

Native Title Report - July 1996 to June 1997

Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Attorney-General as required by section 209 of the *Native Title Act 1993*

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Chapter 1: Introduction

This is the final year of my term as Australia's first Aboriginal and Torres Strait Islander Social Justice Commissioner. This is the last report that I will make under s.209 of the *Native Title Act 1993* (Cth) ('NTA'), which requires me to report to the Commonwealth about the operation of the

NTA and its effect on the exercise and enjoyment of human rights by Aboriginal peoples and Torres Strait Islanders.

As I approach the end of my term as Commissioner, Australia is at a crucial point in its dealings with Aboriginal and Torres Strait Islander peoples. Nothing is more important to the shaping of our national character than the way in which our elected representatives respond to the High Court's decision in *Wik Peoples and Thayorre Peoples v State of Queensland* ('Wik').¹ In September the Federal Government tabled the Native Title Amendment Bill 1997 (Cth), which, if passed, will implement the 'Ten Point Plan'² released by the Government in the wake of the *Wik* decision. Our Parliament's response to this Bill will provide a measure of the values by which we live and work together as a nation.

In *Wik*, the High Court found that the grant of a pastoral lease does not necessarily extinguish native title rights. Where pastoral rights are inconsistent with co-existing native title rights, they prevail over them but do not extinguish the underlying native title.

As Noel Pearson has explained, the argument put by the *Wik* and *Thayorre* peoples was a moderate one.

*When lawyers for the Wik peoples addressed the High Court in June this year they put a simple argument: that the rights of pastoralists to their pastoral leases were in no way under challenge and the native title rights of traditional owners could co-exist with the pastoralists' rights. ...They did not challenge the rights of the pastoralists, indeed they urged the court to confirm pastoral rights. All they sought was recognition of co-existing rights.*³The High Court's acceptance of co-existing rights to pastoral land reflected the way in which the pastoral industry developed, not only in Queensland but elsewhere in Australia:

*At one level, the High Court ruling that native title can co-exist with pastoral leases merely confirms historical reality. Aborigines and pastoralists have shared vast tracts of grazing land almost from the time settlers took cattle and sheep to the WA outback. Aboriginal labour and bushcraft contributed significantly – perhaps indispensably – to the development of the industry. The image of Aboriginal stockman at home in the saddle remains an enduring symbol of the history of WA pastoralism. The early relationship between Aborigines and pastoralists was often turbulent and violent as some clans resisted the encroachment of the new settlers. But in general the parties eventually reached an accommodation – even if this was based mainly on the exploitation of cheap labour. The arrangement might have been one-sided but co-existence was an everyday reality on stations across WA where Aboriginal communities lived, worked, hunted, fished and observed their religious obligations.*⁴

The essential contribution of Aborigines to the development of the pastoral industry and the long history of black and white Australians living side by side on pastoral properties are explored in detail in Chapter 2 of this report.

Central to the High Court's decision was its confirmation of the rights of pastoralists. *Wik* was a

¹ *Wik Peoples and Ors v State of Queensland and Ors* (1996) 141 ALR 129.

² The Hon. Senator N. Minchin, *Federal Government's Response to the Wik Decision: The Ten Point Plan*, 4 June 1997 ('The Ten Point Plan').

³ Pearson, N., 'Fine example of cooperation, not conflict', *The Australian*, 24 December 1996, p.13.

⁴ Kovacs, Z., 'Sharing is as old as settlement', *The West Australian*, 23 January 1997, p. 14.

“conservative” judgment, “carefully securing the Crown grantee’s status quo.”⁵ There is nothing to suggest:

*...that this regime of co-existence is somehow a striking innovation in property law. Every law student knows that more than one person may have an interest in the same land. There is nothing revolutionary in the High Court’s finding that the rights of Aboriginal people can co-exist with rights of pastoral lease holders.*⁶

Chapter 3 of this report analyses the central elements of the High Court’s *Wik* decision.

When it comes to co-existence, there is far more ‘uncertainty’ for Indigenous Australians than for pastoralists:

The existence or otherwise of native title does not affect the legal entitlements of a pastoral holder or the value of the holding. The Australian Institute of Valuers and Land Economists has stated ‘the Wik decision should not lead to a general devaluation of pastoral leases’.

*... For native title holders the uncertainty is whether their native title has survived through a connection recognised by the white law as sufficient. Legal recognition affects their capacity to exercise customary entitlements over pastoral leasehold land and water. The uncertainty of their rights before Wik has prevented many Aboriginal communities from exercising existing legal rights for close on 200 years.*⁷

Nevertheless, the responses of Indigenous Australians to the *Wik* case have been rational, responsible, constructive and firm. A constant theme of those responses has been the willingness of Indigenous peoples to accommodate the legitimate rights and needs of the pastoral industry, government and miners. There was no rush to lodge claims over pastoral lands. On the contrary, this was specifically discouraged by Aboriginal leaders.⁸ Galarrwuy Yunupingu, the Chairman of the Northern Land Council, went so far as to suggest a two year ‘moratorium’ on claims relating to pastoral leases.⁹

The National Indigenous Working Group on Native Title (‘NIWG’) devoted much time and energy to producing a detailed response to the *Wik* decision, entitled *Coexistence – Negotiation and Certainty*. This was presented to the Government and was made available to all stakeholders and the public at large.

Naturally, the primary concern of the NIWG was to ensure that any legislative response to the *Wik* decision did not bring about any impairment or extinguishment of native title beyond that which existed under common law.¹⁰ However, the NIWG model also included proposals such as the

⁵ Keon-Cohen QC, B., ‘Wik: Confusing Myth and Reality’, *Forum - Wik: The Aftermath and Implications*, *The University of New South Wales Law Journal*, vol 3 no 2, June 1997, p15.

⁶ Letter, ‘Nothing revolutionary in Wik property principle’, Neave, Prof M O’Connor, P, Faculty of Law, Monash University, *The Australian*, 28 January 1997, p12.

⁷ Flood, S., ‘The Rule of Law or the Rule of the Mob After Wik – An Essay for a Public Forum, Sharing Country: Land Rights, Human Rights and Reconciliation after Wik’, Research Institute for Humanities and Social Sciences, University of Sydney, 28 February 1997, pp. 11-12.

⁸ See e.g. Noel Pearson quoted in ‘A Decision for Chaos’, *The Sydney Morning Herald*, 24 December 1996, p. 1.

⁹ See ‘Halt to claims proposed as peace gesture’, *Courier Mail*, 23 January 1997, p. 7.

¹⁰ National Indigenous Working Group on Native Title, *Co-existence – Negotiation and Certainty*, April 1997, p8

following for the resolution of co-existence issues:

Guarantee under the NTA that the rights of pastoralists under all forms of pastoral leases, including validated perpetual leases and renewed leases are confirmed in the same way as the rights of native title holders...

A process for the Commonwealth Minister to exempt certain acts or classes of acts, ancillary to the purposes of pastoral leases, from negotiation requirements with native title parties, as long as the act or acts will have minimal effect on native title, and there has been proper consultation about the proposed exemption...

The approach to coexistence should encourage the early settlement of native title claims so that pastoral leaseholders, governments and resource developers know who they are supposed to deal with...

There should be opportunities for diversification in leases through agreement processes underpinned by a 'future act' procedure; and

Native title holders would need to satisfy an enhanced threshold test but not the extreme test set out in the current amendments.¹¹

The measured approach of the NIWG contrasts dramatically with the positions expressed by non-Indigenous stakeholders. Many of the statements made in response to the Wik decision have been blatantly misleading and seem calculated to create panic about the implications of the decision:¹²

Queensland Premier Rob Borbidge called for an emergency Premiers' conference to discuss the decision he described as 'the worst of all worlds for everyone'.¹³

An angry Mr McGauchie [president of the National Farmers' Federation] said the decision meant 'all bets were off'. He demanded legislation to return certainty to the pastoral sector, even if this meant winding back the RDA.¹⁴

The National Party yesterday endorsed a tax rise to finance any compensation bill for the removal of Aboriginal rights as it called for legislation to extinguish native title on pastoral leases. The party's president, Mr Don McDonald, said Australians should be prepared to compensate Aborigines to give pastoralists exclusive rights to their properties because farmers had supported the nation since white settlement.....Mr McDonald said farmers would begin to sue state governments for breach of contract if the Commonwealth did not move quickly to resolve Wik and clear the way for pastoralists to develop their land....Mr McDonald said the Wik decision was a direct attack on democracy.¹⁵

After the Wik ruling, Mr McGauchie warned that residential leases in Canberra could be under threat from native title claims. ...Mr McGauchie said the Wik decision could undermine the freehold form of tenure. 'We view the Wik decision as the most fundamental attack on

¹¹ *Ibid*, pp. 9-10

¹²See Nettheim, G., 'Which way now for the Wik judgment?', *Sydney Morning Herald*, 14 January 1997, p. 13.

¹³'Farm leases now a land claim target', *The Daily Telegraph*, 1st edition, 24 December 1996, p. 6.

¹⁴Taylor, L. and Syvret, P., 'Industry dismayed by Wik ruling', *The Australian Financial Review*, 24 December 1996, p. 1.

¹⁵'Taxpayers must fund Wik: Nats', *The Age*, 2nd edition, 8 February 1997.

*agricultural land tenure at every level, and don't exclude freehold as part of an ongoing exercise', he said.*¹⁶

*'You don't create a spirit of reconciliation by taking pastoralists' land off them by the judicial theft of property which is what the High Court decision in respect of Wik amounts to', [Premier Borbidge] said.*¹⁷

It is notable that pastoralists have hidden behind the image of the 'small family farmer' in calling for responses to the *Wik* decision. By portraying the decision as a threat to the family farm, the National Farmers' Federation ('NFF') attempted to raise concern about the decision and thus build momentum for a response which served its members' interests.

This characterisation of the *Wik* decision is profoundly misleading. The decision has no implications for farming operations conducted on freehold title land. It dealt with pastoral leases for the running of cattle. And, as explained above, the rights of pastoralists under these leases were secured by the High Court's decision. Part of the agenda of the NFF, however, was to protect many of its members who wanted to perform activities beyond the terms of their leases – or had already done so – and were angered at any notion that they may have to deal with native title holders when changing the nature of their activities. An interview with the executive director of the NFF made it clear that, "[t]he farmers want their rights to prevail inside and outside the terms of pastoral leases."¹⁸ As Marie Coleman explained:

*The thing the land-grabbers don't want to discuss is that by and large the cattle industry is stuffed. Except for some live-cattle exports direct to the Middle East and the countries to our north, our export beef industry is in bad shape. So is the fragile land, heavily overstocked for years, and racked by droughts. Pastoralists have been looking for some time to exploit their leases for different purposes. What might these be? Well, in the Northern Territory, there's a lot of interest in mineral development...There's a lot of interest in tourism, too, in the development of day tours, camping and home stays, with a dash of indigenous culture thrown in.*¹⁹

Senior political journalist Alan Ramsey described in the plainest of terms what he saw occurring in the wake of the *Wik* decision, explaining that:

*...ever since the High Court handed down in its Wik judgment confirming the basic right of Aboriginal people to a role in the legal complexities of ownership and/or management of Crown land, various self-interested groups have been campaigning stridently, if not brutally, to further circumscribe those rights to the advantage of themselves, be it material or political.*²⁰

Our Federal leaders could have made a real effort to use the *Wik* decision to draw Australia together. They could have been leaders in the truest sense. The Federal Government could have responded to *Wik* by devoting some real time and money to educating the nation about the issue in a calm and factual way. The common misperception that native title claimants can 'throw farmers off their land'

¹⁶Peake, R., 'Protect rural land: farmers', *The Canberra Times*, 18 February 1997, p. 5.

¹⁷'Angry Borbidge warns PM of lawyers' banquet', *Courier Mail*, 23 April 1997, p. 4.

¹⁸Marr, D., 'Dam Certain', *Sydney Morning Herald*, 2 May 1997, p. 13 (emphasis added).

¹⁹ Coleman, M., 'Beware the modern Batman', *The Canberra Times*, 16 May 1997, p. 9.

²⁰ Ramsey, A., 'Wik: Shame, Howard, shame', *Sydney Morning Herald*, 3 May 1997, p. 45.

could have been comprehensively put to rest. Once people's fears and misunderstanding about native title are overcome, breakthroughs can be achieved.

Instead, the opposite has occurred. The Federal Government used the Wik decision as an excuse to produce a Bill which completely restructures the way in which native title is accommodated by the non-Indigenous legal system and is entirely calculated to serve the interests of the Coalition's major constituencies. Father Frank Brennan's straightforward appraisal of the Bill is that "[t]he Government wants to wind back native title as far as the Senate, the High Court and the Constitution will permit".²¹

The Prime Minister claimed that his Ten Point Plan, translated into the *Native Title Amendment Bill 1997*, resisted the sustained calls for 'blanket extinguishment' of native title. By contrast, his Deputy has described the Government's response as containing "bucket-loads" of extinguishment.²² Mr Fischer's description is distressingly apt. The Bill cuts away at the protection of native title and delivers extinguishment and impairment of native title 'bucket by bucket'. This is achieved by the following key elements of the proposals:

'Validation' of all titles issued since the commencement of the NTA without following the required procedures under the existing legislation.

'Confirmation' that a range of previously issued titles "must have been intended" to grant rights of exclusive possession, and therefore extinguish native title.

Expansion of the rights of pastoralists so that broad-ranging "primary production activities" can be performed without requiring consultation or negotiation with native title holders.

Removing the right to negotiate and allowing State and Territory regimes to apply where native title rights on leasehold or reserved lands are acquired by governments to benefit third parties. This will make it significantly easier for governments to upgrade pastoral titles to freehold, at the expense of native title rights.

Allowing reservations made prior to the Wik decision to be implemented without any procedural rights being available to native title holders, causing extinguishment of native title where public works are built.

Allowing new "facilities for services to the public" to be constructed on native title lands without acquisition processes being followed.

Clearing the way for private interests to construct 'infrastructure' for their own projects, outside the right to negotiate.

Dramatically reducing the application of the right to negotiate in relation to exploration and mining.

Imposing an exceptionally onerous registration test for access to the right to negotiate, which will be applied retrospectively to knock out previously valid claims.

Many of these and other aspects of the Bill are explored in detail in Chapters 4 and 5.

²¹ Brennan, F., 'A certa in kind of justice', *The Canberra Times*, 4 September 1997, p. 9.

²² Brough, J., 'Wik draft threat to native title', *The Sydney Morning Herald*, 28 June 1997, p. 3.

The imbalance of the package could not be more blatant. For example, the upgrading of pastoral rights to ‘primary producer’ level:

*...represents, at the stroke of the parliamentary pen, a wholly unnecessary extinguishment of native title by stealth, and a breathtakingly audacious increase in pastoralists’ rights without payment of a single cent. The result is a land grab by pastoralists across Australia far exceeding anything contemplated by native title claimants. And yet, pastoralists are reported to be unhappy with the proposed amendments! What more could pastoralists want?*²³

Allowing the right to negotiate to be replaced with a range of State and Territory regimes greatly increases the vulnerability of native title rights. This fundamental shift in approach has far-reaching implications:

*[I]t is odd that the present Government seems inclined to place itself once again in a position in which the capacity of maverick States such as Queensland and Western Australia to act in their own parochial interests and with careless disregard for the national interest will be increased, so placing Australia’s international standing at grave risk. Indeed, it not only seems odd but downright foolish that the Commonwealth would contemplate hamstringing its own capacity to handle such a sensitive issue, especially in the light of Australia’s push into the Asia-Pacific region.*²⁴

The Bill fails to meet non-discrimination standards under international law and is open to challenge on that basis. The constitutional validity of the package is also questionable. If passed into law, the amendments will not provide the ‘certainty’ which the Government claims to seek. The only certainty will be protracted litigation by title holders with nowhere to turn but the courts. These issues are discussed in detail in Chapter 6.

The approach which Australia takes to the native title issue will send a message about our national character and values to future generations, both in Australia and around the world. At present, the signs are grim. The contents of the Bill currently before our Federal Parliament indicate that:

*[w]hite Australia is very likely to use its weight of numbers in the cause of self-interest. And Black Australia is very likely to be punished yet again for the grave political sin of inconvenience.*²⁵

Our nation has fundamental decisions to make:

*There comes a time in the history of a nation when fair-minded people should stand up, assert basic values, and stem the tide of revenge politics which threatens to throw us backwards as a disintegrating society, not forward as one people reconciled with its past, and confident of its future. As in 1993, this is such a time. In particular, this is a time when our politicians and their masters – the general community who elect them – should realize that miners and pastoralists do not have a God given right to dig up or use the land as they see fit at all times. Rather, they should realise that this is a time when respect for cultural values in a multicultural society, a need to cement our national ethic of tolerance and of equal opportunity for all, should prevail over dollar-driven economic development, be it through mining or pastoralism. Just once, **cultural** values, critical to indigenous persons and of great*

²³ Keon-Cohen QC, B., ‘Wik: Confusing Myth and Reality’, *op.cit.*, p.16.

²⁴ Attwood, B., ‘Howard’s Wik plan upsets the balance’, *The Australian*, 2 May 1997, p. 15.

²⁵ Smark, P., ‘When reasonable men do unreasonable things’, *Sydney Morning Herald*, 25 January 1997, p. 39.

*value to the entire nation, should be recognised and asserted as a national priority.*²⁶

Our leaders' response to the *Wik* decision will be the crucial test of whether their purported desire for 'reconciliation' between Indigenous and non-Indigenous Australians has any substance.

The co-existence of rights is at the heart of reconciliation, along with respect for different values and acceptance that different sectors of the community can share resources with beneficial results.

... We want to be certain that we are not missing any of the rights and opportunities that other members of the Australian community enjoy. We also want the certainty that we will not be punished for our successes under the processes of European-Australian law...If our communities are to make headway towards developing economic opportunities and achieving self-empowerment, we need to have confidence that mainstream systems will work equally in our interests as they do for non-indigenous Australians.

*... No indigenous person will agree to the surrender of our rights as the fee for acceptance by the wider community, and no-one truly committed to reconciliation would seek that transaction from us... If reconciliation dies, it will be killed by those who declare it dead whenever things do not go their way.*²⁷

Australia's native title estate hangs in the balance. Will our national leaders take the predictable approach and pander to the interests of the loudest and most powerful stakeholders to the fullest extent possible under the Constitution? Alternatively, will they think seriously about the kind of national values that we aspire to and develop imaginative ways to combine efficiency and certainty with genuine respect for the unique property rights of native title holders? The Parliament has a critical role to play in the resolution of this issue.

The report which follows analyses and refers to a 'Working Draft' of the *Native Title Amendment Bill 1997*, released on 25 June 1997. As preparation of the report drew to an end, the final version of the Bill was tabled in the House of Representatives. Accordingly, it was not possible to take the document tabled in Parliament into account in this report. However, I hope to be able to circulate a 'Stop Press' outlining significant differences between the Working Draft and the tabled Bill.

The essence of this report is captured in the following statement made by the Ngarinyin people in response to the *Wik* decision:

We can embrace pastoralists and their cattle in our land. We have no problem with that.

We can negotiate our native title rights. That is no problem either.

We can negotiate access, and movement around their leases – gates, roads, rubbish – all of those things.

What we cannot do is allow our identity, and the birthright of our identity, to be rubbed out. No human beings on Earth can allow that.

*None.*²⁸

²⁶ Keon-Cohen QC, B., 'Wik: Confusing Myth and Reality', *op.cit.*, p. 16.

²⁷ Djerrkura, G., 'Giving Wik its worth', *Sydney Morning Herald*, 23 January 1997, p. 15.

²⁸ Extract from the 'Ngarinyin response to the Wik decision' by the Kamali Council and its Chair, Paddy Neowarra; reproduced

The human rights of Aboriginal and Torres Strait Islander peoples are in a precarious situation. The land issue has not been resolved in this country. The Parliament and the people of Australia are currently presented with another opportunity to deliver justice to the first peoples of this country. They can choose a workable and fair co-existence that protects our human rights, or an unjust and discriminatory re-affirmation of *terra nullius*.

This report argues the case for the protection of the human rights of Indigenous Australians. If our rights are not upheld there will be no justice, nor will the land-management system of this country enjoy workability or certainty. Only land justice will enable our country to reach these goals.

Chapter 2: The history of pastoral co-existence - By Ann McGrath

The only 'Aboriginal histories' known to many Australians are those of fatal frontier conflicts between coloniser and colonised, and of separate, institutionalised lives. Yet, just as our history tore peoples apart, it also drew them together. Through work, domestic and familial relations, Aborigines and other Australians shared the same country, living their lives alongside each other.²⁹

Reactions to the Wik decision suggest that many Australians are unaware of the rich history of co-existence which occurred on northern cattle stations for much of the twentieth century. Although Aboriginal people were highly valued and respected workers, they are still frequently depicted as either unwilling slaves or lazy bludgers. In Australia's northern pastoral regions they were in fact the backbone of the cattle industry, building it up from scratch. During the late nineteenth and early twentieth century many stations only employed a sprinkling of whites, with all the essential tasks and services performed by local Aboriginal men and women. Many station lessees conceded that the stations could not survive without Aboriginal labour. In his 1928 report on the Northern Territory, Queensland administrator J W Bleakley paid special homage to the Aboriginal woman, who, he argued, was the "true pioneer". Without them, white men could not have carried on. Even where white women ventured, Aboriginal women were indispensable.³⁰

With the early spread of pastoralism, Aboriginal people were confronted with a strange industry comprised of small groups of white men tending mobs of peculiar beasts. Sometimes animals appeared long before their human owners. Initially many Aboriginal groups were terrified, believing the unfamiliar creatures to be devils. Sometimes the horse and rider, observed from a distance, were thought to be a single monster. The white people also presented difficulties with peculiar coverings disguising their sex and skin the colour of death-paint, leading some Aboriginal peoples to believe whites were their returned dead relatives.³¹ Like many other groups, the Kulin people of central Victoria conducted tanderrum ceremonies to acknowledge acceptable strangers, introducing them to the local spirits. Whereas numerous Aboriginal clans violently fought the invaders, especially if they transgressed indigenous laws, in many parts of Australia Aboriginal people also had a generous tradition of welcoming others into their world, of sharing their land, pathways, water and food.³²

as an annexure to Flood, S., 'The Rule of Law or the Rule of the Mob after Wik', *op.cit.*; also in the *Indigenous Law Bulletin*, vol. 4, issue 1, April 1997 at p. 16.

²⁹ Reynolds, H., *Frontier*, Allen & Unwin, 1987; *The Other Side of the Frontier*; Penguin, 1982; McGrath, A., ed., *Contested Ground*, Allen & Unwin, 1995.

³⁰ Bleakley, J.W., *The Aborigines and the Half-Castes of Central Australia and North Australia*, Commonwealth Government Printer, 1929, cited in A. McGrath, 'Born in the Cattle', Allen & Unwin, p. 49.

³¹ Broome, R., 'Aboriginal workers on south-eastern frontiers', *Australian Historical Studies*, vol, 26, no. 103, 1994, p. 207; Reynolds, H., *The Other Side of the Frontier*, *op.cit.*.

³² *Ibid*, p 207.

From the 1830s and earlier, in South Australia, Victoria and NSW, Aborigines worked in a variety of jobs for Europeans: as hewers of firewood, domestic servants, messengers, blacksmiths, apprentice tanners, agricultural labourers, whalers and sealers.³³ Historians Richard Broome, Heather Goodall and others have started to trace the extent of quality labour provided by Aboriginal groups in south-eastern Australia.³⁴ Aboriginal trackers guided over-landers and other pioneering pastoralists through the landscape and hundreds were later employed on their runs in each colony. Aborigines became sought-after workers, especially as stockmen and as mounted messengers. Port Phillip Aborigines were especially interested in working with horses. As Edward Curr's recollections stated, the Aboriginal stockman "excelled the average stockman. He had better nerve, quicker sight and stuck closer to the saddle. George McCrae also praised their honesty, their fearlessness and affection for horses, their pride in their whips and spurs.³⁵ Demand for Aboriginal labour varied according to the availability of convict workers, increasing dramatically during the gold-rushes. In north Western Australia and elsewhere, pastoralists were willing to pay more for land which came with an Aboriginal labour force.

When the white intruders arrived with large numbers of stock, Aborigines resisted by spearing cattle, sheep and horses. Frontier warfare sometimes continued in pastoral areas for over a decade with Aboriginal people suffering a devastating toll. Amidst shocking massacres, a few women, men or young boys were spared, to be forcibly rounded up and kidnapped by the newcomers, then 'tamed' into a labour force. Other Aboriginal peoples voluntarily agreed to cease warfare, deciding to 'come in' to stations and work for the white man. Motivation varied among clans; from a desire to cease warfare, to ensure community survival, to maintain access to their land, to acquire new products, or to 'help out' the lonely white man.

In Queensland in 1876, over 40% of the pastoral workforce was black, and by 1886, 55%. By 1901, at least 2000 Aborigines were employed as stock workers and domestics, with many more working in the industry.³⁶ In 1927, Victoria River Downs station in the Northern Territory employed 129 Aborigines. Another 73 people were classed as 'dependants' of workers, although they performed regular part-time work.³⁷ By about 1937, 3000 Aboriginal people were employed on Northern Territory cattle stations. Aboriginal men and women worked in every facet of stock work, mustering, tailing, droving, breaking in horses, catching escaped horses, saddling, cattle-dipping, branding, ear-marking, separating weaners and working as blacksmiths. Skilful workers became head

³³ Broome, R., 'Aboriginal workers on south-eastern frontiers', *op.cit.*

³⁴ Broome, R., Goodall, H., *Invasion to Embassy*, Allen & Unwin, 1996; For other histories of Aboriginal work, especially in pastoral areas, see: McGrath, A., Saunders, K., Huggins, J., eds., *Aboriginal Workers*, Labour History, 1995; McGrath, A., 'Born in the Cattle': *Aborigines in Cattle Country*, Allen & Unwin, 1987; May, D., *Aboriginal Labour and the Cattle Industry*, Cambridge, 1994; May, D., *From Bush to Station*, Townsville, 1983; Reynolds, H., *With the White People*, Penguin, 1990; Atherton Young, J., ed., *Jane Bardsley's Outback Letterbook: Across the Years*, Angus & Robertson, 1984; Brock, P., *Outback Ghettos: A history of Aboriginal institutionalisation and survival*, 1993; Rosser, B., *Dreamtime Nightmares*, Aboriginal Studies Press, 1985; Bird-Rose, D., *Hidden Histories*, Aboriginal Studies Press, 1991; Loos, N., *Invasion and Resistance*, 1982; Shaw, B., *When the Dust Comes in Between*, Aboriginal Studies Press, 1992; Shaw, B., *Bush Time, Station Time*, Aboriginal Studies and Teacher Education Centre, 1991; Marshall, P., ed., *Raparapa*, Magabala, 1988; Austin, T., *Never Trust a Government Man. Northern Territory Aboriginal Policy 1911-1939*, NTU Press, 1997; Haebich, A., *For Their Own Good*, UWA, 1987, Kimberley Language Resource Centre, *Moola Bulla: In the Shadow of the Mountain*, Magabala, 1996; Berndt, R.M. & C.H., *End of an Era*, Aboriginal Studies Press, 1987. For a comparative dimension, see Iverson, P., *When Indians Become Cowboys*, University of Oklahoma, 1994.

