helpful if there is different legislation between the States'.<sup>223</sup> It is also reported that the NSW Government 'fears that without uniform State laws, a positive approach by it and Queensland to Aboriginal interests would be undercut by other States, causing developers to transfer their capital'. The report continued:

A spokeswoman for the NSW Premier, Mr Carr, said NSW had a chance to reach a co-operative arrangement with all bordering States - Queensland, Victoria and South Australia. Western Australia, which squeezed extra concessions from Mr Howard to sign off on the Wik deal, is expected to go it alone.<sup>224</sup>

Making for a level of consistency is the fact that significant elements of the amended NTA scheme are defined to be disallowable instruments, which means that those aspects can be rejected by either House of the Commonwealth Parliament. For section 43A the crucial point is that any determination made by the relevant Commonwealth Minister sanctioning an alternative State scheme is itself a disallowable instrument. The effect of this is to treat that determination, and by extension the State law involved, as if it were a regulation of the Commonwealth Parliament. While this may not be a force making for strict procedural consistency, it would surely deter the tendency to outright eccentricity or waywardness amongst the States and Territories.

On the other side, unlike section 207A (establishing recognised State or Territory bodies) and section 207B (establishing equivalent State or Territory bodies), both of which stipulate that certain requirements have to be met to 'ensure that there is a nationally consistent

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<sup>222</sup> Supplementary Explanatory Memorandum, *Native Title Bill 1997[No2]*, p 30.

<sup>223</sup> M Kingston, 'All States urged to agree on native title', *The Sydney Morning Herald*, 8 July 1998.

<sup>224</sup> *Ibid.*

approach', under section 43A the assumption seems to be that the alternative provisions may vary from one jurisdiction to another. It would seem therefore that for section 43A inconsistency in approach to native title issues is not a criteria as such for rejecting a relevant State or Territory law.

**What other amendments were made under the compromise agreement?** Several other changes were also made to the NTA Bill under that agreement. Four of these can be noted here.

***Pastoral leases and the question of extinguishment:*** one of the major points of concern of indigenous groups was that the NTA Bill provided for 'bucket-loads of extinguishment' to the detriment of the rights of indigenous people.<sup>225</sup> The statutory categories of 'previous exclusive possession acts' and 'previous non-exclusive possession acts', introduced to implement points 2 and 4 of the Ten Point Plan, were seen to be particularly problematic in this regard. There was also the argument that, under *Wik*, native title rights were not in fact partially extinguished by a non-exclusive lease, but that native title rights and interests were only suspended by this kind of grant and could therefore be revived once the lease was no longer in force.

Responding to these concerns, the Federal Government agreed to soften one aspect of its reform package. This was achieved by leaving open the question of whether non-exclusive pastoral and agricultural leases do in fact extinguish native title, as the Government believed, at least to the extent of inconsistency between the two. Under section 23G(1)(b) of the amended NTA the grant of a non-exclusive possession lease will only extinguish native title rights that are inconsistent with the grant *if that is the position at common law*. In other words, it was left to the courts to decide whether such pastoral and agricultural leases extinguish or merely suspend native title. The development was welcomed by ATSIC.<sup>226</sup>

***Renewals and pastoral leases:*** Under the NTA Bill the renewal, re-grant or extension of a non-exclusive pastoral lease constituted a 'permissible lease renewal' under the amended 'future act' regime. This meant that such a renewal was valid even if the lease was, for instance, for a longer term or if it was renewed as a perpetual lease. This proposal was criticised by indigenous representatives, with ATSIC commenting: 'The upgrading of pastoral leases to perpetual leases was stated in the Ten Point Plan to be subject to compulsory acquisition processes. Under this substituted proposal, native title holders will be denied their procedural rights in the face of "renewals", even for those which give leases a perpetual status for the first time'.<sup>227</sup> More generally, ATSIC commented that it was:

the Government's intention to minimise the procedural protections available

<sup>225</sup> ATSIC, *Native Title Report, July 1996-June 1997*, Chapter 4. The term itself is attributed to the Deputy Prime Minister.

<sup>226</sup> ATSIC, *Analysis of the Howard/Harradine Agreement*, 5 July 1998.

