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**AUSTRALIAN ABORIGINAL LAND RIGHTS IN  
TRANSITION (PART II): THE LEGISLATIVE RESPONSE  
TO THE HIGH COURT'S NATIVE TITLE DECISIONS IN  
*MABO V. QUEENSLAND* AND *WIK V. QUEENSLAND***

Gary D. Meyers<sup>†</sup> and Sally Raine<sup>††</sup>

I. INTRODUCTION

This article is the second of a series of two articles which review and assess the development of indigenous land rights law in Australia over the last decade. Part I<sup>1</sup> reviewed and critiqued the Australian High Court's historic judgment in *Mabo v. Queensland*,<sup>2</sup> acknowledging the reception into Australian common law of the "Native Title Doctrine." The Native Title Doctrine, initially articulated in 1823 by Chief Justice John Marshall in the seminal U.S. Supreme Court decision in *Johnson v. M'Intosh*,<sup>3</sup> and subsequently followed in 1847 in New Zealand,<sup>4</sup> 1889 in Canada,<sup>5</sup> and in

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1. Gary D. Meyers & John Mugambwa, *The Mabo Decision: Australian Aboriginal Land Rights In Transition*, 23 ENVTL. L. 1203-47 (1993).
2. *Mabo v. Queensland* [ No 2] (1992) 175 C.L.R. 1.
3. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823).
4. *The Queen v. Symonds*, [1847] N.Z.P.C.C. 387.
5. *St. Catherine's Milling and Lumber Co. v. The Queen*, [1887] S.C.R. 577.

other British colonies,<sup>6</sup> essentially holds that the indigenous inhabitants of lands subsequently acquired, whether by force, cession, or “peaceful settlement,” retain their “ownership” of and rights to use those lands and their resources until such time as the new sovereign affirmatively extinguishes those rights.

The *Mabo* decision, albeit “late in the game,” and despite considerable political, social, and economic resistance,<sup>7</sup> brings Australian law in respect of its indigenous peoples into line with the law in other former British colonies. *Mabo* has forever altered the socio-legal landscape of Australian society and can be described as a transforming event in Australian history.<sup>8</sup> Over the last decade, the rights and interests of both indigenous and non-indigenous Australians have altered markedly. The commonwealth government’s legislative response to *Mabo* was the Native Title Act of 1993 (Cth) (NTA) which established the National Native Title Tribunal (NNTT) to resolve native title claims. The NTA was enacted amidst intense, and often hostile political and community comment about these “newly created” rights for indigenous Australians which comprise native title with respect to the traditional lands and waters of Aboriginal and Torres Strait Islander peoples.<sup>9</sup> Much of that comment focuses upon

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6. See generally KENT MCNEIL, COMMON LAW ABORIGINAL TITLE (1989).

7. See generally GARY D. MEYERS & SIMONE C. MULLER, THROUGH THE EYES OF THE MEDIA (PART 1): A BRIEF HISTORY OF THE POLITICAL AND SOCIAL RESPONSES TO *MABO V. QUEENSLAND*, 1995; *MABO: A JUDICIAL REVOLUTION: THE ABORIGINAL LAND RIGHTS DECISION AND ITS IMPACT ON AUSTRALIAN LAW* (M.A. Stephenson & Suri Ratnapala eds., 1993); *ESSAYS ON THE MABO DECISION* (1993); NONIE SHARP, NO ORDINARY JUDGEMENT (1996).

8. See Gary D. Meyers, *WA v. Commonwealth of Australia*, in IMPLEMENTING THE NATIVE TITLE ACT: FIRST STEPS; SMALL STEPS - SELECTED DISCUSSION PAPERS OF THE NATIONAL NATIVE TITLE TRIBUNAL (1994-1995) 27 (Gary D. Meyers ed., 1996). See also Robert Blowes, *Settlement of Australia Phase II: Aboriginal Land Rights in Australia after Mabo v. State of Queensland*, AUSTRALIAN ENVTL. L. NEWS (Sept. 1992) at 36; Garth Nettheim, “*The Consent of the Natives*”: *Mabo and Indigenous Political Rights*, in *ESSAYS ON THE MABO DECISION* 103, (1993) (where Professor Nettheim, Chair of the Aboriginal Law Centre at the University of New South Wales, characterises the *Mabo* decision as a “pebble thrown into the pool of Australian public life which will continue to produce ripple effects for generations,” and, as a “key element in a much broader and decisive review of the political relationship between Australia and its Aboriginal peoples.”) *Id.* at 104.

9. See Meyers & Muller, *supra* note 7; Robert S. French, *The National Native Title Tribunal and the Native Title Act, Agendas for Change*, in IMPLEMENTING THE NATIVE TITLE ACT: THE NEXT STEP: FACILITATING NEGOTIATED AGREEMENTS 24 (Gary D. Meyers ed., 1997). Justice French, former President of the NNTT describes the *Mabo* decision as a singular point in the history of the relationship between Australia and its Indigenous peoples, and the catalyst for political and legislative action and a three stage governmental response recognising the rightful place of indigenous people in our society.

the adverse effects of native title rights and interests on the national economic interest and on problems with the “workability” of the NTA and the NNTT. As a result, it was only after extensive legislative debate that a series of proposed amendments to the original NTA was finally passed in 1998.<sup>10</sup> To a significant degree, these amendments constitute the Federal Government’s response to the High Court decision in *Wik*,<sup>11</sup> a leading case which establishes that native title, in certain circumstances, can coexist with other non-exclusive property rights.

This article begins where Part I leaves off, by briefly considering the native title principles articulated in the *Mabo* decision and reviewing the NTA and the evolution of native title as a result of both subsequent judicial and NNTT determinations. It then considers the lead up to the amendment of the NTA, and reviews the changes brought about by the Native Title Amendment Act of 1998 (Cth)(NTAA). Next, the complimentary legislation of the States/Territories is reviewed, with a particular focus on legislation passed in Western Australia (WA). Finally, the constitutional and international ramifications of the amendments are also considered, including the potential for legal challenge to the amended Act and international scrutiny of Australia’s legislation.

## II. *MABO* (NO. 2) AND THE (UNAMENDED) NATIVE TITLE ACT 1993 (CTH)

In *Mabo*, the High Court acknowledged the indigenous occupation of Australia prior to colonial settlement and recognised the existence of native title at common law. The polemic judgement dispels the notion that the continent of Australia was a land *terra nullius* at settlement, and gives common law recognition to the rights and interests of its indigenous inhabitants which arise from their original occupation of, and their traditional connection with, the land. Enactment of the NTA was the Federal Government’s direct response to the High Court’s decision in *Mabo*.

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See also Sean Flood, *The Spirit of Mabo - The Land Needs the Laughter of Children: Native Title and the Achievements of Aboriginal People*, in IMPLEMENTING THE NATIVE TITLE ACT: THE NEXT STEP: FACILITATING NEGOTIATED AGREEMENTS, *supra* at 102, 104 (describing some of the diverse community response to *Mabo*).

10. The Senate voted to pass the Native Title Amendment Bill of 1998 (Cth) after 105 hours of debate as negotiated between the Independent Senator Brian Harradine and the Prime Minister John Howard (as reported in THE AUSTRALIAN on July 8, 1998). The bill received royal assent on July 27, 1998, and came into effect on September 30, 1998.

11. *Wik Peoples v. State of Queensland*, (1996) 141 A.L.R. 129.

Native title is an interest in land that is distinct from statutory Aboriginal land rights<sup>12</sup> or a governmental grant of land. It is the means by which the common law recognises all the rights enjoyed by Aboriginal and Torres Strait Islander inhabitants of land by reason of their prior occupation of that land and reconciles the rights of indigenous inhabitants with the rights obtained by the Crown upon claiming sovereignty over Australia.<sup>13</sup> These indigenous interests are not defined by reference to the rights or interests in land which form the law of real property at common law. While native title may conform to traditional common law concepts of rights and interests in land, it is a unique or a *sui generis* set of rights<sup>14</sup> and cannot be confined to interests which are analogous to common law proprietary rights or common law estates in land.<sup>15</sup>

The native title rights or interests of Aboriginal Peoples or Torres Strait Islanders generally involve the right of a community to occupy or use certain land or waters and so native title generally does not constitute an individual property right. Ordinarily, native title is a "communal interest" in land and the rights exercised under it will be communal rights.<sup>16</sup> The pre-existing interests of native title are presumed to survive the assertion of sovereignty unless expressly confiscated at that time, or extinguished or expropriated by legislation thereafter.<sup>17</sup> Except for formal surrender to the Crown, which generally has the effect of extinguishing indigenous rights, native title is inalienable outside the traditions of the holders of native title rights.<sup>18</sup>

Recently, in *Yorta Yorta*,<sup>19</sup> Federal Court Justice Olney commented that the definition of native title found in Section 223 of the NTA should be understood in the context of the *Mabo* case from which it was developed. In *Mabo*, Justice Brennan (author of the principal judgement)

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12. Such as encountered under the *Aboriginal Land Rights Act* (NT) 1976, and other State land rights acts. For a review of these acts, see FIRTH WAY & SIMEON BECKETT, *LAND-HOLDING AND GOVERNANCE STRUCTURES UNDER AUSTRALIAN LAND RIGHTS LEGISLATION* (1999).

13. *Ward v. Western Australia* (1998) 159 A.L.R. 483, 498, commonly known as *Miriuwung/Gajerrong*.

14. *Id.*

15. *Mabo v. Queensland* [No 2] (1992) 175 C.L.R. 1 (per Deane and Gaudron at 85 and 89, and per Toohey at 178-9, 187 and 195).

16. *Ward*, 159 A.L.R. at 499.

17. *Id.* at 498.

18. *Id.* at 500.

19. *Members of the Yorta Yorta Aboriginal Community v. Victoria* (Federal Court of Australia, Olney J., June 7, 1996, unreported, BC9602438). Handed down in December 1998, *Yorta Yorta* was the first major decision on native title after *Wik*.

used the term to refer to the rights and interests of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by those peoples. While the judgements in *Mabo* speak only of the rights and interests of indigenous peoples in their lands with no reference to waters, the NTA has application in relation to native title rights and interests in both lands and waters.<sup>20</sup>

The Crown's right to extinguish native title is limited by the general provisions of The Racial Discrimination Act of 1975 (Cth) (RDA) prohibiting discrimination on racial grounds and the Crown cannot extinguish native title in a manner that is not applicable to non-Aboriginal people in the same way.<sup>21</sup> The recognition of native title in *Mabo* has no effect on existing property rights or past events, apart from establishing the "invalidating effect" of the RDA on grants and other acts potentially extinguishing native title rights and interests. Thus, the significance of *Mabo* lies in the future, since the decision brought a 200-year period of the law in Australia sanctioning the dispossession of Aboriginal peoples of their land without compensation to an end.<sup>22</sup>

#### A. *The Native Title Act of 1993 (Cth)*

The national statutory regime set up by the original NTA provides for the recognition, regulation and protection of native title, for the validation of "past acts" (i.e., legislative or executive grants of interests in lands)<sup>23</sup> which may have been invalid because of the existence of native title, for the determination of compensation for extinguishment of native title, and for the regulation of future acts<sup>24</sup> affecting native title.<sup>25</sup> The Act

20. Native Title Act (1993) § 6 (Austl.) extends the Act to coastal seas of Australia, external territories of Australia, and any waters over which Australia asserts sovereign rights under the Seas and Submerged Lands Act of 1973 [hereinafter NTA (1993)].

21. *Mabo v. Queensland* [No. 2] (1992) 175 C.L.R. 1, 111-12 (per Deane and Gaudron).

22. Hal Wootten, *The Rights and Recognition of Indigenous People – Consequential Land Management Impacts on the Environment, and on the Recognition of Native Title*, in IMPLEMENTING THE NATIVE TITLE ACT: FIRST STEPS; SMALL STEPS, *supra* note 8, at 60.

23. NTA (1993) § 228. Defined under s228 in both the original and the amended NTA, where, if either before July 1, 1993, when native title existed in relation to a particular land or waters, an act consisted of the making, amendment or repeal of legislation, or before January 1, 1994 (when the NTA commenced operation) when native title existed in relation to a particular land or waters, any other act took place, and apart from the NTA, the act was invalid to any extent, but it would have been valid to that extent if the native title did not exist, the act is a past act in relation to the land or waters.

24. *Id.* § 233. Defined under s233 in both the original and the amended NTA, as an act in relation to land or waters if it consists of the making, amendment or repeal of legislation and takes place on or after July 1, 1993, or it is any other act that takes place on or after

established the NNTT to receive native title applications, and on acceptance to register them,<sup>26</sup> to notify and identify parties to those applications, and to assist applicants and parties to reach negotiated settlements. Where agreement could not be reached, an application was referred to the Federal Court for a contested hearing. The Tribunal is empowered to deal with applications for compensation in a similar way. Notably, however, the NNTT formed under the original Act was not a court of law and its main function was to provide a means by which the parties to an application “could reach a fair and reasonable agreement about an outcome.”<sup>27</sup> The Tribunal’s primary function was as a mediation service.<sup>28</sup>

Under the unamended Act, governments proposing to pass laws or do executive acts affecting native title were required to observe a non-discrimination principle in relation to native title holders.<sup>29</sup> In particular, onshore dealings<sup>30</sup> with land affecting native title holders were to be done in a way that would not discriminate between native title holders and freehold title holders, and if native title was affected, then entitlements to compensation were created.<sup>31</sup> Acts to which the protective provisions applied were called “future acts,” comprising legislative or other acts which affect native title either by extinguishing native title rights and interests or impairing those rights by being inconsistent with their continued existence, enjoyment or exercise. Non-discriminatory onshore future acts were defined as permissible future acts, as was the renewal, re-

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January 1, 1994 and it is not a past act, and apart from the NTA either it validly affects native title in relation to the land or waters to any extent, or it is to any extent invalid and it would be valid to that extent if native title did not exist and if it were valid to that extent it would affect the native title.

25. Wootten, *supra* note 22.

26. Two sections of the original NTA appeared to contradict one another with respect to registration of a claim and the Act was interpreted by in *Northern Territory v. Lane* (1995) 59 F.C.R. 332 and *Kanak v. National Native Tribunal* (1995) 135 A.L.R. 329. *See also* Robert S. French, *Wik and Beyond – an Overview of the Proposed Amendments to the Native Title Act 1993*, in *IN THE WAKE OF WIK: OLD DILEMMAS; NEW DIRECTIONS IN NATIVE TITLE LAW* 111, 119 (Gary D. Meyers, ed. 1999).

27. Robert S. French, *Introductory Notes for Mediation Conference*, in *IMPLEMENTING THE NATIVE TITLE ACT: FIRST STEPS; SMALL STEPS*, *supra* note 8 at 7.

28. French, *supra* note 26, at 118.

29. *Id.*

30. NTA (1993) § 253. Onshore dealings refer to those involving an “onshore place,” an onshore place being defined under the original NTA in s253 as “land or waters within the limits of a State or Territory to which this Act extends,” and being defined similarly in the amended NTA in s253.

31. NTA (1993) §§ 23(6), 23(4)-(5), 24(2) and 25(1).

grant or extension of the terms of a commercial, agricultural, pastoral or residential lease, provided no proprietary interest was created where none was created before, or where no larger proprietary interest was created.<sup>32</sup> Future acts conducted offshore, in contrast, were all categorised as future permissible acts.<sup>33</sup>

In addition to the general protection of native title from discriminatory action, the NTA created a specific protective structure known as the right to negotiate process. Statutory protection of native title lies principally in this right to negotiate process<sup>34</sup> and the entitlement to compensation for destruction of native title rights and interests. The right to negotiate provisions made negotiation with both native title claimants and the holders of native title compulsory, before a government could validly do certain acts onshore for the benefit of third parties where those acts would affect native title rights and interests.<sup>35</sup> The acts to which the process applied were the grant of mining and mining exploration tenements, and the acquisition of native title rights and interests under a compulsory acquisition act where the purpose of the acquisition was to confer rights or interests in a third party, and acts approved by the Commonwealth Minister.<sup>36</sup> In these circumstances there was no absolute requirement for consent by native title holders. However, the "future act" regime set up by the unamended Act created a "right to negotiate" for the native title holders, where the intended act would affect native title and where it also could be carried out in relation to freehold land. Accordingly, the government party was obliged to give all native title parties an opportunity to make submissions and to negotiate in good faith<sup>37</sup> with the native title parties and grantee parties with a view to obtaining the agreement of native title parties to the doing of the act and any conditions to be attached to the act. Excepted from the limited right to negotiate,

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32. *Id.* §§ 322-26.

33. *Id.*

34. *Id.* §§ 26, 31, 33.

35. *Id.* §§ 26, 31, 33; *see* French, *supra* note 9.

36. *Id.* § 26(2).

37. The duty of the parties to negotiate in good faith is stated in s31 of both the unamended and the amended Native Title Act. Negotiations in good faith were held to be a condition precedent to a successful application in *Walley v. Western Australia*, (1996) 137 A.L.R. 561, 576-77, with good faith including a need to negotiate with an open mind and a genuine desire to reach an agreement. In the *Matter of the Native Title Act of 1993 (In behalf of Njamaal people)* App. WF96/4 at 15 (National Native Title Tribunal Aug. 7, 1996). The good faith requirement in negotiation is discussed in RICHARD H. BARTLETT, *NATIVE TITLE IN AUSTRALIA* 359-61, 364-67 (2000). Useful indicia regarding a lack of good faith were also provided in *Njamaal People*, WF 96/4 at 17-18, such as unreasonable delays, failures to make offers or failure to communicate or contact.



were all off-shore grants and grants which did not directly interfere with community life, interfere with areas or sites of particular significance, or involve major disturbance to any land or waters. Six months, or four months in the case of exploration tenements, was allowed to reach an agreement. If agreement was not reached a determination of whether or not the grant might issue or the act might be done, and under what conditions, could be sought from the Tribunal. But even if the Tribunal concluded that a grant should not issue and thereby override native title, the determination of the Tribunal could be overruled by the Commonwealth Minister if considered to be in the National, State or Territory interest.<sup>38</sup> The right to negotiate process is discussed in greater depth below.

### *B. The Evolution of Native Title After 1993*

Absent the NTA, the only mechanism for recognising native title is a common law legal claim naming the relevant government and holders of affected private interests as defendants. When the Australian Parliament passed the NTA in 1993, it sought to circumvent an impending scenario of increasing numbers of native title claims in the courts. While providing a mechanism for determining claims, the original NTA did not, however, seek to alter the substance of native title, and native title therefore remained a set of interests in land defined by the common law.<sup>39</sup> As a result, a number of subsequent Federal and High Court decisions clarified both the concept of native title and the operations of the NNTT.

#### 1. Interpreting the NTA of 1993 (Cth) and the Role of the NNTT

The constitutionality of the NTA was challenged in three cases collectively referred to as *WA v. Commonwealth*, where one of the key contentions of Western Australia was that the Commonwealth Act had no effect on the State because the Act was outside the legislative powers assigned to the Commonwealth under the Constitution.<sup>40</sup> The *WA v. Commonwealth* cases resulted from a conflict between the Federal Government and the Liberal State Government of Western Australia, which enacted its own legislation in an attempt to forestall the comprehensive approach to the settlement of native title claims envisaged by the NTA.<sup>41</sup> But the High Court was clear about the constitutionality of the

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38. NTA (1993) §36; see Richard Bartlett, *Dispossession by the Native Title Tribunal*, 26 W. AUSTRALIAN L. REV. 108, 116 (1996).

39. Wootten, *supra* note 22, at 62.

40. Meyers, *supra* note 8, at 27-39.

41. *Id.* at 28.

Act. Section 51 (xxvi) of the Constitution provides that the Commonwealth may make laws for the people of any race for whom it is necessary to make special laws. The Court observed that it is for Parliament to make the political judgement that a special law is necessary, not the courts, and that such a law may be special if it confers a right or imposes an obligation on a people of a particular race. The Court held it was within the scope of the Federal Parliament to legislate with respect to a race as was determined by the Parliament.<sup>42</sup>

Following the enactment of the 1993 NTA, there was widespread criticism of the Act and the NNTT. In particular, the native title application and determination process was criticised as needing streamlining and modification.<sup>43</sup> One problem was that an applicant for native title was not required to establish a prima facie case in order to have the application accepted. The Act required the Registrar of the Tribunal to apply a test whereby the Registrar must accept the application if it complied with section 62, unless the application appeared frivolous or vexatious or that a prima facie claim could not be made out. The presumption was that a claim would be registerable unless it appeared prima facie that the claim could not be made out.<sup>44</sup> As a result, there was no real screening process associated with the submission of an application, and multiple or overlapping claims could be registered.

The procedural requirements for registration of a claim under the original Act were addressed in *Northern Territory v. Lane (Native Title Registrar)*,<sup>45</sup> and subsequently approved by the Full Federal Court of Australia in *Kanak v. National Native Title Tribunal*.<sup>46</sup> These decisions established that the proper construction of the 1994 Act meant that lodgement of an application for a determination of native title was enough to achieve registration.

The power of the NNTT to determine the substance of a claim and whether or not to accept an application for registration was a limited one.