³⁵ From Curr, E., *Recollections of Squatting Victoria*, 1883, p 137 and McCrae, G., 1911, p 24, cited in Broome, R., 'Aboriginal Workers on South-eastern Frontiers', *op.cit.*

³⁶ May, D., *Aboriginal Labour and the Cattle Industry*, *op.cit.*, pp 187-9.

³⁷ McGrath, A., *Born in the Cattle*, *op.cit.*, p 30.

stockmen, often in charge of white workers.³⁸ While most Aboriginal men worked as stockmen, there were also more specialised jobs as butchers, caring for camels, mules or stallions, or in charge of the manager's plant, wagon, car, mail, garden or kitchen.

White pastoralists and workers spent weeks at a time performing mustering and other activities alongside Aboriginal cattlemen and women. For example, Jackson of Bonrook was trained by Harold Giles from his boyhood in the 1900s as an all-rounder and stockman. When Giles was immobilised by back problems, Jackson cared for him and was responsible for doing most of the work single-handedly. While managers went away, they entrusted the keys to the store to reliable head women like Daisy Djunduin. Employers sometimes unfairly assumed they had acquired servants for life, and were bitterly disappointed when their employees left to spend time with Aboriginal relatives or have families of their own.³⁹

Managers often preferred women as stock workers because of their reliability in procuring bush foods, and as importantly, for sexual services and female companionship. Such liaisons included casual sexual exchanges akin to western prostitution, and harshly exploitative liaisons where women were imprisoned and raped. But there were also unions which observed the complex and lengthy indigenous protocols of the arranged marriage. However, the uneven power relationships of colonialism left great scope for brutal treatment. Due to racist attitudes and discriminatory legislation concerning mixed unions, including child-removal policies, very few white men sought or obtained a legal marriage with an Aboriginal woman.

On larger stations with more complex domestic requirements, Aboriginal women not only managed the cooking and cleaning, but also organised firewood, procured water, ran domestic gardens, cared for milking goats or cows and collected extra bush tucker. Aboriginal staff were paid in blankets, pipes, clothing, mouth-organs, pocket money and food rations.⁴⁰

White women relied heavily on Aboriginal women's skills; they performed most of the domestic work and also acted as midwives during labour. The remoteness of cattle stations and their husbands' frequent absence created a trusting reliance and often strong bonds. The reminiscences of the Northern Territory's Jeannie Gunn and Queensland's Jane Bardsley reveal how white women had to learn the roles expected of them, including an understanding of Aboriginal beliefs, customs and ceremonies. Bardsley recounted her head domestic, Kitty's, sensitivity to her feelings, saying that "she watches me and understands if I feel sad. Sometimes Kitty went to great lengths to get Bardsley to laugh, dressing up and dancing for her.

Because of the great dependence of station whites upon certain Aboriginal domestics, these women were often prevented from going on annual walkabouts or holidays. They were expected to reside in the 'big house', and in some cases, such as Maudie Moore of Dunham River, in the Kimberleys, were prevented from marrying and having (or keeping) their own children.⁴¹

Child-rearing arrangements demonstrated the reliability of Aboriginal women workers. Nannies suckled and reared many white babies from birth. Many white station children spoke local Aboriginal dialects before English and they enjoyed playing with the Aboriginal children. White station children thus grew up bicultural, comfortably moving between Aboriginal and English world views and lifestyles. Their affection for and dependence upon Aboriginal women could cause resentment or

³⁸ *Ibid*, p 32,35.

³⁹ *Ibid*, passim, Bardsley, Gunn, et al.

⁴⁰ Bardsley, cited in Atherton Young, J., ed., *Jane Bardsley's Outback Letterbox*, op.cit., p 128; 1900 section.

⁴¹ McGrath, A., *Born in the Cattle*, op.cit., Ch 4.

confusion for the station managers; many white station children were consequently sent off to boarding school to remove them from surrounding cultural influences.

White pastoralists understood labour management as a paternalistic regime, but they delegated many key responsibilities to selected Aboriginal workers, who ensured the labour force functioned smoothly. Aborigines called the bosses names like 'mullaka', denoting father (on Elsey station), or 'missus'. Such names implied reciprocal obligations and if bosses failed to fulfil them, Aboriginal staff made their feelings clear. A squatter or manager had to earn their trust and respect. He had to prove himself a good cattleman and horseman and show his grit and stamina before he earned the respect of the Aboriginal stockmen. He had to show he was tough but fair.

Aboriginal workers refused to tolerate head stockmen or other station employees who were brutal or unjust, challenging them by threats of force or complaints to police. At Wrotham Park in North Queensland during the 1920s, station workers reported to a distant police station a policeman and accountant who were cheating Aborigines out of wages and forcing them to renew contracts. They complained of poor food and one man's illegal imprisonment, but to guarantee action, included explicit details of the two men's rampant sexual activities with Aboriginal station women.⁴² Aboriginal workers demanded certain standards of treatment and returns and were willing to struggle for their rights. Strikes and other forms of resistance occurred on Pilbara stations during the 1940s, with the best-known taking place at Wave Hill during the 1960s.

Within a context of structural inequality and exploitation, pastoral workers sustained an environment of richer human interaction. Station employment and prestigious roles such as head stockman enhanced the authority and dignity of Aborigines in the eyes of the wider community, as well as being a source of personal self-esteem. In a book about Glen Helen station, pastoralist Bryan Bowman described the abilities of a young Aboriginal man whose death some decades later was investigated by the Royal Commission into Aboriginal Deaths in Custody. Bowman wrote of Kwementyaye Price as "a superb stockman and horse tailer and the best man after wild cattle I ever rode with. A head injury caused by a fall from a horse was followed by severe epilepsy and deteriorating health, leading to his loss of employment. He fell into a spiral of alcohol abuse. In the report of the inquiry into his death, Commissioner Elliott Johnston found his health-related unemployment to be a primary underlying issue and considered unemployment generally to be a significant factor in many Aboriginal deaths in custody."⁴³

Although station wages were meagre, many Aboriginal workers liked the excitement of working with horses and cattle, stoically persisting with their strenuous work. They were classic Australian 'battlers'. However, the substantial loss of employment in the pastoral industry was devastating to many Aboriginal communities.

Aboriginal payment and government regulation

Before World War II, Aboriginal workers in the Northern Territory and Western Australia were usually paid only in clothing, kit and rations, with occasional pocket money. They were generally supplied with only meagre accommodation and the most basic western food. On Territory stations during the 1920s and '30s, the government required that pastoralists not paying wages must feed workers and their dependants. In Queensland and around government rationing depots such as Moola Bulla in Western Australia, squatters expected the government should supply food to

⁴² Queensland State Archives, Wrotham Park Inquiry, A /31709.

⁴³ Johnston, E., Royal Commission into Aboriginal Deaths in Custody: *Report of the Inquiry into the Death of Kwementyaye Price*, AGPS, Canberra, 1990. Bowman quote cited therein, p 11 and *National Report of the Royal Commission into Aboriginal Deaths in Custody*, AGPS, Canberra, 1991, vol 2, ch 2.

‘dependants’, or workers’ relatives.⁴⁴ Pastoralists resented the introduction of stricter legislative controls, such as the Queensland Native Labourer’s Protection Act 1897-1901, the award scales of 1919 and the improved living conditions demanded by government welfare in the 1950s.

When wage scales were introduced in Queensland, Northern Territory and Western Australia, a large proportion was compulsorily saved into government trust accounts. The system was never adequately explained to workers and as Aboriginal people expected remuneration as part of kinship reciprocity, they did not understand why the government was taking their money. Police were supposed to distribute the funds, but they were regularly transferred and Aboriginal workers were loathe to demand money of strangers. In any case, the requests they made were often refused and a large portion consequently remained in government accounts. Aboriginal workers lost huge amounts of money because they had such restricted access to their earnings. In the Northern Territory, where accumulated earnings rose to £3000 by the 1930s their growing balances were not spent on Aboriginal people, but were transferred to consolidated revenue.⁴⁵ The Queensland government lucratively reinvested the vast forced earnings of Murrie workers, which totalled £323,007 by 1930, yet it refused to pay the account holders any interest. Most of it was used on general government expenditure. Although the schemes contravened the League of Nations’ Forced Labour Convention of 1930, Australia had only agreed to apply this to territories under its stewardship, not ”internal dealings with subject peoples. ⁴⁶

Aborigines preferred to negotiate with people in their own traditional country, from within their own extended kin networks, into which they had incorporated many of the non-Aboriginal station residents. They valued employers who treated them with respect as fellow men, who recognised their different cultural priorities and the demands of their ceremonial cycle. They were willing to show flexibility if it was reciprocated.⁴⁷ A high cultural priority was for their relatives and old people to be permitted to stay on the stations, to be fed well, and provided with clothing and other necessities. With the introduction of welfare policies, the government rather than employers increasingly maintained worker’s dependants.

Like trust accounts, and even improved welfare, the introduction of equal wages was intended to provide greater ‘certainty’ for Aboriginal workers. Yet their win on one front was often accompanied by loss on another. The Wave Hill strikes and walk-offs supported the equal pay case of the 1960s, which argued that Aboriginal pastoral workers should receive the same award as other pastoral workers. Wages, however, were only part of the reason for the Wave Hill protest. Gurinji leaders also stressed the importance of land rights and concern about their women’s exploitation by white employees but they had no intention of leaving their country. Nor did they want to desert their station duties, expressing concern for the cattle that needed looking after.

Tragically, the introduction of equal wages became the catalyst for whole communities to be forced or ‘persuaded’ off the stations. Many pastoralists refused to employ them under the changed conditions; a large number of Aboriginal workers not only lost their jobs but also the right to stay on their own land. The exodus was exacerbated by diminishing employment opportunities due to rural recessions, low beef prices, increased fencing and technology and the introduction of road-trains and heli-mustering. Aborigines were also encouraged to seek medical help from urban hospitals and

⁴⁴ May, D., *Aboriginal Labour and the Cattle Industry*, op.cit., p 48-9; KLRC, passim.

⁴⁵ McGrath, A., *Born in the Cattle*, op.cit., p 137-8.

⁴⁶ Evans, R., and Scott, J., ‘Fallen Among Thieves’: Aboriginal Labour and State Control in Inter-war Queensland’ in *Aboriginal Workers*, op.cit., p 126.

⁴⁷ Hardy, F., *The Unlucky Australians*, Thomas Nelson, 1968, passim; Stevens, F., *Aborigines in the Northern Territory Cattle Industry*, ANU Press, 1974.

education for their children from local towns. Many station managers refused to install water systems and other necessities. Furthermore, newly arrived managers sometimes had little respect for the achievements of local Aboriginal communities in pioneering the stations and were either ignorant of, or disinterested in, the generations who had long provided loyal service, generosity and hard work.

A history of cultural negotiation and co-operation

Under early Queensland law and continuing today in Northern Territory, South Australia and Western Australia, Aboriginal people had access rights to their land for hunting, gathering and, in some cases, for residential purposes. This was not always honoured in practice and Aborigines knew that reliance upon their labour enhanced their security of access to their land and its sustenance. One of the key motivations for Aboriginal people to work on cattle stations was clearly to ensure they could stay on or near their traditional land. Through active participation in the northern pastoral industry, they maintained their connection to traditional land. Co-existent rights to land were being exercised, whether officially recognised or not.

Station work provided Aborigines with highly valued opportunities to travel around their clan and wider range-lands. It was not incompatible with traditional economic pursuits nor vice versa; stockmen could shoo cattle away from significant sites and take advantage of opportunities to hunt game. They were strategically placed to ensure a continuing say about disturbance to particular sites in their country.

Wherever possible, Aborigines practiced their traditional bush economy. They played an indispensable role supplying varied bush foods to station lessees, especially to survival on remote stations regularly cut off by floods. In 1896, for example, Jane Bardsley told of how the Aborigines would come to the Midlothian kitchen with fish, duck, crabs and other foods.⁴⁸ On remote Koolpinyah, the Herberts enjoyed magpie geese, eggs, a variety of fish and wild vegetables.

The agreement of many northern pastoralists to maintain dependants of station workers, which became increasingly necessary with resource depletion, enabled workers to fulfill reciprocal obligations and importantly, to keep their communities together and Law strong. Aborigines in cattle country thus maintained their dignity, had productive work to do and could also train their children towards employment futures, teaching them simultaneously how to be good cattlemen and women, and good members of their Indigenous community. There was a practical co-existence of cultures.

Aborigines maintained their cultural practices in synthesis with the seasonal cycle of the pastoral industry. The evolution of the 'walkabout' is a prime example of Aboriginal peoples' willingness to accommodate pastoral interests. Northern Aborigines adapted their previous yearly patterns of large ceremonial gatherings. These had traditionally been held during the dry season, where they gathered in large groups alongside the birds and other game which gathered around the remaining water-holes. In the Victoria River District, the big ceremonies had been held just after the wet season, a busy time for cattle stations.

In order to adapt to the demands of the cattle economy, Aborigines agreed to switch their big ceremony time to the wet season, the 'slack time' in the station calendar. Bosses endorsed the long annual holiday, sometimes lasting 'three moons', providing substantial rations. The walkabout usually involved a long journey on foot across their country where clans met up with kin and other clan groups, including station and 'bush' dwellers, or those pursuing traditional lifestyles. Here they stayed for some time to sort out business relating to marriage, trade, initiation, punishments, and the dead. They cemented ties with extended family members, discussed news, exchanged dreaming stories, danced, sang, carved and painted.

⁴⁸ Bardsley cited in Atherton Young, J., ed., *Jane Bardsley's Outback Letterbox, op.cit., ibid*, p 71.

Here the elders were the ‘only bosses’; this was an Aboriginal world, allowing time to reflect upon the cattle world and upon the doings of white men. It was an intensive time to educate the young in bush skills, in ceremonies. Station managers required a few men to remain back to prepare for the coming season. Key household workers and domestics were always expected to remain. While some of these may have had their own reasons for not participating, most had no choice, and therefore missed out on this important breathing space and confirmation of personal and clan identity.⁴⁹

The disadvantages of wet season walkabouts included the discomfort of rain and greater difficulty travelling, plus larger game being more dispersed. However, the interests of the cattle economy were given a degree of priority. Water was plentiful, and several bush fruits ripened during this season. The walkabout thus continued to play a crucial role in affirming the viability of the bush economy, in confirming identity and in the education of the next generation.

Pastoralists sometimes overtly recognised, respected and adapted to Aboriginal values. At Koolpinyah station during the 1910s for example, the Herbert brothers were troubled by illness and itching and were informed by local Aborigines that they should move their homestead as it was located at a louse dreaming site. The Herberts moved their dwelling elsewhere.⁵⁰ Station managers had to accept that sometimes a valued employee might be called away on urgent ceremonial business. To avoid conflict over key staff, Aboriginal employees usually arranged for a suitably skilled replacement, who would appear for work, well-briefed. Aborigines learned to inform the boss when they needed to ‘go bush’ for ceremonial, community or medicine business. The station camp became the focus and meeting place for many smaller-scale ceremonies and rituals staged throughout the working year. Often held at night or on Sundays, some managers complained about the noise and crowds. Aborigines were keen to induct new station managers to witness or participate in ceremonies, for this was a way of teaching and incorporating them into the local Law, with its complex reciprocal relationships.

Some bosses were undeniably cruel and callous towards Aboriginal staff, and sometimes there were serious gulfs of understanding between parties, leading to violent conflict. But in the station world, it was in everyone’s interests to attempt to co-exist harmoniously. Station managers needed stock-workers and domestic labourers and they wanted to feel safe on their leases. Aborigines were cheap, efficient, and accessible. Managers required advice about and assistance with resources and bush foods and often they wanted female and male companionship. Aborigines valued security to live with their communities on their clan or tribal lands. They wanted an opportunity to negotiate about intrusions on sensitive sites. They wanted a future for their children, both in the cattle industry and in their country.

Aborigines undertook complex community and employer negotiations over generations in order to maintain, via pastoral work, a fragile form of security of tenure to their land. Their achievements and contributions to the industry have never been officially recognised. And, as has already been stated, new managers often failed to recognise the essential contribution of generations of indigenous people to developing the property. After World War II, the introduction of government rationing, assimilation policies, equal wages and other changes severely reduced Aboriginal presence on stations. Over the past three decades such factors, combined with increasing management obstruction, have made Aboriginal efforts to maintain their residency and links with their traditional land increasingly difficult or impossible. But the story is not over. Aboriginal communities have set up their own cattle stations and outstations. Tenure to these properties varied from freehold to leasehold. Native title potentially provides an opportunity for Aboriginal people to align ownership

⁴⁹ McGrath, A., *Born in the Cattle*, op.cit., p 159; Bird-Rose, D., *Hidden Histories*, op.cit. pp 7-8.

⁵⁰ Koolpinyah diaries, cited in McGrath, A., *Born in the Cattle*, op.cit., Ch 9.

of their traditional economic base with scope for strong participation in the cattle industry. Many Aboriginal people express a strong desire for further employment within the industry they have made their own.

The pastoral heritage

White Australia has forgotten the track of co-existence. White Australia has been celebrating mythologies of the outback bushman as exclusively white for a hundred years. During the 1890s and 1900s, the nation saw its future as white and Aborigines as a dying race. Stories of co-existence between coloniser and colonised were not considered relevant to nation-making (unlike Clancy of the Overflow or the Man from Snowy River). Today's Aboriginal visitors to the Stockman's Hall of Fame at Longreach thus search in vain for their ancestors; in this representation of the past, Aboriginal faces are few and far between. As the new millennium approaches, however, we should surely start to celebrate shared histories. The story of Aborigines and pastoralists on northern pastoral stations is a rich example: stories can be found of people working and living alongside each other in the same land, of shared and contrasting values, tempered by strong ties of inter-dependence for survival, brightened by creative adaptations on both sides, of cross-cultural collaboration, of listening, understanding and co-operation. Although power relations were asymmetrical, this is a history which contains promising lessons about the possibilities of a mutually beneficial co-existence.

Perhaps pastoralists, feeling accused of being slave-drivers by city humanitarians and white unionists for so long, reckon more positive histories of pastoralist/Aboriginal relations will not be believed. The paternalism of Jeannie Gunn's *We of the Never Never* is seriously unfashionable. And it is true that pastoralists and white station workers played a role in labour and sexual exploitation which would be quite unacceptable today. Greed for profit, especially in the case of larger companies, led to neglect of workers' health, avoidance of compensation payments, poor wages and rations. At the same time, however, the pastoralists' desire to make a success of remote pastoral enterprises encouraged many to work alongside Aboriginal people, to learn from them, to understand them, to make it work as a mutually rewarding relationship. The pastoral industry did not generally uproot local Aborigines from their land, nor force them to become dependants in segregated bureaucratically-run institutions. Inter-dependent personal relationships were forged and friendships grew out of everyday intimacy, a reciprocal respect for different cultures and the reality of shared lives and spaces.

The barbed wire fence imagined to separate whites and Aborigines over the Wik decision is a fiction flowing from a narrow understanding of history. In order to work effectively alongside people of Aboriginal background, some pastoralists have displayed cultural sensitivity, astuteness and flexibility. Even as recently as the 1950s, pastoralists were willing to acknowledge that Aborigines were the owners of the land, while they owned the cattle, horses, buildings and fences.⁵¹ Although they held the pendulum of power, many demonstrated more than a passing respect for Aboriginal land relationships, kin obligations and different laws. The tenuous, though sustained achievement of co-existence and reconciliation achieved by pastoralists and Aborigines, has not been officially acknowledged. Once this is done, we will be able to move on to a co-existence based on mutual respect and accommodation for each other's needs, but free of the unequal returns, and the many legal and civil injustices, which permeated Aboriginal people's lives.

Inevitably, some pastoralists have had trouble coming to terms with the shifting realities of station life. For example, the events of the World War II led some employers to suggest that American soldiers or army benefits had 'spoilt' Aborigines. As well as the changes to pastoral work and employment opportunities described above, since the 1970s alcoholism has also taken its toll on

⁵¹ Coniston Muster, feature film AIAS.

relations. Add to this the dramatic native title and land rights developments of recent years and it seems that the cocktail of change has been too strong for some pastoralists to swallow. Aborigines, too, have had to cope with dramatic changes in their lives. They will continue their struggle to ensure the rights they have always known to be their due. But they continue to employ strategies of co-operation in their struggle to guarantee ongoing co-existent rights to cattle country. Although competing interests may arise, pastoralists and Aborigines will find the best solutions about cattle country by working together. In the past, innumerable small-scale, regional negotiations, based on person to person discussions and compromises, have led to workable decisions and mutual understandings. If more pastoralists and farmers employed Aborigines and if more Aborigines were able to run their own enterprises, the two groups would no longer be mistakenly envisaged as polarised sectors.

It is wrong and utterly misleading to equate pastoralists with progress and Aborigines with backwardness. Aboriginal people's widespread collaboration not only created our northern pastoral industry, it enabled peaceful relations, wealth and innovation. Aborigines not only share Australia's pastoral heritage, they shaped it. Traditional lands have become cattle country and many Aborigines embrace the changes as part of their lives and their people's histories. They are not caught up in western ideas of authentic Aboriginality as a frozen moment in time. Like other human cultures, they welcomed some aspects of new foods, technologies and lifestyles. Training in station work became incorporated as part of rigorous demands of manhood preparation, with Aboriginal elders taking on the role of teaching the young boys. They incorporated aspects of cattle culture into their own, combining a bush and station lifestyle not in a partial 'adaptation' but in a creative breakthrough, nurturing new and dynamic cultures to embrace their present, post-contact time. They also have much to offer in rectifying some of the environmental degradation caused by overstocking and poor knowledge of the land.

The meeting of Queensland pastoralists in mid-1997 to hear the Prime Minister, John Howard, speak at Longreach saw white men and women practising identity politics. White cattle men and women and the Sydney-based Prime Minister himself, proudly wore Akubra hats, RM Williams boots and stockman's shirts. They gathered in front of the stage-like steps of the Stockman's Hall of Fame, a monument to commemorate the Bicentenary of white settlement in Australia. Aborigines, it seems, were not invited. Yet, why not? Although denied the same economic benefits, they shared a past, and like white participants in the cattle industry, many Aborigines enthusiastically wear the same apparel, badges which signify their deep spiritual and historical affiliation with the station world.

Co-existence is a track which has its historical signposts after all. The Wik decision, with its recognition of native title on pastoral leases, potentially enables Australians to embrace our full bush heritage. National institutions like the Stockman's Hall of Fame thus have the exciting scope to explain a more positive and more inclusive national story: one of creative adaptation and dynamism, where indigenous and other Australians pioneered economically productive, co-operative, though in the long run, tragically unequal, relationships. A truly just outcome of the Wik negotiations might bring together Aborigines and whites to stand side by side on the steps of the Stockman's Hall of Fame. A just response to the Wik decision can enable both parties to walk the track to the future on a more equal footing. Beneath a calm sea of matching hats, we might picture the proud faces of Aboriginal and non-Aboriginal cattlemen and women, united by a complex but shared history.

Chapter 3: The Wike case

The Wik and Thayorre Peoples

I believe that my analysis of the High Court's decision in *The Wik People and the Thayorre People v*

State of Queensland & Ors (the ‘Wik case’)⁵² should begin with an introduction to the peoples at the heart of that case.

Connection to country

The Wik and Thayorre peoples come from the remote, resource-rich lands of western Cape York. Wik country stretches from around Weipa in the north to the Edward River in the south.⁵³ The traditional lands of the Thayorre overlap with the southern end of this area, hugging the edge of the Gulf of Carpentaria down to the Coleman River.⁵⁴ This is tropical country, ruled by the ‘wet’ and the ‘dry’. Flat coastal flood plains rise to hills covered in rainforest. Further inland lie forests and pastoral country, draining to the sea through a series of large rivers.⁵⁵

The Wik peoples “are better considered as a ‘nation’ than a ‘tribe’”.⁵⁶ For some time the name ‘Wik’ has been used by anthropologists to refer collectively to groups including the Wik-Ompom, Wik-Mungkana, Wik-Me’anha, Wik-Iiyanh, Wik-Paacha, Wik-Thinta, Wik Ngathara, Wik-Epa, Wik-Ngathana and Wik-Nganychara.⁵⁷

The Wik were among the first Aborigines to have contact with Europeans. The Dutch ship Duyfhen landed on the western coast of Cape York in 1606. After spending some time on land, the crew was driven off by the Wik. The location of this landing was subsequently named Cape Keerweer, meaning ‘turn around’.⁵⁸ It appears that the Dutch continued to visit this area sporadically throughout the next century and a half, and that “[i]t is possible that the strength of Aboriginal resistance to the Dutch in this region was a major deterrent to their colonising Australia a century or so before Cook”.⁵⁹

Colonisation first began to have a serious impact on the Wik and Thayorre peoples during the second half of the nineteenth century. In the 1870s, a telegraph line was built through the middle of Cape York.⁶⁰ The cattle industry followed. The expansion of white settlement into Wik and Thayorre territory brought with it frontier conflict, devastating diseases, and the kidnapping of men for forced labour on pearlers and luggers. The once-thriving Indigenous populations declined rapidly.⁶¹

⁵² *Wik Peoples and Ors v State of Queensland and Ors* (1996) 141 ALR 129 (‘Wik’).

⁵³ Martin, D.F., ‘The ‘Wik’ peoples of western Cape York’, *Indigenous Law Bulletin* vol. 4(1) April 1997, p. 8.

⁵⁴ Bottoms, J., ‘Thayorre People v Queensland’, in Hiley G. (ed.) *The Wik Case: Issues and Implications*, Butterworths, Sydney, 1997, p. 19.

⁵⁵ *The Encyclopedia of Aboriginal Australia*, AIATSIS, Canberra, 1994, p. 1172, Martin, D.F., ‘The ‘Wik’ peoples of western Cape York’, *op.cit.*, p. 8.

⁵⁶ *The Encyclopedia of Aboriginal Australia*, *op.cit.*, p.1179.

⁵⁷ *The Encyclopedia of Aboriginal Australia*, *op.cit.*, p. 1179; Martin, D.F., ‘The ‘Wik’ peoples of western Cape York’, *op.cit.*, p. 8.

⁵⁸ Roberts, J., *Massacres to Mining: the colonisation of Aboriginal Australia*, Blackburn, Dove, 1985, p. 7; *The Encyclopedia of Aboriginal Australia*, *op.cit.*, pp. 1172, 1179; Schultz, J., ‘People Power’, *Courier Mail*, 22 February 1997, p. 24.

⁵⁹ *The Encyclopedia of Aboriginal Australia*, *op.cit.*, p. 1172.