<sup>227</sup> ATSIC, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, p 15.



to native title holders and to increase the circumstances in which their rights can be overridden, leaving them merely with an ability to apply for compensation for what has been lost.<sup>228</sup>

Under the agreement of July 1998, the impact of these changes was modified by the inclusion of improved procedural rights for native title claimants and bodies corporate. In effect, where a non-exclusive pastoral lease is renewed or extended, if the renewal or extension is for a longer term than the original lease, then the same procedural rights apply as those which operate where a compulsory acquisition is made on behalf of a third party.<sup>229</sup> Thus, native title claimants and bodies corporate will have a right to consultation in these circumstances, as well as a right to object to an independent body.

***Previous exclusive possessions acts:*** Another controversial issue was the scope of extinguishment that could occur under the category of previous exclusive possession acts, as discussed under point 2 of the Ten Point Plan. It was said, for instance, that extinguishment would take place by means of what ATSIC described as the granting of ‘fake freehold’ from governments to their statutory authorities. Under the compromise agreement of July 1998 further exclusions were made from the definition of ‘Scheduled interests’, that is, those acts which the relevant Commonwealth, State or Territory government believes has conferred exclusive possession and have therefore extinguished native title. These exclusions include: grants under ‘indigenous land rights’ type legislation created expressly for the benefit of indigenous peoples; the creation of national parks; acts done by or under legislation that expressly provides that such acts do not extinguish native title; a Crown grant or vesting that has not extinguished native title at common law; and anything the grant of which has been excluded by regulation under subsection 23B(10) from the definition of ‘previous exclusive possession act.’<sup>230</sup>

***Primary production:*** Further to point 4 of the Ten Point Plan, in order to clarify any uncertainty, the NTA Bill proposed to permit the holder of a pastoral lease to engage in ‘primary production’ activities, or in activities incidental to ‘primary production’, such as farmstay tourism, without having to go through the right to negotiate process. This was criticised in part on the ground that it allowed too much scope for the expansion of pastoral activities without reference to either native title rights or to the terms and conditions of existing leases. Of this aspect of the NTA Bill, ATSIC said that it denied native title holders the ability to:

prevent the conduct of primary production activities even when the leaseholder has nor complied with an applicable law. For example, a leaseholder may have failed to obtain authority under his or her lease, or to

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<sup>228</sup> Ibid, p 18.

<sup>229</sup> Section 24ID (4). The section also applies if the new authority is a perpetual lease (section 24IC (4)(c)). The act is to be treated as if it were a compulsory acquisition of the kind mentioned in section 24MB (6B).

<sup>230</sup> Section 249C and sections 23B(9), (9A), (9B), (9C) and (10).

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obtain a permit under applicable State or Territory law.<sup>231</sup>

In response, the proposal was modified under the agreement of July 1998 so that, in the amended NTA, there is the additional requirement that the future act, the grant of a licence or permit for example, could have been validly done or authorised at any time before 31 March 1998 if native title had not existed.<sup>232</sup> Likewise, there is the additional requirement that primary production activities of a physical (non-legal) nature, such as the construction of a dam, could have been done at any time before 31 March 1998. Note that neither the 'legal' future act nor the 'physical' activity must have been done in fact, the requirement is only that either could have been done. The effect of this seems to be that activities which go beyond those permitted in the lease may be valid, but the activities must be such 'as could have been permitted under existing State legislation'.<sup>233</sup>

**How have the roles of the Federal Court and the National Native Title Tribunal been redefined?** Basically, the amended NTA provides for the Federal Court to make determination as to whether native title exists or not, as well as about compensation.<sup>234</sup> The role of the Tribunal, on the other hand, has been wound back as envisaged after the *Brandy* ruling, mainly to the provision of assistance with mediation,<sup>235</sup> as well as the administrative arrangements related to such matters as the right to negotiate and the registration of native title claims. There will, in addition, be a role for the Tribunal in deciding if certain agreements are covered by the NTA and in making determinations concerning a right to negotiate.<sup>236</sup> For practical purposes, it should be noted, too, that the scope of the Tribunal's activities may also be curtailed if any or all of the States and Territories decide to establish their own 'equivalent' bodies under section 207B of the NTA.

A further point to reiterate is that the Federal Court is to be 'bound by the rules of evidence, except to the extent that the Court otherwise orders' and that it 'may' (not 'must') take account of the cultural and customary concerns of indigenous peoples.<sup>237</sup>

**How has the claims process been changed?** It can also be noted here that the claims process itself has been revised, with applications for determination of native title (whether or not native title exists) now being made to the Federal Court itself. These applications must be endorsed by the native title group on whose behalf the claim is made. To make a

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<sup>231</sup> ATSIC, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, p 14.

<sup>232</sup> Section 24GB(1)(e).