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42. *Id.* at 34.

43. Robert S. French & Patricia M. Lane, *Response to Commonwealth Government Discussion Paper Outlining Proposed Amendments to the Native Title Act 1993 in IMPLEMENTING THE NATIVE TITLE ACT: THE NEXT STEPS: FACILITATING NEGOTIATED AGREEMENTS* *supra* note 9, at 86, 89. See also Hal Wootten, *Towards a More Workable Native Title Act in Working with the Native Title Act: The Political and Commercial Realities* 4, 6-7 (AIC Conference, June 16-17, 1997).

44. In *North Galanjanja Aboriginal Corp. v. Queensland* (1996) 185 C.L.R. 595, 625, 628-29, the High Court unanimously ruled that a prima facie claim can be made out when it is "fairly arguable." On the meaning of prima facie, see *Bartlett*, *supra* note 37, at 133.

45. *Northern Territory v. Lane* (1996) 39 A.L.D. 527, 532.

46. *Kanak v. National Native Title Tribunal* (1995) 132 A.L.R. 329.

The High Court made it clear in *Waanyi*,<sup>47</sup> “that the Tribunal had no practical ability to vet applications beyond inspection of applications for compliance with the forms of the Act and the Regulations.”<sup>48</sup> In conjunction with the Federal Court decision in *Kanak*, this resulted in a situation where claimants could get the benefit of the right to negotiate without having to demonstrate that they were likely to succeed in their application. In particular, the Court determined that the Tribunal did not have the ability to acquire and have regard to information other than that provided by the applicants, except for the limited purpose of determining, by reference to the conduct of the applicant, whether an application was frivolous or vexatious.<sup>49</sup>

Thus, the “registration problem” was compounded by the right to negotiate process, since mere registration of a claim enabled claimants to invoke the right to negotiate. Some industry and state government critics of the right to negotiate argued (unfairly in the authors’ view) that these rights constituted unequal treatment, providing extra rights to indigenous property holders not held by non-indigenous rights holders.<sup>50</sup> Setting aside that argument, the President of the NNTT commented in 1996 that a real weakness existed in the right to negotiate process in that it potentially conferred rights on individual native title claimants, which they were able to exercise without the consent of the group of native title holders to which they belonged,<sup>51</sup> therefore the basis for negotiation and agreement was at odds with the common law recognition of native title as a group right.<sup>52</sup> Additionally, where the right to negotiate was acquired by an individual, agreements could be made without the consent or knowledge of the relevant community of native title holders producing a situation of overlapping claims by particular individuals or families. This problem was recognised by all sides of the debate<sup>53</sup> and it was clear that something was needed to improve the basis on which the right to negotiate could be invoked.

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47. *North Ganalanja Aboriginal Corporation v. Queensland* (1996) 135 A.L.R. 225, otherwise known as the *Waanyi* decision.

48. French & Lane, *supra* note 43, at 88.

49. *Id.* “On the basis of the *Waanyi* decision the Tribunal cannot, in the ordinary course, have regard to land tenure information not provided by the applicants which would indicate the current or prior existence of extinguishing events on the land the subject of the application.” *Id.*

50. Bartlett, *supra* note 38, at 11-12.

51. French, *supra* note 9, at 34.

52. *Id.*

53. *Id.* at 42.

## 2. Defining the Scope of Native Title

### a. *Wik v. Queensland*

Whether or not a pastoral lease extinguishes native title has been one of the most contentious areas of native title. The *Wik* case juxtaposed the property rights and interests of pastoralists against those of Indigenous Australians, and as a result was very controversial and the subject of much criticism and debate.<sup>54</sup>

Pastoral leases make up a substantial proprietary interest in Australia, with some 42%<sup>55</sup> of the land mass being leasehold and most of that being pastoral leasehold. In 1997, the *Wik* judgement examined the issue of whether Queensland pastoral leases extinguished native title. The High Court found that pastoral leases do not confer exclusive possession and consequently, native title rights can co-exist with the interests of pastoral leaseholders. The pastoral lease issue turned to a large extent on the construction of the Queensland legislation under which the leases at issue were granted and the terms of the grants.<sup>56</sup> Native title was held to be extinguished only to the extent that the rights of the lessee are necessarily inconsistent with native title rights, and although the different judgements formulated the tests for inconsistency in different ways, there was concurrence that inconsistency will not readily be found by the Court.<sup>57</sup>

Two new principles at common law were established in *Wik*. First, the Court held that pastoral leases do not grant exclusive possession to the leaseholder and as such native title can co-exist with these rights, although pastoral lease rights prevail over native title rights if they are inconsistent with the existence of native title rights; second, the Court determined that pastoral leases and other statutorily based grants of land, on expiration, do not necessarily result in the Crown attaining a reversionary interest which entails full beneficial ownership and control, exclusive of native title.<sup>58</sup>

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54. See generally HENRY REYNOLDS, *WHY WEREN'T WE TOLD? A PERSONAL SEARCH FOR THE TRUTH ABOUT OUR HISTORY* 217-24 (1999); see also GARY D. MEYERS & SONIA POTTER, *MABO – THROUGH THE EYES OF THE MEDIA (PART IV): ANSWERING THE PASTORAL LEASES QUESTION – THE WIK DECISION* (1999).

55. Garth Nettheim, *Responding to Wik: First, Define the Problem*, *INDIGENOUS L. BULL.*, Apr. 1997, at 14-15, citing The Australian Surveying and Land Information Group as of 1994.

56. Ernst Wilhelm, *Queensland Pastoral Leases and Native Title: Wik Peoples v. Queensland*, *ABORIGINAL L. BULL.*, Feb. 1997, at 20-23.

57. *Id.*

58. *Wik Peoples v. Queensland* (1996) 141 A.L.R. 129. On these issues see *Wik*, 141 A.L.R. at 179-85, 188, 208-09, 245-47, 281-84. The Crown's reversionary interest was also referred to in *Mabo*, 175 C.L.R. at 49. Justice Brennan holds that the extinguishing of

Four of the justices concluded that a Crown grant can only unilaterally terminate native title by virtue of inconsistency, if the legislation granting these rights manifests a clear and plain intention that extinguishment should result from the grant.<sup>59</sup>

*b. The Content of Native Title*

The existence of native title rights in offshore places was addressed in *Yarmirr v. Northern Territory of Australia*.<sup>60</sup> One of the important findings was that under the NTA the recognition and protection of native title can extend offshore although it does not involve a right of exclusive possession, notwithstanding that under the common law such an extension of native title rights and interests might not be recognised.<sup>61</sup> The Court rejected the argument that native title can only exist when "recognised" or enforced by the common law, and that since the common law has no operation beyond the low water mark, native title cannot exist in that area. The Court held that native title entails a non-exclusive right of the claimants to travel through the claimed area, to fish and gather to satisfy their personal and communal needs (but not for commercial purposes), and to visit and protect places of particular cultural or spiritual significance.<sup>62</sup>

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native title depends on the effect which the grant has on the right to enjoy native title. He notes that, "[i]f a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from the mere radical title and, on the expiry of the term becomes a plenum dominium. . . ."

59. See Richard Bartlett, *Wik: Equality and the Fallacy of 'Extinguishment'*, INDIGENOUS L. BULL., Apr. 1997 at 11-12, arguing that the essence of the position in *Mabo*, that native title should be accorded equal treatment under the law with interests granted by the Crown, a fundamental rationale of equality, is upheld in *Wik*.

60. *Yarmirr v. Northern Territory* (1998) 156 A.L.R. 307 (also known as the *Croker Island* case or the *Northern Territory Sea Rights Case*). *Australia v. Yarmirr* (1999) 168 A.L.R. 426 (upheld on appeal to the Full Federal Court). Affirmed and appeals dismissed, *The Commonwealth v. Yarmirr & Ors* and *Yarmirr v. Northern Territory & Ors*, High Court of Australia No. 56 (Oct. 11, 2001, unreported, available at [http://www.austlii.edu.au/au/cases/cth/high\\_ct/2001/56.html](http://www.austlii.edu.au/au/cases/cth/high_ct/2001/56.html)).

61. Ron Levy, *Native Title and the Seas: the Croker Island Decision* INDIGENOUS L. BULL. Dec. 1998/Jan. 1999, at 20. On native title sea rights, see generally GARY D. MEYERS, ET AL., *A SEA CHANGE IN LAND RIGHTS LAW: THE EXTENSION OF NATIVE TITLE TO AUSTRALIA'S OFFSHORE AREAS* (1996).

62. See Howard Allen, *Mary Yarmirr & Ors v. The Northern Territory of Australia & Ors*, NATIVE TITLE NEWSLETTER June-July 1998, at 8. It was held that native title was not restricted to the territorial limits of the Northern Territory, however territorial limits in any case extended to the low water mark of the coast-line of the islands and the mainland.

The more recent ruling of the Federal Court recognising the native title rights of the *Miriuwung/Gajerrong*<sup>63</sup> claims in the East Kimberley region of Western Australia and the Northern Territory sits beside the *Wik* judgement as a powerful advocacy of lawful co-existence.<sup>64</sup> In this instance, the native title claim covered vacant Crown land and different types of Crown leaseholds, and native title was found to survive some of the acts which the State Government had assumed would extinguish native title. At trial, Justice Lee of the Federal Court considered pastoral leases that have Aboriginal reservations within them and found that native title continues to exist in these areas. Justice Lee recognised substantial native title rights, including rights to possess and occupy the land, control access to land, the right to trade in resources on the land, and the right to control the use and enjoyment of the land and its resources, adopting the Canadian jurisprudence on the nature of native title rights.<sup>65</sup> Quoting *Delgamuukw v. British Columbia*,<sup>66</sup> Lee notes that, "Aboriginal title is a right in land . . . more than the right to engage in specific activities which may themselves be aboriginal rights. Rather it confers the right to use the land for a variety of activities . . . Those activities do not constitute the right per se; rather they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the [group's] attachment with the land,"<sup>67</sup> and goes on to observe, again citing *Delgamuukw*, that native title is a communal right to land arising from prior occupation of land by an indigenous community living under its customs: "[i]t is not a mere 'bundle of rights.'"<sup>68</sup>

At trial in *Miriuwung/Gajerrong*, Justice Lee was clear that native title in Australia is as expansive a concept as is Aboriginal title in Canada, and described the content of native title as being more than a permissive right to occupy the land which includes the rights to possess, use and occupy the

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63. *Ward v. Western Australia* (1998) 159 A.L.R. 483, commonly referred to as *Miriuwung/Gajerrong*. The Full Federal Court Appeal case *Western Australia v. Ward and Others* (1999) 170 A.L.R. 159, narrowed the scope of native title rights and interests.

64. Kent McNeil, *Co-existence of Indigenous and Non-indigenous Land Rights: Australia and Canada Compared in Light of the Wik Decision*, INDIGENOUS L. BULL., Aug-Sept 1997, at 4.

65. See Gary D. Meyers, *Environmental and Natural Resources Management by Indigenous Peoples in North America: Inherent Rights of Self Government Part II – Defining the Content of Aboriginal Rights in Canada* 16, 25-26 (1998).

66. *Delgamuukw v. British Columbia*, [1998] 1 CNLR 14.

67. *Ward v. Western Australia* (1998) 159 A.L.R. 483, 505, 508 (commonly referred to as *Miriuwung/Gajerrong*).

68. *Id.* at 508.

area, to make decisions about the area's uses, to access and control others' access to the area, to use and enjoy the area's resources, to trade in those resources, to receive royalties from the use of those resources and to protect important cultural sites and knowledge.<sup>69</sup> However, in the subsequent appeal to the Full Federal Court, mining leases and State and Territorial mining legislation were found to extinguish native title, and pastoral leases to partially extinguish native title.<sup>70</sup> Thus, native title can be extinguished in part by government or legislative acts. A final determination on the definition and content of native title in Australia awaits a determination of these issues by the High Court on appeal.

*c. The Extinguishment of Native Title*

As noted above, one of the principal issues addressed by the Federal Court in the *Miriuwung/Gajerrong* case is the "extinguishment question," i.e., what kinds of acts extinguish native title, to what extent is native title extinguished by certain acts, and when is extinguishment accomplished. Clearly, a grant of a freehold or fee simple interest in land which transfers the full beneficial interest in the property to a grantee extinguishes all native title rights and interests. In *Fejo*,<sup>71</sup> the Court found that native title is completely and permanently extinguished by a freehold grant so that no form of native title can co-exist or survive (regardless of the land being held by the Crown in the future). This means that there is no potential for native title to revive in relation to freehold land under the common law when the land is returned to the Crown. This accords with the common law principles approved in *Mabo* and *Wik*, that where a valid Crown grant of an estate that is inconsistent with the continued right to enjoy native title, it will extinguish native title rights and interests to the extent of that inconsistency.<sup>72</sup>

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69. *Id.* at 644-45. In *Miriuwung/Gajerrong*, some exceptions to native title were also found, namely that roads, public reserves, power and telephone stations and some agricultural land, are areas that extinguish native title rights and interests. See also Australian Institute of Aboriginal and Torres Strait Islander Studies, *Claims: Western Australia: Miriuwung/Gajerrong*, NATIVE TITLE NEWSLETTER, Oct.-Nov. 1998, at 4-5.

70. *Western Australia v. Ward* (2000) 170 A.L.R. 159, at ¶¶ 88-109. The state government and the Kimberley native title claimants have applied for special leave to appeal to the High Court seeking High Court clarification. See Anne Buggins, *Claim Parties Want Clearer Ruling*, THE W. AUSTRAL., Apr. 4, 2000, at 14.

71. *Fejo v. Northern Territory* (1998) 156 A.L.R. 721. For a brief case note, see Lisa Strelein, *Northern Territory: Fejo and Mills on Behalf of the Larrakia People v. The Northern Territory and Oilnet (NT)*, NATIVE TITLE NEWSLETTER, Dec. 1998/Jan. 1999, at 6-7.

72. *Mabo v. Queensland [No 2]* (1992) 175 C.L.R. 1, 68-69, 110, 195-96, cited in *Wik v. Queensland* (1996) 141 A.L.R. 129, 152, 193, 209, 218. See Graeme Neate, *Determining*

The High Court in *Yanner*<sup>73</sup> reached a similar result in respect of wildlife legislation as it did in respect of pastoral lease legislation in *Wik*. Examining Queensland legislation which expressed the State's "ownership" of wildlife within its borders, the Court held such legislation did not intend to assert more than the State's paramount public interests in its wildlife nor did it thereby express a clear intention to assume all beneficial interests in that wildlife and consequently extinguish native title. Moreover, the Court noted that Section 211 of the NTA preserves indigenous hunting and fishing rights, and therefore, the Aboriginal appellant did not violate Queensland law by exercising his native title rights to hunt crocodiles without a permit.<sup>74</sup>

The scope and extinguishment of native title was also considered in detail in *Yorta Yorta*.<sup>75</sup> The plaintiffs claimed native title over certain parcels of public land in the Murray Darling Basin of southern New South Wales and Northern Victoria. The Yorta Yorta people are the indigenous people of the Murray, Goulburn and Ovens regions of Southeastern Australia. It was the first on-shore claim in which the content of native title was considered in detail and was opposed by the state governments of New South Wales, Victoria and South Australia, and others. Justice Olney of the Federal Court determined that native title does not survive where the claimants fail to establish a continuous link with the land and the laws and customs of the inhabitants of the area back to the time of the earliest contact with Europeans. The test applied in the case requires the claimants to establish that they, and each generation of their ancestors since 1788, have acknowledged and observed the same traditional laws and customs, and occupied the land and waters in the same manner, as their ancestors had in 1788.<sup>76</sup> Justice Olney held that the "tide of history has indeed washed away" any real acknowledgement of the claimants' traditional laws and any real observance of their traditional customs. The foundation of the claim to native title in relation to the land previously occupied by those ancestors having disappeared, the native title rights and interests previously enjoyed were not capable of revival.<sup>77</sup>

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Compensation for Native Title: Legislative Issues and Practical Realities, *in Working with the Native Title Amendment Act 1998* 1, 40 (AIC Conference, Dec. 1, 1998).

73. *Yanner v. Eaton* (1999) 168 A.L.R. 1.

74. *Id.*

75. *Members of the Yorta Yorta Aboriginal Community v. Victoria* (Federal Court of Australia, Olney J., June 7, 1996, unreported, BC9602438).

76. This part of the decision, with other aspects, is subject to appeal. The case is briefly reported in NATIVE TITLE NEWSLETTER, *supra* note 71, at 3-4.

77. *Members of the Yorta Yorta Aboriginal Community v. Victoria* (Federal Court of Australia, Olney J., June 7, 1996, unreported, BC9602438) at ¶ 129.



The Federal Court also found in *Yorta Yorta* that oral evidence of the claimants lacked credibility and as such was afforded less weight than written European histories. Given the substantial need to rely on oral records of Aboriginal use and occupation of lands to establish native title rights, the weight accorded traditional evidence is crucial for the success of these claims.<sup>78</sup> In *Delgamuukw*, in contrast, the Canadian Supreme Court notes that notwithstanding the challenges created by the use of oral histories as proof of historical fact, the laws of evidence must be adapted in order that this evidence can be accommodated and placed on an equal footing with other types of historical evidence that courts are familiar with, which largely consists of historical documents.<sup>79</sup> The finding in *Yorta Yorta* narrowed the standing of oral testimony in native title hearings, and the case is currently subject to appeal.

### 3. Procedural Issues Under the NTA

After enactment of the NTA, concerns gradually arose about the administrative procedures of the NNTT. The First Report of the Parliamentary Joint Committee on Native Title in 1994 drew attention to the workings of the Tribunal.<sup>80</sup> Criticisms were raised about the cost and difficulty in compiling land tenure histories, the inaccuracy of some of the maps provided by the NNTT as part of the claim notification procedure, and the response procedures generally. The Committee notes that the notice and response provisions of both State and Commonwealth legislation should be sensitive to the needs of Aboriginal people, including their particular decision making practices. The Report comments that these matters, including access to land tenure histories and maps need to be addressed by the Commonwealth, State and Territory governments to ensure that the processing of native title applications complies with the intention of the Act. In addition, the Committee reports that some Aboriginal organisations felt that the test for the acceptance of applications for a determination of claim by the Tribunal were not being applied as a "low threshold" test.<sup>81</sup>

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78. *Delgamuukw v. British Columbia*, [1998] 1 CNLR 14, 21.

79. *Id.*

80. In accordance with s204 of the Native Title Act, the Parliamentary Joint Committee on Native Title was appointed in 1994; its duties included to consult extensively about the implementation and operation of the Act and to report on it from time to time. THE FIRST REPORT OF THE PARLIAMENTARY JOINT COMMITTEE ON NATIVE TITLE: CONSULTATIONS DURING AUGUST 1994. Summary presented in *Parliamentary Joint Committee on Native Title 1* AUSTL. INDIGENOUS L. REP. 91-93 (1996).

81. *Id.*

The Second Report<sup>82</sup> of the Parliamentary Committee again drew attention to the procedures of the Tribunal, especially in regard to the acceptance process in relation to claims which had been a matter of considerable public comment. Submissions to the Committee criticised the fact that a claimant could gain the benefit of the right to negotiate without presenting a prima facie case for a land claim. Submissions also called for both tightening of the acceptance test and for the acceptance test to remain a low-level screening test. The Second Report also confirms that the Tribunal should not engage in a mediation type role during pre-acceptance consultations, since the role of the Tribunal should be confined to the securing of information.

C. *Lead-up to the Amendment of the NTA 1993 (Cth)*

The enactment of the Commonwealth native title legislation at the close of 1993 followed a series of contentious political discussions about native title involving numerous community groups.<sup>83</sup> The Native Title Bill finally emerged from a process of consultations and was subject to exhaustive consideration by Parliament. "The Senate took almost 52 hours to deal with the Bill [and of] 149 amendments moved, 119 were adopted."<sup>84</sup>

The NTA was enacted in response to a new development of common law, and as such, was likely to undergo subsequent modification through amendment. In this vein, the Federal Labor Government introduced a bill during November 1995, proposing a response to the High Court's decision in the *Brandy*<sup>85</sup> case, which raised questions regarding the capacity of the Tribunal to make determinations on native title. However, following the dissolution of the House of Representatives and a national election in March 1996 resulting in a change of Federal Government, the bill lapsed.<sup>86</sup>

A short time later in June 1996, in light of the effects of the *Brandy*, *Lane* and *Waanyi* decisions upon the processes under the NTA, the new Coalition Government introduced a further series of amendments. These foreshadowed a second set of Coalition amendments described in an

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82. THE SECOND REPORT OF THE PARLIAMENTARY JOINT COMMITTEE ON NATIVE TITLE: THE NATIONAL NATIVE TITLE TRIBUNAL ANNUAL REPORT 1993-1994. Summary presented in *Parliamentary Joint Committee on Native Title*, *supra* note 80, at 93-94.

83. See generally Meyers & Muller, *supra* note 7.

84. Parliament of Australia, THE SIXTH REPORT OF THE PARLIAMENTARY JOINT COMMITTEE ON NATIVE TITLE AND THE ABORIGINAL AND TORRES STRAIT ISLANDER LAND FUND (Nov. 1996), available at [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/report\\_6/index.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/report_6/index.htm).