⁶⁰ *Ibid.*

⁶¹ Martin, D.F., ‘The ‘Wik’ peoples of western Cape York’, *op.cit.*, p. 8; Collings, N., ‘The Wik: a history of their 400 year struggle’, *Indigenous Law Bulletin*, vol. 4(1) April 1997, p. 5; Schultz, J., ‘People Power’, *op.cit.*, p. 24; *The Encyclopedia of Aboriginal Australia*, *op.cit.*, p. 1172.

Concern about the suffering of Aborigines in western Cape York led to the establishment of several missions during the late nineteenth century. The most important missions for the Wik and Thayorre peoples were those at Aurukun and Pormpuraaw.

Aurukun mission was established in 1904 by the Presbyterian Church. It was an unusual mission in that its population did not primarily consist of people who had been forcibly relocated from distant areas. Instead, most people who lived at Aurukun were Wik.⁶² Outstations were established and people came and went between them and the mission. Many Wik people spent time working on pastoral properties located on their traditional lands.⁶³ The Wik remained connected to their country and, to a large extent, retained their culture and languages.⁶⁴ Today, school children at Aurukun are taught in both Wik-Mungen and English.⁶⁵ As Jan Roberts says:

*This is one of the strongest tribal communities left in Australia. They retain their languages and their culture. They still dance their sacred dances and hunt and gather on their ancestral lands.*⁶⁶

The mission to which most Thayorre people were taken was Pormpuraaw, which was established by the Anglican church in 1938. Pormpuraaw is located within the traditional lands of the Thayorre, near the Edward River.

Ironically, as David Martin has explained, the missions of western Cape York:

*...enabled the maintenance of significant aspects of Aboriginal social, cultural and political life, including those relating to land. Aurukun and Pormpuraaw in particular have long been recognised as the bastions of traditional Aboriginal values in Queensland.*⁶⁷

Recognition of rights

In considering the *Wik* case, it should be remembered that it is the most recent episode in a long-fought campaign by the Wik peoples to protect their culture from the impact of dispossession and to gain recognition of their rights to their traditional estates.

The Wik came to national attention in 1975 when the Queensland government issued a foreign consortium with a special lease to mine bauxite in the middle of the Aurukun reserve.⁶⁸ This was done without any consultation, either with the people of Aurukun or with mission authorities. Under the terms of the grant, no compensation was to be paid to the Aurukun community. Instead, the Queensland Director of Aboriginal Affairs was to receive 3% of the mine's net profits.⁶⁹

The people of Aurukun were vehemently opposed to the granting of the lease on their traditional

⁶² *The Encyclopedia of Aboriginal Australia*, *op.cit.*, pp. 72, 1179; Schultz, J., 'People Power', *op.cit.*, p. 24.

⁶³ Martin, D.F., 'The 'Wik' peoples of western Cape York', *op.cit.*, p. 9.

⁶⁴ *The Encyclopedia of Aboriginal Australia*, *op.cit.*, pp. 72, 1179; Schultz, J., 'People Power', *op.cit.*, p. 24.

⁶⁵ Schultz, J., 'People Power', *op.cit.*, p. 24.

⁶⁶ Roberts, J., *From Massacres to Mining: the colonisation of Aboriginal Australia*, *op.cit.*, p. 118.

⁶⁷ Martin, D.F., 'The 'Wik' peoples of western Cape York', *op.cit.*, p. 9.

⁶⁸ The lease was granted by means of special legislation, the *Aurukun Associates Agreement Act 1975* (Qld).

⁶⁹ Roberts, J., *From Massacres to Mining: the colonisation of Aboriginal Australia*, *op.cit.*, pp. 119, 120.

lands. They launched a court challenge, financially supported by the Uniting Church. The Wik argued that the Director of Aboriginal Affairs had failed to uphold his statutory duty to act as their ‘trustee’, as he had agreed to the lease without consulting them or negotiating compensation for the damage to their land. These arguments were upheld by the Supreme Court of Queensland.⁷⁰ However, the Queensland government appealed this decision to the Privy Council, which overturned the Supreme Court’s decision.⁷¹

At around the same time, significant numbers of people began to move from Aurukun onto outstations. This was inconsistent with the Bjelke-Petersen government’s official policy of assimilation. The government’s displeasure at the outstation movement and church-sponsored resistance to mining led it to announce that the Aurukun mission would be brought under State government control.⁷² This move was emphatically opposed by the Aurukun community.⁷³

Initially, the Fraser Government expressed a degree of support for the community.⁷⁴ The Federal Parliament passed legislation which said that if a majority of the community wished, the reserve could be governed by an Aboriginal Council. This was too much for Premier Bjelke-Petersen. Only days before the Federal Bill was passed, the Queensland parliament de-gazetted the reserve, so that it became Crown land and was removed from the scope of the Federal Act. The state then passed legislation which gave the people of Aurukun a 50-year lease over their land, but reclassified the mission as a Shire Council. This classification placed the mission under the control of the Queensland Department of Local Government and outside the reach of Commonwealth power.⁷⁵ Only a few months later the Queensland Minister for Local Government dismissed the elected council and appointed an administrator.⁷⁶

The Queensland government also sought to prevent Wik people from buying their traditional lands. During the late 1970s, Old Man Koowarta,⁷⁷ a Wik elder, was granted Commonwealth funds to purchase a leasehold property which formed part of his clan’s country. The Queensland government refused to process the transfer on the blatantly racist basis that it opposed the acquisition of large freehold or leasehold areas by Aboriginal people.⁷⁸ In what became a ground-breaking constitutional case, Old Man Koowarta challenged the actions of the Queensland government in the High Court, claiming that the government had breached the *Racial Discrimination Act 1975 (Cth)*.⁷⁹ Although Koowarta won this case, his peoples’ joy was to be short-lived. The Queensland Government immediately re-classified the area – which was significantly degraded – as a national park, thus preventing its legal purchase.

⁷⁰ *Peikinna and ors v Corporation of the Director of Aboriginal and Islanders Advancement* W. No. 553 of 1976 (5 October 1976).

⁷¹ *Corp. of the Director of Aboriginal and Islanders Advancement v Peikinna & ors* (1978) 52 ALJR 286.

⁷² The same intention was announced in relation to the Mornington Island Reserve – see Nettheim, G., *Victims of the Law – Black Queenslanders Today*, Allen & Unwin, Sydney, 1981, p. 10.

⁷³ Martin, D.F., ‘The ‘Wik’ peoples of western Cape York’, *op.cit.*, p. 9.

⁷⁴ Bennett, S., *Aborigines and Political Power*, Allen & Unwin, Sydney, 1989, p. 78.

⁷⁵ *Ibid*, p. 71.

⁷⁶ Nettheim, G., *Victims of the Law – Black Queenslanders Today*, *op.cit.*, p 12.

⁷⁷ It is the tradition of the Wik not to use the first name of a deceased person – see Collings, N., ‘The Wik: a history of their 400 year struggle’, *op.cit.*, p. 6.

⁷⁸ Collings, N., ‘The Wik: a history of their 400 year struggle’, *op.cit.*, pp. 6-7.

⁷⁹ *Koowarta v Bjelke-Petersen* (1982) 39 ALR 417.

As can be seen, the native title claim which gave rise to the Wik case is only the most recent attempt by the Wik to gain recognition of their rights to land through non-Indigenous legal and political processes. The case must be regarded:

*...as the latest in a series of actions taken by the Wik people to assert their fundamental customary and legal rights, and to demand recognition of their society and culture by the wider state. It is certainly seen as such by Wik people themselves.*⁸⁰

The pastoral leases

A significant proportion of the western area of Wik and Thayorre country is now 'Aboriginal land', held by Community Councils under leases or Deeds of Grant in Trust. Native title proceedings relating to these areas are currently in mediation with the National Native Title Tribunal.⁸¹

The Wik case primarily concerned areas further inland held under pastoral and mining leases.⁸² The two pastoral lease properties involved were referred to by the Court as the 'Mitchellton pastoral lease' and the 'Holroyd pastoral lease'.

The Mitchellton pastoral lease

Two leases were granted over the Mitchellton pastoral lease area, both under *Land Act 1910* (Qld). Possession of the land was never taken by the lessee under either of the leases.

The first lease was granted in 1915. It was expressed as being for "*pastoral purposes only*". After only three years this lease was forfeited for non-payment of rent.

Another lease, again for "*pastoral purposes only*", was issued in 1919. This lease survived for an even shorter period than the first one. In 1921 the Chief Protector of Aboriginals wrote to the Home Secretary in Brisbane complaining that he had not been consulted about the granting of the second lease. He informed the Home Secretary that there were about 300 "*natives*" roaming on the country who would be "*hunted off*" when the leaseholder commenced operations.⁸³ The lease was surrendered later that year. Since 1922 the land has been reserved for the use and benefit of Aboriginal peoples.

In his judgment, Justice Kirby described the situation which existed on this remote piece of land:

Members of the Thayorre continued living on the land in their traditional way. They would have had no reason (there having been no entry) even to be aware of the grant of any pastoral lease over the land. Soon after the surrender of the lease in October 1921, a reserve was created for them. ...[S]o far as they were concerned, nothing of relevance had occurred to their land, save for (as it was put in argument) 'the signing of documents by people in

⁸⁰ Martin, D.F., 'The 'Wik' peoples of western Cape York', *op.cit.*, p. 9.

⁸¹ *Ibid*, p. 8.

⁸² *Ibid*. As well as relating to pastoral leases, the claimants "*tested the validity of the leases granted for major mining projects at Weipa and Aurukun in Cape York before 1975. They claimed that the state had breached its fiduciary duty...and failed to accord natural justice to the native title holders. All seven judges dismissed this claim of the Aborigines.* (Brennan, F., *Wik: the Parliament's Opportunity to Restore Certainty and to Rectify a Significant Moral Shortcoming in Australian Land Laws*, Uniya Jesuit Social Justice Centre, 10 March 1997, p.3).

⁸³ *Wik*, *op.cit.*, per Toohey J., p. 169.

Brisbane.⁸⁴

The Holroyd pastoral lease

The first Holroyd pastoral lease was granted in 1945 under *Land Act 1910* (Qld). It was expressed as being for "*pastoral purposes only*" and was for a term of 30 years.

In 1972 the Holroyd lessees applied for the grant of a new lease, as the current lease was due to expire in 1975. Another 30-year lease was granted over the area, this time under the *Land Act 1962* (Qld). It was not expressed as being limited to pastoral purposes. However, like the other leases, it was subject to various reservations, including a reservation of rights in gold and minerals for the Crown. It contained express conditions requiring the lessee to erect a manager's residence and to effect other improvements, including fencing and an airstrip, within five years.

By 1984 an airstrip had been made but no fences or buildings had been constructed. According to an inspector's report in 1988:

*...the only cattle on the land were feral cattle. There were no branded cattle and only about 100 unbranded. The only occupants of the land, so far as the lessee was concerned, were two sleeper cutter gangs of six men and the contract musterers in the dry season. A machinery shed had been built. But no residential quarters for employees had been constructed. Timber cutters, using their own money, had erected a toilet and shower system. ...The introduction of helicopter mustering had, in the opinion of the inspector, reduced the necessity to insist on permanent mustering yards.*⁸⁵

Again, as the Court explained:

*...it seems a reasonable inference that traditional Aboriginal life would have been little disturbed by the grant of the pastoral lease.... The number of persons entering the land was small and mostly seasonal. The physical improvements were virtually non-existent. In such a large remote terrain, for most of the year, the Wik could go about their lives with virtually no contact with the lessee or the tiny number of stockmen, wood gatherers and occasional inspectors who entered their domain, or, more recently, in the case of helicopter pilots engaged in mustering, who flew over it.*⁸⁶

The history of the action

The Wik peoples initiated a common law action in the Federal Court prior to the enactment of the *Native Title Act 1993* (Cth) ('NTA'). They sought a declaration that they had "*Aboriginal*" or "*possessory*" title rights over approximately 28,000 square kilometres of their traditional lands; and claimed damages and other relief if it was found that these rights had been extinguished. The Thayorre were joined to the action at a later stage after making a cross-claim for a similar declaration in respect of lands which overlapped with the Mitchellton pastoral lease area.

The claimants alleged that their title had not been extinguished by the granting of pastoral leases and constituted "*a valid and enforceable interest in the land co-existing with the interests of the lessees under the pastoral leases and exercisable at all times during the continuation of the pastoral leases.*"

⁸⁴ *Ibid*, p. 270.

⁸⁵ *Ibid*.

⁸⁶ *Ibid*, per Kirby J., p. 271.

⁸⁷ No attack was made on the validity of the pastoral leases. The Wik argued that native title ‘co-existed’ with the interests of the pastoral leaseholders and accepted that in the event of inconsistency between these rights, the leaseholders’ rights would prevail.⁸⁸

After the commencement of the NTA, the Wik peoples made a claim under the Act for a ‘determination of native title’. It was subsequently ordered by Justice Drummond in the Federal Court that certain legal issues raised by the initial proceedings should be heard and determined. It was thought that this approach “*might resolve the major, if not all, issues in the Federal Court proceedings as well as those in the claim under the Native Title Act.*”⁸⁹

Justice Drummond formulated several questions of law which he then sought to answer. He concluded that the pastoral leases conferred a right of exclusive possession on the lessees, and that the grant of the leases had necessarily extinguished all native title on the lands in question.⁹⁰

Leave was granted for the Wik and Thayorre peoples to appeal directly to the High Court. The scope of the appeal was defined by the questions of law which had been formulated by Justice Drummond. This made the decision somewhat circumscribed, and narrowed the issues on which it can be considered authoritative.

The crucial questions which were asked by Justice Drummond and appealed can be summarised as follows:

Did the pastoral leases confer a right of exclusive possession on the grantees?
If so, did the grant of the pastoral leases necessarily extinguish all incidents of native title in respect of the leased areas of land?⁹¹

Exclusive possession

The questions framed by Justice Drummond required the judges to consider whether the leases conferred a right of exclusive possession on the lessees, despite the fact that “‘*exclusive possession*’ was not necessarily an element in an inquiry as to extinguishment by the grant of a pastoral lease.”⁹² The inappropriate emphasis which was placed on this issue was criticised by several of the majority judges, who have been described as having dealt with it “*reluctantly*.”⁹³

There was a crucial difference of opinion between the majority and minority of the Court in relation to this issue. This sprang, in part, from opposing views as to whether Queensland pastoral leases were purely statutory forms of title, or whether they incorporated the common law incidents of a

⁸⁷ *Ibid*, per Brennan C.J., p. 136.

⁸⁸ *Ibid*, per Toohey J., p. 166.

⁸⁹ *Ibid*, per Gaudron J., p 191.

⁹⁰ Justice Drummond regarded himself as being bound by the decision of the Full Federal Court in *North Ganalanja Aboriginal Corporation v Queensland* (1995) 132 ALR 565 – see Bottoms, J., ‘Thayorre People v Queensland’ in Hiley, G. (ed) *The Wik Case: Issues and Implications*, *op.cit.*, p 21.

⁹¹ See Justice Drummond’s questions 1B (b) and (d) and 1C (b) and (d), in Wik, *op.cit.*, per Brennan J., pp. 136-137.

⁹² Bartlett, R., ‘The Wik Decision and Implications for Resource Development’, *Australian Mining and Petroleum Law Journal*, vol. 16, 1997, p 30.

⁹³ *Ibid*.

lease.

Chief Justice Brennan wrote the leading minority judgment. He explained that at common law, a 'lease' is an interest in land which confers a right of exclusive possession. He stated that it was a fundamental rule of statutory interpretation that where a statute uses a term that has a technical legal meaning, the term will be taken to bear that meaning in the absence of contrary indications.⁹⁴ On this basis he found that the pastoral leases in question conferred the incidents of a common law lease, including a right of exclusive possession.

By contrast, the majority found that the pastoral leases in question were a purely statutory form of title, developed specifically to respond to local circumstances. In Justice Toohey's words, the pastoral leases:

...reflected a regime designed to meet a situation that was unknown to England, namely, the occupation of large tracts of land unsuitable for residential but suitable for pastoral purposes. Not surprisingly the regime diverged significantly from that which had been inherited from England. It resulted in 'new forms of tenure'.⁹⁵

As the pastoral leases in question were "creatures of statute",⁹⁶ the majority declared that in order to determine what rights they conferred one must look solely to the terms of the legislation under which they were granted and the terms of the leases themselves, rather than referring to common law principles.⁹⁷ The issue that had to be determined was whether or not the leases conferred a right to exclude native title holders from the leasehold properties.⁹⁸

In order to interpret the statutes under which the leases were granted, the judges considered the circumstances which had surrounded their enactment.⁹⁹ As Justice Kirby described, the creation of the statutory pastoral lease was a response to, and an attempt to control, illegal squatting.

Moves to depasture stock outside the concentrated settlements in New South Wales first began without official sanction in the late 1820s. They continued in the following two decades. So-called 'squatters' simply moved onto land unoccupied by other squatters and took possession of that land without any right or title to it. Faced with this fait accompli, the New South Wales legislature enacted the 'Squatting Acts', instituting a system of pastoral licences.... The government was concerned about uncontrolled activities on Crown land, particularly where the land was acquired without payment, unsurveyed and beyond legal and administrative control.¹⁰⁰

As Justice Toohey explained, the history of pastoral lease legislation in both New South Wales and Queensland reflected the "clear intention of the Crown that the pastoralists should not acquire the

⁹⁴ *Wik, op.cit.*, per Brennan C.J., p 145.

⁹⁵ *Ibid*, p. 172. See also Gaudron J., p. 204, Gummow J., p 224, Kirby J., p. 266.

⁹⁶ Gal, D. 'An Overview of the Wik Decision', *UNSW Law Journal Forum*, vol. 3(2), June 97, p. 2.

⁹⁷ Smith, P.A., 'Pastoral Leases & Native Title', in Hiley, G. (ed), *The Wik Case: Issues and Implications, op.cit.*, p. 24.

⁹⁸ Bartlett, R 'The Wik Decision and Implications for Resource Development', *op.cit.*, p. 30.

⁹⁹ *Ibid*, p. 31.

¹⁰⁰ *Wik, op.cit.*, p. 266.

freehold of large areas of land, the future use of which could not be readily foreseen. ¹⁰¹

Historical sources indicated that the new statutory forms of title were also intended to protect Indigenous peoples from being brutally driven from their lands; thus implying that their continued presence on the land was anticipated. In the words of Justice Toohey:

It is apparent from a despatch from Sir George Gipps, transmitting the Crown Lands Unauthorized Occupation Act to the Secretary of State that one of its aims was 'for the purpose of putting a stop to the atrocities which have been committed both on them [the natives] and by them.' Furthermore, under the regulations made pursuant to that Act a licence could be cancelled if the licensee was convicted 'of any malicious injury committed upon or against any aboriginal native or other persons'. The whole tenor of these provisions indicates a contemplation that Aborigines would be upon licensed lands. ¹⁰²

In 1842 all grants of Crown land were brought under the legislative supervision of the Imperial Government by its *Sale of Waste Lands Act*.¹⁰³ The Order in Council which implemented this Act in New South Wales empowered the Governor to grant leases for pastoral purposes. However, correspondence from Imperial officials indicated that this form of tenure was not intended to permit leaseholders to exclude Indigenous peoples from their traditional lands. Three of the majority judges quoted a despatch from Earl Grey, Secretary of State for the Colonies, in support of this conclusion.¹⁰⁴ Earl Grey advised the Governor of New South Wales that it was:

*...essential that it should be generally understood that leases granted for this purpose give the grantees only an exclusive right of pasturage for their cattle, and of cultivating such land as they may require within the large limits thus assigned to them, but that these Leases are not intended to deprive the Natives of their former right to hunt over these Districts, or to wander over them in search of subsistence, in the manner to which they have been heretofore accustomed, from the spontaneous produce of the soil except over land actually cultivated [or] fenced in for that purpose.*¹⁰⁵

In the view of these majority judges, the circumstances surrounding the enactment of the pastoral lease legislation suggested that it was not the intention of the legislature to enable lessees to exclude traditional owners from leasehold properties. However, the majority judges stressed that the intention of the legislature must ultimately be determined from the terms and operation of the statutes themselves.¹⁰⁶ Upon analysing the statutes, the majority unanimously concluded that they contained nothing which could be interpreted as conferring a right to exclude native title holders. As Justice Toohey explained:

There is nothing in the statute which authorised the lease, or in the lease itself, which conferred on the grantee rights to exclusive possession, in particular possession exclusive of all rights and interests of the indigenous inhabitants whose occupation derived from their

¹⁰¹ *Ibid*, p. 173.

¹⁰² *Ibid*, p. 179.

¹⁰³ *Ibid*, per Kirby J., p 266.

¹⁰⁴ *Ibid*, per Toohey, J., p. 179, per Gaudron, J., p.197, per Kirby, J., p.267.

¹⁰⁵ *Ibid*, per Toohey J., p.179.

¹⁰⁶ Hunter, P., 'The Wik Decision: Unnecessary Extinguishment', in Hiley, G. (ed), *The Wik Case: Issues and Implications*, *op.cit.*, pp. 12-13.

*traditional title.*¹⁰⁷

After concluding that the leases in question were purely statutory interests which did not confer a right to exclude traditional owners, the judges were faced with the question of whether the granting of those leases had "*necessarily extinguished* native title.

Extinguishment or co-existence?

As described above, Justice Drummond had asked whether native title was "*necessarily extinguished* if the pastoral leases conferred a right to exclusive possession on the lessees. Because the majority found that the pastoral leases did **not** confer a right of exclusive possession, the extinguishment question did not strictly arise. However, the majority resolved the issue at the heart of the case by concluding that the granting of the pastoral leases did not "*necessarily extinguish* native title.

Although the High Court in *Mabo* (No.2) discussed the 'extinguishment' of native title, it did so in a limited way, leaving the concept to be further elaborated by the Australian common law.¹⁰⁸ I discussed this issue in my first *Native Title Report*,¹⁰⁹ in an attempt to encourage a judicial approach which would contemplate native title from an Indigenous perspective and ensure the non-discriminatory protection of Indigenous property rights. As I wrote in 1994:

*The extent of common law restrictions on the extinguishment of native title are presently unclear. ...The common law rules relating to extinguishment therefore continue to be of fundamental relevance to the operation of the Native Title Act and its impact on the human rights of Aboriginal and Torres Strait Islander peoples.*¹¹⁰

The *Wik* decision has provided considerable "*elaboration of the general principles governing the extinguishment of native title*"¹¹¹, the details of which require close examination.

Extinguishment of native title requires a clear and plain expression of legislative intention

In *Mabo [No 2]*, three of the six majority judges found that native title could be extinguished by legislation or by executive grants of interests in land, provided that the action of the legislature **or** executive revealed a "*clear and plain intention* to extinguish native title.¹¹² Such an intention could be indicated by express words, or be implied by 'inconsistency' between native title and the action in question.

In my *Native Title Report 1994*, I expressed concern about the notion that the property rights of native title holders could be extinguished by inconsistent executive grants, in the absence of a clear and plain legislative intention to achieve that end. As I explained:

¹⁰⁷ *Wik, op.cit.*, p. 181.

¹⁰⁸ *Mabo and Ors v State of Queensland [No.2]* (1992) 175 CLR 1, ('*Mabo [No.2]*'); see also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* January – June 1994 ('*Native Title Report 1994*'), AGPS, Canberra, 1994, p. 103.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid*, p. 77.

¹¹¹ Attorney General's Department, 'Legal Implications of the High Court Decision in *The Wik Peoples v Queensland*: Current Advice', 23 January 1997, p. 4.

¹¹² Bartlett, R., 'Wik: equality and the fallacy of "extinguishment"', *Indigenous Law Bulletin* vol.4(1) April 1997, p. 11.

*That native title can be removed by legislative acts which have a clear and plain intent to extinguish does not place native title in a position different from other property interests. The Parliament has the power to extinguish any property interest through legislation with clear and unambiguous words. However, the executive does not have the power to remove property rights unless authorised to do so by the legislature. ...[T]he reasoning of the High Court in relation to extinguishment departs from this rule by allowing executive acts to extinguish native title without clear and unambiguous legislative authorisation.*¹¹³

The majority in *Wik* have moved away from this position, by unanimously providing that extinguishment could only occur in situations where a clear and plain legislative intention had been expressed.¹¹⁴ Justice Kirby set out the relevant principles in some detail, explaining that:

There is a strong presumption that a statute is not intended to extinguish native title. The intention to extinguish native title must be clear and plain, either by the express provision of the statute or by necessary implication. General provisions of an Act are not construed as extinguishing native title if they are susceptible to some other construction. Whether by necessary implication a statute extinguishes native title depends upon the language, character and purpose which the statute was designed to achieve. This is species of a general proposition applied by courts in the construction of legislation. It is applied out of deference to the presumption that parliament would not normally take away the rights of individuals or groups, without clearly stating such a purpose...

*... Although the legislators in 1910 and 1962 did not know of the existence of native title, it should be presumed that, had they known, parliament would have acted to protect such rights against uncompensated expropriation. Especially would it have done so in circumstances where the expropriation asserted was alleged to have occurred by a legal fiction, viz the grant of a leasehold interest but one whose peculiarities would leave traditional Aboriginal life totally, or largely, undisturbed. In Canada, the principle has been approved that courts should attribute to parliament the objective of achieving desired results with as little disruption as possible of the rights and interests of indigenous peoples and affecting their rights and status no more than is necessary. Moreover, the principles of statutory construction to which I have referred are by no means new principles. They were many cases before and at the time of the enactment of the early pastoral leases legislation which adopted analogous principles. Existing proprietary rights might be affected by parliament acting within, and in accordance with, its constitutional powers. However, to deprive a person of pre-existing proprietary interests, the legislation enacted by parliament must clearly do so, either by express enactment or by necessary implication.*¹¹⁵

Richard Bartlett has explained the majority position on ‘clear and plain intention’ in the following terms:

In Wik Gaudron J and Toohey J were joined by Gummow J and Kirby J in upholding the rationale of equal status for native title. The Justices formed a majority of four in concluding that a Crown grant can only unilaterally terminate native title by virtue of inconsistency if legislation has manifested a clear and plain intention that extinguishment should result from the grant. The majority applied the principles governing expropriation of all other rights and interests to native title. They rejected the application of a unique and arcane jurisprudence

¹¹³ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1994*, *op.cit.*, p. 86.

¹¹⁴ Bartlett, R., ‘Wik: equality and the fallacy of “extinguishment”’, *op.cit.*, p. 12.

¹¹⁵ *Wik*, *op. cit.*, pp. 282-284 (citations omitted).