<sup>233</sup> J Kildea, *Native Title: A Simple Guide*, Revised Edition, July 1998, p 30.

<sup>234</sup> Note that the Federal Court is now bound by the rules of evidence and that it may take account of the cultural and customary concerns of indigenous peoples (section 82).

<sup>235</sup> Section 86A. Note that the Federal Court, unless it makes an order to the contrary, must refer every application for a determination of native title to the Tribunal (section 86B).

<sup>236</sup> Section 151(2).

<sup>237</sup> Section 82.

claim therefore an individual now needs the support of a native title group. The Federal Court will give a copy of the application to the Native Title Registrar and the new registration test will be applied to decide if the claim has merit. A claim which fails that test may still proceed through the Federal Court to a determination. Failing the registration test means that the claimant cannot be entered on the Register of Native Title Claims which, in turn, means that the claimant cannot be a negotiation party in relation to future acts covered by the right to negotiate. In other words, an application may just seek a determination of native title and would not need to satisfy the registration test to proceed. On the other hand, an application may seek a determination and be concerned with, for instance, a proposal to create a mine on a pastoral lease, in which case it would need to satisfy the registration test to access the right to negotiate process in relation to that future act. Alternatively, an application may be solely for the purpose of accessing the right to negotiate process, which means it would be sent directly to the Registrar and would be required to satisfy the registration test.

## 7. OVERVIEW OF THE AMENDED FEDERAL NATIVE TITLE ACT

**What are the key features of the amended Native Title Act?** Following the overview of the amended Act in new section 4 of the NTA, its key features are as follows:

- ***Recognition and protection of native title:*** The NTA ‘recognises and protects native title’ and provides that native title cannot be extinguished ‘contrary’ to the Act.
- ***Topics covered:*** The NTA covers such issues as: the determination of whether native title exists; compensation for acts affecting native title; and establishing what kinds of acts can legitimately affect native title, such as under what circumstances a mining title could be granted over land covered by a pastoral lease.
- ***Kinds of acts affecting native title:*** Under the NTA the acts affecting native title are basically of two kinds: (a) ‘past acts’, which are mainly acts done before the NTA’s commencement on 1 January 1994 that were invalid because of native title (‘intermediate period acts’ which, as explained below, are certain acts done before the *Wik* decision and would otherwise be invalid, can be treated as part of this ‘past act regime’);<sup>238</sup> and (b) ‘future acts’, which are mainly acts done after the NTA’s commencement that either validly affect native title or are invalid because of native title.
- ***Consequences of past acts and future acts:*** Thus, where past and future acts are concerned, the NTA deals with: (a) their validity; (b) their effect on native title, such as whether native title is extinguished or whether the non-extinguishment principle

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Note that Division 2AA of Part 2 of the NTA validates transfers of land under section 36 of the New South Wales *Aboriginal Land Rights Act 1983*. The section permits the NSW Aboriginal Land Council to claim land which the Act defines to be ‘claimable Crown lands’. The land must not be subject to either a native title claim or an approved determination and, among other things, must not be lawfully used or occupied.

applies; and (c) compensation for the acts.

- ***Confirmation of extinguishment of native title:*** The NTA also confirms that many acts done before the Wik decision, that were either valid or have been validated under the past act or intermediate period act provisions, will have extinguished native title. If the acts are ‘previous exclusive possession acts’, the extinguishment is complete. The word ‘extinguish’ is defined to mean ‘that after the extinguishment the native title rights and interest cannot revive, even if the act the caused the extinguishment ceases to have effect’.<sup>239</sup> Schedule 1 lists those grants of exclusive possession, including residential, commercial and agricultural leases, which Commonwealth, State and Territory governments think have extinguished native title in this way. If the acts are ‘previous non-exclusive possession acts’, which would include most pastoral leases, the question of extinguishment to the extent of any inconsistency between the lease and native title is left to the courts to decide.
- ***Role of Federal Court and National Native Title Tribunal:*** The NTA explains the functions and responsibilities, as revised, of the Federal Court and the National Native Title Tribunal.