85. *Brandy v. Human Rights & Equal Opportunity Comm'n* (1994-95) 183 C.L.R. 245.

86. THE SIXTH REPORT OF THE PARLIAMENTARY JOINT COMMITTEE, *supra* note 84.

October 1996 publication entitled "Exposure Draft."<sup>87</sup> However, none of those had been debated when, on December 23, 1996, the High Court handed down its decision in *Wik*. Following a series of consultations that involved a range of people including the National Indigenous Working Group, but including principally the States and Territories,<sup>88</sup> the Federal Government published an outline of its proposed legislative response to the *Wik* decision at the end of April 1997. This comprehensive set of amendments to the NTA became known in summary form as the 10 Point Plan<sup>89</sup> and provided the basis of the Native Title Amendment Bill (also known as the *Wik* Amendment Bill). It constituted the Federal Government's response to the *Wik* decision and would be enacted after much parliamentary debate as The Native Title Amendment Act of 1998.

### 1. The First Set of Amendments in 1995

The *Brandy*<sup>90</sup> case in which the High Court found that processes employed by the Human Rights and Equal Opportunity Commission to make determinations of liability under the Human Rights and Equal Opportunity Commission Act of 1986 (Cth) which were similar to those used by the NNTT to make native title determinations were ultra vires, i.e., violated the separation of powers doctrine by assigning judicial functions to an executive agency, posed a question about the ability of the Tribunal to make binding determinations of native title. Independently of that question, there was a tension between the Tribunal's role as a neutral mediator and its role as a decision maker in relation to the acceptance and determination of applications.<sup>91</sup> To overcome this potential hurdle, the first set of amendments in 1995 proposed that all applications would commence as proceedings in the Federal Court and then be referred to the Tribunal for mediation. Decisions about the viability of an application would then be made in the context of strike out motions and the standing

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87. *Id.*

88. Robert Orr, *Working with the NTA and Amendments*, in *WORKING WITH THE NATIVE TITLE ACT: ALTERNATIVES TO THE ADVERSARIAL METHOD* 21-23, (Lisa Strelein ed., 1998) (proceedings from the Native Title Legal Practitioners' Workshop, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, June 4-5, 1997).

89. *Re Wik and Proposed Amendments to the Native Title Act*, 2 AUSTL. INDIGENOUS L. REP. 282 (1997) (outlining the chronology of events).

90. *Brandy*, 183 C.L.R. 245.

91. The procedure adopted by the Tribunal in response to the *Brandy* decision takes mediation to the point of an agreed determination and then refers the matter to the Federal Court for a consent order. See French, *supra* note 26, at 128.

of persons to be parties would also be a matter for determination by the Court.

The 1995 amendments also proposed a more rigorous registration test prior to invoking the right to negotiate. The test required the Registrar to accept a claim for registration unless he or she considered that a prima facie claim could not be made out. It was described as a low threshold test, although the Registrar was entitled to have regard to information other than that contained in the application and to consider submissions by third parties.<sup>92</sup> It was generally agreed that a “tightening up” of the registration process would ameliorate problems such as overlapping claims or the fact that native title claimants without a prima facie case could get the benefit of the right to negotiate.

Although the 1995 amendments lapsed with the proroguing of Parliament, they were incorporated into the subsequent Coalition amendments enacted in 1998. However, the registration test would be much more stringent than that mooted in 1995 and the breadth of the right to negotiate would be considered in some detail, and eventually, significantly narrowed.

## 2. The Coalition Amendments Culminating in the Native Title Amendment Bill of 1998

At the Opening Ceremony speech of the Australian Reconciliation Convention in May 1997, the Prime Minister reiterated that he had spent a great deal of time in trying to find a just, fair and workable outcome in the Government’s response to the *Wik* decision.<sup>93</sup> A characteristic feature of the Coalition Government’s approach to native title was that substantive “fairness” would be gained by treating parties similarly and without special favour.

Essentially, the *Wik* decision rejected the notion that a pastoral lease confers rights of exclusive possession on the leaseholder and so necessarily extinguishes native title. As a result *Wik*, gave rise to the view that the rights of pastoral leaseholders would subsequently be devalued. This arose from concern that the subsistence of native title on pastoral leases would attract the operation of protective provisions of the NTA and so constrain some pastoral activities, restrict diversification of pastoral holdings into other activities such as horticulture or tourism, and delay mining plans on pastoral lease properties.

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92. *Id.* at 129.

93. An extract of the Prime Minister’s “Opening Ceremony Speech” was published in *Council for Aboriginal Reconciliation, A Call to the Nation*, WALKING TOGETHER, Aug. 1997.

Prime Minister Howard commented that in 25 years of political experience, native title was the most difficult issue he had ever dealt with.<sup>94</sup> To a similar end, Justice Robert French, then President of the National Native Title Tribunal, described the ferocity of the reaction to the *Mabo* decision as paling in comparison to the response to the decision of the High Court in *Wik*.<sup>95</sup>

The legislative changes embodied in the *Wik* amendments were largely intended to confirm the economic and industrial interests of pastoralists, developers and miners, and address some of the procedural problems that became apparent under the original NTA. They included much of the previously formulated Coalition amendments on a range of issues, but in particular the right to negotiate process.<sup>96</sup> The Government was most critical of this process considering it unwieldy and an inhibitor to economic development. Therefore, part of the purpose of the amendments was to make the right to negotiate process "more workable" or a more efficient procedural process (as opposed to a substantive right).

Another major aspect of the *Wik* amendments was validation of grants of interests in land done between the commencement of the NTA and the *Wik* judgement. The view of the Federal Government was that it was assumed that pastoral leases extinguished native title at common law,<sup>97</sup> and consequently, a number of activities were carried out by governments such as mining grants made over pastoral lease lands or the upgrading of pastoral properties. In many cases, it seemed that such diversification of uses was carried out on pastoral leases without any express authority under the lease.<sup>98</sup> Those practices which went beyond the lawful title of pastoralists came to be regarded (wrongfully) as an incident of that title.<sup>99</sup> As such, they arguably constituted future acts depending on their impact on native title rights. Further, some acts that are "authorised" by a lease might also arguably be considered future acts, particularly where some additional official permission is necessary to carry them out.<sup>100</sup> Many acts were therefore carried out without complying with the processes of the NTA and were likely to be rendered invalid under that Act following *Wik*.

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94. See Robert S. French, *October 1 - A New Dawn or More of the Same*, Speech at the 41st Annual Pastoral Conference (Sept. 10-11, 1998).

95. French, *supra* note 26, at 113.

96. Orr, *supra* note 88, at 21-31.

97. *Id.*

98. French, *supra* note 26, at 114.

99. *Id.*

100. *Id.*

Nonetheless, the Government considered that such activities were carried out *bona fide*, although on a false assumption, and should be validated.

One of the major political concerns forming the rationale for the amendment of the NTA was a wish to provide "certainty" to the mining and pastoral industries. Issues about certainty included industry concerns that native title rights could stymie legitimate mining development or prevent or limit the opportunity for pastoral leaseholders to develop or diversify in the future. The Native Title Amendment Act of 1998 (Cth) (NTAA) sets out detailed modifications to the original NTA that include procedural and substantive changes as well as confirmation of non-native title rights. It increases the approximately 125 pages of the original Act to more than 360 pages.

Not surprisingly, there was a large amount of parliamentary debate over the *Wik* amendments, with a complex and confusing array of legislative material reaching the Senate. While possessing a majority in the House of Representatives, the Coalition Government held only a minority in the Senate,<sup>101</sup> requiring the vote of at least two independent senators to pass a bill. Adding to this potential for fiery senate debate, amendment of the NTA attracted detailed input from a number of political parties. The Government proposed 93 amendments, while the opposition parties (the Australian Labor Party, the Democrats and the Greens) tabled three sets of amendment packages, each containing about 350 amendments, and the independent Senator Harradine released 54 amendments.<sup>102</sup> Introduced into the Senate in late 1997, defeated in December, and then re-introduced in March 1998 as a potential trigger for a double dissolution of Parliament, the Native Title Amendment Bill was eventually passed with the assistance of Senator Harradine in April 1998.

### III. PROVISIONS OF THE NATIVE TITLE AMENDMENT ACT OF 1998 (CTH)

The 1998 amendments substantially modify the procedural processes that must be complied with when submitting an application for native title. In order to alleviate the problems associated with the validity of the Tribunal arising from the *Brandy* decision, claims must now be filed in the Federal Court,<sup>103</sup> instead of with the NNTT. Upon submission, an application has the status of a Federal Court proceeding, after which the

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101. The Coalition held 37 out of 76 Senate seats and so procured the votes of the independent Senators Malcolm Colston and Brian Harradine to gain a majority.

102. Paul Burke, *The Native Title Amendment Bill: What Happened in the Senate*, INDIGENOUS L. BULL., Feb. 1998, at 4.

103. Native Title Amendment Act, §§ 61, 69, 70 (1998) (Austl.) [hereinafter NTAA (1998)].

application process is managed by the Court, rather than the Tribunal. Once it is filed, the Federal Court refers the native title claim to the Registrar at the NNTT to be considered for registration. Applications must pass a new registration test<sup>104</sup> to become a registered native title claimant and may then progress to mediation where the Court has deemed that mediation is appropriate.<sup>105</sup>

A. *Limiting Application of the Commonwealth Racial Discrimination Act*

The amendments alter section 7 of the original Act referring to the Racial Discrimination Act of 1975 (Cth) (RDA), so that the provisions of the RDA apply only to the performance of functions and the exercise of powers conferred by the NTA. In addition, in order to construe the NTA, and thereby to determine its operation, ambiguous terms are to be construed consistently with the RDA if that would remove the ambiguity. So long as the functioning and administration of all government (including State and Territory) native title regimes is conducted in a non-discriminatory way, the RDA can only be used to determine the meaning of any ambiguous terms of the NTA.<sup>106</sup>

The changes to section 7 of the original Act have been criticised because they considerably reduce the scope for challenging the provisions of the NTA on the ground of inconsistency with the RDA.<sup>107</sup> However, the potential for challenge may still exist. Where the amendments reduce or remove the right to negotiate process, arguably they do not afford native

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104. *Id.* §§ 190A, 190B.

105. *Id.* § 86B. In addition the Court is able to strike-out an application that does not comply with the statutory requirements of an application for registration or the Court may amend an application to make it comply. *Id.* § 64. With respect to striking out an application, s84C enables a party to apply to the Court at any time to strike out an application if the application does not comply with s61 (which deals with the basic requirements for applications), s61A (which provides that certain applications must not be made) or s62 (which requires applications to be accompanied by affidavits and to contain certain details).

106. *Id.* Sections 7(1), 7(2), 7(3) state “[t]his Act is intended to be read and construed subject to the provisions of the Racial Discrimination Act of 1975.” Under s7(2) “Subsection (1) means only that: (a) the provisions of the Racial Discrimination Act of 1975 apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and (b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the Racial Discrimination Act of 1975 if that construction would remove the ambiguity.” *Id.* Under s7(3) “Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.” *Id.*

107. Aboriginal and Torres Strait Islander Commission, *Detailed Analysis of the Native Title Amendment Act 1998 (Cth)* (May 16, 1999), available at <http://www.atsic.gov.au/cultural/rsd.htm> [hereinafter Aboriginal and Torres Strait Islander Commission].

title holders the same level of recognition and protection which is provided to other land holders.<sup>108</sup> If the right to negotiate process is characterised as a function of the NTA, then any erosion of the right to negotiate process may be inconsistent with the RDA. Similarly, the validation of leaseholds between the enactment of the NTA and the decision in *Wik*, when characterised as a function or exercise of power as conferred by the Act, may be inconsistent with the RDA.

### *B. The Validation of Certain Acts*

The original NTA set up a process for governments to grant exploration and mining leases on native title land. Grants made without going through such a process were held to be invalid to the extent that they affected native title. Since the Act did not deal specifically with the validation of grants of pastoral leasehold, the capacity of a pastoral lease to extinguish native title was left to the common law. The outcome of the *Wik* decision, i.e., that grants of pastoral leasehold did not necessarily extinguish native title, meant that if the granting of a pastoral lease did not comply with the NTA then the pastoral lease was possibly invalid.

Prior to *Wik*, there was a widespread belief that the grant of a pastoral lease overrode any native title rights and interests. For example, a Discussion Paper published by the Commonwealth Government on the amendments proposed in 1996, had not proposed legislative extinguishment of native title on pastoral leases. The paper pointed out that under the common law of native title there was no uncertainty about the status of pastoral leases. If native title exists on pastoral leases, it is subject to the rights of the lessee; the rights conferred by the lease are not affected.<sup>109</sup> However, concern remained as to the status of granting pastoral leasehold and there was concern in some quarters over the question of whether or not pastoral leases extinguish native title.

Between the commencement of the original NTA on January 1, 1994, and the date of the *Wik* decision on December 23, 1996, Western Australia followed the requirements of the NTA in granting pastoral leases. In contrast, Queensland chose to ignore the requirements of the NTA, working on the assumption that validly granted pastoral leases extinguished native title.<sup>110</sup> To remedy the invalidity of any grants not made in

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108. NATIVE TITLE REPORT, JULY 1995-JUNE 1996, REPORT OF THE ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMMISSIONER OF THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION (1996).

109. COMMONWEALTH OF AUSTRALIA, TOWARDS A MORE WORKABLE NATIVE TITLE ACT: AN OUTLINE OF PROPOSED AMENDMENTS (1996). See French & Lane, *supra* note 43, at 90.

110. Nerida Cooley, *Working With the New Native Title Act*, PROCTOR, Dec. 1998, at 16-18. See also ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION REPORT ON THE SENATE



accordance with the NTA, the 1998 amendments introduce new provisions for “intermediate period acts.”<sup>111</sup> Under these provisions the rights and interests granted over pastoral leasehold between the commencement of the NTA and the *Wik* decision undergo blanket validation and extinguish native title whether or not they would do so at common law. Indigenous groups see this as particularly unfair since it offers little to native title holders and rewards the indiscriminate actions of the States which ignored the requisite processes of the NTA.<sup>112</sup> As such, the amendments allow the expansion of interests held by non-indigenous stakeholders at the expense of the rights of native title holders in circumstances where such expansion could not occur on “ordinary” title land.<sup>113</sup>

Intermediate period acts<sup>114</sup> are certain grants of rights and interests in land made by the Commonwealth, State or Territory governments between the commencement of the NTA and the date of the *Wik* judgement. The amendments define and validate four categories of intermediate period acts and establish whether or not each category extinguishes native title. The format of these amendments is similar to the provisions in the original Act that were used to validate past acts. In addition, the States and Territories are given their own power to pass complimentary laws to formulate similar protection against native title.

Category A intermediate acts<sup>115</sup> are defined as those granting freehold estates; certain leaseholds, including a commercial, exclusive agricultural, residential, community purposes lease or any lease conferring a right of exclusive possession; the vesting of exclusive possession of particular land or waters in any person by a State or Territory; or the construction of a public work (unless the act is for the benefit of Aboriginal or Torres Strait

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AMENDMENTS TO THE NATIVE TITLE AMENDMENT BILL (1998); The National Indigenous Working Group, *Critique of the 10 Point Plan*, INDIGENOUS L. BULL., Jun. 1997, at 10, 12 [hereinafter *Critique of the 10 Point Plan*].

111. NTAA (1998) div. 2A.

112. Aboriginal and Torres Strait Islander Commission, *supra* note 107.

113. NATIVE TITLE REPORT, *supra* note 108.

114. NTA (1993) § 232A. An intermediate period act is defined as an act that took place between January 1, 1994 and December 23, 1996 where the act was not the making of legislation, “other than legislation that affects native title by creating a freehold estate, lease or license over land or waters,” or legislation that contained, made or conferred “a reservation, proclamation or dedication under which the whole or part of the land or waters [concerned] is to be used for a particular purpose,” and the act was invalid due to native title, and the act was not a past act; and at any time before the act was done, either a valid grant of freehold estate or lease was made other than a mining lease, or a valid public work was constructed. *Id.*

115. NTAA (1998) § 232B.

Islanders). Category A acts are validated<sup>116</sup> and have the effect of extinguishing native title in relation to the land and waters concerned if the act involves the granting of freehold or a lease, or, if it deals with a public work.<sup>117</sup> Category B intermediate period acts consist of the grant of a lease if the lease is neither a category A lease or a mining lease, nor a lease granted to benefit Aboriginal or Torres Strait Islanders.<sup>118</sup> These acts extinguish native title to the extent that the act is “wholly or partly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests concerned.”<sup>119</sup> Category C intermediate period acts consist of the grant of a mining lease,<sup>120</sup> and category D acts<sup>121</sup> consist of any intermediate period acts that are not a category A, B or C act. For category C and category D acts the non-extinguishment principle applies to the act.<sup>122</sup>

When an intermediate period act consists of a right to mine, or the extension of a right to mine or the period for which the right to mine has effect, and before the intermediate act occurred either a grant of freehold estate or a lease was made, or a public work constructed, on land or waters affected by the act, then special requirements exist regarding notification. In these circumstances, notification must be given about the act to any registered native title claimants, Aboriginal or Torres Strait Islander representative bodies, and the public, within six months of the amended Act (or a complimentary State or Territory law) commencing.<sup>123</sup> The requirement to notify applies to all mining rights granted during the intermediate period over freehold, leasehold or public works, and will probably facilitate claims for compensation being made.<sup>124</sup>

At common law, exclusive possession tenures have the effect of extinguishing native title. The original NTA largely left the question of what extinguishes native title to the common law, and *Mabo* determined that there must be a clear and plain intention on the part of a Government for

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116. *Id.* § 22A.

117. *Id.* § 22B. In addition, under s22D, s22E, if the act is attributable to the Commonwealth, then compensation is payable by the Commonwealth on just terms, and under s22G compensation is also payable where the law of a state or territory validates an act and extinguishes native title.

118. *Id.* § 232C.

119. *Id.* §22B(c).

120. *Id.* § 232D.

121. NTAA (1998) § 232E.

122. *Id.* § 22B(d).

123. *Id.* §§ 22EA, 22H (for the Commonwealth, and a state or territory, respectively).

124. Cooley, *supra* note 110.

extinguishment to occur.<sup>125</sup> In contrast, the NTAA validates a list of tenures considered to grant exclusive possession through a series of “confirmation” provisions in which a list of valid or validated acts prior to December 1996 extinguish native title.<sup>126</sup> To this end, a previous exclusive possession act<sup>127</sup> carried out by the Commonwealth on or before December 23, 1996, is defined as including a valid grant of a scheduled interest,<sup>128</sup> a freehold estate, or of a commercial, residential or community purposes lease (which include category A intermediate period acts), or the construction of a public work. Such previous exclusive possession acts extinguish native title as of when the act was done.<sup>129</sup> Similarly, the Government proposal that a previous non-exclusive possession act<sup>130</sup> carried out by the Commonwealth, that involves the valid grant of a non-exclusive agricultural lease or a non-exclusive pastoral lease on or before December 1996, or a lease that is the exercise of a legally enforceable right created on or before December 1996, would extinguish native title.<sup>131</sup>

The Government argues that in this manner, legal certainty is assured in relation to Government acts or legislation that may have unlawfully affected native title prior to December 1996. These provisions effectively extinguish native title rights where such rights may have existed at common law. However, following representations from indigenous interests, the Government made some exceptions to the extinguishment of native title under the amendments.<sup>132</sup> Claims can therefore be made against the following: historic tenures (the so-called “ghost leases”) that are now vacant Crown land or Aboriginal reserves, regardless of tenure history, so long as they are currently occupied by native title holders,<sup>133</sup> Aboriginal land,<sup>134</sup> any acts to which the non-extinguishment principle

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125. Aboriginal and Torres Strait Islander Commission, *supra* note 107.

126. NTAA (1998) § 23B, C, D, DA, E, F, G, H, HA, I, J, JA.

127. *Id.* § 23B.

128. *Id.* § 249C. Defined as “anything set out in Schedule 1 other than mining leases or anything covered by subsection 23B” to not be a previous exclusive possession act, something declared to be a scheduled interest. This schedule covers specific types of leases, both past and present, that are considered to grant exclusive possession and extinguish native title. Final Senate changes to the amendments agreed to by Senator Brian Harradine and the government removed the power to add to the schedule of extinguishing interests by regulation, so that further items can only be added to the schedule by amending the Act. *See* Burke, *supra* note 102.

129. NTAA (1998) § 23C.

130. *Id.* § 23F (non-exclusive possession act defined).

131. *Id.* § 23G.

132. Aboriginal and Torres Strait Islander Commission, *supra* note 107.

133. NTAA (1998) § 47A, B.

134. *Id.* § 23B(9).

applies,<sup>135</sup> national parks<sup>136</sup> and the so-called “fake freehold” or Crown to Crown grants.<sup>137</sup> In addition, final senate changes to the amendments<sup>138</sup> resulted in a considerable concession to legislative extinguishment of native title.<sup>139</sup> Under section 23G(1) the question of whether or not inconsistent rights on non-exclusive tenures (e.g., pastoral leases) permanently extinguish native title and thus the legal effect of these grants is left open to the Courts. The amendments mean that inconsistent native title rights on pastoral leases may only be suspended (and not permanently extinguished).