*that relies upon a lesser unequal status for native title.*¹¹⁶

Permanency of ‘extinguishment’

It is also extremely significant that the majority judges reached no conclusion as to whether the ‘extinguishment’ of native title caused by an inconsistent grant must be permanent, or whether native title can revive on the expiration of such a grant. They deliberately left open the possibility that native title may be wholly ‘suspended’ for the duration of an inconsistent grant, saying that this point did not strictly arise for determination due to their conclusion that native title was not necessarily extinguished by the pastoral leases in question.¹¹⁷ Justice Toohey acknowledged the unreality of concluding that temporary inconsistent grants must cause native title rights to be lost forever, suggesting that:

*...there is something curious in the notion that native title can somehow suddenly cease to exist, not by reason of a legislative declaration to that effect but because of some limited dealing by the Crown with Crown land. To say this is in no way to impugn the power of the Crown to deal with its land. It is simply to ask what exactly is meant when it is said that native title to an area of land has been extinguished.*¹¹⁸

Thus, room has been left by the majority for this issue to be explored further. And as the Court has done in the past, it may look to Canadian jurisprudence for guidance.

In *Delgamuukw*¹¹⁹, the British Columbia Court of Appeal was of the opinion that even where there was clear and plain legislative authority to issue a grant which was legally inconsistent with Aboriginal rights,¹²⁰ such a grant would not extinguish those rights. The Aboriginal rights could be exercised until the grantee actually made use of her or his rights in a fashion which was in conflict with the exercise of the Aboriginal rights.¹²¹ And, in that event, as Associate Professor Kent McNeil of York University in Ontario explains:

*...Lambert JA was of the view that the Aboriginal rights would be suspended rather than extinguished, and none of his colleagues expressed disagreement with him on that point. Moreover, Lambert JA’s view has since received strong support from Badger, where Cory J said that a treaty right (which in that instance reaffirmed a pre-existing Aboriginal right) would merely be suspended for the duration of inconsistent use of the land by a landowner who had a fee simple estate derived from a Crown grant.*¹²²

¹¹⁶ Bartlett, R., ‘Wik: equality and the fallacy of “extinguishment”’, *op.cit.*, p. 12.

¹¹⁷ *Wik*, *op.cit.*, per Toohey J., pp 170, 185, 188, 190; per Gummow J., p.248; see also Attorney General’s Department, ‘Legal Implications of the High Court Decision in *The Wik Peoples v Queensland*: Current Advice’, *op.cit.*, p. 8; Bartlett, R., ‘The Wik Decision and Implications for Resource Development’, *op.cit.*, pp. 34-35.

¹¹⁸ *Wik*, *op.cit.*, per Toohey J., p. 185.

¹¹⁹ *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 (BCCA), as cited in McNeil, K., ‘Co-existence of indigenous and non-indigenous land rights: Australia and Canada compared in light of the Wik decision’, *Indigenous Law Bulletin*, Vol. 4, Issue 5, August-September 1997, p.4.

¹²⁰ Aboriginal rights is the common Canadian term for Indigenous rights, and includes title to land as well as more specific rights such as hunting and fishing rights: McNeil, K., ‘Co-existence of indigenous and non-indigenous land rights: Australia and Canada compared in light of the Wik decision’, *op.cit.*, p.4.

¹²¹ See McNeil, K., ‘Co-existence of indigenous and non-indigenous land rights: Australia and Canada compared in light of the Wik decision’, *op.cit.*, p. 9.

¹²² *Ibid.*

I made a similar point in 1994, after giving quite some consideration to the Canadian and other common law jurisprudence:

... I query how a lease can extinguish native title. If there is inconsistency and the requisite clear and plain intent that the grant will prevail to the extent that the inconsistency exists, then inconsistent native title rights may be impaired or suspended for the term of the lease and the term of any renewal pursuant to a right to renew contained in the original grant. It is not safe to assume that native title holders will cease to maintain a connection to traditional land even where a lease grants exclusive possession. In practice the fact of whether expired leases have extinguished native title could be determined by examining whether the laws and customs of Indigenous people still recognise a traditional title after a lease expires. Indeed, I believe the mere fact that native title continues to exist and Indigenous people continue to observe their laws and customs after an interest expires is itself compelling evidence that the interest was not so inconsistent with native title as to render it extinguished.¹²³

We will have to await the conclusion which is ultimately reached about the permanency or otherwise of ‘extinguishment’ under the Australian common law. In the meantime, the *Wik* decision confirms that extinguishment of native title will arise from the granting of an inconsistent interest in land where there is a clear and plain legislative intention that such action will extinguish native title. As we have just seen, this was not the opinion of the British Columbia Court of Appeal in *Delgamuukw*.¹²⁴ However, a crucial aspect of the *Wik* decision is that the judges set down strict tests for determining what will constitute ‘inconsistency’ indicating a legislative intention to extinguish.

‘Inconsistency’ leading to extinguishment

Each of the majority judges in *Wik* took a different approach to resolving the issues in the case, and each judgment contains a different description of when ‘inconsistency’ giving rise to extinguishment will exist. Although the case did not produce a clear, unanimous statement on this point, there are strong similarities between the approaches and themes which are apparent in the different judgments. This makes it possible to develop principles about this issue which are consistent with the logic of all the majority judges.

In my view, the majority judgments support a ‘minimalist’ approach to determining when inconsistency leading to extinguishment will arise. Put briefly, this analysis has two main elements. Firstly, it is clear that the judges set a high threshold for determining when ‘inconsistency’ giving rise to extinguishment will occur. To quote Richard Bartlett:

Mere inconsistency in a Crown grant will not suffice. It must be such an inconsistency that it can be said that the legislature clearly and plainly intended to bring about the expropriation without compensation of native title... .¹²⁵

*The majority considered that such an intention was only manifested when the inconsistency was such that native title rights and the rights of the grantee are **unable** to co-exist...or ‘**impossible**’ of co-existence.¹²⁶*

¹²³ Native Title Report, *op.cit.*, p. 95.

¹²⁴ I consider the Canadian position further in the following chapter in relation to the proposal by the Commonwealth to legislatively ‘confirm’ extinguishment by ‘exclusive’ tenures.

¹²⁵ Bartlett, R., ‘Wik: equality and the fallacy of “extinguishment”’, *op.cit.*, p. 12.

¹²⁶ Bartlett, R., ‘The Wik Decision and Implications for Resource Development’, *op.cit.*, p. 29 (emphasis added).

Secondly, when the extent of any extinguishment has been determined, surviving native title rights will ‘co-exist’ with the rights of the lessee. The exercise of rights under the pastoral lease will not ‘extinguish’ native title in these circumstances but rather will ‘prevail’ over it to the extent of any practical inconsistency.

How is ‘inconsistency’ determined?

In my view, the majority judgments indicate that in order to determine whether extinguishment has occurred as the result of a grant, one must consider the rights granted to the leaseholder, rather than any actions which are subsequently performed on the land.¹²⁷ In order to resolve the ‘extinguishment’ issue, the rights granted to the lessee must be compared against the native title rights which are claimed, in order to determine any ‘inconsistency’ between them.¹²⁸

A vital aspect of the judgments is the way in which they approach this comparison between rights. The majority judges stress that ‘inconsistency’ will only be found if rights granted to the pastoralist make it **impossible** for native title rights to survive. The fact that the rights of the pastoralist under the lease **may** be exercised adversely to native title rights is irrelevant to determining whether there is inconsistency that will bring about extinguishment.¹²⁹ There will be no ‘inconsistency’, and thus no ‘extinguishment’, where there is any possibility that native title rights could continue to be exercised on the land over which the interest has been granted.

For example, according to Justice Toohey, in order for there to be ‘inconsistency’ leading to extinguishment, native title rights must be incapable of surviving the exercise of pastoral rights. He defines ‘inconsistency’ as being the *“inability of native title and non-Indigenous title to co-exist.”*¹³⁰ As he explains, *“[i]f the two can co-exist, no question of implicit extinguishment arises... .”*¹³¹

Gummow takes a similar approach, refusing to find that the leases had extinguished native title in the absence of *“clear, plain and distinct authorisation by the relevant grant of acts necessarily inconsistent with all species of native title which might have existed.”* As Gummow explains, there were no indications that exercise of rights granted under the leases would inevitably lead to the *“full abrogation of any native title.”*¹³²

These views are echoed by Justice Kirby, who suggests that ‘inconsistency’ leading to the extinguishment of native title will only occur if the exercise of the leasehold rights would make it *“impossible for native title rights to be exercised.”*¹³³

It is possible that a grant which would satisfy the tests put forward by the majority and be regarded by them as ‘necessarily extinguishing’ all incidents of native title is one of exclusive possession. This certainly appears to be the view of Justice Gaudron. Upon determining that the leases did not grant a

¹²⁷ Attorney-General’s Department, ‘Legal Implications of the High Court Decision in *The Wik Peoples v Queensland*: Current Advice’, *op.cit.*, p. 5.

¹²⁸ *Wik*, *op.cit.*, per Toohey J., p. 190.

¹²⁹ Attorney-General’s Department, ‘Legal Implications of the High Court Decision in *The Wik Peoples v Queensland*: Current Advice’, *op.cit.*, p.4.

¹³⁰ *Ibid*; and *Wik*, *op.cit.*, per Toohey J., p. 184.

¹³¹ *Wik*, *op.cit.*, p. 184.

¹³² *Ibid*, pp. 246-247.

¹³³ *Ibid*, p. 284.

right of exclusive possession, her Honour concluded that there was no necessary inconsistency between the parties' rights arising from the nature of their respective titles.¹³⁴ This conclusion implies the application of a very strict test of 'inconsistency' similar to that of the other majority judges.

I disagree with any suggestion that the exercise of a right of exclusive possession would necessarily make the exercise of native title rights impossible. People may continue to pass on the traditional laws and customs about their country even when they are excluded from it and thus keep their native title alive. The other majority judges do not deal directly with the question of whether a grant of exclusive possession would satisfy their definitions of 'inconsistency' so as to lead to the comprehensive extinguishment of native title. According to the joint majority statement, inconsistency must ultimately be determined by comparing the rights claimed against the rights granted.¹³⁵ In theory, this leaves room for the grant of rights inferior to exclusive possession to give rise to inconsistency entailing the extinguishment of some native title rights. However, this theoretical possibility appears quite remote when set firmly against the strict approach to this issue which is taken by the majority judges. As explained, their statements indicate that in order for inconsistency to be found by this 'measuring' process, it must be obvious that the exercise of the grantee's rights would make it **impossible** for a claimed native title right to be exercised. Without this, there will be no evidence of a 'clear and plain legislative intention' that the grant should extinguish the right in question. It is clear that extinguishment will not result merely from the granting of rights which, when exercised, **may** be inconsistent with the exercise of native title rights. Wherever any possibility of co-existence remains, there will be no question of extinguishment.

Prevalence, not extinguishment

It has been suggested by some commentators that the majority judgments in *Wik* leave open the possibility that acts performed under a pastoral lease may 'extinguish' native title, despite the fact that the granting of the lease did not give rise to extinguishment. In other words, the potential for extinguishment may 'hover over' a leasehold property, eventually arising "from the actual performance of conditions under the lease such as the construction of buildings, dams or an airstrip, which created an inconsistency with the exercise of native title rights over 'particular portions' of the land." ¹³⁶ This has been said to create uncertainty, by making it difficult to determine where native title has been extinguished.¹³⁷ It certainly gratuitously expands the circumstances in which native title may be extinguished.

The purported confusion is created by brief comments of Justices Gaudron and Gummow. The relevant section of Justice Gaudron's judgment is as follows:

The questions whether performance of the conditions attached to the Holroyd Pastoral Lease effected any impairment or extinguishment of native title rights and, if so, to what extent are questions of fact and are to be determined in the light of the evidence led on the further hearing of this matter in the Federal Court. ¹³⁸

¹³⁴ *Ibid*, per Gaudron J., p. 218.

¹³⁵ *Ibid*, per Toohey J., p 190.

¹³⁶ Bartlett, R., 'The Wik Decision and Implications for Resource Development', *op.cit.*, p 35; Attorney-General's Department, 'Legal Implications of the High Court Decision in *The Wik Peoples v Queensland*: Current Advice', *op.cit.*, p. 6; see also footnote no. 76, above.

¹³⁷ See Hiley, G., 'Introduction' in Hiley, G. (ed) *The Wik Case: Issues and Implications*, *op.cit.*, p. 4; Smith, P.A., 'Pastoral Leases and Native Title', in Hiley, G. (ed), *The Wik Case: Issues and Implications*, *op.cit.*, p. 25.

¹³⁸ *Wik*, *op.cit.*, per Gaudron J., p. 218.

For his part, Justice Gummow stated that the performance by the lessee of conditions contained in the lease:

*...would present particular issues of fact for decision. The performance of the conditions, rather than their imposition by the grant, would have brought about the relevant abrogation of native title.*¹³⁹

Confusion about whether or not acts performed under Crown grants could, of themselves, ‘extinguish’ native title was first created by comments of the then Justice Brennan in the *Mabo* decision. On the one hand, Justice Brennan asserted that ‘extinguishment’ was something caused by legislative or executive action which revealed a clear and plain intention to extinguish native title. On the other, he suggested that where the Crown reserved land for a public purpose, native title may ultimately be ‘extinguished’ by inconsistent **use** of the land, rather than by the reservation itself.¹⁴⁰

Employment of the term ‘extinguishment’ by Justice Gaudron in the *Wik* case has led to further confusion, by giving rise to suggestions that land use may be relevant to determining the issue of ‘extinguishment’. Justice Gummow’s comments have also been interpreted in this way by some commentators, although he does not actually use the term ‘extinguishment’. Such interpretations fly in the face of statements by all of the judges – including Chief Justice Brennan – indicating that the question of ‘extinguishment’ must be resolved by reference to the rights of each party, not by considering the acts which have been performed by the holders of Crown-granted titles.

As is explained in the Attorney-General’s departmental analysis of *Wik*, when considering how ‘extinguishment’ should be determined, “*each of the majority judges expressly declare (or at least assume) that the focus of the inquiry should be on the nature or character of the rights granted rather than on the actual use of the land or the activities of the grantee.*”¹⁴¹

According to Justice Toohey, the majority were in agreement that, “[w]hether there was extinguishment can only be determined by reference to such particular rights and interests as may be asserted or established.”¹⁴²

Justice Kirby made clear statements in this regard, including the following:

*What is in issue is **title** in respect of land. It is therefore a question about the existence or otherwise of rights of a legal character in respect of the land.*¹⁴³

*To suggest that the actual conduct of a pastoralist, under a pastoral lease, could alter the rights which the pastoralist and others enjoyed under the lease would be tantamount to conferring on the pastoralist a kind of unenacted delegated power to alter rights granted under the Land Acts. This cannot be.*¹⁴⁴

Only if there is inconsistency between the legal interests of the lessee (as defined by the

¹³⁹ *Ibid*, per Gummow J., p. 247.

¹⁴⁰ *Mabo [No. 2]*, *op.cit.*, per Brennan J., p 68.

¹⁴¹ Attorney-General’s Department, ‘Legal Implications of the High Court Decision in *The Wik Peoples v Queensland*: Current Advice’, *op.cit.*, p. 5; see also Bartlett, R., ‘The Wik Decision and Implications for Resource Development’, *op.cit.*, p. 35.

¹⁴² *Wik*, *op.cit.*, p. 190.

¹⁴³ *Ibid*, p. 274.

¹⁴⁴ *Ibid*, p. 275.

*instrument of lease and the legislation under which it was granted) and the native title (as established by evidence) will such native title, to the extent of the inconsistency, be extinguished.*¹⁴⁵

Justice Gummow stated emphatically that the question of inconsistency is **not** determined "by regard, as a matter of fact in a particular case, to activities which are or might be conducted on the land. Rather, in his view, "it requires a comparison between the legal nature and incidents of the existing right and of the statutory right."¹⁴⁶

Justice Gaudron's judgment is clearly based on a similar approach. She describes as "undoubtedly correct" an assertion that it would be the **grant** of a right of exclusive possession which would extinguish native title, not the exercise of such a right.¹⁴⁷

It seems that the peculiar circumstances of the *Wik* case have led some readers to conflate two different aspects of the native title claims process. Confusion has been caused by fact that the Court was asked to decide whether grants had necessarily extinguished all incidents of native title before the nature of those incidents had been clarified. The judges were acutely aware of the problematic nature of the questions which were put to them.¹⁴⁸ The circumstances of the case gave the Court's discussion of extinguishment a hypothetical quality and blurred the distinction between two separate issues, namely:

- i. the nature of the claimants' native title rights as a question of fact; and
- ii. the extent of any 'extinguishment' of those rights as a matter of law.

The first step of the claims process is to determine the nature and extent of the claimants' native title rights. This is a factual issue which requires the Court to consider all evidence relating to the claimants' traditional connection to the area. Many different factors will influence the ability of claimants to establish their native title rights. For example, traditional connection to land may be dramatically affected by acts which are performed by Crown grantees. However, such acts will at most be one factor to be taken into consideration in determining the degree to which claimants have maintained their traditional connection to an area. Use of the term 'extinguishment' in this context is misleading.

It is only when the claimants' rights have been assessed that they can be 'measured' against the grantee's rights, to see whether any of the native title rights are 'extinguished' as a matter of law. As has been seen, the *Wik* decision indicates that a strict test of inconsistency will be applied. Native title rights which are not extinguished will survive alongside the rights of the grantee. The grant cannot cause any further legal 'extinguishment'. As the pastoralist continues to exercise his or her rights, these actions will 'prevail' over native title to the extent of any inconsistency but will not 'extinguish' native title rights. Assessment of any subsequent loss of connection will, again, be a multi-faceted factual issue.

¹⁴⁵ *Ibid*, p. 279.

¹⁴⁶ *Ibid*, p. 233.

¹⁴⁷ *Ibid*, p. 193.

¹⁴⁸ Bartlett, R., 'The Wik Decision and Implications for Resource Development', *op.cit.*, pp. 28-29. On page 28 Bartlett notes the view taken by Justice Lee in *Ben Ward* on behalf of the *Miriwung Gajerrong v WA* (Federal Court No. WA G6001 of 1995) that "since a finding of extinguishment on account of an inconsistent grant generally entails deciding the nature of that with which the inconsistency is asserted, consideration of the question of extinguishment without a finding as to the content and nature of the native title suggest the possible futility of the exercise.

For these reasons drawn from the majority judgments, I believe ‘extinguishment’ must be given a narrow scope. In my view, the most coherent analysis of the judgments compels the conclusion that inconsistency between co-existing rights leads to the ‘suppression’ of native title, not its ‘extinguishment’. This distinction is central to the *Wik* decision, and essential for the protection of native title.

It is notable that the Attorney-General’s Department has put forward a similar analysis of the judgment, suggesting that it resolves any ‘confusion’ or ‘inconsistency’ arising from the comments of Justices Gaudron and Gummow. As its advice explains:

*This apparent inconsistency might be explained if the Court is in effect saying that the use of the land or the exercise of rights by the grantee in a manner inconsistent with surviving native title rights **overrides**, rather than extinguishes or impairs, such native title rights. That is, the inconsistent exercise of co-existing rights may be a separate issue from that of extinguishment by the grant of inconsistent rights.*

*...In such circumstances, the native title rights must ‘yield’...in the sense of give way to the exercise of the grantee’s rights. However, it may not be appropriate to speak in terms of extinguishment or impairment of native title rights in such cases. As the High Court appears to contemplate concurrent and potentially overlapping rights in relation to an area of land, the issue at this level may be simply one of **priority** between such rights as opposed to their extinguishment or impairment. Any native title rights which survive the grant of the lease must **give way** to the extent that they are inconsistent with the exercise of the grantee’s rights, but not so as to affect the existence of the native title rights for all time (i.e. their extinguishment). It may mean no more than native title rights being **unenforceable** while inconsistent rights are being exercised, with the possibility that they can once again be enforced if the inconsistency is removed.* ¹⁴⁹

As well as providing the most coherent and logical interpretation of the various majority judgments, the ‘prevalence’ model protects the property rights of native title holders, as it does not rely upon, nor further expand, the extinguishment of those rights. This is of great importance. As I explained in 1994, the concept of ‘extinguishment’ is the “component of the common law recognition of native title which potentially impinges most greatly on the enjoyment of our human rights.” ¹⁵⁰

Conclusion

For the reasons outlined, I interpret the *Wik* decision as an imprimatur for Australians to take up the notion of co-existing titles, rather than focusing on extinguishment. Our system of property law has long recognised the co-existence of different non-Indigenous proprietary interests in land, without requiring the extinguishment of certain interests by others. As Maureen Tehan has explained, in responding to the *Wik* case:

...the project should be one of teasing out the boundaries and adjustment at the margins of each interest in order to accommodate co-existence rather than one requiring the extinguishment of one interest in order to accommodate the other. That approach has not been necessary in relation to the multiplicity of common law interests in land and is not necessary here. ¹⁵¹

¹⁴⁹ Attorney-General’s Department, ‘Legal Implications of the High Court Decision in *The Wik Peoples v Queensland*: Current Advice’, *op.cit.*, pp 7-8.

¹⁵⁰ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1994*, *op.cit.*, p. 103.

¹⁵¹ Tehan, M. ‘Co-existence of Interests in Land: A Dominant Feature of the Common Law’, in *Land, Rights, Laws: Issues of*

As will be seen in the following chapter, the High Court's approach to the issues of extinguishment and co-existence has significant implications for the way in which the relationship between native title and non-Indigenous titles should be accommodated in legislation.

The decision of the High Court in *Wik* does not end the struggle of the Wik and Thayorre peoples to achieve legal recognition of their native title rights. Gladys Tybingoompa, a Wik woman who danced outside the High Court after the decision was handed down, described the decision as a "gateway on a long journey."¹⁵² She explained that the judgment was of great significance to her people.

To say what you feel about your land, your ceremonies, your ways, your language, practices in hunting and gathering, then as an individual of that right, of your people, you have a right to say of who you are. Before it wasn't like that.

*It gives the Wik people more encouragement. It gives us strength.*¹⁵³

Chapter 4: "Bucket-loads of extinguishment"

Validation, confirmation, primary production activities and compulsory acquisitions

The *Wik* decision¹⁵⁴ provided our country with a potential basis for co-existence between Indigenous and non-Indigenous Australians. The Federal Government's Ten Point Plan¹⁵⁵ destroyed that potential and produced the Native Title Amendment Bill 1997 (Cth) ('the Bill')¹⁵⁶. The Bill rejects a fundamental and dynamic proposition contained in *Wik*: that where pastoral rights are inconsistent with co-existing native title rights, they prevail over them but do not extinguish the underlying native title. The Bill represents a concentrated drive towards the permanent extinguishment of native title.

This chapter describes, from a human rights perspective, how the Bill enshrines the key elements of the Ten Point Plan to remove and diminish the rights of Indigenous Australians:

The validation proposals of the Bill reward non-compliance with the *Native Title Act* 1993 (Cth) ('NTA') and impair or extinguish native title. Native title holders will have to wait years for any compensation.

The Bill does not 'confirm' common law extinguishment. It anticipates the law and 'deems' extinguishment to have taken place. The potential for the legislation to wrongly anticipate the current boundaries of extinguishment is unacceptably high. The Bill pre-empts and extends the true position of the common law.

Native Title, Native Title Research Unit, AIATSIS, Issues Paper no. 12, January 1997, p 7.

¹⁵² 'Long journey south brings joyful news', *Adelaide Advertiser*, 24 December 1996, p. 2.

¹⁵³ *Ibid.*

¹⁵⁴ *Wik Peoples and Ors v State of Queensland and Ors* (1996) 141 ALR 129 ('*Wik*').

¹⁵⁵ The Hon Senator N. Minchin, *Federal Government's Response to the Wik Decision: THE TEN POINT PLAN*, 4 June 1997, p. 1 ('The Ten Point Plan').

¹⁵⁶ Working Draft of 25 June 1997 ('*NTAB 1997*'). Note that references to *NTAB 97* relate to Schedule 1, unless otherwise specified.

Clearing the way for pastoralists to carry on all primary production activities as the Bill proposes, denies our procedural rights and impairs our title to the point of effecting *de facto* extinguishment.

The compulsory acquisition proposals of the Bill allow State and Territory procedures to replace the right to negotiate, and facilitate the acquisition and extinguishment of native title in order to upgrade the titles of pastoralists.

Whichever way you look at these proposals it is impossible to find a just and fair framework which seeks to balance Australian property rights. You see bias. You see gross infringements of the human rights of Aboriginal and Torres Strait Islander peoples. You see "*bucket-loads of extinguishment*"¹⁵⁷.

The Government's proposals are not only unjust, they are unnecessary. The High Court has already declared that the rights of pastoralists prevail. Indigenous representatives have indicated their acceptance of the legislative confirmation of this principle. Such confirmation could be combined with other initiatives to make co-existence workable and to protect both Indigenous and non-Indigenous property rights. These initiatives would include assisting the development of the common law on native title; making certain necessary but modest adjustments to the *NTA* that respect Indigenous rights; and facilitating negotiated agreements. This approach would require goodwill and a genuine abandonment of the longing for *terra nullius*.

Validation

The Proposed Regime

The 'validation' provisions of the draft Bill propose the implementation of point 1 of the Ten Point Plan.

The Bill proposes the validation of non-legislative acts which took place between the commencement of the *NTA* on 1 January 1994 and the handing down of the *Wik* decision on 23 December 1996. That is, where those acts are invalid because of the existence of native title.¹⁵⁸ Some acts performed **after** the *Wik* decision would also be validated – for example, the exercise of an option created prior to *Wik*. All of these previously invalid acts are defined as "*intermediate period acts*"¹⁵⁹.

For validation to apply to an act there must have been at some time before the act was done a valid freehold estate, a lease other than a mining lease or a public work in existence on some part of the land or waters affected by the act.¹⁶⁰ This requirement is purportedly designed to restrict validation to land that is not vacant crown land.¹⁶¹

¹⁵⁷ Brough, J., 'Wik draft threat to native title', *The Sydney Morning Herald*, 28 June 1997, p. 3 and see Highfield, J., 'Interview by Tim Fischer with John Highfield on Native Title Act Amendments', *ABC TV World At Noon*, Transcript provided by the Office of the Deputy Prime Minister and Minister for Trade, 4 September 1997, p. 1.

¹⁵⁸ The provisions apply to non-legislative acts which took place on or after 1 January 1994 and on or before 23 December 1996.

¹⁵⁹ ^10 and s.232A, item 35, *NTAB 97*. Note the symbol '^' used here has been used throughout the *NTAB 97* to refer to proposed provisions to which section numbers have not yet been allocated. ^50" for example, refers to the proposed provision defining "*previous exclusive possession acts*" on pages 14-15 of *NTAB 97*.

¹⁶⁰ s.232A(2)(e)-(f), item 35, *NTAB 97*.

¹⁶¹ See below.