**In summary, what’s new in the amended Native Title Act?**<sup>240</sup> The new elements of the amended NTA are as follows:

- ***The NTA and the Racial Discrimination Act:*** As discussed at page 44, the relationship between these two statutes is set out in new section 7 of the NTA. The Racial Discrimination Act applies to the performance and exercise of powers conferred or authorised by the NTA and, in the case of ambiguity, the NTA should be construed consistently with the Racial Discrimination Act, if that construction would remove the ambiguity. The validation of acts under the NTA is not affected.
- ***Validation of intermediate period acts:*** The past act regime is supplemented by the validation of intermediate period acts which occurred between 1 January 1994 and 23 December 1996.<sup>241</sup> For validation to occur, certain conditions must have applied before the act was done, notably there must have been a grant of a freehold estate or a lease (other than a mining lease), or a public work over any of the land or waters concerned. For instance, the provision would validate the granting of a mining title on land covered by a pastoral lease. Native title holders are entitled to compensation from the relevant government.
- ***Previous exclusive possession acts :*** Where a government granted a freehold estate or a lease conferring exclusive possession on or before 23 December 1996 this

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<sup>239</sup> Section 237A.

<sup>240</sup> This summary is based on J Kildea, *Native Title: A Simple Guide*, Revised Edition, July 1998, pp 27-34.

<sup>241</sup> Sections 21-22H.

would completely extinguish native title.<sup>242</sup> New Schedule 1 to the NTA lists those previous exclusive possession acts, such as the granting of a residential lease, which are confirmed by the relevant government to have extinguished native title. Presumably, taking the view that the NTA provisions only operate to confirm past extinguishment and do not themselves effect extinguishment, these ‘confirmations’ may be challenged in the courts in the future.<sup>243</sup> The NTA also sets out what are not previous exclusive possession acts, including Crown to Crown grants and the creation of national parks.<sup>244</sup> Native title holders are entitled to compensation.<sup>245</sup>

- ***Previous non-exclusive possession acts:*** In response to *Wik*, these relate typically to pastoral leases. The amended NTA provides that the act of granting, for instance, a non-exclusive pastoral lease on or before 23 December 1996<sup>246</sup> will have extinguished native title to the extent of any inconsistency, but only if that is the position at common law, something which is left to the courts to decide. Otherwise, the granting of this kind of lease is taken only to have ‘suspended’ native title.<sup>247</sup> Again, native title holders are entitled to compensation.<sup>248</sup> Also, to the extent of inconsistency, the rights of the leaseholder are to prevail over those of the holders of native title.<sup>249</sup>
- ***Future act regime is more complex and detailed:*** The future act regime is more complex and detailed than that found in the original NTA. Basically, new Division 3 of Part 2 of the NTA, validates a whole range of acts which may occur in the future to the extent that these affect native title. The following future acts are not subject to the right to negotiate and, with the exceptions noted below, do not give native title claimants specific procedural rights:

*Indigenous land use agreements.*<sup>250</sup> In keeping with the amended NTA’s emphasis on settling native title claims by agreement, there are detailed provisions for the making of what are called indigenous land use agreements. There are three types of such agreements: (a) ‘body corporate agreements’ which operate where there has

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<sup>242</sup> Sections 23A-23E. As noted, in *Fejo v Northern Territory* [1998] HCA 58 (10 September 1998) the High Court decided that the grant of a freehold title extinguishes native title.

<sup>243</sup> J Kildea, *Native Title: A Simple Guide*, Revised Edition, July 1998, p 28.

<sup>244</sup> Section 23B (9)(9A)(9B)(9C) and (10).

<sup>245</sup> Section 23J.

<sup>246</sup> Or if the act takes place in exercise of an enforceable right created by that date (section 23F (3)(c).

<sup>247</sup> Section 23G (1)(b).

<sup>248</sup> Section 23J.

<sup>249</sup> Section 23G (1)(a).

<sup>250</sup> Sections 24BA-24EC.

been a determination of native title for the whole area which is the subject of the agreement: (b) ‘area agreements’ where no determination has been made but where there are registered native title bodies corporate for the whole area concerned; and (c) ‘alternative procedure agreements’ which also apply where there is no determination in place but where there is at least one native title body corporate or one representative body for the area. As noted, this is one area where the amendments were welcomed by all parties to the native title debate.

*Primary production activity:*<sup>251</sup> This refers to future activities on land covered by non-exclusive leases, typically pastoral leases, granted on or before 23 December 1996. The amended NTA allows for the holders of such leases to engage in a range of activities which it defined as ‘primary production’, thus allowing for diversification in one part of the farming community. The term includes farmstay tourism, forest operations and horticultural activities. The term does not cover: mining; a non-exclusive pastoral lease greater than 5,000 hectares where the majority of the land would be used for non-pastoral purposes; or the upgrading of a lease into a lease conferring exclusive possession or into a freehold estate. On the other hand, some off-farm activities related to primary production (grazing and activities related to access to water) are permitted if reasonable access to native title holders is maintained.<sup>252</sup> Also, certain rights may be granted to third parties, including the granting of government licences to remove timber, gravel and river sand from the land covered by the non-exclusive lease. Compensation by the relevant government applies, as does the principle of non-extinguishment.