The issue of compensation is also addressed by the amendments. If the confirmation provisions extinguish native title where in fact there would be no extinguishment at common law, then just terms compensation is provided under the amendments, as necessitated by the Commonwealth Constitution.<sup>140</sup> This statutory modification of the common law has been criticised by indigenous groups since it is not accepted by them as appropriate to compensate materially for the loss of native title rights and interests in many, if not most instances. Moreover, the Aboriginal and Torres Strait Islander Commission (ATSIC) recognise that there is a fundamental problem in the compensation provisions: indigenous people seeking compensation for extinguishment or impairment of native title will have to go through the arduous and costly process of proving native title in the first instance to the satisfaction of the courts before compensation is payable.<sup>141</sup>

### C. *The Application Process and the Registration Test*

The statutory requirements for lodging an application for the determination of native title have been “toughened” under the revised Act. Applicants must now pass a more stringent registration test<sup>142</sup> in order to gain access to the protective provisions of the Act such as the right to the negotiating process. The Federal Government contends that the new registration test achieves a “balance between the interests of native title holders and the need to ensure that economic development is not unduly

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135. *Id.* § 23B(9B).

136. *Id.* § 23B(9A).

137. *Id.* § 23B(9C).

138. In the last minute changes negotiated between Senator Brian Harradine and the government before passage of the amendment bill.

139. Aboriginal and Torres Strait Islander Commission, *supra* note 107.

140. NTAA (1998) § 51(xxxi).

141. See *Emerging Problems in the Operation of the Amended NTA*, (1999), available at <http://www.atsic.gov.au/observe/C.htm> (last visited May 6, 1999).

142. NTAA (1998) §§ 61, 61A, 190A, 190B, 190C, 190D, 251B.

impeded,”<sup>143</sup> while indigenous groups argue that the new test unfairly shifts the balance decidedly against native title holders.<sup>144</sup> In terms of who is able to apply for registration, the amendments specify that an application<sup>145</sup> may only be made by the following parties: a person or persons “authorised”<sup>146</sup> by all the persons of the native claim group who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group; a person who holds a non-native title interest in relation to the whole of the area in relation to which the determination is sought; or the relevant Commonwealth, State or Territory Minister in relation to the area where the determination is sought.

One of the more crucial aspects of the claimant standing provisions is the requirement that a claimant group must show that authority has been obtained from all the native title holders in the group to bring the claim. While this has a particular impact on reducing the number of overlapping claims, it also enforces a more rigorous procedure on native title claim groups than in the past, apparently to obviate conflict or disagreement within a claim group about an application. This authorisation process may, however, be problematic for indigenous groups given the time frames imposed upon applications, and in addition, places an onerous administrative requirement on a native title claimant.<sup>147</sup>

The amendments determine that once lodged with the Federal Court, an application for native title is referred to the NNTT where the Native Title Registrar must apply the amended registration test to determine whether or not to register the claim. The purpose of the test is to ensure that only those claims with merit are registered and thereby given access to statutory benefits such as the right to negotiate or compensation. In order

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143. The Hon. Daryl Williams QC, Second Reading Speech to the Native Title Amendment Bill 1996, No. 6, Weekly Hansard (House of Representatives), p. 3056 (Jun. 24-28, 1996).

144. Simeon Beckett, *Workability in Whose Interest? The Native Title Amendment Bill 1996*, AUSTL. LEGAL BULL., 1996, at 4.

145. NTAA (1998) § 61.

146. NTAA (1998) § 251(B). “Authorised” means that where a process of decision making is part of the traditional laws and customs of the group, that process must be complied with in relation to authorising things such as the making of the application, or where a process does not exist then some agreement must be made as to a process by the members of the group.

147. Greg McIntyre et al., *Administrative Avalanche: The Application of the Registration Test Under the Native Title Act 1993 (Cth)*, INDIGENOUS L. BULL., Apr./May 1999, at 8, 10.

to be registered, the claimants must satisfy a series of criteria,<sup>148</sup> including that:

information is supplied identifying the boundaries of the area claimed with reasonable certainty in relation to particular land or waters,<sup>149</sup> as well as a map showing the claimed area,<sup>150</sup> and that details are included of searches carried out to determine the existence of any non-native title rights and interests in relation to the area claimed;<sup>151</sup>

a particular description of the native title rights and interests claimed is included to allow the rights and interests claimed to be readily identified;<sup>152</sup>

there is a general description of the factual basis of native title which is sufficient to support the assertion that the native title rights and interests claimed exist; in particular the factual basis must support the assertions that the claimant group and their ancestors have had an association with the area, that traditional laws and customs exist to give rise to the claimed native title, and that the claimant group continued to hold the native title in accordance with those laws and customs;<sup>153</sup>

there are details of any activities that the claimant group currently carry on in relation to the area claimed;<sup>154</sup>

the persons in the claim group are named or described sufficiently clearly so that it can be ascertained whether any particular person is in that group;<sup>155</sup>

at least one member of the claimant group has or has had a traditional physical connection with any part of the land or waters claimed, or used to have such a connection and would still have but for government action or the action of a lessee or other interest holder;<sup>156</sup>

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148. NTAA (1998) §§ 62, 190A, 190B, 190C.

149. *Id.* §§ 62(1)(b), 62(2)(a), 190B(2).

150. *Id.* § 62(2)(b).

151. *Id.* §§ 62(1)(b), 62(2)(c).

152. *Id.* §§ 62(1)(b), 62(2)(d), 190(B)(4).

153. *Id.* §§ 62(1)(b), 62(2)(d), 190(b)(5).

154. NTAA (1998) §§ 62(1)(b), 62(2).

155. *Id.* §§ 61(4), 190B(3).

156. *Id.* §§ 62(1)(c), 190B(7).

prima facie at least some of the native title rights and interests claimed can be established,<sup>157</sup>

there has been no previous determination of native title in relation to the area;<sup>158</sup>

there has been no previous exclusive possession act done in relation to the area by the Commonwealth, a State or Territory,<sup>159</sup> or no previous non-exclusive possession act done in relation to the area by the Commonwealth, a State or Territory if the claimed native title rights and interests confer possession, occupation, use or enjoyment of the land to the exclusion of all others,<sup>160</sup> unless sections 47, 47A or 47B apply so that extinguishment is disregarded;<sup>161</sup> and finally,

the application and accompanying documents must not disclose, and the Registrar must not be aware of any of the following: to the extent that the native title rights and interests claimed consist of or include ownership of minerals, petroleum or gas—these are wholly owned by the Crown; to the extent that the rights and interests claimed relate to waters in an offshore place—those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place; or in any case—the rights and interests have otherwise been extinguished (except to the extent that extinguishment is required to be disregarded under 47, 47A or 47B).<sup>162</sup>

Many of the amendments to the registration test affect the accessibility to, or latitude of, the registration process. A crucial component of the new registration procedure is the traditional physical connection test, designed in theory, to meet the common law requirement that native title claimants prove that they have continued to “occupy” the land since settlement. Physical occupancy by current claimants is not necessarily

157. *Id.* § 190B(6).

158. *Id.* § 61A(1).

159. *Id.* § 61A(2).

160. NTAA (1998) § 61A(4).

161. *Id.* §§ 47, 47A, 47B. These sections refer to land held under pastoral lease by or on behalf of the applicants, land that is held freehold or is under a lease that was granted under land rights legislation, or land that is currently vacant Crown land, and which is occupied by the applicants for native title.

162. *Id.* §§ 190B (9)(a)(b)(c), 47, 47A, 47B. These sections refer to land held under pastoral lease by or on behalf of the applicants, land that is held freehold or is under a lease that was granted under land rights legislation, or land that is currently vacant Crown land, and which is occupied by the applicants for native title.

mandatory; the physical connection criterion can extend back one generation upon an application to the Federal Court, so that registration can still proceed where a parent had such a connection.<sup>163</sup> In this instance, described as the “superimposed locked-gates provision,” the Federal Court must be satisfied that a deceased parent had a traditional physical connection with the area under claim, and would have maintained it but for government action or the action of a lessee, and where prima facie some of the claimed rights can be established, the Court may order the Registrar to register the claim.<sup>164</sup>

The requisite physical connection means that a spiritual connection with land will not suffice for registration, which significantly narrows the original registration test. However, “spiritual connection” is a very significant part of indigenous peoples’ links with their country, and so with their native title rights and interests.<sup>165</sup> Much of the indigenous relationship to land and water is built upon “actively thinking about a place and talking about it.”<sup>166</sup> Indigenous groups see the preclusion of any spiritual attachment to the land in assessing establishment or interference with native title as unreasonable and discriminatory.<sup>167</sup> The physical connection test has been described as a means of de facto extinguishment of native title<sup>168</sup> by the National Indigenous Working Group, and as a requirement that is illogical, unfair, and something that acts to reward those pastoralists who have obstructed legitimate access to traditional country.<sup>169</sup>

One of the final changes made to the amendments before passage in the Senate resulted in an exception to the current physical connection

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163. See L. B. Tilmouth, *Negotiating Native Title Agreements and How the Right to Negotiate Has Changed Native Title Amendment Act*, AIC Worldwide National Forum (Nov. 30-Dec. 1, 1998).

164. NTAA (1998) § 190D.

165. Kado Muir, *The Earth Has an Aboriginal Culture Inside: Recognising the Cultural Value of Country*, 23 NATIVE TITLE RESEARCH UNIT 1, 5-7 (July 1998). See also Alex Barlow, *Continuing Aboriginal Cultural Connection with Country: The Case for Eastern, Southern and South-Western Australia*, in IDENTITY, LAND AND CULTURE IN THE ERA OF NATIVE TITLE 91-94 (Gary D. Meyers & Anita Field, eds. 1998).

166. Muir, *supra* note 165, at 6.

167. See Aboriginal and Torres Strait Islander Commission, *supra* note 107; see also The National Indigenous Working Group on Native Title, *Co-existence – Negotiation and Certainty*, INDIGENOUS L. BULL., May 1997, at 10-11 [hereinafter *Co-existence – Negotiation and Certainty*].

168. *Co-existence – Negotiation and Certainty*, INDIGENOUS L. BULL., May 1997, at 10-11.

169. *Critique of the 10 Point Plan*, *supra* note 110; see also *Co-existence – Negotiation and Certainty*, *supra* note 167.



requirement for registration. The superimposed “locked gates provision”<sup>170</sup> permits a claimant group to satisfy the physical connection criterion if the applicants were separated or prevented from having a physical connection with the land through, for example, government policy (i.e., forced removal) or the actions of a leaseholder over land or waters. If the only reason for non-registration is the lack of a physical connection by any member of the claimant group, the applicant must be advised of a right to apply to the Federal Court for a review of the decision. Indigenous groups argue that many Aboriginal people have been prevented or actively discouraged from having access to their traditional country. This loss has often occurred in relatively recent times, including in the 1960s in the wake of the 1968 Cattle Industry (Northern Territory) case,<sup>171</sup> which gave equal wages to Aboriginal workers.<sup>172</sup> The locked gates provision will at least mean that those indigenous peoples who have a strong traditional affiliation with their land but who have been denied access in relatively recent times, may be able to have the access they seek until their claim is determined.<sup>173</sup> However, where the connection of a parent is relied upon, registration can only be by a Federal Court order which will be difficult to achieve within the time provided under section 29 where the government intends to issue a mining lease or to compulsorily acquire land.<sup>174</sup>

The unamended Act required the Registrar of the Tribunal to accept an application unless the claim was “frivolous or vexatious” or “*prima facie* the claim cannot be made out.”<sup>175</sup> The new provisions reverse this premise since claimants must be able to establish *prima facie* each of the native title rights and interests claimed.<sup>176</sup> Practically, this will mean that applicants must now gather sufficient material as stipulated under the registration

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170. NTAA (1998) §§ 62(1)(c)(ii), 190B(7)(b). Whereby the physical connection requirement will be satisfied if any member of the native title claim group would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to land or waters) by the Crown, statutory authority or leaseholder has been prevented from gaining access to any of the land or waters covered by the application.

171. The Cattle Station Industry (Northern Territory) Award, 1951 (1966) 113 C.A.R. 651.

172. *Critique of the 10 Point Plan*, *supra* note 110.

173. *Id.*

174. Aboriginal and Torres Strait Islander Commission, *Analysis of the Howard Harradine Agreement* (May 19 1999), available at [http://www.atsic.gov.au/native\\_title/analysis\\_of\\_the\\_howardharradine.htm](http://www.atsic.gov.au/native_title/analysis_of_the_howardharradine.htm).

175. NTAA (1998) § 63(1).

176. *Id.* § 190B.

requirements to lodge a *prima facie* case, whereas previously they could lodge a relatively simple application form.<sup>177</sup>

A number of the amendments address problems that arose with the "workability" of the Act. If two or more proceedings relate to native title determination applications that cover all or part of the same area, the Federal Court must make appropriate orders to ensure that the overlapping applications are dealt with in the same proceeding. In addition, the Registrar of the Tribunal has the capacity to review external information about a claim supplied by a government body to modify or strike out an application, to reduce the area covered in an application, or to combine two separate applications relating to the same area. Applications are restricted for example, because registration is not possible where the land or waters claimed have had native title extinguished or where mineral or petroleum interests are owned by the Crown.<sup>178</sup> Similarly, restrictions exist on the making of claimant applications. Once there is an approved determination of native title for an area, other applications cannot be made over the same area.<sup>179</sup>

The amendments are intended to effect a pragmatic "streamlining" of the registration process. The new registration procedures mean that native title claims need to be much more comprehensive and well prepared, that there will be a reduction in competing claims over the same land, that emphasis is placed on the communal nature of native title and involves the local indigenous community to a larger extent in claims on their behalf, and that since applications are initially made to the Federal Court the claimants will be able "to enforce and protect their native title in the same proceedings."<sup>180</sup> As the new President of the NNTT, Graeme Neate observes, significantly, the provisions which go toward reducing overlapping applications are intended to affect applications made by members of the same group.<sup>181</sup> The Act does not prevent overlapping claims by different groups. Nor does it prevent the Federal Court from finding that, in a particular area, native title is held by more than one group.<sup>182</sup> Although some overlapping claims are evidence of disputes between and

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177. Beckett, *supra* note 144, at 5.

178. NTAA (1998) § 190B(9).

179. *Id.* § 190C(3). Registration is not possible where a member or members of the claimant group are part of another claimant group in relation to which an application has already been registered over the area. *Id.*

180. Jeff Kildea, *Claims Assessment Procedures-New Regime*, in *Living with Wik: The New Native Title Laws Conference* (Nov. 16-17, 1998) at 21.

181. Graeme Neate, Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (Oct. 20, 1999).

182. *Id.*

within groups over who has native title rights and interests, other overlaps reflect the traditional sharing of country between groups or the distinctly different, but interrelated rights and duties of people to particular areas of land.<sup>183</sup> Importantly, the Act recognises that different groups may make overlapping native title applications. What the Court has to determine is whether or not native title exists in relation to that area.<sup>184</sup> If native title does exist, the Court must decide who are the persons, or groups of persons, holding the common or group rights in relation to that area and what those native title rights and interests are.<sup>185</sup>

A major difficulty with the registration process is that it is most unlikely that claimants will be able to successfully complete the process within the prescribed time limits. The production of the highly detailed application that is required will necessitate a level of research that may not be possible within the stipulated time frames of the Act.<sup>186</sup> Where a government body issues a section 29 notice about a future act and the right to negotiate applies, a potential native title claimant must prepare and lodge an application for registration within three months of the notification day specified on the notice. Considering the complexity and comprehensiveness of the application required, it may prove too difficult or too costly for potential claimants to put together a viable application for registration in the time allowed. The stringent time frame now imposed on registration will place considerable pressure on Aboriginal people to lodge preemptive applications, and in this way the Commonwealth has placed a sunset type clause on claims.<sup>187</sup> The amendments are therefore a way of forcing common law native title holders to lodge applications in anticipation of acts which will affect their rights, because if they are not able to achieve registration in the time frames set out they will be ineligible for any protection that can be afforded them by the NTA.

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183. *Id.*

184. *Id.*

185. *Id.*

186. NTAA (1998) § 29. This section establishes that any registered native title party must be given notice of any future act of the Commonwealth, a state or a territory that is subject to the right to negotiate. *Id.* §26. Under s30(1) a native title party who may be eligible to the right to negotiate process includes any person who files an application before the end of three months after the notification day (s29(4)) and who after four months after the notification day is a registered native title claimant in relation to land or waters that will be affected by the act referred to in the s29 notice. Similarly, notification must be given to any body corporate that, three months after the notification day is a registered native title claimant or that becomes a registered native title claimant after the end of that period of three months as the result of an application made before the end of that period of three months. *Id.* § 30(1)(b) and (c).

187. Tilmouth, *supra* note 163, at 8-9.

When the amended registration test is evaluated as a whole, and compared with the previous registration procedures of the original Act, the new requirements are relatively onerous and complicated. A greater degree of complexity is now required in the claims process, and this will impose burdens, both administratively and financially, on those making claims to native title or for compensation.<sup>188</sup> This may actually work as a constraint upon the ability of indigenous people to access their common law right of native title. Additionally, any modification of the registration process that makes it more complicated or difficult has the effect of making the right to negotiate less accessible to claimants.

Indigenous groups have voiced strong concerns about the amended registration test including that claimants now need to provide information and material that is "suited for a judicial process, not an administrative one."<sup>189</sup> While indigenous groups have accepted the need for a higher threshold test to replace the essentially automatic procedure previously in place<sup>190</sup> which allowed multiple and poorly orchestrated claims, they have overtly rejected the requirement for a solely physical connection to the land under claim, and the need to establish a *prima facie* claim.<sup>191</sup>

Native title is a unique form of proprietary interest, which involves both a spiritual and physical relationship with the land. In recognition of the unique nature of native title, the original right to negotiate was made applicable to a limited class of future acts which would have a particularly deleterious effect on native title rights and interests,<sup>192</sup> requiring negotiation with native title claimants in good faith over the terms of the impairment or extinguishment of their native title.<sup>193</sup> Invariably, applicant groups may already hold "title" according to their laws and customs and they will only be seeking recognition of their native title from the Crown. On this basis, claimants should not be forced by overly formalistic registration requirements into a situation where their social structure as a

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188. Kildea, *supra* note 180, at 20.

189. Kado Muir, *Registration Test*, NATIVE TITLE NEWSLETTER, Feb. 1999, at 2-3.

190. Aboriginal and Torres Strait Islander Commission, *supra* note 107.

191. NTAA (1998) §§ 62(1)(c)(i), 190B(7) (detail the physical connection requirements of the registration test). See Aboriginal and Torres Strait Islander Commission, *supra* note 107.

192. The right to negotiate applied to grants of interests which created a right to mine and to the compulsory acquisition of land for the purposes of conferring an interest on third parties. See *infra*, notes 224-78 and accompanying text.

193. Anne De Soyza, *Engineering Unworkability: The Western Australian State Government and the Right to Negotiate*, 26 NATIVE TITLE RESEARCH UNIT 1, 2 (Oct. 1998).

native title holding group is modified to reflect an administrative model developed for implementing the registration test.<sup>194</sup>

Finally, it is significant that failure of an application for determination of native title to pass the registration test does not mean that the application has been rejected by the Federal Court. The registration test is not a screening process for access to the Court. Therefore, although native title applicants who do not satisfy the registration test will lose the right to negotiate and some other procedural rights, their claim can still remain on foot in the Federal Court and in mediation before the Tribunal. It may still proceed to a determination by the Court unless it is struck out, settled or withdrawn.<sup>195</sup> This has led to criticism of the amendments since there may be no impetus for reducing efforts to achieve native title agreements through negotiation.<sup>196</sup> Where applications are not resolved through negotiation or mediation, they could result in lengthy and expensive Federal Court proceedings.<sup>197</sup>

#### D. Mediation

The NTA amendments mean that the Tribunal's role in mediation continues, although not autonomously but rather as a referee delegated by the Federal Court. Mediation is no longer initiated *de novo* by the NNTT, but under the direction and subject to any conditions imposed by the Court.<sup>198</sup> The Court may refer the whole or part of a proceeding for mediation, or may order that there be no mediation if it considers that mediation is unnecessary or that there is no likelihood that the parties will reach agreement.<sup>199</sup> In addition, the Court may order mediation to cease in relation to the whole or a part of a proceeding either on its own motion at any time in the proceeding, or upon application of a party to the proceeding at any time after three months after the start of the mediation.<sup>200</sup> If an order is of the Court's own motion, then the Court must be satisfied that mediation is unnecessary or the parties are unlikely to reach agreement. However, if the party making an application is the applicant for native title, or the Commonwealth or a State or Territory, then the Court has a greater onus and must make an order for mediation to cease unless it is

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194. Muir, *supra* note 189.

195. P. Jeffrey, *The New Application and Mediation Process, in Living With Wik: The New Native Title Laws Conference*, *supra*, note 180, at 9.