"*Intermediate period acts* are divided into different categories. The categories indicate the impact which different validated acts will have on native title. Exclusive agricultural and pastoral leases, community purpose leases and interests to be listed in a special schedule to the *NTA* (described below) are included in "*category A* intermediate period acts.¹⁶² Category A intermediate period acts extinguish native title completely.¹⁶³ Subject to exceptions, leases which are wholly or partly inconsistent with native title are "*category B* intermediate period acts and extinguish native title to the extent of the inconsistency.¹⁶⁴

The States and Territories will also be allowed to validate acts if they do so on the same terms as provided in the Bill.¹⁶⁵

Native title holders are entitled to compensation for validated acts.¹⁶⁶

The validation regime cannot be justified

In both my 1993 and 1994 *Native Title Reports* I warned of the risk of governments issuing mining titles without taking into account the possible existence of native title on pastoral lands and therefore without utilising the future act regime of the *NTA*. My warning could not have been clearer:

*It is one thing to take a position about extinguishment, but it is an entirely different matter for governments to act on that position before it is confirmed in law. It is alarming that state and territory governments have limited their use of the future act regime and the protection that it provides to Indigenous peoples on the basis of assumptions about extinguishment. Given the uncertainty around the issue, I find such an approach extraordinarily risky. The legal advice that state and territory governments are acting upon may ultimately be confirmed in the courts. However if it is wrong, governments have potentially issued tenements contrary to the NTA and the human rights of Indigenous peoples. Throughout the drafting of the NTA concerns were stated over the need to remove sovereign risk with regard to mining tenements. The right to negotiate provides a mechanism for interests to be granted without the risk of subsequent invalidity due to the existence of native title. The failure of state governments to use the right to negotiate process on assumptions relating to extinguishment which may be incorrect increases sovereign risk in circumstances where such risk could be easily avoided.*¹⁶⁷

The Bill rewards those who ignored such warnings.¹⁶⁸ Post-*Wik* validation is entirely different to the validation of land interests which occurred after *Mabo*. Ignorance of the existence of native title is one thing, denial of its existence is another. No doubt many governments had legal advice to which they referred in ignoring the future act procedures. But I doubt that such advice would have been unequivocal or that it was the only motivation behind the policy of ignoring native title on pastoral leases.

¹⁶² s.232B(5)(b), item 35, *NTAB 97* and s.229(3)(a), *NTA*.

¹⁶³ ^15(a)-(b), *NTAB 97*.

¹⁶⁴ ^15(c) and s.232C, item 35, *NTAB 97*.

¹⁶⁵ ^35, *NTAB 97*.

¹⁶⁶ ^^25 and 40, *NTAB 97*.

¹⁶⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1994 – June 1995*, AGPS, Canberra, 1995, p. 158 ('*Native Title Report 1995*'). See also, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report January-June 1994*, 1995, p. 138 ('*Native Title Report 1994*').

¹⁶⁸ s.232A(2)(c), item 35, *NTAB 97*.

It was the path of convenience for government – accept advice that native title is extinguished on pastoral leases; satisfy the pastoral lobby; save the up-front cost to government of compliance with the future act regime; ignore Indigenous assertions, manifest in the *Wik* claim, that native title had survived on pastoral lands; and maintain the tradition of *terra nullius*.

When the false economy of this approach became clear with the handing down of the *Wik* decision, State and Territory governments demanded immediate validation of their invalid actions. The cost of having to comply with the future act regime and provide validation to land titles by proper process could then be side-stepped. There remains the cost of compensation and the very real cost of overriding the human rights of native title holders.

As the National Indigenous Working Group (NIWG) has argued:

*The basic unfairness is that blanket validation [as provided for in the Ten Point Plan] damages native title rights [and] potentially provides up-front solutions to non-native title parties, whilst leaving compensation for native title holders to slow and expensive processes, possibly taking years.*¹⁶⁹

As they stand, the validation proposals are unprecedented, discriminatory and constitutionally doubtful. ATSIC has identified the key concerns:

Validation will amount to retrospective sanctioning of conduct which was known to be potentially invalid at the time, on the part of State and Territory governments, and statutory authorities. Consequently, such a legislative provision, if enacted by the Parliament, would be unprecedented.

The legislation is discriminatory in that it purports to validate acts and to provide for extinguishment, only in relation to native title and not in relation to other forms of title. There is no countervailing benefit to be obtained from these proposals which could render this conduct a special measure.

*The validation effected by the amendments, together with the ability under these amendments for State and Territory legislation to be passed with similar effect, will give rise to compensation where native title is extinguished. However, the provision for compensation, in relation to unidentified acts, may not constitute just terms compensation because native title holders may not be in a position to know whether their rights have been affected by the validation. Thus a question of constitutional validity arises.*¹⁷⁰

More generally, the validation proposals are vulnerable to constitutional attack due to the adverse impact they will have on native title and the intrinsic unfairness of a blanket validation. The validation proposals advance the interests of those who have benefitted from governments side-stepping the very clear requirements of the *NTA*.

The NIWG has argued quite rightly that there are no "compelling" reasons to validate the following titles:

¹⁶⁹ National Indigenous Working Group on Native Title, *Coexistence – Negotiation and Certainty: Indigenous Position in Response to the Wik Decision and the Government's Proposed Amendments to the Native Title Act, 1993*, April 1997, p. 18 ('Coexistence – Negotiation and Certainty').

¹⁷⁰ ATSIC, *The Native Title Amendment Bill 1997: Preliminary Commentary*, 25 July 1997, p. 2 ('ATSIC Preliminary Commentary').

Crown to Crown grants and Crown grants to Statutory authorities that do not involve the grant of an interest in land where there are third parties;...

Grants made over land that was and [is] subject to an existing and accepted claim.

*Validation of such grants should be through the Future Act regime, or the proposed Regional Agreements process.*¹⁷¹

The NIWG has proposed a scheme to overcome the problems with delayed compensation payments. Under its proposal:

native title holders would be given notice of major projects;
 a temporary Commission, possibly the National Native Title Tribunal, would assess expedited compensation claims for major projects;
 minor projects could be subject to a general compensation allowance instead of incurring the expense of case by case treatment;
 the expedited compensation obligation arising from validation would only be available to native title claimants who meet an enhanced threshold test; and
 compensation could include financial benefits, employment opportunities, training and other benefits, such as expedited settlement of native title claims.¹⁷²

Further, provision should be made in any validation proposals to negotiate agreements that include protection of Indigenous culture, heritage and land use.

Further concerns

Under the Bill, if there is a mining title to be validated which covers large tracts of native title land which was formerly 'vacant crown land' – apart from one small segment which was subject to, for example, a lease or even an expired lease – then the entire mining title can be validated. This is a significant departure from the Ten Point Plan, which provides that validation will only apply to "*acts or grants made in relation to non-vacant crown land*".¹⁷³

Validated community purpose leases, which permit land or waters to be used for religious purposes, will extinguish native title. Through the agency of a community purpose lease non-Indigenous religious activities will remove the common law rights of native title holders to enjoy their title, including their ancient spiritual practices and ceremonies for the land or waters involved. Consideration needs to be given to the impact of this discriminatory proposal under the *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief* 1981.

The proposed s.249C(1)(b) allows for "*an interest ..., of a type declared by a regulation for the purposes of this paragraph to be a Scheduled interest* to extinguish native title. Thus, the provisions allow extinguishment by regulation.¹⁷⁴ Astonishingly, there are no criteria limiting the kinds of interest which may be included in these regulations and thus lead to the extinguishment of native title rights. There is a serious question regarding whether this proposal would meet the strict test of clear and plain intent required of a parliament for express statutory extinguishment.

¹⁷¹ *Coexistence – Negotiation and Certainty, op. cit.*

¹⁷² See *Coexistence – Negotiation and Certainty, op. cit.*, pp.18-19.

¹⁷³ *The Ten Point Plan, op. cit.*

¹⁷⁴ Item 45, ^15(a), and s.232B(5)(e), item 35, *NTAB 97*.

The Bill contains a number of exclusions from the validation provisions:

the regulations may exclude an act from being an intermediate period act; and
freehold or leasehold grants only to or for the benefit of Aboriginal peoples or Torres Strait Islanders.¹⁷⁵

However, the validation provisions fail to exempt Crown to Crown grants. This is a complete reversal of the policy in the current *NTA*.

Confirmation of extinguishment

Previous exclusive possession acts

The proposed regime

The proposed "*previous exclusive possession act*" provisions implement point 2 of the Ten Point Plan.¹⁷⁶

The draft Bill proposes to 'confirm' that valid and validated:

grants of freehold;
grants of leasehold which confer exclusive possession; and
commencement of construction or establishment of public works;

by the Commonwealth on or before the date of the *Wik* decision have completely extinguished native title from the time of the grant or the commencement of the public works.¹⁷⁷

The following grants are defined as "*previous exclusive possession acts*" which will extinguish native title:

freehold;
exclusive agricultural and pastoral leasehold;
commercial, residential and community leasehold; and
"*scheduled interests*".¹⁷⁸

Some acts performed **after** the *Wik* decision will also constitute "*exclusive possession acts*" which extinguish native title. These include:

the performance of legally-enforceable rights created on or before the date of the *Wik* decision;
acts which give effect to offers, commitments, arrangements or undertakings which were created on or before the date of the *Wik* decision and of which there is written evidence; and
the commencement of the construction of public works in accordance with reservations, proclamations, dedications, conditions, permissions or authorities made on or before the date of the *Wik* decision.¹⁷⁹

¹⁷⁵ ss.232B(7) and 232C(b)(ii), item 35, *NTAB 97*.

¹⁷⁶ The Ten Point Plan, *op. cit.*

¹⁷⁷ ^50-55, *NTAB 97*.

¹⁷⁸ ^50(2)(c), *NTAB 97*.

¹⁷⁹ ^50(5) and (7), *NTAB 97*.

The proposed s.237A of the *NTA* defines extinguishment under the *NTA* to be permanent. It rules out revival, even where the extinguishing act ceases to have effect.¹⁸⁰

States and Territories may enact confirmation provisions, provided their legislation is to the same effect as the Bill.¹⁸¹ Native title holders are entitled to compensation but only to the extent (if any) that native title rights and interests have not already been extinguished by law.¹⁸²

Freehold and leasehold grants by or under legislation that makes such grants only to, or for the benefit of, Aboriginal and Torres Strait Islander peoples, are excluded. This means these grants do not extinguish native title.¹⁸³

If extinguishment by a grant is ‘confirmed’, then the extinguishing effects of validation do not apply. That is, while the grant itself can still be validated, extinguishment takes place under the confirmation and not the validation provisions.¹⁸⁴

Maintaining the tradition of terra nullius

In considering these proposals to purportedly ‘confirm’ the extinguishment of native title by ‘exclusive titles’ across this country, it is appropriate to recall the dispossession of Indigenous Australians, the belated recognition of native title and the legal development of the notion of extinguishment. This ongoing process highlights the tradition of non-Indigenous belief in *terra nullius* and the priority afforded their interests. It manifests in an appetite for extinguishment in this country which so often drives the development of the law regardless of Indigenous property rights.

In *Mabo (No 2)*¹⁸⁵ Justice Brennan (as he then was) canvassed the doctrine of *terra nullius* which had previously underwritten Australian property law. The assumption that the land ‘belonged to no one’ formed the basis for the proposition that on ‘settlement’ the Crown acquired the full beneficial ownership of all land in the colony.

However, Justice Brennan went on to say that:

The proposition that, when the Crown assumed sovereignty over an Australian colony, it became the universal and absolute beneficial owner of all the land therein, invites critical examination. ...

... According to the cases, [under this proposition] the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by any civilized standard, such a law is unjust and its claim to be part of the

¹⁸⁰ item 41, *NTAB 97*.

¹⁸¹ ^60, *NTAB 97*.

¹⁸² ^80(1), *NTAB 97*. (Item 41, ^80(1) and ^75 (in place of ^60) also apply to “previous non-exclusive possession acts : see below.)

¹⁸³ ^50(8), *NTAB 97*.

¹⁸⁴ ^55(3), *NTAB 97*; and see ss.14-15 *NTA*, and ^^10-15, *NTAB 97*.

¹⁸⁵ *Mabo and Ors v State of Queensland [No.2]* (1992) 175 CLR 1 (*‘Mabo [No.2]’*).

*common law to be applied in contemporary Australia must be questioned.*¹⁸⁶

Further on in his judgement, Justice Brennan stated his opinion that:

*... the common law of Australia rejects the notion that, when the Crown acquired sovereignty over territory which is now part of Australia it thereby acquired the absolute beneficial ownership of the land therein, and accepts that the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty. Those antecedent rights and interests thus constitute a burden on the radical title of the Crown.*¹⁸⁷

At long last, in June 1992, the property rights of Indigenous Australians had received judicial recognition.

Despite the overwhelmingly positive nature of the High Court's decision on the recognition of native title in *Mabo (No. 2)*, it was notable that Justice Brennan and the majority indicated that native title could be extinguished by an inconsistent executive action in the absence of a clear and plain legislative intention. I expressed concerns about this in my *Native Title Report 1994* as discussed in Chapter 3. As Professor Kent McNeil explained in relation to the judgment:

*... the rules of extinguishment propounded by the majority appear to violate the human right of the indigenous peoples in Australia not to be arbitrarily deprived of their legal rights to land. This is racially discriminatory, as the interests in land of other racial groups in Australia cannot be extinguished in these ways.*¹⁸⁸

In addition, Professor McNeil points out that:

*... the overwhelming authority of the common law is inconsistent with the High Court's rules of executive extinguishment. The common law prior to Mabo No.2 does not support the proposition that native title could be extinguished by the Executive by inconsistent Crown grant or appropriation. That proposition violates incontestable and long-standing constitutional principles. Its source is none other than the Mabo No.2 decision itself.*¹⁸⁹

By contrast, in *Wik* the majority accepts that clear and plain legislative intention is required to extinguish property rights.¹⁹⁰ This intention may either be express or 'necessarily implied' by the legislation.¹⁹¹

It must be remembered that there is yet to be a decision of the High Court that any native title has been extinguished by inconsistent grant in this country, either on the basis of an express or implied legislative intention. Rather, there has to date been much judicial discussion about the requirements for extinguishment – all in the absence of any decision determining that there has in fact been extinguishment of native title.

¹⁸⁶ *Mabo [No.2]*, *op. cit.*, pp. 28-29.

¹⁸⁷ *Ibid.*, p. 57.

¹⁸⁸ McNeil K., 'Racial Discrimination and Unilateral Extinguishment of Native Title', *Australian Indigenous Law Reporter*, (1996) 1(2), p. 218.

¹⁸⁹ *Ibid.*, p. 219.

¹⁹⁰ See the discussion of this issue in Chapter 3.

¹⁹¹ See, for example, Kirby J., *Wik*, *op. cit.*, pp. 282-284, as quoted in Chapter 3.

Continuing the tradition of terra nullius

As explained above, the Commonwealth is proposing to provide expressly that freehold grants and a range of leases will extinguish native title from the time of grant.

A parliament can extinguish native title by clear and plain legislative intention expressed in clear and unambiguous words. However, the Commonwealth's ability to enact legislation which extinguishes or 'confirms' the extinguishment of native title is subject to significant constitutional doubt. This issue is discussed in Chapter 6.

Nevertheless, this Government is proposing to 'confirm' extinguishment by grants that are yet to be found by the Australian common law to have extinguished native title. The legislation authorising the grants will not have expressly stated the intention that the grants will extinguish native title. Rather, the grants will be deemed to have extinguished native title on the basis that the legislation authorising them 'necessarily implied' that this was intended.

As I have shown, Justice Kirby has indicated that the issue of whether a statute extinguishes by necessary implication "depends upon the language, character and purpose which the statute was designed to achieve"¹⁹². To date, the High Court has only considered a very limited number of interests with respect to the existence of such a 'necessary implication'. It has done this in *Mabo (No 2)*¹⁹³ and *Wik*.¹⁹⁴ Yet the Bill will confirm the extinguishment of native title by scheduled interests, freehold estates, and exclusive agricultural and pastoral leases! These various grants would have been made under a plethora of enactments stretching back well over a century under Colonial, State, Federal and Territory governments. There has been no opportunity to consider whether there is any foundation for extinguishment by 'necessary implication' due to "the language, character and purpose" of these multitude of statutes.

As Justice Kirby has explained:

*The position [with respect to extinguishment] of the countless other leasehold interests in Queensland, described by Dr Fry and of the pastoral and other leasehold interests elsewhere in Australia must remain to be elucidated in later cases.*¹⁹⁵

Justice Gummow observed:

*... the further elucidation of common law principles of native title, by extrapolation to an assumed generality of Australian conditions and history from the particular circumstances of the instant case, is pregnant with the possibility of injustice to the many, varied and complex interests involved across Australia as a whole. The better guide must be "the time-honoured methodology of the common law whereby principle is developed from the issues in one case to those which arise in the next."*¹⁹⁶

¹⁹² *Wik, op. cit.*, p. 283.

¹⁹³ *Mabo [No. 2], op. cit.*, for example, per Brennan J., pp. 69-73.

¹⁹⁴ For example in *Wik*, the Court examined pastoral leases granted under the 1910 and 1962 Queensland Land Acts: *The Land Act 1910 (Qld)* and *The Land Act 1962 (Qld)* ('the Land Acts'). See *Wik, op. cit.*, for example per Gaudron J., pp. 208-209 and 218-219.

¹⁹⁵ *Wik, op. cit.*, p. 285.

¹⁹⁶ *Wik, op. cit.*, p. 232.

And yet the Government is proposing to generalise in precisely the manner criticised by Justice Gummow by creating national legislation about the extinguishing effect of a great variety of tenures. The legislation under which many of these tenures are granted may be devoid of any ‘clear and plain intention’ that extinguishment of native title should result from the grant. It is not the legal effect of a grant that is being ‘confirmed’. That legal effect, extinguishment, is being created by the Government’s proposals. It is a blatant return to *terra nullius*. To refer to ‘confirmation’ is sleight of hand.

No legislation enacted by past Australian parliaments has expressly declared native title to be extinguished. This is what the Federal Government is preparing to do as we approach the centenary of federation. What a federation gift to Indigenous Australians. What a commemoration of our national values. Perhaps the Government is planning to use the Federation Fund to finance the massive compensation bill it is creating.

A right of exclusive possession

In *Wik*, Justice Gaudron indicated that “*a pastoral lease did not operate to extinguish or expropriate native title rights, as would have been the case, had it conferred a right of exclusive possession.*”¹⁹⁷ Justice Gummow was of the opinion that common law leases would extinguish native title.¹⁹⁸ Justices Toohey and Kirby did not deal directly with the question as to whether grants of exclusive possession would extinguish native title.

The Government is proposing that the Parliament decree that “*exclusive possession acts* extinguish native title. The Bill explains the Government’s rationale: if the acts involve “*grants of ... leases that conferred exclusive possession... the acts will have completely extinguished native title*”¹⁹⁹.

This justification is misleading. For example, the Bill deems that commercial, residential and community leases are “*exclusive possession acts*”. However, there is no necessary requirement that commercial, residential and community leases confer rights of exclusive possession. The Bill simply pronounces them to have that status. The Commonwealth also proposes that an extensive range of interests that it considers confer rights of exclusive possession will be listed in a schedule and deemed to be “*exclusive possession acts*”.²⁰⁰

The Bill defines exclusive agricultural and pastoral leases as being leases which confer “*a right of exclusive possession over the land or waters covered by the lease*”.²⁰¹ Such a definition provides no clear legislative criteria as to what constitutes an exclusive lease. To actually determine whether a particular lease provides rights of exclusive possession, recourse will have to be made to the general law.

A reading of *Wik* reveals the complex nature of the concept of ‘exclusive possession’. Justice Gaudron exhaustively examined the question of whether the Queensland pastoral leases in issue conferred rights of exclusive possession. She noted that there was no express provision in the Land Act as to whether rights of exclusive possession were intended to be granted, meaning that the Court had to determine what it was that the Queensland legislature had “*intended but failed to say in plain*

¹⁹⁷ *Wik, op. cit.*, p. 209.

¹⁹⁸ *Wik, op. cit.*, p. 226.

¹⁹⁹ ^45(2), *NTAB 97*.

²⁰⁰ ^50(2)(c)(vi), *NTAB 97*.

²⁰¹ ss.247A and 248A, items 43-44, *NTAB 97*.

words. ²⁰² Her Honour's analysis of this issue, with respect to the Mitchellton pastoral leases under the 1910 Land Act, runs for five pages.

To the extent that "*exclusive possession acts* are statutory interests, a similar analysis is required to ascertain the existence or otherwise of a right to exclusive possession. And many statutes will "*fail to say in plain words* what precise form of interest the relevant legislature intended to grant.

Rather than merely deeming commercial, residential and community purpose leases to be "*exclusive possession acts*", these leases need to be analysed according to general law principles to determine whether this is in fact the case. The existence or otherwise of Indigenous property rights is at stake. Our rights must not be sacrificed on the basis of some presumption that rights of exclusive possession have been conferred. On the contrary, there "*is a strong presumption that a statute is not intended to extinguish native title*".²⁰³ To the extent that there is any uncertainty as to whether particular commercial, residential or community purpose leases confer rights of exclusive possession, the courts may read down the proposed provisions to only catch leases that do, at law, provide rights of exclusive possession. This possibility does not create 'workability' or 'certainty'.

As Justice Gaudron noted, whether a legal document amounts to a lease or a licence is a matter of substance, not language. And yet proposed s.242(1)(b) of the NTA provides that a 'lease' includes "*a contract that contains a statement to the effect that it is a lease*". So, for example, a residential or community purpose contract that contains such a statement would be a lease under the NTA. But under Justice Gaudron's analysis, it would not necessarily be a lease amounting to a grant of exclusive possession. So once again "*exclusive possession acts*", by operation of the proposed legislation, do not necessarily provide rights of exclusive possession. And yet it is intended that they will extinguish native title!

Scheduled interests

Under the Bill, "*scheduled interests* which are effectively 'deemed' to confer a right to exclusive possession will permanently extinguish native title."²⁰⁴

The relevant schedule has not been publicly released at the time of writing but apparently it "*contains a schedule of land titles submitted by the States and Territories that purportedly provide exclusive tenure*".²⁰⁵ It is my understanding that a range of agricultural, pastoral and related leases will be included:

According to Premier Borbidge, the full range of "Selections under the old Queensland Land Act 1962 will be listed as Scheduled Interests. These selections can be divided into two categories:

Those which can be automatically upgraded to freehold under pre-1975 legislation. They will extinguish native title just as surely as does freehold. These selections include grazing homestead freeholding leases, perpetual lease selections and agricultural farm leases. ...

Those which can be upgraded to freehold at the discretion of government. These include development grazing homesteads, prickly pear development grazing homesteads, and grazing

²⁰² Wik, *op. cit.*, p. 205.

²⁰³ Wik, *op. cit.*, per Kirby., J, p. 282, as quoted in Chapter 3.

²⁰⁴ s.249C, item 45, NTAB 97.

²⁰⁵ Short, J., 'Nats threaten Coalition split on leases', *The Australian*, 22 August 1997, p. 4.

*homestead perpetual leases.*²⁰⁶

I cannot see why the potential to upgrade leases to freehold has any bearing on whether leases confer rights of exclusive possession. The question is whether the leases confer exclusive possession as they stand, not whether at some point in the future they may provide exclusive possession.

The potential inclusion of agricultural and pastoral leases in the schedule is particularly revealing. Agricultural and pastoral leases which confer a right of exclusive possession would be categorised as ‘exclusive agricultural and pastoral leases’ under the Bill, and would constitute “*exclusive possession acts*” on that basis.²⁰⁷ There would be no need for the ‘scheduling’ of these titles. It would appear that the most likely reason for the inclusion in the schedule of a wide range of agricultural and pastoral leases is that Australian governments are in fact very uncertain that such a range of leases actually confer exclusive possession.

It would appear from Premier Borbidge’s comments that the schedule of land titles will be a very long one. From what I understand of this less than transparent process, the States and Territories have provided their wish-lists of extinguishing tenures to the Commonwealth. A set of indicators has been developed on the basis of which Government officers have determined which tenures provide rights of exclusive possession and which do not.

This is an absolute scandal. The Government has purportedly rejected blanket extinguishment, only to give us extinguishment by scheduling. This is Tim Fischer’s “*bucket-loads of extinguishment*”. The detailed list of extinguishing tenures will probably be in the hundreds or thousands. The governments of Australia have been at it all winter, compiling their lists. A schedule compiled in answer to vested interests and political constituencies will substitute for the justice of the law as determined in open court.

Government officials have been deciding ‘on the papers’ whether, for example, a prickly pear development grazing homestead lease in far northwest Queensland can extinguish the ancient property rights of native title holders. I think it highly unlikely that they have visited the areas in question and spoken with the Indigenous inhabitants about the incidents of their title. Rather, armed with the instruments of non-Indigenous land management, they have undertaken the task of determining the subtleties of exclusive possession for potentially thousands of tenures throughout Australia. To operate at this level of generality is indeed “*pregnant with the possibility of injustice*”.²⁰⁸ This process is designed to enable the Parliament of Australia to dispossess, once and for all, native title holders throughout this land.

The Government has explained that the rationale of its confirmation proposals is:

*... to put beyond doubt that native title has been **extinguished on certain kinds of tenure**. This will ensure certainty for governments and those with interests in land about the legal status of those tenures.*²⁰⁹

‘Certainty’ for governments and tenure-holders is modern code for *terra nullius*. Governments and

²⁰⁶ Brennan, F., *A Critique of the Ten Point Plan and the Exposure Draft Legislation*, Address to Australians for Native Title and Reconciliation (Queensland) at St Mary’s Catholic Church, South Brisbane, 8 July 1997, p. 1.

²⁰⁷ ^50(2)(c)(iii), *NTAB 97*.

²⁰⁸ *Wik, op. cit.*, per Gummow J., p. 232.

²⁰⁹ The Ten Point Plan, *op. cit.*, p. 4.

tenure-holders do not want to deal with native title claims.²¹⁰ The control of land without the inconvenience of native title, is the objective of State and Territory governments; the unimpeded use of all leasehold land is the aim of lessees. In my *Native Title Report 1994*, I reported:

The issue of uncertainty was raised in many of the submissions made to me. Governments are concerned about the lack of definition about the nature and extent of native title at common law; where native title is and who holds it; and the extent to which past acts extinguish native title.

Complaints about uncertainty must be kept in perspective. ... A system based on the presumed existence of native title is more balanced and reasonable than the nostalgic hankering for terra nullius that seems to be implied in some of the state governments' lamentations.

*Given that this is not the system contemplated in the NTA, all sides need to make compromises so that administrative efficiency can be reconciled with human rights.*²¹¹

If the national values of this country include genuine respect for justice and equality before the law, then the Parliament of Australia must reject the Schedule of Extinguishment.

Reflecting the common law

It is the Commonwealth's stated intention that its 'confirmation' proposals will "*reflect the current state of the common law*."²¹² The Prime Minister himself "*has also vowed that the legislation implementing his 10-point plan would not extinguish existing native title common law rights*."²¹³

As I have outlined, the majority in *Wik* indicated that a clear and plain legislative intention must be present in order for native title to be extinguished by an act of the Crown. The Court explained that the incidents of native title must be identified before the degree of 'inconsistency' between the legal nature of native title rights and a grantee's rights can be determined. The majority took a very strict approach to defining when 'inconsistency' giving rise to extinguishment will occur.