*Renewals and extensions etc:*<sup>253</sup> The renewal, re-grant or extension of the term of certain leases, licences or permits are permitted under the future act regime. The renewal etc of a non-exclusive pastoral lease constitutes a ‘permissible lease renewal’,<sup>254</sup> which means that such a renewal is valid even if the lease is for a longer term or if it was renewed as a perpetual lease. However, where a non-exclusive pastoral lease is renewed or extended, if the renewal or extension is for a longer term than the original lease, then the same procedural rights apply as those which operate where a compulsory acquisition is made on behalf of a third party.<sup>255</sup> Thus, native title claimants and bodies corporate will have a right to consultation in these circumstances, as well as a right to object to an independent body. As for mining leases, only those that confer the same or lesser rights as the existing mining lease

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<sup>251</sup> Sections 24GA-24GE.

<sup>252</sup> But not if the native title includes a right of exclusive possession.

<sup>253</sup> Sections 24IA-24ID.

<sup>254</sup> But not if the pastoral lease is greater than 5,000 hectares where the majority of the land would be used for non-pastoral purposes.

<sup>255</sup> Section 24ID (4). The section also applies if the new authority is a perpetual lease (section 24IC (4)(c)). The act is to be treated as if it were a compulsory acquisition of the kind mentioned in section 24MB (6B).

are exempted from the right to negotiate. Note that if the original lease or licence did not permit mining, the renewal etc cannot either. In any event, compensation would apply.

*Management of water and airspace:*<sup>256</sup> Future acts such as the granting of irrigation licences and fishing licences are covered under the new future act regime.

*Reservations (national parks etc):*<sup>257</sup> Also included are such things as the creation of a national park management plan, but only where the reservation establishing the national park itself occurred before 23 December 1996. If a public work (a school for example) is constructed or established then the extinguishment principle applies, but otherwise the non-extinguishment principle operates. Compensation applies in either case, as does the requirement for the original reservation to have occurred before 23 December 1996.

*Facilities for services to the public:*<sup>258</sup> The construction, maintenance etc of other public works (roads, bridges, pipelines) is also permitted, as long as native title holders have reasonable access to the land or waters in question. Section 24KA does not apply, however, to compulsory acquisitions and indigenous heritage values must be protected. Compensation applies, as does the non-extinguishment principle.<sup>259</sup>

- ***The right to negotiate:*** The position that grants of certain mining interests and the compulsory acquisition of native title rights and interests for the benefit of third parties attract the right to negotiate has been maintained under the amended NTA. However, some activities are now excluded from the right to negotiate, including: (a) compulsory acquisitions for privately built infrastructure;<sup>260</sup> (b) with the approval of the Commonwealth Minister, the creation or variation of certain mining rights permitting some kind of low impact or small scale mining;<sup>261</sup> (c) compulsory acquisitions within a town or city.<sup>262</sup> As noted, where the renewal etc of mining leases are at issue, those that confer the same or lesser rights as the existing mining lease are exempted from the right to negotiate.

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<sup>256</sup> Section 24HA.

<sup>257</sup> Section 24JA.

<sup>258</sup> Section 24KA.

<sup>259</sup> Note that the future act regime also covers 'low impact future acts' (section 24LA).

<sup>260</sup> Section 26(1)(c)(iii). The negotiation rights of native title holders are set out in section 24(MD)(6B).

<sup>261</sup> Sections 26A-26C. This includes low impact exploration, prospecting, fossicking, small scale opal and gem mining in existing opal and gem mining areas, and alluvial mining for gold or tin.

<sup>262</sup> Rights of negotiation do apply, however, to acts of compulsory acquisition (section 24MD(6B)). Note that the creation or variation of a right to mine in a town or city continues to be subject to the right to negotiate until such time as an alternative State scheme is approved under section 43A.

The other major change in this area is of course the provision in section 43A for an alternative State or Territory regime to operate over what are called ‘alternative provision areas’, thus replacing the right to negotiate where the Commonwealth Minister has given his or her approval to the scheme (pages 49). Section 43A applies to future acts over land that has been covered by pastoral leases or many types of reserve or freehold.