196. French, *supra* note 94.

197. Tilmouth, *supra* note 163.

198. Geoff Clarke, *What Procedure Should Now be Followed in the Event of a Native Title Issue, in Native Title Amendment Act 1998 Conference 2* (Nov. 30-Dec. 1, 1998).

199. NTAA (1998) § 86B.

200. *Id.* § 86C.

satisfied that the mediation is likely to be successful. This places an obligation on the Court to end the mediation process unless it appears that the parties will be successful. If the party is any other person, then the Court may make an order to cease mediation unless it is satisfied that the mediation is likely to be successful, but is under no obligation to do so.

A significant change with respect to mediation is that the Federal Court has the power to, at any time during the mediation, determine a question of fact or law that is referred to it by parties during the mediation.<sup>201</sup> This is a valuable amendment as it enables the NNTT and the Court to adopt any agreement on facts as determined by the Court that could otherwise hold back the mediation process.

The NNTT President, Graeme Neate, notes that the amendments have removed much of the basis for claims of institutional bias against the Tribunal. It is not bound by technicalities, legal forms or rules of evidence.<sup>202</sup> Perhaps intended to promote the institutional impartiality of the Tribunal, are the amendments whereby the Registrar may give assistance to help people prepare applications and accompanying material and may also help other people at any stage of the proceeding in matters relating to the proceeding.<sup>203</sup> Further, the Tribunal *may* take into account the cultural and customary concerns of Aboriginal and Torres Strait Islanders in all of its functions,<sup>204</sup> but not so as to unduly prejudice any other party. As a result, there is now on the one hand, an expanded range in respect of which cultural and customary concerns are to be taken into account, while on the other hand, the obligation to take these concerns into account is a matter for the discretion of the Tribunal.<sup>205</sup>

#### *E. Freehold Test and Compulsory Acquisition of Native Title Rights*

The original Act incorporated a fundamental safeguard for native title rights and interests that applied to onshore areas only. That safeguard was the "freehold test," which in essence provided that only if an act could be done in relation to a freehold property interest, could it validly be done to native title.<sup>206</sup> The Act also allowed for compulsory acquisition of native title rights if the relevant compulsory acquisition legislation provided just compensation and an opportunity to negotiate non-monetary compensa-

201. *Id.* § 86D.

202. *Id.* § 109(3).

203. *Id.* § 78; *see also* Neate, *supra* note 181.

204. NTAA (1998) § 109(2).

205. Neate, *supra* note 181.

206. NTA (1993) § 235.

tion.<sup>207</sup> In addition, acquisition itself did not extinguish native title, only the act done in giving effect to the purpose of the acquisition extinguished native title.<sup>208</sup>

The amendments have modified how the freehold test applies.<sup>209</sup> When the grant of an interest in land is pursuant to a legislative act, then it must apply in the same way to the native title holders as if they instead held ordinary title, or the effect of the act on the native title does not cause the native title holders to be in a more disadvantageous position at law than they would be if they held ordinary title. When the act is a non-legislative act, then the act must pass the freehold test, i.e., that the act can only be done in relation to the land if the act could be done if the native title holders instead held ordinary title.

The amended freehold test applies to onshore acts<sup>210</sup> where the act is a future act that is the making, amendment or repeal of legislation that would apply in the same way to non-native title holders who held ordinary title to the land, or, the effect on the native title does not cause the native title holders to be in a more disadvantageous position than they would be if they instead held ordinary title.<sup>211</sup> It also applies to onshore activities that could be done in relation to the land or waters concerned if the native title holders instead held ordinary title, and a law of the Commonwealth, a State or Territory makes provision in relation to protection of the area to which the act relates or sites that may be in the area which are of particular significance to Aboriginal or Torres Strait Islander peoples,<sup>212</sup> or the future act consists of the creation or variation of a right to mine for opals or gems and a law of the Commonwealth, a State, or Territory makes provision in relation to protection of the area to which the act relates or sites that may be in the area and of particular significance to Aboriginal or Torres Strait Islander peoples.<sup>213</sup> By these means, the amendments require the Commonwealth, State, or Territories to have Aboriginal heritage protection legislation in place in order to take advantage of the freehold test. As the provisions do not specify any standards for such legislation, they will probably have no effect in jurisdictions where legislation is already in place. However, the amendments may have some effect in

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207. *Id.* §§ 23(3), 79.

208. Aboriginal and Torres Strait Islander Commission, *supra* note 107.

209. NTAA (1998) §§ 24MA, 24MB.

210. *Id.* § 24MC.

211. *Id.* § 24MA.

212. *Id.* § 24MB(1).

213. *Id.* § 24MB(2).

Queensland where the existing heritage legislation does not specifically address Aboriginal heritage issues.

The amendments establish that where the Commonwealth, a State or a Territory compulsorily acquires the whole or part of native title rights and interests, and also compulsorily acquires the whole or equivalent part of all non-native title rights and interests in relation to the same land or waters, and the native title holders are not at any greater disadvantage than is caused to the non-native title holders, then the compulsory acquisition extinguishes the native title rights and interests<sup>214</sup> and there is an entitlement to compensation for the acquisition.<sup>215</sup> These provisions establish that the compulsory acquisition itself has the effect of extinguishing native title,<sup>216</sup> and mean that when coexisting native title rights are compulsorily acquired, all other non-native title coexisting interests must be compulsorily acquired as well.<sup>217</sup> If extinguishment of the native title occurs by surrender in the course of the right to negotiate process, then the surrender extinguishes the native title and compensation is not allowed other than that provided for in the negotiated agreement.<sup>218</sup> Certain leases, e.g., a non-exclusive agricultural or on-exclusive pastoral lease, are excluded from these provisions.<sup>219</sup>

A future act affecting offshore places is also validated by the amendments. The compulsory acquisition of the whole or part of any native title rights or interests under the law of the Commonwealth, a State, or Territory extinguishes that native title and there is an entitlement to compensation.<sup>220</sup> In the case of any other future act affecting an offshore place, the non-extinguishment principle applies.<sup>221</sup>

The amendments make some crucial changes to the previous role of the freehold test. There is now an expanded number of government acts which are validated by the Act, such as public works, facilities for services to the public, reserved land, future water management and primary production.<sup>222</sup> These acts are effectively exempted from the freehold test because they invoke either direct extinguishment of native title or the

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214. *Id.* §§ 24MD(1), (2)(a)-(c).

215. NTAA (1998) § 24MD(2)(d)-(e).

216. *Id.* § 24MD(c).

217. *Id.* § 24MD(b).

218. *Id.* § 24MD(2A).

219. *Id.* § 24MD(5).

220. *Id.* § 24NA(1-3),(5).

221. NTAA (1998) § 24NA(4).

222. See discussion *infra* section III.F (explaining Subdivision G-Future acts and primary production).



application of the non-extinguishment principle. Accordingly, the amended freehold test has a much reduced capacity to protect native title.

Finally, the amendments include new provisions for procedural rights relating to a limited number of compulsory acquisitions of native title rights for the benefit of third parties. These are not as extensive as the right to negotiate but incorporate many of its features and pertain to compulsory acquisition for third party infrastructure projects, compulsory acquisition for a third party in a town or city of the intertidal zone, and the grant of a mining tenement solely for construction of infrastructure facilities associated with mining.<sup>223</sup>

#### F. *The Right to Negotiate*

Under the original Act, specified future acts invoked the right to negotiate, namely the creation of a right to mine, whether by the grant of a lease or otherwise, or its extension or variation; the compulsory acquisition of native title rights; or any other act approved by the Commonwealth Minister. In contrast, the NTAA specifies that a future act is invalid to the extent that it affects native title unless a provision in the Act provides otherwise.<sup>224</sup> It provides that the right to negotiate applies only to certain future acts carried out by the Commonwealth, a State, or a Territory involving certain types of lease renewals, certain conferrals of mining rights such as renewals or creation of a right to mine, certain compulsory acquisitions of native title rights and interests, and other acts approved by the Commonwealth Minister.<sup>225</sup> As a result, there are now very discrete and limited circumstances where the right to negotiate is an available option.

The amendments put in place a revised future act regime that assures legal certainty to governments when dealing with land on which native title might exist. The approach of the amendments favours the interests of government and industry by reducing a native titleholder's access to the right to negotiate. The government contends that the purpose of the amendments is to give efficacy to the right to negotiate processes so that unnecessary delays are eliminated while protecting the legitimate interests of native titleholders.<sup>226</sup> This has been achieved by considerably restricting

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223. Aboriginal and Torres Strait Islander Commission, *supra* note 107.

224. NTAA (1998) § 24OA.

225. *Id.* § 26(1A), (1). (Section 1A(a) provides that §24IC, which deals with permissible lease etc. renewals, applies to the act).

226. Explanatory Memorandum from the Parliament of the Commonwealth of Australia, *Native Title Amendment Bill 1996 Supplementary Explanatory Memorandum*, Exposure Draft. See also Elizabeth Keith, *Neither Rights Nor Workability: The Proposed*

the accessibility of the right to negotiate to native titleholders, since the relatively wide scope of mining activities that were included under the original right to negotiate process is now much reduced.

In a broad sense, the changes to the legislative right to negotiate fall into two categories: they either alter the procedure of the right to negotiate process; or, they exempt many acts or areas from the operation of the right to negotiate process.<sup>227</sup> Changes to the procedures include removal of the requirement that both the government and the grantee parties must negotiate in good faith,<sup>228</sup> removal of the consideration of the effect of the act on the natural environment in arbitration,<sup>229</sup> and an expansion of the types of acts that will attract the expedited procedure.<sup>230</sup> By defining areas where the right to negotiate process can operate, the amendments set out that the right to negotiate pertains only to specific future acts.<sup>231</sup> It applies where a future act is a permissible lease renewal<sup>232</sup> carried out by the Commonwealth, a State or Territory, and where the renewal, re-grant, re-making or extension of the term of the lease, licence, permit or authority concerned creates a right to mine. In addition, the right to negotiate applies to a future act that passes the freehold test and involves the creation (or variation to extend the area) of a right to mine, except where the right is for the sole purpose of the construction of an infrastructure facility associated with mining, or where the act is for the compulsory acquisition of native title rights and interests, unless the acquisition is to confer rights and interests in relation to land or waters on a government party or the purpose of the acquisition is to provide an infrastructure

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*Amendments to the Right to Negotiate*, 15 NATIVE TITLE RESEARCH UNIT (Apr. 9, 1997), available at <http://www.aiatsis.gov.au/ntpapers/ntip15.htm>.

227. Tilmouth, *supra* note 163, at 10.

228. NTAA (1998) § 31(2).

229. *Id.* § 39.

230. *Id.* § 237.

231. *Id.* § 26.

232. *Id.* § 24IC(1). Defined to be “the renewal; or the re-grant or the re-making; or the extension . . . of a lease, licence, permit or authority (*original lease etc.*) that is valid . . . and the original lease etc. was granted on or before December 23, 1996, [or] . . . was a permissible lease etc. renewal or a pre-existing rights-based act, [or] the original lease etc. was created by an act . . . relat[ing] to primary production activities or involving the management or regulation of water and airspace; and the future act does not confer a right of exclusive possession . . . [or] create a larger proprietary interest in the land or waters . . . [or] cover an area greater than 5,000 hectares and the majority of the area covered was not . . . to be used for purposes other than pastoral purposes . . . and if the original lease . . . is . . . for the benefit of Aboriginal or Torres Strait Islander peoples . . . and if the original lease did not permit mining. . . .” then neither does the renewed one. *Id.*

facility or any other approved act by the Commonwealth Minister.<sup>233</sup> This leaves the right to negotiate as potentially applicable only to future government acts which involve the creation of a new or revised right to mine or which involve the compulsory acquisition of native title rights for a government party or for an infrastructure facility or any approved act by the Commonwealth Minister. Notably, the right to negotiate has been removed altogether from the compulsory acquisition of native title for private infrastructure projects, which are not associated with mining. Therefore, the right to negotiate no longer applies to the conversion of specified-term, non-exclusive pastoral and non-exclusive agricultural leases to a longer term or to perpetual leases.

The amendments also directly exempt certain future acts from the right to negotiate process. This substantially narrows the available scope of the right. Exempted future acts are:

an act involving the effect of an indigenous land use agreement;<sup>234</sup>

an act that is a Commonwealth Minister approved exploration act that is unlikely to have a significant impact on native title;<sup>235</sup>

approved gold and tin mining act schemes for such acts that, in the opinion of the Minister, are unlikely to have a significant impact on native title;<sup>236</sup>

opal or gem mining areas on certain conditions;<sup>237</sup>

the renewal of re-grants or extensions of valid mining leases;<sup>238</sup>

an act that is the compulsory acquisition of native title rights and interests and that relates to land or waters wholly within a town or city;<sup>239</sup> and acts which do not take place on the landward side of the mean high-water mark of the sea.<sup>240</sup>

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233. *Id.* § 26(1).

234. NTAA (1998) § 26(2).

235. *Id.* §§ 26(2)(b), 26A.

236. *Id.* §§ 26(2)(c), 26B.

237. *Id.* §§ 26(2)(d), 26C. These sections exclude the right to negotiate from the creation or variation of a right to mine (including a right to explore or prospect) relating solely to land or waters wholly within an approved opal or gem mining area under certain conditions.

238. *Id.* §§ 26(2)(e), 26D.

239. *Id.* §§ 26(2)(f), 251C.

240. NTAA (1998) § 26(3).

As a result of these exemptions, the right to negotiate no longer applies to offshore land or waters, to the compulsory acquisition of native title rights in a town or city, or to the renewal of valid mining leases, exploration acts, and certain gold and tin and opal or gem mining activities.

The right to negotiate process has also been narrowed by other aspects of the amendments. This occurs where the right to negotiate is excluded from a series of future acts which under the amendments are validated and then made subject to the non-extinguishment principle.<sup>241</sup> Future acts which are exempted from the right to negotiate process in this manner involve:

primary production activities<sup>242</sup> (including cultivating land, animals, fish, aquaculture, leaving fallow or de-stocking land, horticulture, or forest operations<sup>243</sup> or farm tourism<sup>244</sup> on non-exclusive agricultural and pastoral leases validly granted before December 1996, where the future act that takes place after December 1966;<sup>245</sup>

grazing or acts related to gaining access to or taking water;<sup>246</sup>

permitting or conferring the right to remove timber, sand, gravel, rocks, soil or other resources (except for mining);<sup>247</sup>

legislative or licensing acts in respect of water and airspace;<sup>248</sup>

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241. *Id.* § 238. Defines the non-extinguishment principle as meaning that the native title is not extinguished but where the act is wholly inconsistent with the native title the native title will continue to exist in its entirety but will have no effect in relation to the act, and where the act is partly inconsistent the native title will continue to exist in its entirety but will have no effect in relation to the act to the extent of the inconsistency. Note that where the act consists of the grant of a freehold estate or the conferral of a right of exclusive possession over particular land or waters, then the in contrast the act extinguishes any native title, as per s241D.

242. *Id.* § 24G (validates a future act where it permits or requires the primary production activity or associated activity). *See also* § 24GC (validates an activity where it is the carrying on of a primary production activity or an associated activity).

243. *Id.* § 24GA.

244. *Id.* § 24GB(2).

245. *Id.* §§ 24GB(4), 24GC (unless the lease is for an area greater than 5,000 hectares or the lease converts).

246. NTAA (1998) § 24GD.

247. *Id.* § 24GE.

248. *Id.* § 24HA.

a pre-existing rights based act involving the exercise of a legally enforceable right<sup>249</sup> or the renewal or extension of a lease made before December 23, 1996;<sup>250</sup>

future acts where an earlier act on or before December 1996 made a reservation and the future act is conducted in accordance with the reservation or in the area covered by the reservation and the act's impact on the reservation is no greater than the impact that any act that that could have been done in accordance the reservation would have had,<sup>251</sup> or, an act by the Crown consisting of the grant of a lease to a statutory authority of the Commonwealth, the State or a Territory where the whole or part of any land or waters covered by the lease was to be used for a particular purpose (for which there is written evidence created before December 23, 1996), and the future act is done in good faith and consists of the use, by the statutory authority or any person for the particular purpose;<sup>252</sup>

the construction or establishment of a public work,<sup>253</sup> although if the act consists of the creation of a plan for the management of a national, State or Territory park intended to preserve the natural environment of an area, then, before the act is done, any representative Aboriginal/Torres Strait Islander bodies, registered native title bodies corporate and registered native title claimants must be given the opportunity to comment on the act,<sup>254</sup> and in this case the future extinguishes native title;<sup>255</sup>

a facility for services to the public relating to an onshore place, for example, roads, bridges, electricity transmission or pipelines;<sup>256</sup> and low impact future acts where the act takes place on land or waters before an approved determination is made that native title exists, and does not continue after, and does not include granting of freehold estate or leasehold, the conferral of a right of exclusive possession, excavation or clearing, mining construction or a building or other thing, or disposal or storing of waste.

249. *Id.* § 24IB (validates this future act with native title being extinguished rather than the non-extinguishment principle applying).

250. *Id.* § 24IC.

251. *Id.* § 24JA(1)(a)-(e).

252. NTAA (1998) § 24JA(2)(a)-(e).

253. *Id.* § 24JB.

254. *Id.* § 24JB(7).

255. *Id.* § 24JB(2).

256. *Id.* § 24KA.

A major effect of this list of exemptions is to significantly reduce the capacity for indigenous peoples to have input into activity conducted on their land which does not extinguish native title. Moreover, the removal of the right to negotiate from specific acts of compulsory acquisition for the benefit of a third party has critical ramifications. Most governments in Australia limit their acts of compulsory acquisition to land needed for public purposes. Nonetheless, the amendments mean that land may be acquired for the benefits of a pastoralist to upgrade a pastoral lease, or with respect to acquisition of land for third parties in town or cities for the benefit of a property developer, without regard for any native title rights and interests. This enables property rights to be taken from one group of private citizens for the benefit of others, so native title rights yield to the interests of other landholders. As the National Indigenous Working Group notes, this legitimates government acquisition of land from one citizen to give to another, and is fundamentally unfair and discriminatory.<sup>257</sup>

Another mechanism exists by which the amendments weaken the right to negotiate. Under section 26A, a minister is allowed to invoke an "expedited procedure" to approve exploration by a mining company simply because he or she considers the mining activity "unlikely to have a significant impact on the particular land or waters concerned". Certain conditions must be satisfied before a Minister can grant approval for a mining project, including assessing the degree of impact on indigenous people from the activity, notification of representative bodies and the public of the proposed activity, and invitations to make submissions on proposed actions, and consideration of those submissions.<sup>258</sup> However, the responsible ministers are able to approve the exploration of a mining company simply because they consider the mining activity unlikely to have a significant impact on the particular land or waters concerned.<sup>259</sup> This Ministerial role substantially weakens the position of native titleholders in the negotiations for any proposed mining exploration because it empowers the ministers to exclude native title claimants from having an influential voice in these expedited decisions.<sup>260</sup>

The existing right to negotiate has been reduced further by limiting negotiation to a single opportunity for each project proposed by mining interests. Section 26D is known as the "once only" right because one

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257. Cooley, *supra* note 110, at 11.

258. NTAA (1998) § 26A.

259. *Id.* § 26A(3).

260. G. Freeman Cappio, *Erosion of the Indigenous Right to Negotiate in Australia: Proposed Amendments to the Native Title Act*, 7 PAC. RIM L. & POL'Y J. 405, 418 (1998).

negotiation suffices for the length of a project.<sup>261</sup> This allows mining plans to change after negotiations with Indigenous Australians are over. As one commentator notes, when a right to mine is created after a right to explore is granted, the right to negotiate does not apply to the former, even if the mining project changes drastically between the negotiations and the actual implementation of the project.<sup>262</sup>

Another critical legislative change is that under section 43A, the right to negotiate can be replaced by alternative provisions under State or Territory schemes that need to be approved by the Commonwealth Minister and both Houses of Parliament. These schemes are able to operate in an area where native title has not been extinguished and is currently or has previously been subject to leases (including Aboriginal owned pastoral leases), or land reserved in some way, or in use, for a public or particular purpose (including national parks and Aboriginal reserves), or an area that is wholly within a town or city. This may leave the right to negotiate applying only to a very small percentage of Australia.<sup>263</sup>

Potential State/Territory regimes regulating native title may also be critical to the right to negotiate. Section 43A provides vague and minimum standards under which State and Territory governments must develop their own procedures. The development of inconsistent State and Territory responses has the potential to limit the ability of the NTA to offer protection to native titleholders.<sup>264</sup> One of the requirements that is set for the States and Territories is that registered claimants must receive notification of a future act that attracts the right to negotiate, and must be given the right to object within a specified period after the notification, however, there is no minimum time period that must be left open for an objection to be raised. Although the Federal Act stipulates that four months is available for native titleholders to secure registration and lodge an objection,<sup>265</sup> the State Acts have no obligation regarding timeframes. Should State legislative regimes enact limited time periods, such as the Northern Territory has done by stipulating 30 days, then native title holders may be forced down the path of blanket lodgement of applications in the expectation that they may otherwise be excluded from any

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261. *Id.* at 419.

262. *Id.*

263. Tilmouth, *supra* note 163, at 11.

264. *Id.* at 15.