With these principles in mind, how can it be said that provisions which 'deem' exclusive possession and extinguishment "*reflect* the common law? The deeming will, in part, be based on bureaucratic opinion as to the implied legislative intent of hundreds, or even thousands, of enactments. Surely this is an issue of sufficient complexity and significance to require proper forensic examination.

Given the fatal consequences of extinguishment under the Bill, surely native title holders should be entitled to equality before the law with respect to the application of these legal principles.²¹⁴

The Bill's focus on the issue of 'exclusive possession' does not accurately "*reflect* the common law, particularly for statutory titles. The questions put to the High Court in *Wik* linked exclusive possession to necessary extinguishment. In Justice Gummow's view, "*the posing of a question in*

²¹⁰ See Short, J., 'Nats threaten Coalition split on leases', *op. cit.*

²¹¹ *Native Title Report 1994*, *op. cit.*, p.143.

²¹² The Ten Point Plan, *op. cit.*

²¹³ Short, J., 'Nats threaten Coalition split on leases', *op. cit.*

²¹⁴ See Chapter 6.

those terms may have distorted the essential issues.²¹⁵ Earlier in his judgement he had explained:

Attention is to be focused upon the terms of the legislation and of the instruments themselves. In that examination, the term "exclusive possession" is of limited utility...

*To reason that the use of terms such as "demise" and "lease" in legislative provisions with respect to pastoral leases indicates (i) the statutory creation of rights of exclusive possession and that, consequently, (ii) it follows clearly and plainly that subsisting native title is inconsistent with the enjoyment of those rights, is not to answer the question but to restate it.*²¹⁶

In my view, Professor Richard Bartlett has analysed the issue correctly:

*"Exclusive possession" was not necessarily an element in an inquiry as to extinguishment by the grant of a pastoral lease. In order to determine if an instrument confers exclusive possession and should be characterised in law as a lease it is necessary to consider the entire range of rights and duties, and the condition and qualifications to which they are subject, with respect to the rest of the world and all persons in it. No such inquiry was necessarily appropriate in order to determine if the grant of an instrument extinguishes native title. The relevant inquiry was as to the nature of the relationship between the holder of the pastoral lease and the native title claimants, and in particular did the former have the power to exclude the latter such that a clear and plain intention to extinguish was manifested.*²¹⁷

If the Government were to take an honest approach, its confirmation provisions would focus on whether there had been extinguishment or not, rather than whether there was exclusive possession. Or they would deem extinguishment to have occurred, rather than deeming that rights to exclusive possession have been conferred. However, such provisions would so obviously constitute 'blanket extinguishment' that the Government realises that it is not a politically or constitutionally sustainable position. The racial discrimination would be patently clear. The subsequent compensation would be unquantifiable. But, in effect, that is exactly what the proposals confirming exclusive possession are. They answer the question of whether there is extinguishment by statutorily turning exclusive possession into extinguishment; permanent extinguishment. They create extinguishment where the Courts have not even been asked to look. They will deliver "bucket-loads of extinguishment" if the Parliament and the High Court allow the proposals to stand.

As I mentioned in Chapter 3, the British Columbia Court of Appeal has expressed the opinion that there will be no extinguishment even where there is clear and plain legislative authority to issue grants which are inconsistent with Aboriginal rights. When an actual conflict in the exercise of rights emerges, the Aboriginal rights would be suspended rather than extinguished.²¹⁸ This illustrates how the common law could develop with respect to extinguishment.

By purporting to 'confirm' extinguishment by inconsistent grants, the Commonwealth is purposely pre-empting the development of the common law. For all the need for 'certainty' and 'workability', there is the balancing objective of allowing sufficient time to integrate the belated recognition of

²¹⁵ *Wik, op. cit.*, p. 248.

²¹⁶ *Wik, op. cit.*, p. 241.

²¹⁷ Bartlett, R., 'The *Wik* Decision And Implications For Resource Development', *Australian Mining and Petroleum Law Journal*, vol. 16, 1997, p. 30.

²¹⁸ *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 (BCCA), per Lambert JA., as discussed in McNeil, K., 'Co-existence of indigenous and non-indigenous land rights: Australia and Canada compared in light of the *Wik* decision', *Indigenous Law Bulletin*, Vol. 4, Issue 5, August-September 1997, p. 9.

native title into Australian's land management system. This does not require the obliteration of Indigenous interests so as to favour non-Indigenous interests. It does not require a return to *terra nullius*. Nor does it require endless years of expensive litigation. The proper recognition of co-existent native title can be achieved by modest legislative amendments and a suitable balance of case law and negotiated agreements, undertaken with goodwill and in good faith.

Crown to Crown grants

Under the proposals in the Bill Crown to Crown grants, such as from a State Government to the Commonwealth Government, will extinguish native title. This will occur even through the land use is consistent with co-existing native title. The injustice of this proposal is illustrated with great clarity by the large vacant military training area north of Derby in the Kimberley. The common law has not yet determined that such freehold grants involve a clear and plain intention to extinguish native title.²¹⁹

On the far side of the continent to Derby, at Shoalwater Bay just north of Rockhampton, there is another military establishment which again illustrates the injustice of extinguishing native title on land owned by the Crown and used for purposes consistent with native title.

An area of 454,500 ha at Shoalwater Bay has been in Commonwealth ownership since 1965 and is presently:

*occupied and used extensively by the Department of Defence as a defence training area for the conduct of single service and joint defence training exercises. ... The Department of Defence's management includes managing the resources of the Area for nature conservation purposes as well as for defence training.*²²⁰

A Commission of Inquiry was convened in 1993 to inquire into environmental issues in relation to the Shoalwater Bay area in Queensland. The Commission reported that it preferred a combination of uses and activities for the area. These included, defence, conservation and Aboriginal use. The Commission noted the area occupied by the Commonwealth "is the largest coastal area with high wilderness values south of Cooktown on the east coast of Australia and, as such, is regionally and nationally very significant".²²¹

The Commission considered the Aboriginal values and use of the area:

*The Area is part of the traditional lands of the Darumbal Aboriginal people whose dispossession in the late nineteenth and early twentieth centuries was brutal, ferocious and comprehensive. Against all odds, the descendants of the Darumbal people have maintained core cultural knowledge and interest in their traditional lands and the important archaeological sites which they contain. ... The Commonwealth is presented at Shoalwater Bay with an opportunity to put into practice the policy principles of reconciliation and important principles arising from the Royal Commission into Aboriginal Deaths in Custody. ... The Darumbal descendants' desire to control some of their traditional estate could be achieved if the Commonwealth makes available land for their use within the Area.*²²²

²¹⁹ See ATSIIC Preliminary Commentary, *op. cit.*, pp. 3-4.

²²⁰ Commonwealth Commission of Inquiry Shoalwater Bay, Capricornia Coast, Queensland, *Summary Report: Report No. 4*, May 1994, AGPS, pp. 5-6.

²²¹ *Ibid.*, p. 50.

²²² *Ibid.*, p. 31.

The Commission went on to recommend that the Darumbal-Noolar Murree Aboriginal Corporation for Land and Culture be granted freehold title to a specified part of the defence area.²²³

I have visited the country around Shoalwater Bay at the invitation of the Durumbal people. I was impressed by their determination to gain recognition of their connection to their country. It is beautiful country, and recognition of their proper relationship to their lands is quite capable of co-existing with the other uses of the area. It would be a travesty if the native title amendments were to extinguish the recognition by non-Indigenous law of a relationship which has already survived a "brutal, ferocious and comprehensive" dispossession. The extinguishment provisions in the Government's Bill will demonstrate very vividly what we well know them to be – a scandalous attempt at dispossession on a massive national scale.

If contrary to the human rights of native title holders, the confirmation provisions proceed through the Parliament, then at the very least the exclusion provisions need to be strengthened. Crown to Crown grants and crown grants to statutory authorities need to be excluded from the provisions as they have been excluded in the existing past act validation provisions in the *NTA*.²²⁴

Previous non-exclusive possession acts ²²⁵

The proposed regime

This proposal implements the first part of point 4 of the Ten Point Plan.²²⁶

According to the draft Bill, Commonwealth grants of 'non-exclusive' agricultural and pastoral leases made prior to the *Wik* decision will have extinguished native title rights and interests:

to the extent of any inconsistency with the rights and interests conferred by the grant; and
to the extent that native title rights and interests confer possession, occupation, use and enjoyment to the exclusion of others.

This extinguishment will have occurred at the time of the grant.²²⁷

'Non-exclusive acts' performed **after** the date of the *Wik* decision will also have this effect, if they:

constitute the exercise of a legally enforceable right created on or before the date of the *Wik* decision; or
give effect to an offer, commitment, arrangement or undertaking, created on or before the date of the *Wik* decision, of which there is written evidence.²²⁸

If extinguishment under category A of the past act provisions applies to a non-exclusive possession act, then extinguishment under the confirmation provisions does not. So there will be full extinguishment under category A by applicable non-exclusive agricultural and pastoral leases rather

²²³ *Ibid.*, pp. 41-42.

²²⁴ See ss. 229(2)(b)(i), (3)(d)(i) and 230(d)(i), *NTA*.

²²⁵ ^65-75, *NTAB* 97.

²²⁶ The Ten Point Plan, *op. cit.* p. 1.

²²⁷ ^70(1), *NTAB* 97.

²²⁸ ^65(3), *NTAB* 97.

than partial extinguishment under the confirmation proposal.

Otherwise, if extinguishment applies to a non-exclusive possession act under the confirmation provisions, then extinguishment under validation (past and intermediate period acts) does not apply. That is, while the act itself can still be validated, extinguishment takes place under the confirmation and not the validation provisions.²²⁹

Extinguishment by grant of inconsistent rights and interests

This provision proposes that any inconsistency between the grant of agricultural or pastoral rights under a non-exclusive lease and native title rights will result in the permanent extinguishment of native title to the extent of that inconsistency.²³⁰ While there is diversity in the majority judgements in *Wik*, my reading of those judgements certainly does not support such a proposition.

This proposal is designed to erode the rights of native title holders on non-exclusive leases. It attempts to provide a one-sided statutory resolution of complex issues, which were dealt with by the High Court under the handicap of the hypothetical position in which the Court was placed. Their judgement had to consider the extinguishment of native title without any determination of whether that title still subsisted, and, if so, the incidents of that title. The primary intention of the provision is not to clarify the common law on extinguishment but to wind back the majority judgements in *Wik*.

It will contribute very little to ‘certainty’ and ‘workability’. Before inconsistency can be determined, the incidents of native title must be established by evidence.²³¹ Given the long delays in bringing native title claims to trial, if the provision is to have any operation it will not be for some considerable time and will require a case by case approach. Surely this in itself demonstrates why the common law should be left to operate in the individual proceedings which are required to identify native title. Such proceedings must take place before any extinguishment, should it exist, can be determined.

Despite the absence of a determination of native title in *Wik*, Justice Gaudron, after referring to the appropriate rule of construction with respect to the 1910 Land Act, said “*a pastoral lease did not operate to extinguish or expropriate native title rights*.”²³² Justice Kirby stated “*the nature of the interests conferred by a pastoral lease granted under the successive Land Acts was not, of its legal character, inconsistent with native title rights*.”²³³

Further, under the various tests developed by the majority judges, a “*high threshold*” is required before inconsistency leading to extinguishment will be found.²³⁴ To determine any inconsistency, a strict test is applied. For example, as mentioned in Chapter 3,²³⁵ Justice Toohey explains that ‘inconsistency’ between native title and rights created by legislation is “*the inability*” of the two sets of rights to coexist. Such inconsistency will produce extinguishment. But if the two sets of rights can

²²⁹ s 70(2)-(3), NTAB 97 and see ss.14-15 NTA and ss.10-15, NTAB 97.

²³⁰ s 70(1)(a), NTAB 97.

²³¹ *Wik*, *op. cit.*, see Kirby J., p. 284.

²³² *Wik*, *op. cit.*, p. 209.

²³³ *Wik*, *op. cit.*, p. 284.

²³⁴ See Attorney General’s Department, *Legal Implications of the High Court Decision in The Wik Peoples v Queensland: Current Advice*, 23 January 1997, p. 4.

²³⁵ Where formulations of the “*high threshold*” applied by Toohey, Gummow and Kirby JJ., are outlined.

coexist, "no question of implicit extinguishment arises".²³⁶

The potential for co-existence is, therefore, highly relevant to the question of extinguishment. If there is no necessary inconsistency, but rather the potential for either consistent or inconsistent exercise of rights, then there will be no extinguishment.²³⁷

The proposed section does not satisfactorily accommodate the potential for co-existence between the rights of grantees and those of native title holders. When rights are granted native title may be potentially consistent with the general exercise of rights by grantees but inconsistent with the particular exercise of those rights. For example, native title may be consistent with the general operation of a pastoral property but inconsistent with the construction of mustering yards on particular parcels of the property. As demonstrated in *Wik*, there is capacity for co-existence with native title by the general exercise of a pastoralist's rights. However, to the extent that the particular exercise of rights to construct mustering yards is inconsistent with native title, the latter will yield to the pastoralist's rights.²³⁸

To the extent that there is any tendency to merge the impact on native title of the grant of rights with the exercise of those rights, the proposed section has the capacity to produce the result that inconsistency with the particular exercise of the rights of grantees will extinguish native title. This contrasts with the approach taken by the majority in *Wik*.

The provision may lead to extinguishment on the basis of an assumption that the grant of certain rights 'anticipates' the extinguishment of native title by the exercise of those rights. Any capacity for the provision to operate in such a way does not, in my view, reflect the majority judgements in *Wik*.

If the proposed legislative provision operated in either of the above ways, it would wind back the common law rights of native title holders.

Any inconsistent exercise of rights is best explained as requiring the native title to "yield" to the grantee's rights.²³⁹ That is, native title is not extinguished, but rather must "give way"²⁴⁰ to the grantee's rights for the period of the inconsistency.

The principle that only the grant, and not the exercise, of rights has the potential to 'extinguish' native title overcomes a range of practical problems. If it were the case that particular acts performed under leasehold grants could cause 'extinguishment' in their own right, determining the surviving incidents of native title on leasehold properties would become extremely complex. One would have to gather evidence about the history of all relevant acts performed on the property, decide which of these were 'inconsistent' with native title and determine the extent of that extinguishment accordingly. The fact that a homestead once existed in a particular area of a property 100 years ago could lead to the extinguishment of native title over that particular area. A long-abandoned mustering yard could have the same effect. Obtaining accurate information of this nature would be impossible and title holders who wished to clarify their rights would be faced with a nonsensical

²³⁶ *Wik, op. cit.*, per Toohy J., p. 184.

²³⁷ See Chapter 3.

²³⁸ See Attorney General's Department, *Legal Implications of the High Court Decision in The Wik Peoples v Queensland: Current Advice, op. cit.*, pp. 6-8.

²³⁹ *Wik, op. cit.*, per Toohy J., p. 185 and 190; and see Attorney General's Department, *Legal Implications of the High Court Decision in The Wik Peoples v Queensland: Current Advice, op. cit.*, pp. 7-8.

²⁴⁰ Attorney General's Department, *Legal Implications of the High Court Decision in The Wik Peoples v Queensland: Current Advice, op. cit.*, p. 7.

‘patchwork’ of extinguishment.

Such an approach would focus the energies of native title parties on conjecture as to what may or may not have occurred in the past, rather than identifying and resolving issues of current and future co-existence. This would provide neither workability nor scope for reconciliation.

An approach which proposes that the inconsistent exercise of rights has the effect that the grantee’s rights will prevail over native title, rather than extinguishing that title, is also consistent with the fact that the majority judgements leave the question of the suspension of native title open.

Since the question of suspension of native title rights has been left open at common law, it cannot currently be said that ‘extinguishment’ will definitely be permanent. The Bill is therefore completely misconceived in this respect and is an attempt to close off the development of the common law to the potential detriment of native title holders.

As I mentioned in Chapter 3 and above, *Delgamuukw*²⁴¹ and another Canadian case, *R v Badger*²⁴², illustrate how the common law could develop in relation to the suspension of native title.

Moreover, the fundamental basis of s 70(1)(a), which is legal inconsistency²⁴³ leading to extinguishment, is not supported by the judicial opinion expressed in *Delgamuukw* that legal inconsistency will not cause extinguishment. Under this *Delgamuukw* approach extinguishment does not flow from legal inconsistency and suspension, not extinguishment, of Aboriginal rights is the result of actual conflict in the exercise of rights.

It is my view that this approach is very similar in result, if not in structure, to a high test for legal inconsistency leading to extinguishment combined with prevalence of grantee rights arising from the inconsistent exercise of rights. This high test/prevalence approach is, in my opinion, the appropriate way of reading the majority judgements in *Wik* (see Chapter 3). Neither approach supports the proposal contained in s 70(1)(a). The focus on extinguishment in that proposal is inappropriate.

Extinguishment of exclusive rights of possession, occupation, use and enjoyment

The draft Bill provides that on areas covered by non-exclusive pastoral or agricultural leases, any native title rights conferring exclusive possession, occupation, use and enjoyment are extinguished.²⁴⁴

This statutory proposal raises the matter of extinguishment in the context of identified native title rights and interests. As explained above, there needs to be a determination of native title to conclude the issues of inconsistency and extinguishment. Justice Kirby made this clear in *Wik*:

Because the interests under native title will not be uniform, the ascertainment of such interests, by evidence, is necessary in order to judge whether such inconsistency exists as will extinguish the particular native title proved. If inconsistency is demonstrated in the particular

²⁴¹ *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 (BCCA), per Lambert JA., as discussed in McNeil, K., ‘Co-existence of indigenous and non-indigenous land rights: Australia and Canada compared in light of the *Wik* decision’, *op. cit.*

²⁴² *R v Badger* [1996] 2 CNLR 77 (SCC), as discussed in McNeil, K., ‘Co-existence of indigenous and non-indigenous land rights: Australia and Canada compared in light of the *Wik* decision’, *op. cit.*

²⁴³ Inconsistency based on a comparison of the legal nature and incidents of rights and not the exercise of those rights: see *Wik*, *op. cit.*, per Gummow J., p. 233, and per Kirby J., p. 279.

²⁴⁴ s 70(1)(b), NTAB 97.

*case, the rights under the pastoral lease will prevail over native title. If not, the native title recognised by our law will survive.*²⁴⁵

The Attorney-General's Department has argued that a leasehold title would be 'necessarily inconsistent' with a native title right of exclusive occupation. It has concluded that, according to *Wik*, such native title rights would be 'extinguished' or 'impaired'.²⁴⁶ The proposed provision provides a narrow legislative construction of the Commonwealth's own advice, in that the provision contemplates extinguishment only, and not impairment.

In my view, should there be any extinguishment or impairment of native title rights in these circumstances it would only be in relation to the specific grantee. In respect of non-grantees, any native title rights of exclusive occupation would remain. Where the native title right is a full beneficial title then, as I explained in my *Native Title Report 1995*, "if a right of entry, for example, is granted over native title land, the native title holders are left with the right to do anything on the land but exclude the holders of that right".²⁴⁷

Further, because the question of 'suspension' of native title rights has been left open by the High Court, the issue of whether 'extinguishment' of native title must be permanent has not been settled. It may be that the native title right of exclusive occupation, even with respect to the grantee, may revive on the expiry of the grantee's interest. The grantee's rights would merely 'prevail' for the term of the grant over the native title right of exclusive occupation, which would be impaired rather than extinguished.²⁴⁸

However, the draft Bill would produce permanent extinguishment in these situations. Once again the proposals go beyond the common law and pre-empt its development. The proposition that there will be permanent extinguishment worked by the grant of any kind of leasehold interest is problematic indeed. On this proposition, once the native title right to exclusive occupancy has been violated to any degree it can never be restored, even if the leasehold has marginal impact and eventually terminates.

Prevalence and co-existence

As I have explained, the majority in *Wik* set down a very high test for 'inconsistency' leading to the extinguishment of native title. As put by Justice Gummow:

*... the question of inconsistency ... requires a comparison between the legal nature and incidents of the existing right and of the statutory right. The question is whether the respective incidents thereof are such that the existing right cannot be exercised without abrogating the statutory right.*²⁴⁹

For extinguishment to occur, there must be necessary inconsistency between rights at the time of the grant. If there is potential for co-existence, there will be no extinguishment.

²⁴⁵ *Wik, op. cit.*, p. 284.

²⁴⁶ Attorney General's Department, *Legal Implications of the High Court Decision in The Wik Peoples v Queensland: Current Advice, op. cit.*

²⁴⁷ *Native Title Report 1995, op. cit.*, p. 49.

²⁴⁸ See also the discussion above in relation to the judicial opinion expressed in the Canadian cases of *Delgamuukw* and *R v Badger*. Once again, the fundamental basis of s 70(1)(b), which is legal inconsistency leading to extinguishment, is not supported by the judicial opinion expressed in *Delgamuukw* that legal inconsistency will not cause extinguishment.

²⁴⁹ *Wik, op. cit.*, p. 233.

This approach to the extinguishment of native title would apply across the spectrum of native title rights, including rights to:

- enjoy access;
- seek sustenance from land and waters;
- conduct ceremonies;
- protect sites; and
- establish residences and other constructions.²⁵⁰

There will be times when there are difficulties in accommodating the exercise of both native title rights and grantees' rights. But there is ample capacity for the resolution of such difficulties, particularly in view of the principle that grantees' rights prevail. There is abundant scope for co-existence. Any proposal that inconsistency between co-existing rights should lead to extinguishment cannot be justified and should not be passed by the Parliament.

There is a draft regional agreement with respect to pastoral lands being developed in South Australia which provides some illustration of the potential for co-existence. I am not in a position to provide any endorsement of the agreement. I note that it provides for the suspension of native title rights in favour of the traditional rights set out in the agreement. The terms of the agreement would also govern the exercise of statutory access rights under s.47 of the *Pastoral Lands Act 1989* (SA). The South Australian Government claims that such access rights reflect native title rights and interests.

Despite such qualifications, the draft agreement provides in its detail illuminating possibilities for co-existence. It deals with such issues as:

- cultural ceremonies and practices;
- Aboriginal sites and objects;
- access and use of land;
- use of water;
- fires;
- cutting of timber and taking of plants;
- burials;
- commercial enterprises;
- gates; and
- future development.

The water provision provides that members of relevant Aboriginal communities "may take water from any natural water source on the Land". Such members may also "sink bores or construct watering points on the Land for their own use, provided they consult with and obtain the written consent of the Pastoralist". A dispute resolution process and arbitrator are proposed to resolve any disagreements over consent.²⁵¹

The provision regarding gates allows pastoralists to fence all or part of the land. But "sufficient gates, grids or stiles shall be provided to permit reasonable access to all parts of the Land" by

²⁵⁰ By listing rights in this way, I do not mean to suggest that native title is a bundle of rights. Rather as Hal Wootten has argued, "communal title will normally be protected by the courts as equivalent to full beneficial ownership, subject only to the special rights of the Crown". – Wootten H., AC, QC., 'Mabo – Issues and Challenges', *The Judicial Review*, Vol. 1, 1994, p.338.

²⁵¹ Crown Solicitor – South Australia, *Draft Area Agreement Between Minister for the Environment and Natural Resources and the Representative of Aboriginal Communities*, Clause 13 of schedule 1, 30 May 1997.

members of relevant Aboriginal communities.²⁵²

A number of the subjects dealt with in the South Australian Agreement reveal potential for co-existence. The approach taken contrasts dramatically with the Federal Government's focus on the extinguishment of native title. There is a choice to be made in deciding how to respond to co-existing rights. One response could be to focus on the difficulties of native title holders and pastoralists sharing water, particularly in dry climates; another could be to focus on constructive approaches to the sharing and conservation of water. One approach could attempt to limit the access of native title holders; another could provide "gates, grids and stiles" to assist both traditional access and pastoral activities. There could be a focus on extinguishment or on achieving a workable and just co-existence of rights. The High Court has indicated its preference, explaining that "[u]ndue emphasis on the term "extinguishment" tends to obscure what is at the heart of this issue."²⁵³

Primary production

The proposed regime

The proposal implements the second part of point 4 of the Ten Point Plan.²⁵⁴

Acts performed after the *Wik* decision on non-exclusive agricultural or pastoral leases²⁵⁵ (granted on or before the *Wik* ruling) are valid if they permit or require:

- a 'primary production activity'; or
- another activity associated with or incidental to a primary production activity (provided the majority of the leased land will be used for primary production activities while the other activity is occurring).²⁵⁶

Future acts of this kind will occur when States and Territories take steps to authorise or require such activities on leasehold lands. The non-extinguishment principle applies and native title holders are entitled to compensation for the impact of such acts on their rights.²⁵⁷

'Primary production activities' include:

- cultivating land;
- maintaining animals;
- agisting animals;
- fishing or shellfish operations;
- forest operations;
- horticulture; and
- leaving fallow or de-stocking land in relation to the above activities.²⁵⁸

²⁵² *Ibid.*, Clause 23.

²⁵³ *Wik, op. cit.*, per Toohey J., p. 188.

²⁵⁴ The Ten Point Plan, *op. cit.*, p.1.

²⁵⁵ Which are valid or validated.

²⁵⁶ ^300(1) and (5), *NTAB 97*.

²⁵⁷ ^300(6)-(7), *NTAB 97*.

²⁵⁸ ^295(1), *NTAB 97*.

Mining activity is expressly excluded.²⁵⁹ Forest operations cover natural forests as well as plantations, on the basis that the trees are cultivated for felling.²⁶⁰ Future acts requiring or permitting "farmstay tourism" are also valid, unless the tourism involves observing activities or cultural works of Indigenous peoples.²⁶¹

The Bill also deals with primary production activities without reference to any granting of permission or imposition of requirements by States or Territories. Under this scenario, native title does not prevent, after the *Wik* ruling, the carrying out of:

a primary production activity; or
another activity associated with or incidental to a primary production activity (provided the majority of the leased land will be used for primary production activities while the other activity is occurring);

on valid or validated non-exclusive agricultural or pastoral leases granted on or before *Wik*.²⁶² Native title holders are **not** entitled to compensation as a result of these activities.²⁶³

Lost opportunities

Under *Wik*, once the extinguishment issue is resolved the focus shifts to the co-existence of native title and pastoralists' rights. Pastoralists' rights prevail over native title to the extent of any inconsistency between their co-existing rights.²⁶⁴

Since the early days of the *Wik* debate, "*Indigenous people have accepted the Wik position that the existing rights of pastoralists' will prevail wherever they may conflict with native title rights*"²⁶⁵.

This is the Indigenous concession that can make co-existence work. The seed of the compromise that could deliver the harmonious operation of competing rights on pastoral lands has been sown by the High Court in *Wik*: the co-existing rights of pastoralists' prevail over native title. Indigenous Australians demonstrated their good grace by moving quickly to accept the priority afforded to pastoralists by the High Court. This should have been sufficient to develop a fair and just national framework to implement the principles of co-existence handed to the nation by the Court.