*Acts which will attract the full right to negotiate:* The main types of future acts which attract the full right to negotiate are rights to mine and compulsory acquisitions for conferring benefits on non-government parties.<sup>263</sup> Under the amended NTA the notification period has been extended from two months to three months;<sup>264</sup> a number of mining tenements may now be the subject of a single future act notice or a single ‘project act’;<sup>265</sup> and all parties have an obligation to negotiate in good faith.<sup>266</sup>

*Independent body objections:* Mining tenures that are solely for the purpose of providing infrastructure facility for mining, certain ‘approved exploration acts’, compulsory acquisitions within towns and cities permit the native title party to make an objection and for that objection to be heard by an independent body. This may be a State or Territory body, otherwise it will be the National Native Title Tribunal.

*Consultation rights:* Various low level gold, tin, opal and gem mining now attract only low level procedural rights, including a right to be notified and consulted.<sup>267</sup>

- ***A stricter registration test:***<sup>268</sup> In order to access the right to negotiate, as well to enter into a registered Indigenous Land Use Agreement, a stricter registration test must be satisfied under the amended NTA (pages 45-46).
- ***Representative Aboriginal/Torres Strait Islander bodies:*** As Jeff Kildea states, ‘The new Act contains more detailed provisions which the government says are designed to improve the standard of service which these bodies provide’.<sup>269</sup> The activities undertaken by these representative bodies have been increased to include assisting native title claimants with the negotiation of indigenous land use

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<sup>263</sup> Section 26 (1)(c). This is based on Bulletin 11, August 1998 of the Butterworths *Native Title Service*.

<sup>264</sup> Section 29 (4)-(6).

<sup>265</sup> Section 29 (8) and (9).

<sup>266</sup> Section 31 (2).

<sup>267</sup> Sections 26B and 26C.

<sup>268</sup> Sections 190A-190D.

<sup>269</sup> J Kildea, *Native Title: A Simple Guide*, Revised Edition, July 1998, p 34.



agreements.

- ***Quantum of compensation:*** The total compensation payable for the extinguishment of native title is limited to the amount which would be payable if the act involved the compulsory acquisition of a freehold estate in the land or waters in question.<sup>270</sup> However, the freehold cap on compensation is subject to the requirement that just terms be paid under section 51 (xxxix) of the Commonwealth Constitution

**Does the Croker Island case have any implications for the amended NTA?** As noted earlier in the paper (page 3), in the recent Croker Island case (*Yarmirr v Northern Territory*) it was found that may native title exist in offshore waters, in that case over the sea and inter-tidal zone around Croker Island. The question is whether this finding has any implications for the amended NTA, bearing in mind that the Act authorises legislation, or the grant of a lease, licence, permit or authority under such legislation, relating to the management or regulation of surface and subterranean water or living aquatic resources. Water is defined in this context to mean ‘water in all its forms’.

Tentatively, the answer is that the case would not have any implications for the amended NTA. Without attempting a full analysis, the following points can be made: the case acknowledged that native title rights yield to any statutory rights to the extent of any inconsistency; it found, too, that fisheries legislation is concerned with regulation and, while this does not necessarily extinguish native title, it can be the subject of a valid statutory scheme of the kind envisaged under the NTA; that scheme grants compensation and notification rights to the native title holders,<sup>271</sup> but otherwise it would seem that an act such as the grant of further fishing licenses would be a ‘permissible future act’ under the amended NTA;<sup>272</sup> further, the right to negotiate provisions do not apply to ‘offshore places’.<sup>273</sup>

## 8. CONCLUSIONS

That native title is a complex and often complicating issue was never in doubt. With the passing of the amended NTA, a far longer and more detailed piece of Federal legislation is now in place. This will need to be read alongside whatever State and Territory legislation is passed in response to it, as well as in conjunction with the common law. There is sure to be considerable potential for debate concerning the meaning and operation of many facets of this new scheme. It has been suggested that the amended NTA may be the subject of constitutional challenge, but that remains to be seen. Of particular interest will be the reaction of the States and Territories to the new opportunities for involvement in their land management schemes under the NTA. Of considerable importance, too, is the new emphasis

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<sup>270</sup> Section 51A. Bulletin 11, August 1998, Butterworths *Native Title Service*.

<sup>271</sup> Section 24HA. The non-extinguishment principle would apply.

<sup>272</sup> Section 24IC.

<sup>273</sup> Section 24NA sets out the procedural and other rights of native title holders where future acts affecting offshore places occur.

on resolving native title matters by agreement. It may be that the success of the amended NTA will be judged largely in terms of how effectively it operates in the delivery of that objective.