265. NTAA (1998) § 30(a)-(b) (three months after the notification day in the case of a body corporate seeking registration as the claimant).

protection.<sup>266</sup> The alternative procedures of Section 43A also limit the scope of the State/Territory right to negotiate compared with the Commonwealth provisions because they replace the right to negotiate with a “duty to consult.” This duty does not necessarily involve good faith negotiations about whether the act can be done and, if so, on what terms,<sup>267</sup> including conditions dealing with profits, incomes or things produced,<sup>268</sup> or criteria for determination that include the development of social, cultural and economic structures and the freedom of access of native title holders to carry out cultural activities.<sup>269</sup>

Overall, the amendments have dramatically reduced and restricted the right to negotiate held by indigenous peoples under the original 1993 Act. In the leading judgement in *Mabo*, Justice Brennan (with Justices Toohey and McHugh in agreement) notes that native title has its origins in and is given its content by the traditional laws acknowledged by and traditional customs observed by the indigenous inhabitants of a territory.<sup>270</sup> Arguably, in accordance with this principle, the right to negotiate is an incident of common law native title. The right to negotiate acknowledges that indigenous peoples have an attachment to land which includes not only economic but also cultural and spiritual attachments.<sup>271</sup> The right to control access to, and activities taking place on, traditional estates is a consistent feature of Australian Indigenous law.<sup>272</sup> This was raised in *Miriuwung/Gajerrong*,<sup>273</sup> where the agreement between the State and the

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266. Tilmouth, *supra* note 163, at 12.

267. NTAA (1998) § 31; *see also* Tilmouth, *supra* note 163, at 12-13.

268. NTAA (1998) § 33.

269. *Id.* § 39.

270. *Mabo v. Queensland* [No 2] (1992) 175 C.L.R. 1, 58.

271. Michael Dodson, *Notes on the Commonwealth's (October) Amendments to the Native Title Amendment Bill 1996*, Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Fund, Submission No. 36B, Oct. 17, 1996, at 1. *See also* Neil Lofgren, *Compulsory Acquisition and the Right to Negotiate*, 25 NATIVE TITLE RESEARCH UNIT (Sept. 1998), available at <http://www.aiatsis.gov.au/ntpapers/IP25web.rtf>.

272. Michael Dodson, *Commonwealth's Proposed Amendments to the Native Title Act: Address to a Public Hearing*, Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Fund, Submission No. 36A, Oct. 4, 1996, at 1. *See also* Lofgren, *supra* note 271.

273. *Ward v. Western Australia* (1998) 159 A.L.R. 483, 577-80, commonly known as *Miriuwung/Gadjerrong*. At the Full Federal Court appeal, *Yanner v. Eaton* (1999) 168 A.L.R. 1, notwithstanding the terms of the agreement, the majority (Justices Beaumont and von Doussa) determined that “any native title rights must totally yield to the lessee’s rights (and obligations) under the agreement, the Ratifying Act, the Mining Act of 1978 and the mining lease itself. . .” and that all native title rights were extinguished.” *Western Australia v. Ward* (2000) 170 A.L.R. 159, 296, 299.



mining consortium permitted third parties, with the consent of the State, to have access to and to pass over the mining lease, so long as that access and passage did not unduly prejudice or interfere with the operations of the lessors under the agreement. The Trial Court found that, in effect, the agreement acknowledged the reservation of existing rights of access to, and passage over, the land subject to the exercise of those rights not unduly prejudicing or interfering with the mining operations of the lessor.

The right to negotiate, however, is not a special right which is given to indigenous people above the rights of other Australians. It is not a statutory right, but rather a compensatory right that results from the existence of native title *sui generis* at common law. Absent the right to negotiate, the constitutional requirement that property be acquired by the Crown only on "just terms"<sup>274</sup> would not be satisfied. The High Court has held that the constitutional guarantee of just terms encompasses procedural fairness,<sup>275</sup> traditionally reduced to the hearing rule and the rule against bias. In the context of procedural fairness, the right to negotiate flows from the requirement for a hearing.<sup>276</sup> In addition, fairness necessitates consideration of the interests of the community as well as the person whose property is acquired.<sup>277</sup> Native titleholders, in common with all members of the wider Australian community, possess a common law property right to negotiate with government prior to compulsory acquisition. Additionally, native title holders possess an Aboriginal right to negotiate which enjoys Constitutional protection in so far as just terms has been interpreted by the courts to include a requirement for procedural fairness in government decisions affecting proprietary interests.<sup>278</sup> Given all that has been said about the right to negotiate, the substantive erosion of native title rights that is achieved by the 1998 Amendments may be vulnerable to constitutional challenge as racially discriminatory and not in compliance with just terms compensation requirements.

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274. NTAA (1998) § 51(xxxi). (on native title as a common law Aboriginal right, susceptible to variation only on just terms). See also Lofgren, *supra* note 271.

275. *Nelungaloo Proprietary Ltd v. Commonwealth* (1948) 75 C.L.R. 495, 569; *Grace Bros. Proprietary Ltd. v. Commonwealth* (1946) 72 C.L.R. 269, 280. See also Lofgren, *supra* note 271, at 3.

276. Lofgren, *supra* note 271, at 3.

277. *Grace Bros. Proprietary Ltd.*, 72 C.L.R. at 280. See also Lofgren *supra* note 271, at 4.

278. THIRD MINORITY REPORT: NATIVE TITLE AMENDMENT BILL 1997, PARLIAMENTARY JOINT COMMITTEE ON NATIVE TITLE AND THE ABORIGINAL AND TORRES STRAIT ISLANDER LAND FUNDS at 109 (Oct. 1997). See also Lofgren, *supra* note 271, at 4.

### G. *Indigenous Land Use Agreements*

The changes to the NTA on “[i]ndigenous land use agreements (ILUA)”<sup>279</sup> are likely to be recognised as the most beneficial aspect of the amendments. An ILUA is a voluntary agreement concerning an area of land or water where native title has been determined to exist or where it is claimed to exist.<sup>280</sup> When registered, the agreement is legally binding on the parties<sup>281</sup> and on all persons holding native title following an open notification, objection and registration process.<sup>282</sup> The amendments regarding indigenous land use agreements address a major flaw in the original Act identified by indigenous groups.<sup>283</sup> Since agreements made under the 1993 Act were only binding upon parties who were signatories to the agreement, unknown or disputing native titleholders were not bound by the agreement, creating the potential to invalidate those agreements.

The ILUA provisions in the NTAA largely reflect a proposal put forward by the National Indigenous Working Group.<sup>284</sup> Three types of agreements are specified: first, body corporate<sup>285</sup> agreements involving

279. A general definition of the concept of land and resource agreements is provided by Donna Craig who refers to joint management as the sharing of control of an area by two or more different interest groups. A more specific description is by Alistair Harris who refers to modern day treaties between indigenous peoples and governments, covering areas of land and sea occupied by Aboriginal people. See Gary D. Meyers & Simone C. Muller, *An Overview of Indigenous Land (and Resources Agreements)*, in *THE WAY FORWARD: COLLABORATION AND COOPERATION 'IN COUNTRY' PROCEEDINGS OF THE INDIGENOUS LAND USE AGREEMENTS CONFERENCE 7-15* (Gary D. Meyers ed., 1996).

280. An Indigenous Land Use Agreement is defined under NTAA s24BA through s24BE (for body corporate agreements), s24CA to s24CE (for area agreements), and s24DA through s24DF (for alternative procedure agreements). An agreement is voluntarily agreed to by the parties and must relate to one or more of a series of matters, such as doing of future acts, changing the validation of an intermediate period act, the relationship between native title rights and interests and other rights and interests in relation to the area, or the manner of exercise of native title rights. *Id.* §§ 24BB, 24CB, 24DB. An agreement may cover a variety of issues, for example, providing health, education and justice services, management of conservation areas, access to fishing and hunting, control of resource development projects, compensation for past dispossession, land ownership, and protection of intellectual property rights. See Meyers & Muller, *supra* note 279.

281. NTAA (1998) § 24EA.

282. *Id.* §§ 24BG-24BI (for body corporate agreements); *Id.* §§ 24CG-24CL (for area agreements); *Id.* §§ 24DH-24DM (for alternative procedure agreements).

283. See Gary D. Meyers & Simone C. Muller, *An Overview of Indigenous Land (and Resources Agreements)*, *supra* note 279, at 7-15.

284. *Id.*

285. A “registered native title body corporate” is defined under the NTAA s253 as a body corporate whose name and address are registered on the National Native Title Register under s193(2)(d)(iii) or (iv).

areas where native title has been established and to which all of the registered native title bodies corporate must be a party and which can be about any matter that affects native title;<sup>286</sup> second, area agreements that can cover any matter that affects native title and to which all persons in the native title group must be a party;<sup>287</sup> and third, alternative procedure agreements which cannot extinguish native title and to which a representative body<sup>288</sup> or a native title body corporate, but not native title holders, must be a party.<sup>289</sup> The Commonwealth, State or Territory must be a party to the first two categories if the agreement provides for the extinguishment of native title.<sup>290</sup>

The amendments clarify that compensation can be included in an agreement<sup>291</sup> by allowing certain sorts of acts to be validated by agreement<sup>292</sup> (potentially invalid acts not covered by the definition of “intermediate period act” and “future acts”), and by extending the scope of indigenous land use agreements to cover the consequences of agreeing to an act that affects native title including validation (to allow for the possibility that an act agreed to under an indigenous land use agreement would not extinguish native title).<sup>293</sup> In addition, representative bodies must be informed of agreements being negotiated in their area to which they are not a party.<sup>294</sup> One commentator notes that the use of indigenous land use agreements may assist a landholder to conduct activities on the

286. *Id.* at subdivision B.

287. *Id.* at subdivision C.

288. A representative body is defined under NTAA s253 as a representative Aboriginal/Torres Strait Islander Body, which is a body that is the subject of a determination under s202(1), where the Commonwealth Minister may, in writing, determine that body is a representative Aboriginal/Torres Strait Islander body for an area specified in the determination if certain criteria are satisfied such as the body is broadly representative of the Aboriginal peoples or Torres Strait Islanders living in the area and the body satisfactorily performs its existing functions that is recognised under s203AD where the Commonwealth Minister may, by written instrument, recognise, as the representative body for an area, an eligible body that has applied under s203AB to be the representative body for an area if the Commonwealth Minister is satisfied that of certain criteria including that the body will satisfactorily represent persons who hold, or may hold, native title and will be able to consult effectively with Aboriginal peoples or Torres Strait Islanders living in the area.

289. *Id.* at subdivision D.

290. NTAA (1998) §§ 24BD(2), 24CD(5).

291. *Id.* § 24BB(ea) (for body corporate agreements); *Id.* § 24CB(ea) (for area agreements); *Id.* § 24DB(ea) (for alternative procedure agreements).

292. *Id.* § 24EBA.

293. *Id.* § 24EB(1)-(3).

294. *Id.* §§ 24BD(4), 24CD(7).

land which are inconsistent with native title or to upgrade his or her interest in the land.<sup>295</sup> Similarly, the exercise of native title rights or interests on land where other people have legal rights could be facilitated from a negotiated ILUA as a result of the potential flexibility in their content and the legal certainty of an agreement following its registration.<sup>296</sup>

The indigenous land use agreements provisions provide legal certainty. They are legally enforceable and they can cover any matters relating to native title including compensation, procedural rights that may apply instead of the right to negotiate, the manner of exercise of native title and non-native title rights and interests, the surrender of native title, or the permitting of acts that would otherwise be unlawful under the NTA such as granting non-exclusive leases on vacant Crown land.<sup>297</sup> Governments can also use an ILUA to validate grants of interests of land that have issued invalidly.

The indigenous land use agreements have been described as new tools for making native title agreements that may provide a path to certainty and security.<sup>298</sup> As Neate observes, parliaments and courts can only ever address the broad issues or legal principles—they are not in a position to settle the localised, daily issues of living side by side.<sup>299</sup> As both *Wik* and *Miriuwung/Gajerrong* demonstrate, when there is a contested court case about native title involving a pastoral lease and the native title is recognised to co-exist, the decision will have no practical effect on the lessee's rights.<sup>300</sup> The pastoralists and the native titleholders will have to work out how the co-existence will operate on the ground so rules about gates, fencing, hunting, camping, mustering or ceremonial business, who can visit the land, and what happens if the rules are broken or if there is a dispute, will still need to be negotiated. These matters can be addressed after a court case or alternatively they can be settled in negotiated agreements about the management of co-existing rights at the same time as parties negotiate about an agreed recognition of native title. Even where the Federal Court makes a determination pursuant to section 225 of the Act in circumstances where native title is held to exist and other legal rights exist, it is apparent that the Court cannot resolve the numerous

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295. *Id.* § 24EB(1)-(3).

296. NTAA (1998) §24EB(1)-(3).

297. *Id.*

298. Graeme Neate, *Indigenous Land Use Agreements – What Certainty for Pastoralists?* Paper presented at the 69th Annual Conference of the Pastoralists and Graziers' Association of WA (Feb. 24, 1999).

299. Neate, *supra* note 181.

300. French, *supra* note 94.

practical issues which must be addressed.<sup>301</sup> This was illustrated in the *Miriuwung/Gajerrong* case where the judgement determined that how concurrent rights are to be exercised in a practical way in respect to a determination area must be resolved by negotiation between the parties concerned, perhaps assisted by mediation.<sup>302</sup>

Negotiated indigenous land use agreements may be the best way to establish lasting arrangements which recognise native title rights while also protecting the rights and interests of other parties. Many companies, large and small, accept that "negotiation with registered native title claimants is the way to have tenements granted, in order to get mines into production."<sup>303</sup> For example, the potential benefit of negotiated agreements is evident in the Century Zinc mining project in Queensland, where protracted and initially unsuccessful negotiations with the traditional owners finally culminated in an agreement. The terms included \$5.6 million for Government initiatives, \$1.8 million over three years for a social impact study, \$3 million for the development of an outstation, \$2 million over two years for training and education, \$250,000 for programs based on sport and \$15.5 million to upgrade a road and bridge, transfer of land and support for a tourist centre related to fossil deposits.<sup>304</sup> The list of benefits demonstrates the complexity and diversity in dealing with matters in local and regional agreements.

Negotiated ILUAs are "an opportunity for economic certainty and cultural protection at the local or regional level and allow developments to proceed by negotiation without waiting for finalisation of native title applications."<sup>305</sup> In order to resolve an application for the determination of native title, the courts and likely parties can save a great deal in time and resources through negotiation and agreement rather than finding an outcome through judicial determination. Perhaps more importantly, if there is a negotiated agreement, the persons interested in the determina-

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301. Neate, *supra* note 181.

302. *Ward v. Western Australia* (1998) 159 A.L.R. 483, 639 (commonly known as *Miriuwung/Gadjerrong*); see also Neate, *supra* note 181.

303. Allan Padgett, *Native Title - Negotiations, Agreements, Opportunities*, in *IN THE WAKE OF WIK: OLD DILEMMAS; NEW DIRECTIONS IN NATIVE TITLE LAW*, *supra* note 26, at 362, 370; see generally Patricia Lane & Tony McRae, *Sustainable Partnerships*, in *IN THE WAKE OF WIK: OLD DILEMMAS; NEW DIRECTIONS IN NATIVE TITLE LAW*, *supra* note 26, at 412-26.

304. Padgett, *supra* note 303, at 373-374; Lane & McRae, *supra* note 303, at 414.

305. Strelein, *supra* note 71, at 8. Justice Robert French described the agreements in this way when speaking at a conference on Indigenous Land Use Agreements in Kalgoorlie, WA, on December 1, 1998.

tion of the issues are thereby enabled to “establish an amicable relationship between future neighbouring occupiers.”<sup>306</sup>

#### IV. STATE RESPONSES TO THE AMENDED NATIVE TITLE ACT

##### A. Commonwealth Provisions for State-Based Procedures

*Mabo* established that the States have always had the right to extinguish native title, although this right is subject to Commonwealth laws. Accordingly, the RDA limits the rights of the States to reduce or extinguish native title, and the NTA provides a protective framework to which the States must adhere to.<sup>307</sup>

Under the original Act, the States were authorised to validate “past acts” since the commencement of the RDA in 1975 which might otherwise have been invalid due to the existence of native title.<sup>308</sup> The 1993 Act also authorised the States to confirm various existing Crown and public rights, and to set up their own infrastructure to decide applications for determinations of native title.<sup>309</sup> Significantly, the original NTA did not prevent the States from setting up their own native title tribunals. It allowed a recognised State or Territory body to play a parallel role to the NNTT and the Federal Court in making determinations of native title and compensation, as well as have an “arbitral” role in determining whether future acts affecting native title (e.g., mining activity) should proceed in the absence of negotiated agreement. With respect to that arbitral function, a recognised State or Territory body had the sole right to decide. With respect to determination of a native title and/or compensation, indigenous applicants were able to choose between the relevant State or Territory body and the NNTT.<sup>310</sup> It seemed that there was little advantage for a State to establish State based procedures, and only South Australia did so.<sup>311</sup>

The 1998 amendments to the NTA have a major effect on the complementary role of the States and Territories. State politicians have always

306. *North Ganalanja Aboriginal Corp. v. Queensland* (1996) 185 C.L.R. 595, 617; 135 A.L.R. 225, 236; *see also* *Fejo v. Northern Territory* 156 A.L.R. 721, 742-45; *see also* Neate, *supra* note 181.

307. Garth Nettheim, *Native Title and the States*, INDIGENOUS L. BULL., Aug./Sept. 1998, at 20.

308. *Id.*

309. *Id.*

310. *Native Title: State and Territory Legislation*, 1 AUSTL. INDIGENOUS L. REP. 53 (1996).

311. Nettheim, *supra* note 307.

considered that “land management is a State prerogative,”<sup>312</sup> and this notion has been overtly adopted under the amendments. Some of the responsibility of managing native title is regained by the States and Territories who are now empowered to determine their own system of handling native title claims and future acts. The amendments also incorporate a potential restraint on State and Territory powers. Once passed at the State and Territory level, any legislation must go before the Commonwealth Senate, which has the power to disallow the legislation.<sup>313</sup>

Specifically, the amended Act retains, with some modifications, the original section 43 provisions which authorise States to provide alternative procedures for future acts to which the right to negotiate applies. This enables the States and Territories to enact their own legislative schemes for determining an application for native title. As amended, there must be approval in writing from the Commonwealth Minister that the alternative provisions ensure certain procedures are in place.<sup>314</sup> The legislation must, in the opinion of the Commonwealth Minister, satisfy requirements including appropriate procedures for notification,<sup>315</sup> a requirement that negotiation between parties be in good faith,<sup>316</sup> a right for native title claimants to object to the act<sup>317</sup> (although an objection can be overruled on the grounds of State, Territory or national interest),<sup>318</sup> and provisions for appropriate compensation.<sup>319</sup>

The new section 43A also authorises the States and Territories to set up legislative schemes to replace the right to negotiate on pastoral leases and reserved land or waters, and these schemes must contain some, but not all, of the procedural rights of the prior right to negotiate process. Such State or Territory legislation applies to an “alternative provision area,” which is defined as land or waters involving an area of freehold or leasehold, other than a mining lease, where native title has not been extinguished, or an area that is, or was, set aside or in use for public purposes, or an area of land or waters that is wholly within a town or a city.<sup>320</sup> To take effect, the Commonwealth Minister must determine that the provisions comply with certain notification procedures,<sup>321</sup> which include

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312. *Id.*

313. NTAA (1998) § 214.

314. NTA (1993) § 43(1)-(2).

315. *Id.* § 43(2)(a).

316. *Id.* § 43(2)(b).

317. *Id.* § 43(2)(d).

318. *Id.* § 43(2)(i).

319. *Id.* § 43(2)(j).

320. NTA (1993) § 43A(2).

321. *Id.* §§ 43A(1)(b), 43A(3), 43A(4).

giving “any claimant or body corporate the right to object, within a specified period after notification, to the doing of the act so far as it affects their registered native title rights and interests.”<sup>322</sup> The provisions must also “provide for consultation between any claimants, and bodies corporate, who object; and the State or Territory; about ways of minimising the act’s impact on registered native title rights and interests” where the act deals with certain types of compulsory acquisitions,<sup>323</sup> and in other cases, provide for consultation between the claimants and the person wishing to do the act.<sup>324</sup> The provisions must also provide for an independent person or body to hear any objection,<sup>325</sup> although where an objection is upheld, that determination may be overruled by the Minister of the State or Territory, where it is in the interests of the State or Territory not to comply with the determination.<sup>326</sup>

The new section 43A emerged from the “Howard-Harradine Agreement” and imposes certain aspects of the right to negotiate, for example, upon a mining proposal over land “which is or was covered by a pastoral lease . . . or was reserved for a public purpose such as a national park.”<sup>327</sup> However, section 43A also authorises the Commonwealth Minister to endorse an alternative procedures regime “as complying with the Act if the Minister is of the opinion that” the State or Territory law makes provision for compensating native title holders<sup>328</sup> and in addition provides for the preservation and protection of significant areas or sites.<sup>329</sup> The practical application of these amendments means that there is now a focus on compensation and cultural heritage issues in the regulations governing the States’ capacity to implement legislation applicable to the right to negotiate.<sup>330</sup> In contrast, the full right to negotiate process under the Commonwealth system covers “a wider range of issues such as social impact, environmental protection or socio-economic matters.”<sup>331</sup> The

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322. *Id.* § 43A(4)(b).