There is very significant potential for co-existence between pastoralists' rights and interests and those of native title holders. In *Wik* Justice Kirby took the view, with respect to the Mitchellton and the Holroyd pastoral leases, that:

The exercise of the leasehold interests to their full extent would involve the use of the land for grazing purposes. This was of such a character and limited intensity as to make it far from impossible for the Aboriginals to continue to utilise the land in accordance with their native

²⁵⁹ ^295(2), *NTAB 97*.

²⁶⁰ s.253, item 47, *NTAB 97*.

²⁶¹ ^300(2)-(3), *NTAB 97*.

²⁶² ^305(1)-(2), *NTAB 97*.

²⁶³ ^305(3), *NTAB 97*.

²⁶⁴ See above and Chapter 3.

²⁶⁵ *Coexistence – Negotiation and Certainty, op. cit.*, p. 8.

*title, as they did.*²⁶⁶

The reaction of the National Farmers' Federation to the Court's description of the character and limited nature of certain pastoralists' rights all but wiped out the opportunity to develop a fair and just national blueprint; an honorable consensus. The savage reaction to the failure of the High Court to deliver *terra nullius* has led to a relentless national campaign to wipe out native title. Absolute extinguishment of Indigenous title on pastoral lands is the only legislative response to *Wik* which has really been considered by the Government. This has led to the realisation that blanket extinguishment is a blatantly ugly approach. Instead, the plan is to deliver 'buckets of extinguishment' in a variety of disguised forms – through validations, confirmations, acquisitions and, in the present context, the expansion of pastoral rights to a point where 'pastoral' no longer accurately describes the leases in question. This expansion will be imposed by statute, almost regardless of the rights of native title holders and the impact on their native title.

In a far more measured and balanced response to *Wik*, a key legal advisor to the pastoral industry, Mark Love, has explained the scope of pastoralists' rights as he sees them in light of *Wik*:

... the High Court ruled that 'pastoral leases' were not 'leases' according to the common law. A 'pastoral lease' (and hence any statutory grant of rights to Crown land or water) grants only those rights as can be gleaned from the statute under which the grant was made and which are conferred by the grant document itself.

*The statutes under which 'pastoral leases' have been granted are largely silent about the activities which can be pursued on the land. Those statutes have changed little since the turn of the century; they are 100 years out of date. What rights are granted will be narrowly interpreted. These factors are the source of the uncertainty pastoralists face and create the impetus for the change.*²⁶⁷

Indigenous representatives, in their response to the *Wik* furore, have acknowledged that "in addition to the question of confirmation of existing rights under pastoral leases there is the question of the definition of these rights."²⁶⁸

However, the NIWG added that it:

*... believes that the definitional problem has been overstated. Pastoral lease legislation in South Australia, Northern Territory, Western Australia and New South Wales is sufficiently clear in relation to leaseholder rights. It appears that Queensland legislation poses some definitional problems.*²⁶⁹

The NIWG has proposed a model of co-existence that protects the rights of native title holders whilst meeting the legitimate concerns of pastoralists. Key elements of this model are:

legislative confirmation under the *NTA* of both native title and leaseholder rights in relation to all types of pastoral leases, including validated perpetual leases and renewed leases;

²⁶⁶ *Wik, op. cit.*, p. 284.

²⁶⁷ Love, M., 'Lighting the Wik of Change', *Land, Rights, Laws: Issues of Native Title, Issues Paper no. 14, February 1997, Native Titles Research Unit, AIATSIS, Canberra*, p. 2.

²⁶⁸ *Coexistence – Negotiation and Certainty, op. cit.*

²⁶⁹ *Ibid.*

an exemption process removing minimal impact acts from negotiation requirements with native title holders, where those acts are ancillary to the purposes of pastoral leases and there has been proper consultation about the proposed exemption;

an agreement process underpinned by 'future act' procedures to provide opportunities for diversification on pastoral leases; and

proposals by pastoralists for land clearing, tourism, taking of natural resources and change of tenure without existing rights for such activities would be facilitated by the *NTA* 'future act' procedures.²⁷⁰

This model appears to have good prospects of achieving the dual objectives of protecting native title and meeting the legitimate concerns of pastoralists. Diversification of pastoral properties could proceed in a spirit of co-operation between pastoralists and native title holders. Under the *NTA*, native title holders would have the procedural rights of ordinary title holders in respect of such diversification activities. This is appropriate given native title is the underlying title. The consent of an ordinary title holder would be required to develop a tourist facility on their property. Native title holders should have no lesser rights.

But lesser rights are all that are on offer. Responding to the demands of pastoralists and governments from around the country, the Commonwealth has produced a package that seriously erodes the benchmark of equality that is central to the *NTA*. It paves the way for an enormous expansion of pastoralists' rights while removing the legitimate procedural rights of native title holders. The enjoyment of native title is potentially rendered meaningless by the Commonwealth proposals for primary production activities on non-exclusive pastoral and agricultural leases.

Carte blanche

Under the primary production provisions, leaseholders will have the ability to undertake extremely wide-ranging primary production activities. Native title holders, meanwhile, will be rendered powerless to prevent their country being put to a massive range of inconsistent uses. Under the principles espoused in *Wik*, pastoralists' rights will prevail over native title to the extent of any inconsistency. Thus, the dramatic expansion of pastoralists' rights will mean that native title is suppressed to a correspondingly greater extent. Native title will be suspended and rolled back on an unprecedented scale. Together with the so-called 'confirmation' and 'validation' provisions, this will constitute the greatest single impairment of native title in the history of Australia.

The 'suspension' of native title during the currency of expanded activities is certainly better than outright extinguishment. But taken together with the need to maintain connection with traditional country, the potential for permanent erosion of native title rights becomes clear.

By specifying that the 'non-extinguishment principle' applies in these situations, the Government claims that it has resisted calls for the blanket extinguishment of native title on pastoral leases. However, as described, the Bill will allow large-scale *de facto* extinguishment of our title. The non-extinguishment principle in this context is a poor disguise for the fact that your title has been stripped so bare that all that remains is an "empty husk". The High Court once described a tenant as having experienced a similar diminution of rights:

In the case now before us, the Minister has seized and taken away from Dalziel everything that made his weekly tenancy worth having, and has left him with the empty husk of tenancy. In such circumstances he may well say:-

²⁷⁰ *Coexistence – Negotiation and Certainty, op. cit.*, pp.9-10.

*'You take my house, when you do take the prop
That doth sustain my house; you take my life,
When you do take the means whereby I live.'*²⁷¹

In May this year, Galarrwuy Yunupingu addressed the media at the Timber Creek Native Title Summit, organised by the Northern and Central Land Councils. Mr Yunupingu was backed up by 130 elected land council members representing 65,000 Aboriginal people. He told the media conference how the Ten Point Plan was *"the revisit to our water hole to poison it yet again"*.²⁷² He continued:

*Howard must get a message from these people here sitting behind me that his ten points is not acceptable. Not acceptable by all of us. By everybody who's here and therefore he must change his mind. He must design something that will work in a way that coexists with pastoralists, with Aboriginal people living side by side with that law and Aboriginal people and pastoral people benefiting out of the same land equally. Our right must not be taken away ever. Our right is thousands of years old and it is in the land. Without this right we will not maintain and practice what we practice now. We will be like a dead leaf in a river that floats up and down in the stream. We will be a bird that flies ... up in the sky with no foundation with no law with no song with no story.*²⁷³

The proposal will deny us the opportunity to participate in decision-making about the diversification of activities on our lands.

With our participation and proper heritage protection guarantees, the diversification and sustainable development of the Australian rangelands and tropical coastal belt could be a vision of success, benefiting pastoralists, native title holders and the nation as a whole. The development of significant parts of these vast areas could be a best-practice vision of co-operation between cultural, ecological and development values. As Mark Love, lawyer for the Cape York Cattlemen in *Wik*, has explained:

The consequences of the Wik decision must be given full regard and respect, both in respect of the existence of native title and in the rights native title confers. Acceptance of those consequences include an appreciation of the effect of the narrow construction of statutory grants and the ramification of people acting outside their 'authorised' rights on assumptions which have been relied on for as much as 150 years.

The review by the States' of their Land Acts creates an opportunity for change by which the utility of rangeland may be given new lease on life, refocussing the Government on the best use for the Australian public at large. In doing this, recognition of the losses to Aboriginal people and farmers must be made and both should be given the opportunity to protect what is important to them and to allow them to take advantage of the new opportunities as they arise.

Generally, the farmers and the Aborigines have the greatest appreciation of the land and its potential and its limitations. They should play the greatest role in determining the outcomes. It is important that issues of principle do not impede that progress, nor the national interest. It is also important that quick fix solutions to 'the native title problem' do not create a bigger impediment to the social and economic advancement of the occupiers of the rangelands,

²⁷¹ *Dalziel v Minister for the Army* (1944) 68 CLR 261, p. 286, citing Shylock in Shakespeare's *Merchant of Venice*.

²⁷² Yunupingu, G., as quoted in 'Timber Creek Native Title Summit – What They Said', *Land Rights News*, Central and Northern Land Councils, June 1997, p. 10.

²⁷³ *Ibid.*

*leaving the two worse off and neglected sections of Australia even worse off.*²⁷⁴

Clearly, Mr Love's warning was not heeded at the Longreach meeting, in the Premier's office in Brisbane, or in Canberra.

Activities

The Bill denies native title holders the ability to prevent the conduct of primary production activities even where the leaseholder has not complied with any applicable law. For example, the leaseholder may have failed to obtain authority under his or her lease, or to obtain a permit under applicable State or Territory law. Native title holders – who have legally recognised 'co-existing' rights to the land in question – will be powerless in this situation.

The Commonwealth asserts in a note to the provision that compliance with any 'applicable laws' is necessary for primary production activities to be conducted. The Commonwealth's intention appears to be for native title holders to be simply taken out of the picture, so that leaseholders can carry on regardless of native title rights. The protection of our rights is no longer 'applicable law'.

A number of explanations come to mind regarding the rationale for this proposal. It might be a means of allowing leaseholders to continue to conduct their enterprises based on the assumptions about the expansive nature of their titles "which have been relied on for as much as 150 years"²⁷⁵, without 'interference' from native title holders. If this is case, then it is a classic example of non-Indigenous expectations being given legislative priority over Indigenous property rights.

A more cynical interpretation is that there is very little intention that the States and Territories would put themselves or leaseholders to the inconvenience of a permits process for activities that have purportedly been carried out, *de facto*, for many years. Remove the native title 'problem' and the *status quo* can continue.

The non-extinguishment principle is not applicable, presumably because the Bill does not authorise leaseholders to carry out the activities. It just removes the right from native title holders to prevent the activities from occurring. Performance of unauthorised activities cannot, on *Wik* principles, work any extinguishment of native title. But the unrestrained conduct of such activities can certainly impair the exercise and enjoyment of native title rights and interests. Consequently, there is an argument that affected native title holders may be entitled to 'just terms' compensation for the impairment of their titles. This entitlement is specifically denied them under the Bill.²⁷⁶ The Bill justifies this by explaining in a note that native title holders may be entitled to compensation as a result of the initial grant of a lease. But how can such compensation be based on detriment to native title holders caused by activities which were never authorised under the initial lease?

Discrimination

The facilitation of primary production activities on leaseholds with or without any necessary permits or requirements, diminishes the exercise and enjoyment of native title rights. Native title holders are denied their procedural rights in these situations. Only native title rights will be affected by these proposals. Holders of non-native title property interests which 'co-exist' with pastoral leases will not be affected in the same way as native title holders. There will be no such impact on co-existing

²⁷⁴ Love, M., 'Lighting the Wik of Change', *op. cit.*, p. 10.

²⁷⁵ *Ibid.*

²⁷⁶ ^305(3), *NTAB 97*.

interests such as easements, *profits a prendre*, agistment rights and mining development rights. The primary production proposal is discriminatory.²⁷⁷

Off-lease activities

Future acts after the *Wik* decision are valid if they permit or require activity where there is a freehold estate or an agricultural or pastoral lease²⁷⁸ and the activity:

is related to primary production activity on the freehold or lease;
takes place outside the freehold or lease; and
does not prevent native title holders from having reasonable access to the area where the activity will take place.²⁷⁹

The non-extinguishment principle applies and the relevant native title holders are entitled to compensation in accordance with the *NTA*.²⁸⁰

This proposal extends the reach of the primary production expansion beyond leasehold and freehold properties. Its greatest impact will be felt on native title subsisting on vacant crown land. The assault on our rights under the camouflage of *Wik* has certainly moved beyond pastoral properties.

The impairment of native title already described as arising from the primary production proposal is also likely to occur on off-lease areas, subject only to the requirement regarding access to the affected area by the relevant native title holders. The potential for the broad expansion of inconsistent uses on off-lease areas, such as related forestry and horticultural activities, has the capacity to suspend native title on a wide scale.

Rights to third parties

Future acts after *Wik* are valid if they confer, where there is a valid or validated non-exclusive agricultural or pastoral lease,²⁸¹ a right for any person to:

cut and remove timber;
extract and remove gravel;
obtain (other than by mining) and remove rocks, sand or other resources.²⁸²

The future act is only valid if, before the act is done, notification and an opportunity to comment is provided to any relevant representative body and any registered native title bodies corporate or claimants.²⁸³ The non-extinguishment principle applies and the relevant native title holders are entitled to compensation in accordance with the *NTA*.²⁸⁴

²⁷⁷ See Chapter 6.

²⁷⁸ Any of which were granted on or before 23 December 1996 and which are valid or validated.

²⁷⁹ ^310(1)-(2), *NTAB 97*.

²⁸⁰ ^310(3)-(4), *NTAB 97*.

²⁸¹ Granted on or before 23 December 1996.

²⁸² ^315(1)-(2), *NTAB 97*.

²⁸³ ^315(1)(e), *NTAB 97*.

²⁸⁴ ^315(3)-(4), *NTAB 97*.

As stated above, where land clearing or the taking of natural resources is proposed in the absence of an existing right for leaseholders, native title holders should be able to utilise the future act procedures of the *NTA*.

Renewals and extensions etc.

Under the Bill, a "*pre-existing right-based act*" will extinguish native title if the act is the grant of freehold or the conferral of a right of exclusive possession.

These "*pre-existing right-based acts*" are future acts which are performed:

in exercise of legally enforceable rights created on or before *Wik*; and
give effect to a good faith offer, commitment, arrangement or undertaking made or given on or before *Wik*, of which there is written evidence.²⁸⁵

Renewed, re-granted or extended leases, licences, permits or authorities will still constitute "*permissible lease etc. renewals*"²⁸⁶, even if:

they are for a longer term than the earlier interest;
a renewed lease is a perpetual lease; and/or
contrary to the original instrument, they permit or require a primary production activity or another activity associated with or incidental to a primary production activity (provided that it is likely the majority of the leased land will be used for primary production activities while the other activity is occurring).²⁸⁷

The 'carte blanche' which is given to leaseholders by the primary production proposal is perpetuated indefinitely by this provision. The upgrading of pastoral leases to perpetual leases was stated in the Ten Point Plan to be subject to compulsory acquisition processes.²⁸⁸ Under this substituted proposal, native title holders will be denied their procedural rights in the face of 'renewals', even for those which give leases a perpetual status. The concerns I expressed about the Government's 1996 proposals for the conversion of term pastoral leases into perpetual leases are still pertinent:

*Application of the non-extinguishment principle in such a situation constitutes an illusory protection of native title rights and [the proposal] clearly gives rise to a de facto extinguishment of the native title rights and interests affected. If you stand second in line to a perpetual lease, you stand nowhere.*²⁸⁹

Compulsory acquisitions to benefit third parties

The proposed regime

The proposed s.43A of the *NTA*²⁹⁰ implements the last aspect of point 4 and the second part of point

²⁸⁵ ^325, *NTAB 97*.

²⁸⁶ See ^330(1), *NTAB 97*.

²⁸⁷ ^330(2), *NTAB 97*.

²⁸⁸ The Ten Point Plan, *op. cit.*, p. 1.

²⁸⁹ *Native Title Report 1996, op. cit.*, p. 157.

²⁹⁰ Item 10, *NTAB 97*.

7 of the Ten Point Plan.²⁹¹

In relation to non-exclusive leasehold properties, the proposed section 43A²⁹² allows the Commonwealth Minister to approve the application of State and Territory procedures in place of the right to negotiate for compulsory acquisitions of native title rights and interests for the benefit of third parties. Such acquisitions would allow non-exclusive pastoral leases to be ‘upgraded’ to exclusive leases or freehold estates.

Under the amendments, an act of compulsory acquisition may specifically extinguish native title.²⁹³ Currently, only acts done in giving effect to the purpose of acquisitions are capable of extinguishing native title.²⁹⁴

Importantly under the Bill, acquisitions are subject to the ‘freehold test’.²⁹⁵ Consequently, native title can only be acquired if ordinary title could be acquired.²⁹⁶

Clearing the path to extinguishment

The Government has stated that governments will need to acquire native title rights “*by agreement or by means of compulsory acquisition* in circumstances where a leaseholder wishes to “... *undertake activities which make it necessary to have a form of exclusive tenure including freehold (for example to undertake horticulture or other high intensity agriculture) over part or the whole of the lease..*”²⁹⁷

In my view, it is likely that the ‘primary production’ provisions will be sufficient to allow pastoralists to perform horticultural, agricultural and other high intensity primary production activities on their leaseholds. In light of the expanded rights provided to pastoralists, I cannot see the necessity for a grant of exclusive possession to undertake high intensity activities.

The prime purpose of upgrade by compulsory acquisition would appear, therefore, to be to effect the extinguishment of native title. In view of the hysterical reaction by some of the States and Territories to *Wik*, and the ongoing demands for extinguishment from the pastoral lobby, I am extremely perturbed that the Commonwealth is increasing the access of the States and Territories to another device to extinguish our titles. No doubt under the guise that exclusive tenures are required for a productive rural economy. Compulsory acquisitions executed in such circumstances would appear to be challengeable in certain situation on grounds of bad faith.²⁹⁸

Discrimination and constitutionality

A notable feature of the *NTA* is that it currently allows acquisitions of native title for the benefit of

²⁹¹ The Ten Point Plan, *op. cit.*, pp. 1-2.

²⁹² See Chapter 5 for a broader discussion of this proposed provision.

²⁹³ ^375(2)(a), *NTAB 97*.

²⁹⁴ s.23(3)(a)-(b), *NTA*.

²⁹⁵ See ^360-370, *NTAB 97* and discussion in Chapter 5.

²⁹⁶ ^365, *NTAB 97*.

²⁹⁷ *The Ten Point Plan, op. cit.*, p. 6.

²⁹⁸ See Brown, D., *Land Acquisition*, 4th Edition, Butterworths, Sydney, 1996, p. 37.

third parties, subject to the right to negotiate. Under the proposed amendments, native title rights can be acquired for the benefit of private interests, without native title holders having the protection of the right to negotiate.

It is, by contrast, conspicuous that acquisitions for private purposes do not appear to be generally authorised by all State and Territory land acquisition regimes. This raises a discrimination issue with respect to the proposal in the Bill. In order to avoid inconsistency with the *Racial Discrimination Act 1975* (Cth) ('*RDA*') and the 'freehold test', State and Territory legislation will need to allow non-native title property interests to be acquired for equivalent private purposes. With respect to the *RDA*, the legislation will need to ensure equality in acquisition procedures and principles of compensation for the resumption of native title and non-native title interests.

Even if legislative equality is provided, however, there will still be discrimination if such 'non-discriminatory' amendments are really designed to allow the resumption of native title. Recent history would tend to indicate that this indeed would be the real purpose of any overhaul of State and Territory legislation. Over time, it will become clear that the ostensibly neutral power of acquisition is being used predominantly to 'mop up' native title. I have no doubt that it will be revealed to be another discriminatory device to deliver more extinguishment for the direct benefit of pastoral interests. The public purse will pay the compensation – there is a specific amendment to ensure this in respect of non-exclusive agricultural and pastoral lessees.²⁹⁹

In Western Australia, legislative amendments have already been made in order to ensure that all forms of title may be acquired by governments in order to benefit other private citizens. This 'non-discriminatory' action was clearly taken to facilitate the acquisition of native title rights for this purpose. The *Public Works Act 1902* was amended in the context of the repeal of the discriminatory *Land (Titles and Traditional Usage) Act 1993* (WA) and was renamed the *Land Acquisition and Public Works Act 1902*. The amendments provided that land would be able to be acquired for private or public purposes. The relevant part of the *Acts Amendment and Repeal (Native Title) Act 1995*, was proclaimed on 9 December 1995. It allowed land to be resumed "for the purpose of the grant under a written law of any estate, interest, right, power or privilege in, over or in relation to the land". That is, if the proposed grant would deliver an economic or social benefit.³⁰⁰ The property rights of all West Australian title holders were left dramatically exposed by these provisions. However, in practical, political terms, it was only the rights of native title holders which were made vulnerable to large-scale acquisition by the State government for the benefit of other private citizens.

Further, in the context of discrimination and removal of native title rights, a constitutional question is raised in relation to the *NTA*, under both the external affairs and race powers. Does the Commonwealth have the constitutional power to authorise the discriminatory removal of native title rights in favour of pastoral upgrades by compulsory acquisition under State and Territory legislation? I explore constitutional issues more closely in Chapter 6.

Retaining the right to negotiate

If, despite the problems raised above, acquisitions of native title for the benefit of third parties are able to proceed under approved State and Territory procedures, then a 'best practice' model needs to be applied in all States and Territories. The essential elements of such a model would be:

adequate notice to native title holders;

²⁹⁹ s.375(5), *NTAB* 97.

³⁰⁰ s.33C(1)-(2) *Land Acquisition and Public Works Act, 1902*, as inserted by s.10 *Acts Amendment and Repeal (Native Title) Act 1995*.

provision for negotiation of the acquisition by agreement;
 independent review of the decision to acquire;
 accountability requirements if the relevant Minister rejects the recommendations of the independent review.

It is arguable that the provision of ‘just terms compensation’ for acquisitions requires procedural rights not only at the compensation stage but also in relation to the initial decision to acquire:

*... where the Parliament does not specify the amount of compensation but provides a procedure for determining what is fair and just, the Court will examine the nature and extent of the entitlement of a claimant under the procedure established and the nature of the procedure itself in deciding whether the acquisition for which the law provides is "on just terms ..."*³⁰¹

However, the true ‘best practice’ approach is to maintain the right to negotiate. There are clearly grave problems in allowing the right to negotiate to be replaced by State and Territory procedures in relation to acquisitions for the benefit of third parties. If proper protection is to be provided to native title holders and substantive equality is to be maintained, then the right to negotiate must apply to these acquisitions. The proposal for alternative State and Territory procedures should not be implemented.

Concluding comments

The proposed legislative response to the *Wik* decision has been formulated during a period of deep racial conflict and disharmony in this country. This holds potentially tragic consequences for Aboriginal and Torres Strait Islander peoples, and the nation as a whole.

A conjunction of social forces has been deeply antithetical to the human rights of Indigenous Australians for 18 months. The Federal Government, playing variously ringmaster and pawn to State and Territory Governments, has contrived a land management proposal tremendously destructive to the legitimate rights and interests of native title holders. The Australian Government’s proposals are so focussed on servicing vested interests and political constituencies that it has lost sight of a wider social vision in which prosperity is founded on respect for the human rights of all Australians.

The Government is proposing to destroy our ancient titles. We are offered remnant rights: rights that are no more than tactical gestures designed to lift the gates of the Senate and seek clearance of the proposed legislation through the High Court.

It is not only Indigenous Australians who will look critically at the Parliament of this country as it confronts the testing and delineation of our national values which this legislation will force. If human rights are to be respected in our country, then a response to *Wik* must be constructed that seeks a just and fair co-existence between Indigenous and non-Indigenous rights. Discriminatory laws which deny our human rights cannot be tolerated. The Australian Government is clearly in need of guidance offered by the United Nations Expert Seminar on Indigenous Land Rights and Claims:

Governments should renounce discriminatory legal doctrines and policies which deny human rights or limit indigenous land and resource rights. In particular they should consider adopting corrective legislation and policies, within the International Decade, regarding the following:

³⁰¹ *Commonwealth v Tasmania* (1983) 46 ALR 625, per Deane J., p. 831.

(a) *The doctrine of terra nullius;*

...

(e) *Doctrines and policies imposing an extinguishment of indigenous land rights, title or ownership;*

(f) *Policies which exclude some indigenous peoples from the land claims processes established by the State.*³⁰²

Chapter 5: Future acts, the right to negotiate and other proposed amendments

The Native Title Amendment Bill 1997 (Cth) ('the Bill')³⁰³ combines provisions developed after the *Wik* decision with amendments which were tabled by the Federal Government during 1996.³⁰⁴

Some aspects of the Bill are little different from provisions which I reviewed in my 1996 *Native Title Report*. For example, my 1996 report contained detailed discussion of proposed amendments to the registration test and the mediation process.³⁰⁵

This chapter will focus on amendments which have been developed since my previous report. In particular, it analyses dramatic changes which have been proposed to two key elements of the *Native Title Act* 1993 (Cth) ('NTA') – the future acts regime and the right to negotiate process.

The future acts regime

When describing its latest amendments to the *NTA*, the Government has consistently played down their impact on the rights of Indigenous Australians. The proposals have been portrayed as consisting of a short, easily digestible set of 'ten points' which remedy uncertainties created by the High Court's decision in the *Wik* case. However, the way in which the Government has characterised its draft Bill is profoundly misleading. The Bill does not contain a simple 'ten point tune-up' of the *NTA*. Instead, it is founded upon a radical overhaul of the existing 'future acts' regime. At present, this regime is the key source of protection against future discriminatory treatment of native title holders' property rights.

Some of the proposed changes to the future acts regime expand the classes of acts that can be performed on agricultural and pastoral leasehold properties. These proposals are discussed in the previous chapter. While purporting to 'clarify' the rights of lease-holders in response to *Wik*, the amendments dramatically increase the scope of those rights.

Other proposed amendments to the future acts regime relate to issues such as the management of water, the provision of infrastructure and the implementation of reservations. It is impossible to see how these amendments are necessitated by the *Wik* decision. Rather, it seems that the response to

³⁰² United Nations Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims, 'The Whitehorse Conclusions and Recommendations on Indigenous Land Rights and Claims, Whitehorse Canada, March 1996, *Australian Indigenous Law Reporter*, (1997) 2 (1), p. 189.

³⁰³ Working Draft of 25 June 1997 ('*NTAB 97*'). Note that references to *NTAB 97* relate to Schedule 1, unless otherwise specified.

³⁰⁴ *Wik Peoples and Ors v State of Queensland and Ors* (1996) 141 ALR 129 ('*Wik*'); Native Title Amendment Bill 1996; amendments to the Native Title Amendment Bill 1996.