323. *Id.* § 43A(4)(c).

324. *Id.* § 43A(4)(d).

325. *Id.* § 43A(4)(e).

326. NTA (1993) §43A(4)(g). Section 43A(5) defines “in the interests of the State or Territory” to include “for the social or economic benefit of the State or the Territory (including of Aboriginal peoples or Torres Strait Islanders) and in the interests of the relevant region or locality in the State or the Territory.”

327. Nettheim, *supra* note 307.

328. NTA (1993) § 43A(6).

329. *Id.* § 43A(7).

330. Nettheim, *supra* note 307.

331. *Id.*



amended procedures thus fall short of giving indigenous peoples a real say regarding development on lands where they have native title.<sup>332</sup>

Essentially, the State and Territories have acquired a much-expanded role under the amendments and can now establish equivalent bodies to take over part or all of the work of the NNNT.<sup>333</sup> While the States are not obliged to set up their own procedures and may elect to operate under the processes of the Commonwealth Act, potentially, the alternative procedure amendments give States the capacity to narrow native title claim rights. How the State and Territory procedures will take effect depends upon what schemes are actually implemented, and this will ultimately depend on State and Territory attitudes to native title in terms of land administration versus human rights.<sup>334</sup> While these two perspectives are not necessarily incompatible, when combined in negotiated framework to bring people together as opposed to dividing them, the States and Territories have a generally poor record of protecting Aboriginal rights.

## B. *The States Respond*

### 1. Western Australia

The first State to attempt to establish a state-based-system for dealing with native title issues was WA. Prior to the original NTA, WA enacted the Land (Titles and Traditional Usage) Act of 1993 (WA) which abolished native title and substituted statutory rights of traditional usage, which were subordinated to most other interests in land.<sup>335</sup> In challenges by Aboriginal peoples, the High Court eventually held that the WA Act was totally invalid for inconsistency with the Racial Discrimination Act and the NTA.<sup>336</sup> "Thereafter, the [Government] enacted the Titles Validation Act of 1995 (WA), with the limited agenda of validating past acts attributable to the State in accordance with the NTA provisions. It also confirm[ed] existing Crown ownership of natural resources, etc., and public access to beaches, waterways, etc."<sup>337</sup>

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332. *Id.*

333. Neate, *supra* note 181.

334. Nettheim, *supra* note 307, at 20.

335. See Meredith Wilkie & Gary D. Meyers, *Western Australia's Land (Titles and Traditional Usage) Act 1993: Content, Conflicts, and Challenges*, 24 U. W. AUSTL. L. REV. 31-50 (1994).

336. See generally *Western Australia v. Commonwealth* (1995) 128 A.L.R. 1; see also *Native Title: State and Territory Legislation*, *supra* note 310, at 60.

337. *Native Title: State and Territory Legislation*, *supra* note 310, at 60

Following the amendment of the NTA in 1998, the WA Government proposed three bills on native title, constituting a comprehensive State response which adopts in total the amendments of the Commonwealth legislation.<sup>338</sup> The bills were introduced in October 1998, and successfully passed through the Lower House of Parliament. However, the opposition parties comprising Labor, the Greens and the Democrats hold the balance of power in the Upper House (the Legislative Council) and passage of the bills was subsequently blocked in the Legislative Council. At the close of 1998 the opposition referred the bills to a Parliamentary Committee<sup>339</sup> for review, putting them temporarily on hold. The major outcome of the Committee was a recommendation that the evidence included in the Committee's Report be considered during the debate of the bills in the House.<sup>340</sup> The native title bills were then blocked for a second time in the Legislative Council in February 1999, when the State Labor Opposition proposed amendments to alter the list of tenures confirming extinguishment to exclude historical leases, and to upgrade the proposed Aboriginal consultation rights over pastoral leasehold to a right to negotiate.<sup>341</sup> These proposals included a requirement that parties to a dispute should consult with a view to reaching an agreement and should consult in good faith. In contrast, the Government wanted consultation over pastoral leases limited to the mere negotiation of ways to minimise the impact of the development on native title claimants<sup>342</sup> and objected that the opposition amendments would add a further 12.5 percent to the State's land area that is subject to the right to negotiate over future mining activity.<sup>343</sup> Eventually, the WA Government made some concession to Labor's proposed changes, agreeing to the requirement that consultation with native title

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338. Anne De Soyza, *Proposed Native Title Legislation in Western Australia*, INDIGENOUS L. BULL., Dec. 1998/Jan. 1999, at 9.

339. The Select Committee on Native Title Rights in Western Australia was chaired by the Hon. Tom Stephens, MLC and required to report by December 10, 1998.

340. This was the only "Conclusion and Recommendation" of the Report by the Select Committee on Native Title Rights in Western Australia at 132. Part 2A validates intermediate period acts as defined under the Commonwealth Native Title Act. Part 2B confirms the extinguishing effect on native title by certain valid or validated acts such as previous exclusive possession acts as defined under the Native Title Act that are attributable to the State including freehold and leases other than mining leases that confer exclusive possession.

341. Chip Le Grand, *Premier in Bipartisan Switch on Native Title*, THE AUSTL., Jan. 13, 1999, at 6; see also Chip Le Grand, *Labor in Secret Bid to Native Title Deal*, THE AUSTL., Feb. 26, 1999, at 6.

342. Roger Martin, *Land Compromise Tipped*, THE W. AUSTL., Dec. 7, 1998, at 9.

343. Anne Burns & Paul Lampathakis, *It's Back to the Drawing Board*, THE W. AUSTL., Dec. 24, 1998, at 7.

claimants be conducted in good faith.<sup>344</sup> As a result, the legislation was finally passed by the Legislative Council in December 1999, with the adoption of a series of amendments proposed by a new Independent Member of Parliament, whose support was necessary to secure passage through the Upper House.<sup>345</sup>

The first of the three pieces of legislation, the Titles Validation Amendment Act of 1998 (WA), was finally accepted by the Legislative Council<sup>346</sup> in April 1999. The purpose of this Act is to validate certain titles to land and waters which were granted in the "intermediate period" and to confirm the effect on native title of previous land grants and public works.<sup>347</sup> The Act seeks to provide maximum certainty to people to whom titles were granted. It amends the Titles Validation Act of 1995 (WA) in order to validate intermediate period acts between 1994 and 1996, adopts the schedule of extinguishing tenures relevant to Western Australia included in the amended NTA, and confirms the extinguishment of native title to the extent of its inconsistency with past valid or validated acts. Critically, the Act gives rise to the validation of about 9000 titles<sup>348</sup> granted on pastoral leases prior to March 1995 pursuant to the Land (Titles and Traditional Usage) Act of 1993 (WA) that was struck down by the High Court in *WA v. The Commonwealth*. It also validates about 210 mining titles granted since March 1995 outside the future act processes of the NTA.

The trial and appellate court decisions in *Miriuwung/Gajerrong*<sup>349</sup> had important implications for the development of the Western Australian

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344. Julie Butler, *State Native Title Regime Gets Closer*, THE W. AUSTL., Nov. 27, 1999, at 87.

345. Mark Nevill was elected as an Independent Member of Parliament after resigning from the Labor party in August 1999. See R. Martin, *Native Title in Democrats' Hands*, THE AUSTL., Sept. 6, 1999, at 7.

346. Accepted after debate by the Upper House of Parliament, the Legislative Council, on March 25, 1999.

347. The Second Reading Speech by the Hon. Premier Richard Court for the Titles Validation Amendment Bill of 1998, read on November 17, 1998.

348. See THE FIN. REV., Apr. 22, 1999, at 4, cited in NATIVE TITLE NEWSLETTER, Mar./Apr. 1999, at 20.

349. *Ward v. Western Australia* (1998) 159 A.L.R. 483 (i.e., *Miriuwung/Gadjerrong*). The case covered several different types of Crown leases (including pastoral leasehold and mining) and other interests. At trial, the Justice Lee in the Federal Court found that native title survives some acts which the State had assumed would extinguish native title and which the Commonwealth had also made to extinguish under the amendments to the Native Title Act. Lee recognised substantial native title rights, including rights to possess and occupy the land, control access to land, the right to trade in resources on the land, and the right to control the use and enjoyment of the land and its resources. Native title was

legislation. Wherever the legislation works to extinguish native title over pastoral leases and other areas of land where native title would otherwise exist at common law, the native titleholders will be eligible to claim compensation, placing a risk of financial burden upon the State.<sup>350</sup> Following the determination by the Federal Trial Court, the original Titles Validation Amendment Bill of 1998 (WA) did not merely confirm the extinguishing effect of exclusive and non-exclusive tenures on native title as was originally proposed.<sup>351</sup> When this bill was blocked in the Legislative Council, the Labor Opposition put forward amendments seeking to reduce the schedule of extinguishing tenures to conditional purchase, perpetual and residential leases because *Miriuwung/Gajerrong* at trial established that native title actually survives many of the tenures that the Government had included in the bill. A compromise was eventually negotiated between the Government and the Opposition and the bill was amended to reduce the Government's proposed extinguishment of native title on 500 different types of leases while still allowing extinguishment on residential or commercial leases and on exclusive possession leases.<sup>352</sup> "The Labor party amendments that prevent blanket extinguishment of native title over about 1300 disputed leases on crown land covering [about] . . . 0.01 percent of the State," including "so-called historical leases which have now lapsed and miscellaneous leases such as those allowing grazing as opposed to pastoral rights over crown land."<sup>353</sup> Following the subsequent appeal decision, holding that pastoral and mining leases partially extinguish native title and public works wholly extinguish native title, the State Government undertook to process mining applications quickly in line with that decision, without going through the native title processes, if the proponent demonstrated that native title is extinguished according to the reasoning of the appellate decision.<sup>354</sup>

The second piece of Western Australian legislation on native title, the Native Title (State Provisions) Bill of 1998, proposes a Native Title Commission for Western Australia which will become the "recognised

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found to exist however with some exceptions. Roads, public reserves, power and telephone stations and some agricultural land, are areas that extinguish native title rights. For a brief case review, see Australian Institute of Aboriginal and Torres Strait Islander Studies, *supra* note 69.

350. Roger Martin, *Land Bill Turns Into Title Bout*, THE W. AUSTL., Dec. 18, 1998, at 8.

351. De Soyza, *supra* note 338, at 9.

352. Mark Mallabone, *Challenge for Native Title Tilt*, THE W. AUSTL., Dec. 12, 1998, at 30.

353. Mark Mallabone & Anne Burns, *Labor Wins Lease Battle*, THE W. AUSTL., Apr. 21, 1999, at 4.

354. Colleen Egan, *Mining Speed-up Act of Bastardy*, THE AUSTL., June 19, 2000, at 10; Julie Butler, *Native Title Move Rapped*, THE W. AUSTL., June 21, 2000, at 13.

equivalent body” to mediate and determine native title claims and handle the future act process.<sup>355</sup> It will set up a new state system for registering native title claims, through which the Government hopes to reduce the number of claims, the size of claims, and the rights being claimed. In addition, it intends to establish alternative procedures to the federal right to negotiate provisions, and to put in place consultative procedures in relation to acts involving the grant of infrastructure titles, certain lease renewals and compulsory acquisitions within towns and cities. Indigenous claimants will lose the right to negotiate over mining on pastoral leases where the right will be replaced with procedural rights as held by other stakeholders.<sup>356</sup> The bill also provides for the determination of compensation when native title is affected by future acts.<sup>357</sup>

As it currently stands, part seven of the Native Title (State Provisions) Bill establishes the Native Title Commission of Western Australia as the State’s recognised body.<sup>358</sup> The Commission will carry out functions that would otherwise be performed by the NNTT as well as functions associated with maintenance of the Native Title Register. As required by 207B(4)(b) of the NTA, the Commission must be fair, just, informal, accessible and expeditious in performing its functions or exercising its powers.<sup>359</sup> Section 7.3(2) of the bill allocates the Native Title Commission a discretionary power to take into account the cultural and customary concerns of Aboriginal peoples, but not so as to prejudice unduly any party to any proceedings. With a discretionary power and no mandatory obligation, conceivably, the customary and cultural concerns of indigenous peoples may not be afforded due weight in the deliberations of the Commission.

In *Delgamuukw v. British Columbia*,<sup>360</sup> the Canadian Supreme Court notes that native title claims raise inherent evidentiary difficulties and that such cases require a unique approach that accords due weight on an equal footing with other historical evidence. Where customary and cultural concerns of indigenous peoples are not taken properly into account, the only redress open to Aboriginal peoples under the bill may be to

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355. NTAA (1998) §§ 207A, 207B.

356. See Australian Institute of Aboriginal and Torres Strait Islander Studies, *Amendments*, NATIVE TITLE NEWSLETTER, June/July 1998, at 13.

357. De Soyza, *supra* note 338, at 9.

358. NTAA (1998) § 207B.

359. Native Title (State Provisions) Bill, § 7.3(1) (1998) (W. Austl.).

360. *Delgamuukw v. British Columbia*, [1998] 1 C.N.L.R. 1. See also Lisa Strelein, 'Beliefs, Feelings and Justice' *Delgamuukw v. British Columbia: A Judicial Consideration of Indigenous Peoples' Rights in Canada*, 22 NATIVE TITLE RESEARCH UNIT 3-4 (Apr. 1998), available at <http://www.aiatsis.gov.au/ntpapers/fp22web.rtf>.

demonstrate a lack of procedural fairness.<sup>361</sup> This position may be adverse to the rights of indigenous parties when it is considered that one of the objectives of the legislative regime established by the NTA, as stated in the Preamble, is to protect native title.<sup>362</sup>

Part three of the bill addresses the need for consultation procedures<sup>363</sup> regarding future acts which relate to land or waters that are alternative provision areas.<sup>364</sup> Notification by the proponent is required<sup>365</sup> and objections must be lodged within three months. Parties are required to consult about minimising the impact of the act on native title rights and interests, including access to land and waters or the way in which anything authorised by the act may be done, as appropriate, and the Commission may mediate this process if requested to do so by the consulting parties.<sup>366</sup> The Commission must take all reasonable steps to make a determination about whether or not the future act should be done within four months of notification.<sup>367</sup> "In making a determination, the Commission must take into account" the impact of the act on registered native title rights and interests in relation to the land or waters concerned and must consider "questions of access and the way in which any thing authorised by the act may be done."<sup>368</sup> Division six enables the responsible State Minister to overrule a determination of the Commission where it is in the interests of the State to do so. The interests of the State are defined as including activity for the social or economic benefit of the State (including of Aboriginal peoples) and in the interests of the relevant region or locality in the State.<sup>369</sup> This discretionary power is broad and would clearly enable the Minister to sanction an act on the ground that it is in the economic interests of the State or of a particular locality in the State.<sup>370</sup>

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361. Pertinent to judicial review of a Native Title Commission decision is the facilitatory requirement of s7.34(1) of the Native Title (State Provisions) Bill that the determinations of the Commission be made in writing, and must state any findings of fact on which a determination is based.

362. GARY D. MEYERS, THE NATIVE TITLE (STATE PROVISIONS) BILL 1998 (WA): A REVIEW OF THE PROPOSED NATIVE TITLE COMMISSION, CONSULTANCY REPORT TO THE NATIONAL INDIGENOUS WORKING GROUP (Oct. 5, 1998).

363. In accordance with s43A of the NTA (1993).

364. Native Title (State Provisions) Bill § 7.34(1) (1998) (W. Austl.).

365. *See id.* Part 3, Division 3.

366. *See id.* Part 3, Division 4.

367. *Id.* §§ 3.32, 3.34.

368. *Id.* § 3.35.

369. *Id.* §§ 3.42-43, 3.45.

370. MEYERS, *supra* note 362.

Like the Titles Validation Bill, the Native Title (State Provisions) Bill has been the subject of controversial amendment and political disagreement.<sup>371</sup> To secure passage of the bill through the Upper House at the close of 1999, 14 amendments were necessary.<sup>372</sup> These include that the right to consult be replaced with a stronger right to negotiate over pastoral leases which expired within two years of being granted (so-called historic pastoral leases). In general, the other amendments attempt to expedite dispute resolution by giving proponents and objectors earlier notice of their claims and permitting them to bypass the commission in striking compensation deals.<sup>373</sup> In addition, amendments require Ministerial determinations to be tabled in Parliament, although opposition parties would not have the power of veto.

The third component of the WA legislative response is the Acts Amendment (Land Administration, Mining and Petroleum) Bill of 1998. This bill seeks to amend the Land Administration Act of 1997 (WA), the Mining Act of 1978 (WA) and the Petroleum (Submerged Lands) Act of 1982 (WA) to ensure their consistency with the NTA and the Native Title (State Provisions) Bill.<sup>374</sup> Following acceptance of the State Provisions Bill, the Acts Amendment (Land Administration, Mining and Petroleum) Bill was passed without difficulty.

Subsequent approval of the legislation by the Federal Senate may not necessarily be smooth. While the legislation has been approved by the Commonwealth Attorney General,<sup>375</sup> the Western Australian Native Title Working Group has suggested that the State Government will not get its native title legislation through the Federal Parliament because the Australian Democrats, who hold the balance of power in the Senate, have indicated that they would not support State legislation that has not been accepted by Aboriginal groups.<sup>376</sup>

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371. Anne Burns & Paul Lampathakis, *It's Back to the Drawing Board*, THE W. AUSTL., Dec. 24, 1998 at 7; see also Anne Burns, *Court Wages War by Other Means*, THE W. AUSTL., Dec. 24, 1998, at 6.

372. Mark Mallbone, *Nevill Plan Gives Aborigines More Rights*, THE W. AUSTL., Dec. 8, 1999, at 12.

373. *Id.*

374. De Soyza, *supra* note 338, at 9.

375. Mark Mallbone, *WA Clears Native Title Hurdle*, THE W. AUSTL., July 19, 2000, at 6.

376. *News from the Native Title Research Unit: Western Australia*, NATIVE TITLE NEWSLETTER May/June 1999, at 7. See also *Premier to Take Title to Election*, THE AUSTL., Mar. 6, 2000, at 9.

## 2. Other State Responses

Queensland passed the Native Title (Queensland) State Provisions Bill (No. 2) 1998 (in November 1998).<sup>377</sup> The bill provides that the right to negotiate is lost over low impact mining and exploration acts. Negotiation time for other projects is restricted to a 12-month period, with six months for high-impact exploration. A Land and Resources Tribunal will manage negotiations and the right to negotiate will remain in respect to pastoral leases, although the effect on the economy must be considered.<sup>378</sup> In May 2000, the Labor Party's federal leadership resolved to vote against the Queensland proposal when it came before the Senate.<sup>379</sup> Although in June, Labor MPs had not yet formally given support to the leadership's decision, the Australian Democrats had vowed to oppose it before the Senate, giving Labor MPs' vote a critical significance.<sup>380</sup>

On the last day of August 2000, the Queensland legislative package was substantially approved by the Senate. Reversing its earlier position, the Parliamentary Labor Opposition supported the Queensland legislation on the basis of a promise to remedy some of the more egregious provisions in the legislation.<sup>381</sup> The Labor reversal caused considerable controversy. The then shadow minister for Aboriginal Affairs resigned in protest at his party's decision and indigenous leaders declared that the Labor leaders "had blood on their hands."<sup>382</sup>

The Northern Territory passed legislation to validate acts in accordance with the Native Title Amendment Act, and also to change the right to negotiate regime to a right to consultation, and to establish a Lands and Mining Tribunal to administer the Act. Mediation of claims will remain a role of the NNTT.<sup>383</sup> This legislation was criticised for being passed with virtually no consultation.<sup>384</sup> Concerns were also raised about the tight time

377. Paul Burke, *The Native Title Outcome: Takes Shapes in Queensland*, INDIGENOUS L. BULL., Dec. 1998/Jan. 1999, at 11.

378. Australian Institute of Aboriginal and Torres Strait Islander Studies, *Amendments: Queensland*, NATIVE TITLE NEWSLETTER, Oct./Nov. 1998, at 11.

379. Ian Henderson, *Beazley Ready to Sink Beattie's Native Title Plan*, THE WEEKEND AUSTRALIAN, May 6-7, 2000, at 10.

380. *Queensland Native Title Plan Closer*, THE W. AUSTRALIAN, June 2, 2000, at 4.

381. See Ian Henderson, *Senate Set to Reject Beattie's Mine Laws*, THE AUSTRALIAN, Aug. 23, 2000, at 2; Michael McKenna & Matthew Franklin, *Native Title Compromise Splits Labor*, THE COURIER MAIL, Aug. 31, 2000, at 1.

382. McKenna & Franklin, *supra* note 381.

383. Australian Institute of Aboriginal and Torres Strait Islander Studies, *supra* note 378, at 13.

384. Paul Burke, *Update: The Native Title Amendment Act 1998*, INDIGENOUS L. BULL., Oct. 1998, at 16.



frames, limitations on judicial review and a time limit on compensation claims.<sup>385</sup> In mid-1999, it was suggested that Senator Harradine might vote to disallow the Territory legislation when it came before the Senate, although discussions ensued between stakeholders including the Northern Territory Government, the Central Land Council and the Northern Land Council.<sup>386</sup> This proved to be the case when Senator Harradine combined with Senator Brown (Greens) to side with Labour and the Democrats to disallow the Northern Territory Act on August 31, 1999.<sup>387</sup> Criticisms were also made that the Commonwealth legislation is flawed because it does not give the Senate ongoing power to scrutinise State and Territory-based legislation, leaving the way open for the diminishing of Aboriginal rights to negotiate once approval has been given.<sup>388</sup> To date, no further action has been taken in regard to the Northern Territory legislation.

New South Wales passed the Native Title Amendment Act of 1998 (NSW) in September 1998, to confirm titles granted over pastoral leases between the proclamation of the NTA and the High Court's *Wik* decision.<sup>389</sup> The legislation extinguishes native title in eastern and central New South Wales on all freehold, residential leases, commercial leases and leases for community purposes. It is left to the Courts to determine whether native title can co-exist in the State's west and no provision is made for a state-based-tribunal. The legislation does not address the issue of an alternative State scheme for the Right to Negotiate.<sup>390</sup> Victoria has introduced similar legislation into Parliament as the Land Titles Validation (Amendment) Bill which follows the Commonwealth's NTA and does not provide for a State based tribunal.<sup>391</sup> Finally, the Australian Capital Territory (ACT) has tabled the Native Title Amendment Bill of 1999 in the ACT Legislative Assembly; but debate on the bill has been deferred. The bill seeks to enact the validation and extinguishment provisions of the Native Title Amendment Act of 1998, particularly the NSW list of extinguishing tenures in the Commonwealth Act that relate to the Act.<sup>392</sup>

In sum, the States/Territories have, as usual, attempted to further restrict native title within their jurisdictions. Arguably, the current Commonwealth Government had this purpose in mind when it passed the

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385. *Id.*

386. *Amendments: Queensland, supra* note 378, at 13.

387. Megan Saunders & Dennis Shanahan, *PM Turns to Native Title for Next Balancing Act*, THE AUSTL., Sept. 1, 1999, at 2.

388. *Id.*

389. *Amendments: Queensland, supra* note 378, at 11.

390. Burke, *supra* note 384, at 17.

391. *Amendments: Queensland, supra* note 378, at 11.

392. *Id.*

NTAA in the form it did, which allowed the conservative Coalition parties to avoid responsibility for State/Territory actions which further dispossess Indigenous Australians from their land. The Government may, however, not get its way as long as the Senate is controlled by opposition parties. Soon after the Senate's rejection of the Northern Territory legislation, a proposal was mooted by the Prime Minister about possible changes to the NTA that would allow the Senate more power of review in return for a promise not to reject State native title systems outright.<sup>393</sup> As yet, however, that proposal has not been taken any further. Until it is, indigenous people remain vulnerable to State and Territory governments seeking to exploit the NTAA to their economic and political advantage. However, until the current Commonwealth Government responds to these concerns, the Senate is not likely to accept any State/Territory legislation.

#### V. DISCRIMINATION AND NATIVE TITLE

From the outset, the reaction of state governments and industry to the concept of native title was generally hostile. Media reports note that both sought to deny native title and to subordinate it to all other titles and development, and even to assert that recognition of native title and the NTA were racist and discriminatory.<sup>394</sup> In 1993, the mining industry actively campaigned against the Commonwealth NTA with an aggressive approach that intimated that native title promoted inequality. One advertisement included the declaration that: "the Australian Mining Industry is not opposed to Aborigines being granted titles . . . [b]ut we believe that all Australians should have the same rights over these titles. The Australian Mining Industry supports the same land rights for all Australians."<sup>395</sup> The advertisement essentially asserted that native title promoted inequality.<sup>396</sup> Similarly, a state mining industry campaign against the NTA used the heading "*Mabo: Protect Your Children's Future*" and urged that "all Australians must be equal," and rejected "special rights and privileges based on race" and called for the restoration of the "principle of

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393. Karen Middleton, *Howard Faces Revolt Over Native Title*, THE W. AUSTRALIAN, Sept. 1, 1999, at 4.

394. MEYERS & MULLER, *supra* note 7. See also Bartlett, *supra* note 38, at 111-112.

395. *Advertisement: Is This Really One Australia for All Australians?* THE W. AUSTRALIAN, Aug. 14, 1993, at 7.

396. *Id.*

equality.”<sup>397</sup> This attitude from industry helped to shape the legislative response of the Commonwealth government to native title.<sup>398</sup>

Social justice is inherently linked with issues relating to native title. Themes of social justice are raised in the Preamble of the NTA where the law of native title is characterised as a “special measure.” The term special has two distinct roots in Australian legal history and both are important to appreciating the status accorded to native title.

One of the roots is located in the RDA and interpretations of ICERD provisions by the United Nations Committee on the Elimination of Racial Discrimination (UNCERD).<sup>399</sup> According to UNCERD, special measures are taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary to ensure that these groups or individuals enjoy or exercise their human rights and fundamental freedoms. These special measures which promote particular groups rights are not deemed racially discriminatory provided that the measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups, and are not continued after the objectives for which they were made have been achieved.<sup>400</sup>

The description of native title as a special measure was tested in the High Court’s *WA v. Commonwealth* cases in 1995. In this action launched by the Conservative Coalition Government of WA seeking a legal declaration that the NTA was outside the jurisdiction of the Commonwealth and therefore invalid, the High Court found that the NTA could be affirmed as a special measure under the RDA or as a law which, although

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397. Based on an advertising pamphlet entitled: *Mabo – Protect Your Children’s Future*, ASSOCIATION OF MINING AND EXPLORATION COMPANIES (Oct. 1993).

398. Bartlett, *supra* note 38, at 112.

399. International Convention on the Elimination of all Forms of Racial Discrimination, Mar. 7, 1966, S. TREATY DOC. NO 95/2, 660 U.N.T.S. 195, 220. [hereinafter ICERD]. The ICERD has been ratified by Australia. Article 5 requires equality before the law, without distinction as race, colour, or national or ethnic origin, in the enjoyments of various rights, including: “(d)(v) [t]he right to own property alone as well as in association with others” and “(d)(vi) [t]he right to inherit.” *Id.* In 1997, the Committee on the Elimination of Racial Discrimination published its interpretation of the Convention in relation to Indigenous Peoples as General Recommendation XXIII(51). See Garth Nettheim, *The International Implications of the Native Title Act Amendments*, INDIGENOUS L. BULL., Feb. 1998, at 12.

400. Racial Discrimination Act of 1975 (Cth) Schedule 1:4. See Stephen William Robson, *Conceptions of Social Justice in the Wik Debate*, at 39 (1998) (Honours Dissertation, Murdoch University).

it makes racial distinctions, is not racially discriminatory so as to offend the RDA.<sup>401</sup>

The second root from which the NTA may be deemed a “special” measure is the Constitution’s “race power” in section 51(xxvi), which stipulates that the Federal Parliament may make laws with respect to “the people of any race for whom it is deemed necessary to make special laws.” The High Court has suggested in dicta in this regard that the race power extends to what is necessary as determined by Parliament, and not only to legislation that is deemed beneficial to a particular race.<sup>402</sup> Thus, the constitutional power may authorise laws that discriminate against, as well as in favour, of Indigenous Australians. The outcome of this interpretive approach of the High Court on an evaluation of the constitutionality of the NTA is not clear. However, it has been observed that the constitutional validity of the amended NTA would need to be determined with respect to its combined effect with the original act, and that a comprehensive evaluation of the NTA regime would show that the legislation is overall detrimental to native title holders compared with the regime of protection declared at common law and under the RDA.<sup>403</sup>

Rights can best be protected and equality provided for in at least two ways.<sup>404</sup> First, formal equality defines equality as treating everyone the same, where laws providing for different treatment of a certain class of people would as a corollary be unfair or racially discriminatory for the rest of the population. Such preferential laws are justifiable only as a special measure, for example as special entry into university. “Special measures are described under international law as ‘catch up’ measures or those relating to a temporary situation.”<sup>405</sup> Secondly, substantive equality exists where a response to difference is promoted instead of promoting an environment that fosters the achievement of sameness. This requires

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401. *WA v. Commonwealth* 185 C.L.R. at 484.

402. *See Kartinyerir v. Commonwealth* 152 ALR 540, (the Hindmarsh Island Bridge Case) per Brennan and McHugh who did not decide between the opposing views of s51(xxvi) at 20, per Gummow and Hayne who rejected a discriminatory test at 80 and 82, and per Gaudron who suggested that a law must be reasonably capable of being viewed as appropriate and adapted to some differences which the Parliament might reasonably judge to exist as necessitating some special legislative measure at 40, and Kirby, dissenting at 175. All Judges except Kirby considered that amending acts must be read together with the main act as a combined statement of the will of the legislature at 10. *See also* Bartlett, *supra* note 30, at 69-70.

403. Bartlett, *supra* note 30, at 70.

404. *See generally* Jennifer Clarke, *Racial Non Discrimination Standards and Proposed Amendments to the Native Title Act*, NATIVE TITLE RESEARCH UNIT, ISSUES PAPER NO. 16 (Apr. 1997).

405. *Id.*

treating people differently with their difference requiring recognition in some way to provide justice. The rights and interests of indigenous groups may be seen as an example of appropriate cultural difference whereby the notion of substantive equality implies that the same treatment may not be enough to provide genuine equality.

The NTA includes both formal and substantive equality provisions. Arguably however, the recent amendments appear discriminatory because in both a formal and a substantive sense, they obviate or extinguish native title. For example, they fall short of providing formal equality through the expansion of pastoralists' property rights without taking into account the effect on native title rights and interests; and fall short of providing substantive equality by allowing the regranting of mining leases without the right to negotiate. This is in conflict with Australia's international law obligations to "take special measures" for the protection of the rights of disadvantaged racial groups.<sup>406</sup>

International law has been influential in Australia's approach to native title since the *Mabo* judgment. *Mabo* referred to international covenants adopted by Australia, and that with respect to these treaties, the expectations of the international community accorded with the contemporary values of the Australian people. Judged against the standards of international covenants, Justice Brennan observed in his judgment that the doctrine of *terra nullius* was contrary to both international standards and to the fundamental values of Australian common law.<sup>407</sup>

Australia is signatory to charters, conventions, covenants and declarations of the United Nations that embody standards or codes of conduct relating to the prohibition of racial discrimination, the rights of indigenous people, property rights and basic human rights.<sup>408</sup> The principal international instruments to which Australia is a party and which are relevant to the definition and development of native title are: The Universal Declaration of Human Rights (1948), The International Convention on the Elimination of All Forms of Racial Discrimination (1965) (ICERD), The International Covenant on Civil and Political Rights (1966) (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (1966) (ICESR).<sup>409</sup> The enactment of a number of the standards of the Universal Declaration and ICERD into Australian domestic law,

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406. *Id.*

407. *Mabo v. Queensland* [No 2] (1992) 175 C.L.R. 1, 29. See Robson, *supra* note 400, at 37.

408. J. McCarthy, *Native Title Case Law in Review: The Legal and Policy Context for the Native Title in the Wik Amendment Act of 1998*, in *Living With Wik: The New Native Title Laws Conference* 9 (Nov. 16-17, 1998).

409. *Id.*

particularly through the Racial Discrimination Act of 1975, is perhaps the cornerstone on which native title was recognised and developed in Australia.

In the *Mabo* (No. 1) decision in 1988, the High Court held that the RDA was enacted to give effect to Australia's international obligations under the ICERD and thereby curtailed the effect of an exercise of legislative or executive power that attempted to extinguish native title.<sup>410</sup> In *Mabo* (No. 2), Justice Brennan notes that while common law does not necessarily conform with international law, international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.<sup>411</sup>

There are some clear ways in which native title rights and interests are covered by some of these international standards.<sup>412</sup> With respect to property rights, the Universal Declaration of Human Rights, Article 17 states that: 1) Everyone has the right to own property alone as well as in association with others; and, 2) No one shall be arbitrarily deprived of property. Additionally, the ICERD Article 5 requires equality before the law, without distinction as to race, colour, or national or ethnic origin, in the enjoyment of various rights including, d)(v) the right to own property alone as well as in association with others, and d)(vi) the right to inherit. Also, UNCERD published an interpretation of the Convention in relation to Indigenous Peoples as General Recommendation XXIII(51), where it notes, inter alia, that States should recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories. Only when this is for factual reasons not possible, should the right to restitution be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of land and territories.<sup>413</sup>

Arguably, the removal of property rights from members of one racial group (native titleholders) in order to benefit others (pastoralists), most of whom are members of another racial group, is racial discrimination along

410. *Mabo v. Queensland* [No 1] (1988) 166 C.L.R. 186.

411. Sarah Pritchard, *Native Title in an International Perspective* (paper for the Sharing Country, Land Rights, Human Rights and Reconciliation after *Wik* Forum, at the University of Sydney, Feb. 1997), cited in McCarthy, *supra* note 408, at 11.

412. Nettheim, *supra* note 399, at 12-14.

413. *Id.*

both formal and substantive standards.<sup>414</sup> In the case of the NTA amendments, the discriminatory action is the Commonwealth's and gives rise to a breach of international law. This requires the payment of "just terms" compensation under the Commonwealth Constitution,<sup>415</sup> however, compensation does not overcome the act of discrimination.

The amendments to the NTA, to the extent that they extinguish or displace native title, and do so on a discriminatory basis, would appear to infringe these standards, particularly those NTAA provisions narrowing the right to negotiate or extinguishing native title. In addition, the validation of intermediate acts without adequate compensation is questionable. It has also been argued that the exemption of pastoral leases from native title processes so that pastoralists can engage in different activities under the lease (such as agricultural, commercial or tourism activities) without any requirement to comply with the right to negotiate are also potentially discriminatory.<sup>416</sup> The Crown significantly enhances the rights of the pastoralists provided that compensation is paid when any native title rights and interests are affected. The argument that the right to negotiate regime is an additional right that non-indigenous Australians generally do not have in relation to a mining activity and compulsory acquisitions is sometimes used to justify the proposition that its reduction or elimination will not offend non-discrimination principles. But the relationship of indigenous peoples to their land is of a qualitatively different nature to that of non-indigenous peoples. As a result, it requires differential treatment in order to achieve a substantive equality of outcome. This principle has been accepted in a series of Australian inquiries into land rights legislation and has been accepted in international law.<sup>417</sup>

The amendments effecting the extinguishment of native title as well as those that diminish the right to negotiate process appear to adversely affect the cultural rights of native title holders. The United Nations International Covenant on Civil and Political Rights (ICCPR) states in Article 2 that, "in those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their

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414. See *Mabo v. Queensland* [No 1] (1988) 166 C.L.R. 186; *WA v. Commonwealth* (1995) 183 C.L.R. 373; see also Clarke, *supra* note 404.

415. NTA (1993) § 51(xxxi).

416. Richard Bartlett, *A Return to Dispossession and Discrimination: The Ten Point Plan*, 27 U. W. AUSTL. L. REV. 44 (1997).

417. Nettheim, *supra* note 399.

own language.” The Human Rights Committee oversees implementation of the ICCPR by States and in its 1995 General Comment on Article 27 notes that, “culture manifests itself in many form, including a particular way of life associated with the use of land resources, especially in the case of indigenous people . . . [t]he enjoyment of those rights may require positive legal means of protection and measures to ensure the effective participation of members of minority communities in decisions that effect them.” The Human Rights Committee has also determined that Article 27 applies to the use of land and resources by indigenous peoples in the context of a number of communications brought to the committee under the first Optional Protocol to the ICCPR. The amendments to the NTA that extinguished native title and those that diminish the right to negotiate process would both appear to adversely affect the cultural rights of native title holders.<sup>418</sup> The opening up of international remedies to individuals pursuant to the Optional Protocol to the ICCPR brings to bear on the common law the powerful influence of the Covenant and the international standards it imports.

The importance of Australia’s involvement in these international fora in the emergence of native title in Australian law needs to be acknowledged.<sup>419</sup> The native title amendments subordinate native title to all other interests, in particular those of the mining and pastoral industries, and strip native titleholders of substantial protection. Any of the legislative changes that make it more difficult to achieve recognition of native title would then also be carried out on a discriminatory basis. Thus, the amendments to the NTA which make it a more onerous task to apply for a determination of native title may be in breach of international standards and provide further avenue for legal challenge.

#### A. *Considerations of the Committee on Elimination of Racial Discrimination*

As one of the 153 parties to the International Convention on the Elimination of All Forms of Racial Discrimination, Australia is obliged to submit periodic reports as well as further information as requested under the Committee’s early warning measures and urgent action procedures. In August 1998, UNCERD requested the Government of Australia to provide it with information on the changes recently projected or introduced into the 1993 NTA on any changes of policy as to Aboriginal land

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418. Gillian Triggs, *Australia’s Indigenous Peoples and International Law: Validity of the Native Title Amendment Act of 1998 (Cth)*, 23 MELB. U. L. REV. 372, 384-90, 408 (1999).

419. Pritchard, *supra* note 411.



rights.<sup>420</sup> In March 1999, in response to the submission by the Australian delegation, the Committee urged the Government of Australia to suspend the implementation of the NTA concerning indigenous land rights and to re-open discussions with representatives of Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to them and which would comply with Australia's obligations under the Convention.<sup>421</sup> In a decision adopted without a vote, the Committee recognized that within the broad range of discriminatory practices that had long been directed against Australia's Aboriginal and Torres Strait Islander peoples, the effects of the country's racially discriminatory land practices had endured as an acute impairment of the rights of Australia's indigenous communities. The Committee considered the situation in Australia under its early warning measures and urgent action procedures. The Committee expressed concern over the compatibility of the NTA amended, with Australia's international obligations under the Convention, noting that while the original NTA recognized and sought to protect indigenous title, provisions that extinguished or impaired the exercise of indigenous title rights and interests pervaded the amended Act.<sup>422</sup> "The lack of effective participation by indigenous communities in the formulation of the amendments also raised concerns with respect to Australia's compliance with its obligations under Article 5 of the Convention."<sup>423</sup> The Commonwealth failed to respond to these concerns and CERD reiterated its position in 2000.<sup>424</sup>

## VI. CONCLUSION

The law on native title in Australia is in its infancy. While *Mabo* provides a very clear starting point for any consideration of what native title rights and interests comprise, the amended NTA provides an unclear statutory framework for the application of native title in the contemporary Australian community. The common law definition of native title is not changed in this piece of legislation, but the way in which native titleholders may exert their common law right is very much regulated. The potential for indigenous land use agreements is now expanded and these agreements

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420. United Nations Press Release, Australia Presents Report on Aboriginal Rights to United Nations Committee on Elimination of Racial Discrimination (Mar. 12, 1999).

421. United Nations Press Release, Committee on Elimination of Racial Discrimination Concludes Fifty-Fourth Session, 7 (Mar. 19, 1999).

422. *Id.*

423. *Id.*

424. *Committee on the Elimination of Racial Discrimination, Concluding Observations by the Committee on the Elimination of Racial Discrimination, 56th Sess., (Mar. 6-24, 2000).*

potentially provide a powerful and consensual mechanism for resolving issues regarding native title in a non-litigious context. On the other hand, however, the constitutionally justified "right to negotiate" is much reduced, by for example, excluding from its coverage acts in respect of water and the renewal, re-grant or extension of valid mining leases. Moreover, the more stringent registration procedure makes it much more difficult for a native title claimant group to be able to meet the requisite criteria to qualify for the right to negotiate in the first place. This statutory regulation of native title has been very much the product of political, social and economic debate. The real effect of the regulatory legislation will not become evident until States such as Western Australia and Queensland or the Northern Territory have enacted and set in motion their State and Territory based native title regimes.

The evolution of the legal rights and interests of Aboriginal and Torres Strait Islanders in their traditional lands is far from over. The most pivotal developments in native title law can be confined to less than the last decade. These are very recent legal developments in the short history of European settlement, and native title law will continue to evolve in the future.

On the surface, the recent legislative changes to native title embodied in the 1998 amendments to the NTA were carried out to modify, and make more "workable," Parliaments' first attempt at recognising the common law property rights of Indigenous Australians. An in depth analysis of the amendments and the debate which surrounded their passage demonstrates that the amendments are, in fact, an effort to severely limit the reach and scope of native title rights in Australia and subject those rights to the interests of traditional economic interests.

The amendments are likely to be challenged by indigenous groups and/or their supporters, on the grounds of constitutional invalidity and as contravening Australia's international legal obligations. And there are likely to be more legislative changes in the future, perhaps as in the case of the 1998 amendments, in response to future litigation. To avoid these challenges and make native title workable for all Australians, to avoid a long drawn out series of expensive court cases, and to avoid compromising the rights and interests of the "first Australians," governments need to acknowledge those rights and get on with the business of negotiating with Aboriginal and Torres Strait Islander Peoples how indigenous and non-indigenous Australians can profitably share their country.