³⁰⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996*, AGPS, Canberra, 1996. In relation to the registration test, see Chapter 5; for applications and mediation, see Chapter 4. Chapter 6 contains discussion of Indigenous Land Use Agreements.

Wik has been used as a camouflage for the substantial dismantling of the non-discriminatory and protective framework of the future acts regime.

The framework of the proposals

The current regime

The future acts regime was intended to enable governments to make grants over land and waters, while at the same time preventing further discriminatory overriding of native title rights. Thus, the starting point of the present regime governing future actions which affect native title is that native title is to be provided with the same protections as ‘ordinary title’ – that is, freehold title (or leasehold title in the ACT and Jervis Bay).³⁰⁶ This core notion has sometimes been referred to as the ‘freehold test’. The previous Prime Minister, Paul Keating, explained the regime in his Second Reading Speech, saying that:

*Generally, governments may make grants over native title land only if those grants could be made over freehold title. The test is founded directly on a principle of non-discrimination. A government may not make a freehold or leasehold grant to somebody else over your or my freehold. If our title is to be extinguished, a government must acquire it and only for the purposes set down in compulsory acquisition legislation, and you or I must be given the protections involved. ... This is a clear, fair test which land managers in all jurisdictions can use.*³⁰⁷

Explained briefly, the current position is as follows:

- Future acts that affect native title will only be valid if they are ‘permissible future acts’.
 - Acts which relate to offshore areas, or which are ‘low impact’, will be permissible future acts.
- In all other situations:
- An act is ‘permissible’ on native title land where it could also be done on freehold land.
 - An act is ‘permissible’ on native title waters if it could also be done if the land adjoining those waters was freehold land.
- A legislative act will not be ‘permissible’ if it causes native title holders to be in a worse position at law than they would be if they held freehold title.³⁰⁸
 - There are strictly limited exceptions to the ‘permissible future act’ test:
 - Where a ‘non-claimant application’ has been made and no native title claimants have responded within a specified time, future acts can be validly performed.³⁰⁹
 - Where an existing, valid interest contains a legally enforceable right of renewal, it will be ‘permissible’ to renew the interest. It is also possible to renew or extend an existing commercial, agricultural, pastoral or residential lease, provided that the scope of the interest is not expanded.³¹⁰
 - For all future acts, except those which are ‘low impact’ or to which the right to negotiate

³⁰⁶ s.253, *NTA*. From this point on, for ease of reference, ‘ordinary title’ will be referred to as freehold title.

³⁰⁷ The Hon. P. Keating, Prime Minister, ‘Second Reading Speech: Native Title Bill 1993’, *Hansard*, House of Representatives, 16 November 1993, p. 2880.

³⁰⁸ s.235(2)(b), *NTA*.

³⁰⁹ s.24, *NTA*.

³¹⁰ ss.25, 235(7), *NTA*.

applies, native title holders must have the same procedural rights as they would have if they held freehold title to the land, or to the land adjoining the waters.³¹¹

The proposed regime

The new amendments entirely change the structure and ethos of the future act provisions. No longer does the ‘freehold test’ provide a non-discriminatory foundation for the regime.

Under the new framework, a future act will be valid if it is covered by any one of a long list of categories. Loosely described, the categories are set out as follows in the ‘overview’ of the proposed regime:

- (a) Acts covered by Indigenous Land Use Agreements.
- (b) Acts in areas where non-claimant procedures indicate the absence of native title (the equivalent of the protection under s.24 of the present Act).
- (c) Acts permitting primary production on non-exclusive leases.
- (d) Primary production activities on non-exclusive leases.
- (e) Acts permitting ‘off-lease’ activities related to primary production.
- (f) Grants of rights to third parties on non-exclusive leases.
- (g) Management of waters and airspace.
- (h) Renewals and extensions of acts.
- (i) Implementation of government reservations.
- (j) Acts involving services to the public.
- (k) Low impact future acts.
- (m) Acts that pass the freehold test.**
- (n) Acts affecting offshore places.³¹²

The draft Bill goes on to explain that if a future act could potentially satisfy the requirements of more than one of the classifications listed above, *”then it is covered only by the one that is closest to the top of the list.”*³¹³ This provision ensures that none of the future acts listed from (a) to (k) are required to pass the ‘freehold test’ in order to be valid.

It is acceptable for some acts to be exempted from the freehold test. Acts which are ‘low impact’, or which occur on areas where non-claimant procedures have been followed, are already excluded from its application. Exclusion is also appropriate for acts to which native title holders have given their informed consent under a suitable agreements process. However, the new regime does not limit exceptions to the freehold test to these narrow categories. The freehold test has been relegated to little more than a ‘default’ requirement as all of the categories of acts listed above paragraph (m) will be valid, regardless of whether or not they could be done to freehold title.

Similarly, the guarantee of procedural equality between native title holders and freeholders, which was at the heart of the old regime, has been largely abandoned. For example, future acts involving primary production, management of water or airspace, renewals and the implementation of reservations are simply deemed by the Bill to be ‘valid’. Native title holders have no specified procedural rights in relation to these acts.

The draft Bill does not facilitate the equitable co-existence of different property rights. Rather, it

³¹¹ s.23(6), *NTA*.

³¹² ^85, *NTAB 97*. Note that the symbol ‘^’ used here has been used throughout the *NTAB 97* to refer to proposed provisions to which section numbers have not yet been allocated. ‘^50’, for example, refers to the proposed provision defining previous exclusive possession acts on pages 14-15 of the *NTAB 97*.

³¹³ ^90, *NTAB 97*.

maximises the situations in which development can proceed on native title land. The Government's apparent intention is to minimise the procedural protections available to native title holders and to increase the circumstances in which their rights can be overridden, leaving them with merely the ability to apply for compensation. Some aspects of this will now be explored in more detail.

Management of water

Under the proposed future acts regime, governments can make laws to manage or regulate water and water resources. They can also grant rights over them, such as leases and licences.³¹⁴ The 'non-extinguishment principle' will apply and compensation will be payable for any impact on native title.

At present, s.212 of the NTA states that a law may 'confirm':

- (a) **existing** ownership of natural resources by the Crown;
- (b) **existing** rights of the Crown to use, control and regulate the flow of water; and
- (c) that **existing** fishing access rights prevail over any other public or private fishing rights.³¹⁵

Any grant of **new** rights is subject to the current future acts regime, meaning that native title holders must be provided with the same procedural rights as they would have if they possessed freehold title to the land adjoining the waters.

Under the restructured future acts regime, new grants relating to water or water resources will simply be 'valid'. Native title holders will have no procedural rights in relation to these grants. The protections against discrimination contained in the present regime have been removed. The new regime clears the way for governments to grant interests over water and water resources without having to consider the rights and interests of native title holders.

As ATSIC has explained:

*[t]he proposed amendments permit de facto extinguishment of native title to onshore and offshore waters, by ensuring that the grant of future commercial and other interests regarding the use of waters or water resources always takes precedence.*³¹⁶

For example, if a government chose to grant exclusive fishing rights in an area to a third party, native title holders would have no procedural rights in relation to this grant. Although the non-extinguishment principle would apply, the exclusive rights of the grantee would prevail over the rights of native title holders. Over time, the inability of native title holders to exercise their common law rights could lead to a loss of connection and a resulting inability to establish their native title rights. Native title would have been effectively extinguished.

These proposals bear no discernable relationship to the *Wik* decision. Further, they are directly opposed to international developments involving recognition of traditional rights to waters and negotiation over the use of these resources. Indigenous fishing rights have long been recognised in New Zealand, Canada and the United States, including "rights to take fish for subsistence purposes, and in some cases the right to operate commercial fishing ventures."³¹⁷ Recognition of traditional rights in these countries has enabled Indigenous peoples to negotiate with governments and

³¹⁴ ^317, NTAB 97 (note also its application to airspace).

³¹⁵ Emphasis added.

³¹⁶ ATSIC, *The Native Title Amendment Bill 1997: Preliminary Commentary* (provided to the Prime Minister on 25 July 1997) p. 7 ('ATSIC Preliminary Commentary').

³¹⁷ ATSIC *Preliminary Commentary*, *op. cit.*, p. 6.

commercial interests about the use of water resources. Such negotiations have covered issues such as fishing quotas, share of the harvest, protection of species and pollution prevention. In New Zealand, for example, Maori traditional owners have negotiated joint ownership of Sealords Products Ltd, which owns 22% of the New Zealand fishing quota. These agreements have provided Indigenous people with a resource base on which to build employment and economic independence.

While common law recognition of traditional rights has led to productive negotiations in these countries, such developments will not occur in Australia if the draft Bill is enacted. The Australian common law has not yet explored the issue of native title rights to waters. The *Mabo* decision did not answer the question of whether traditional rights and interests to waters may give rise to native title under the common law.³¹⁸ In its present form, the *NTA* leaves this issue to the courts. Two cases which are presently before the Federal Court will provide guidance on these matters – the Yorta Yorta claim, which involves onshore waters, and the Croker Island claim, which includes inter-tidal and offshore areas. However, the Bill pre-empts any finding of native title rights to waters under the Australian common law by ensuring that there will be no need for these rights to be taken into account by governments. As explained by ATSIC:

*In contrast to similar overseas jurisdictions, indigenous people will be unable to protect their interests or negotiate settlements with other stakeholders. Indigenous rights will be limited to compensation claims.*³¹⁹

I believe that it is both unnecessary and unjust for the development of the common law to be pre-empted in this way. If it is found that native title rights of this kind can exist, any legislative response should afford such rights full respect and non-discriminatory protection. While it may take time to develop ‘best practice’ provisions for dealing with native title rights to waters, I am sure that such a task is achievable. Canada, the United States and New Zealand have all taken steps in this direction. Why should it be beyond the capacity of Australia to develop approaches to managing water and water resources which combine efficiency with the just recognition and protection of native title rights?

Implementation of reservations

The proposed amendments provide that where, prior to the Wik decision, a government has reserved land for a particular purpose, the reservation can be implemented.³²⁰ In addition, the government does not need to perform the specific act for which the reservation was made. It can use the land for some other purpose so long as this action is “in good faith” and the impact of the new purpose on native title is not greater than the impact of the original purpose would have been. For example, the Bill explains that it would be acceptable to use land originally reserved for a school to build a hospital.³²¹

The act which is done on the basis of the reservation will simply be ‘valid’. Native title holders will have no procedural rights in relation to the performance of the act. Native title will be extinguished where a public work is constructed. In other circumstances, the non-extinguishment principle will apply.³²²

Australian governments presently have the ability to reserve Crown lands for a range of public

³¹⁸ *Mabo and Ors v The State of Queensland* [No. 2] (1992) 175 CLR 1 (‘Mabo’).

³¹⁹ ATSIC Preliminary Commentary, op. cit., p. 7

³²⁰ ^340, NTAB 97.

³²¹ ^340 (d), NTAB 97.

³²² ^345, NTAB 97.

purposes. If the area which a government wishes to reserve is not Crown land, the government must acquire it, whether by agreement or compulsory acquisition.³²³ Prior to the Wik decision, governments may have reserved land for various purposes without providing native title holders with any procedural rights. For example, on the basis of an assumption that pastoral leases extinguished native title, a government may have reserved land held under a pastoral lease, going through an acquisition process with the lease-holder but ignoring the existence of native title holders. Alternatively, land which was already ‘Crown land’ may have been reserved without an acquisition process being provided to native title holders. These actions are invalid under the NTA, as it presently stands, due to the failure to provide native title holders with equivalent procedural rights to freeholders. However, it is proposed that such acts will be ‘validated’ by the draft Bill.³²⁴ Under the re-modelled future acts scheme, a government can implement the purpose of a discriminatory and previously invalid reservation without ever having to provide any procedural rights to native title holders. As if this isn’t enough, a government can ‘change its mind’ and use land for a purpose other than that for which it was reserved.

The proposed subdivision allows native title to be overridden – or even extinguished, where a public work is built – without native title holders being provided with any procedural rights at all. The only action which they can take is to apply for compensation for detriment which has been caused to their property rights. The provisions thereby permit the discriminatory dispossession of native title holders, which the future acts regime was originally designed to prevent.

It is not entirely clear how these provisions fall within the scope of the ‘Ten Point Plan’. The only ‘point’ which seems of relevance is number 3, which states that “[i]mpediments to the provision of government services in relation to land on which native title may exist would be removed.”³²⁵ It is astonishing that this proposal has led to provisions which allow the property rights of Indigenous Australians to be overridden or extinguished without acquisition processes being followed. One can only imagine the outrage if it was announced that ‘impediments to the provision of government services in relation to land on which freehold and leasehold title may exist will be removed’, and on this basis governments were permitted to use freehold or leasehold land without having to follow acquisition processes.

This subdivision of the remodelled future acts regime is only of relevance in situations where native title holders were discriminated against in the reservation process. In other situations, where reservations were made in accordance with the current freehold test, an acquisition process would have been completed in which native title holders were provided with equivalent rights to freeholders. After such an acquisition, the land would be ‘Crown land’, meaning that there would be no impediment to the relevant government implementing the purpose of the reservation.

The proposed amendments reward governments for failing to comply with the law. Reservations made in breach of the NTA will be validated and exercisable, even in situations where the government uses the land for a purpose other than the one for which the reservation was made. It is very hard to see how this can be justified as being necessary because of the Wik decision. How can any ‘need’ for this be sufficient to override the public interest in ensuring that the property rights of all citizens are protected in a non-discriminatory way? What motivation can there be for permitting discriminatory reservations to be implemented for new purposes, other than to increase the ability of governments to use land at their own discretion, without having to provide procedural rights to native title holders?

³²³ See e.g.: *Vic Crown Land (Reserves) Act 1978* ss.4, 5; *NSW Crown Lands Act 1989* ss.80, 87, 135.

³²⁴ See Chapter 4 for a discussion of the validation proposals.

³²⁵ The Hon. Senator N. Minchin, *Federal Government’s Response to the Wik Decision: ‘THE TEN POINT PLAN’*, 4 June 1997, (‘The Ten Point Plan’) point 3, p.1.

Furthermore, the provisions seem to go well beyond the scope of what was implied by point 3, in that there is no requirement that the reservation involve the "provision of government services". For example, a reservation for forestry purposes could be implemented by giving a lease to a private logging company which allows it to clear the land for its own profit.³²⁶ Where is the public interest in allowing this to go ahead without any form of procedural rights or consultation being provided to native title holders?

Facilities for services to the public

Under the proposed scheme, a future act will be valid if it involves the construction, operation, maintenance or repair of the following things, operated for the general public:

- a road, railway or other transport facility;
- a jetty or bridge;
- an electricity transmission or distribution facility;
- lighting of streets or other public places;
- a pipeline or other water or gas supply or reticulation facility;
- a sewerage or drainage facility;
- an irrigation facility;
- a cable or communication facility; or
- any other thing similar to one or more of the above.³²⁷

The future act must not prevent native title holders from having "reasonable access" to the area, except while it is being constructed, or for health and safety reasons.³²⁸

For the provisions to apply, the relevant jurisdiction must have heritage protection legislation which "makes provision" for the preservation or protection of areas that may be of particular significance.³²⁹

Where the land is covered by a non-exclusive agricultural or pastoral lease, native title holders will have the same procedural rights in relation to the act as lease-holders. In other situations, native title holders will have the same procedural rights as freeholders.³³⁰ The non-extinguishment principle applies and compensation is payable for detriment caused to native title rights and interests.³³¹

While there seems to be little difficulty in providing that the operation, maintenance and repair of existing public facilities are valid future acts, the situation is different in relation to the construction of **new** facilities.

The construction of a public facility would not occur on freehold land without acquisition processes being followed. Under the NTA in its current form, governments wishing to acquire native title land in order to construct public facilities are simply required to comply with the 'freehold test', by providing native title holders with the acquisition rights to which freeholders would be entitled. Governments are not required to go through the right to negotiate process – this only applies to compulsory acquisitions made for the benefit of third parties. Once land has been acquired, governments may use it for public purposes.

³²⁶ ATSIC Preliminary Commentary, op. cit., p. 8.

³²⁷ ^350, NTAB 97.

³²⁸ ^350(1)(c), NTAB 97.

³²⁹ ^ 350(2), NTAB 97.

³³⁰ ^ 350(7), NTAB 97. See also definition of 'ordinary title holders', s.253.

³³¹ ^350(4),(5),(6), NTAB 97.

The only apparent reason for exempting the specified activities from the freehold test is so that governments will be able to use land for these purposes without being required to acquire existing native title rights. The Government clearly implied this in the ‘point form’ overview of the Bill which it released.³³² In the document, the construction of public facilities under this Subdivision was contrasted with the construction of “large scale public works, for which it was said that compulsory acquisition processes would be necessary. Thus, it seems that this Subdivision is intended to allow certain public facilities to be constructed without acquisition processes being required in relation to native title holders.

Such a result would clearly discriminate against native title holders, by allowing governments to override their rights in order to construct public facilities without first needing to acquire those rights. Although the non-extinguishment principle and compensation entitlements apply, such an approach places the obligation on native title holders to seek redress for the detriment which they have suffered, rather than requiring governments to acquire and provide restitution up-front – as is necessary before constructing works which affect other forms of title. Such a situation would place the property rights of native title holders in a uniquely vulnerable position.

ATSIC has proposed that the construction of new public facilities on native title land should only take place by way of agreement between the appropriate parties, rather than by the wholesale validation of such acts in relation to their impact on native title. On this basis, they suggest that the word “construction” should be deleted from the provision.³³³ I support these views.

The requirement that a future act performed under this Subdivision must not prevent native title holders from having “reasonable access” to the area in question seems fairly meaningless in practice. Where a road, railway or jetty is built, native title holders will still have ‘access’ to the area, just like everybody else, but the character of the area – and thus of their access to it – may be changed forever. ATSIC has suggested that the provision be amended “to make it clear that the continuing ‘reasonable access’ to be enjoyed by native title holders is access for their own purposes and not simply as members of the public.”³³⁴ This would be a sensible mitigation of the damage to native title interests.

The requirement that a law of the relevant jurisdiction “makes provision” for heritage protection is particularly weak. Again, ATSIC has made a constructive suggestion, proposing that the provision be re-worded “to require that there be heritage protection laws which will preserve or protect areas of particular significance and not merely laws which ‘make provision in relation to the preservation or protection’ of such areas.”³³⁵

The right to negotiate

The nature of the proposals

Under the NTA in its present form, people who are registered as possessing or claiming native title have a ‘right to negotiate’ in relation to certain kinds of ‘permissible future acts’, namely:

- acts relating to mining (including both exploration and production); and

³³² The Department of Prime Minister and Cabinet, Wik Task Force, Guide to Native Title Amendment Bill 1997 (10-Point-Plan Amendments), p. 8: see discussion of point 3 - “If large scale works – need to compulsorily acquire.

³³³ ATSIC Preliminary Commentary, op. cit., p. 9.

³³⁴ Ibid.

³³⁵ Ibid.

- the compulsory acquisition of native title rights for the benefit of a third party.³³⁶

The NTA sets out a process which must be followed when the right to negotiate applies. The relevant government must give notice of the proposed act in a prescribed way and any native title holders who wish to negotiate about the act must respond to the notice within a certain time. The matter will then proceed to negotiation. If no agreement results within a set time limit, a party to the negotiations may apply to an arbitral body (presently the National Native Title Tribunal) for a determination. The arbitral body's determination may be overruled by the relevant Minister.

There are some narrowly-defined exceptions to the application of the right to negotiate. It does not apply where no claimants have been registered within two months of notification.³³⁷ Acts which have "minimal impact on native title" can be excluded from the process by the Commonwealth Minister.³³⁸ In addition, Governments can apply for an 'expedited procedure' avoiding the right to negotiate where the proposed act "does not directly interfere with the community life of native title holders or" involve major disturbance to any land or waters.³³⁹ Native title holders may object to the application of this procedure.³⁴⁰

My 1996 Native Title Report analysed proposals for amending the right to negotiate which were contained in a discussion paper issued by the Government during May 1996.³⁴¹ Since then, two sets of legislative proposals have been released. In October 1996, the Government tabled amendments to the NTA which contained far-reaching changes to the right to negotiate.³⁴² The draft Bill of 1997 refines these amendments and places the comprehensively re-drafted scheme in 'Subdivision P' of the new future acts regime.

The proposed amendments substantially dismantle the right to negotiate. In its original form, the right to negotiate attempted to provide native title with a meaningful level of protection in situations where it was particularly vulnerable to being overridden by governments which wanted to grant extensive rights to third parties. By contrast, the proposed amendments are entirely weighted in favour of governments and private parties. The details of this are discussed below.

Discrimination implications of curtailing the right to negotiate

The imbalance of the remodelled right to negotiate scheme is in keeping with the flavour of the rest of the draft Bill, highlighting its inconsistency with both the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Racial Discrimination Act 1975 (Cth) (RDA) (which, prior to the Wik decision, the Government committed itself to respecting when amending the Act.)³⁴³ This inconsistency is apparent whether one characterises these instruments as requiring 'formal' or 'substantive' equality in the protection given to the human rights of different *racial groups*.³⁴⁴

The Government has relied on a formal equality argument in order to claim that its proposed

³³⁶ s.26(2), *NTA*.

³³⁷ ss.28(1)(a), *NTA*.

³³⁸ ss.26(3),(4), *NTA*.

³³⁹ ss.32 and 237, *NTA*.

³⁴⁰ s.32(3), *NTA*.

³⁴¹ Commonwealth of Australia, *Towards a More Workable Native Title Act: An Outline of Proposed Amendments*, May 1996.

³⁴² *Amendments to the Native Title Amendment Bill 1996*.

³⁴³ Commonwealth of Australia, *Towards a More Workable Native Title Act: An Outline of Proposed Amendments*, *op. cit.*, p. 1.

³⁴⁴ See the analysis of these concepts in Chapter 6 below.

amendments are consistent with non-discrimination requirements. This was clearly expressed by Robert Orr, General Counsel of the Attorney-General's Department, in his evidence to the Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund in November 1996, when he said that:

*In assessing the current government amendments...and advising in relation to them, the approach has been taken that the amendments need to leave the [Native Title] Act either as a special measure or provide formal equality. Provided that the amendments maintain provisions as special measures or provide formal equality, they comply with the Racial Discrimination Act.*³⁴⁵

Since this statement was made, the latest draft Bill has been issued. The Bill both curtails the right to negotiate and amends the NTA in other crucial respects, as discussed above. It must be asked whether the draft Bill satisfies the Government's own test of non-discrimination, by ensuring that the NTA either provides formal equality to native title holders, or constitutes a 'special measure' for their benefit.

If the right to negotiate is curtailed, would a situation of formal equality exist?

In defending amendments which curtail the right to negotiate, the Government has argued that in order to honour its promise to respect the RDA, it is merely required to ensure that native title holders are left in a situation of formal equality with other title holders. On this basis, it has been suggested that the "special right" provided by the right to negotiate scheme can be wound back or removed without giving rise to racial discrimination.³⁴⁶

This argument is completely undermined by the character of the amendments which have been put forward since the Wik decision. It is clearly wrong to suggest that the amendments ensure that native title holders are left in a situation of formal equality with other title holders. In fact, the theme of the amendments is to move away from such a guarantee.

First, the draft Bill provides for the validation of all non-Indigenous titles granted between the commencement of the NTA and the handing down of the Wik decision. This blatantly favours Crown-granted titles over native title and fails to provide native title with any protection at all, let alone equal protection to that which other title holders enjoy against derogation of their rights. Second, as has been seen above, the provisions governing future acts over native title land are no longer built around a guarantee of formal equality with ordinary title holders. The future acts regime has been completely restructured so that a lengthy list of acts will be valid, regardless of whether or not they can be done over freehold title land or whether native title holders have been provided with equivalent procedural protections to freeholders. Native title holders are merely offered compensation for the impact of any such acts on their property rights. Such a situation clearly fails to provide native title holders with 'formal' equality.

If the right to negotiate is curtailed, could the NTA constitute a 'special measure'?

When it was originally enacted, categorisation of the NTA as a special measure saved it from being regarded as discriminatory, despite the fact that it contained discriminatory provisions validating Crown-granted titles. These provisions were portrayed as being outweighed by 'beneficial' provisions, such as the right to negotiate, which accommodated particular needs of native title

³⁴⁵ Orr, R., Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Hansard*, Wednesday, 27 November 1996, p. NT 3599.

³⁴⁶ See Commonwealth of Australia, *Towards a More Workable Native Title Act: An Outline of Proposed Amendments*, *op. cit.*, p. 27; also The Hon. D. Williams QC, Attorney-General, 'Second Reading Speech: Native Title Amendment Bill 1996', *Hansard*, House of Representatives, 27 June 1996, pp. 1-2.

holders.³⁴⁷

As has just been outlined, the draft Bill **increases** the discriminatory aspects of the NTA, according to a test of formal equality. However, instead of providing additional assistance to native title holders in order to ‘balance’ this increase in discrimination, the amendments allow native title holders to be treated less favourably than other title holders in a range of situations. They also wind back the right to negotiate to a point where it is rarely applicable at law and virtually unusable in practice. It is impossible to see how the NTA, once amended in this fashion, could be characterised as a ‘special measure’ for the benefit of Indigenous peoples.

Thus, even on the Government’s own test, the amended NTA would be discriminatory and inconsistent with the principles of the RDA and the CERD, as it fails to guarantee formal equality and could not realistically be portrayed as a special measure. If enacted in its present form, the Bill would be open to challenge both domestically and in the international arena. This issue is discussed more broadly in the following chapter.

Substantive equality and the curtailment of the right to negotiate

The discrimination argument is even clearer if the RDA and the CERD are interpreted (correctly, in my view) as requiring governments to provide **substantively** equal protection of the rights of all races. I believe that the property rights of native title holders require different protections to those of other title-holders, due to factors such as the communal nature of native title, its independence of government action, its spiritual and cultural significance and the traditional decision-making processes which apply to it.³⁴⁸ In its original form, the right to negotiate could be said to have accommodated these features to a limited degree. The proposed amendments completely undermine these aims. Under the new provisions, the regime will be subject to wide-ranging exemptions, vulnerable to government intervention and almost impossible for native title holders to access due to oppressive registration requirements and time limits. As Jennifer Clarke has explained:

*The ‘right to negotiate’ in the present Native Title Act is an attempt to give...important aspects of native title protection similar to (though ultimately inferior to) the protection of agricultural land. In its present form, the right to negotiate may be inadequate. But attempts to limit it can only bring its operation closer to a form of **inappropriate, different treatment** – i.e. **racial discrimination**.*³⁴⁹

I will now explore the proposed amendments to the right to negotiate scheme in more detail. For the purposes of analysis, the proposed amendments can be divided into three categories:

- amendments relating to compulsory acquisitions;³⁵⁰
- amendments relating to mining titles; and
- amendments relating to both mining titles and compulsory acquisitions.

Amendments relating to compulsory acquisitions

³⁴⁷ See The Hon. P. Keating, Prime Minister, ‘Second Reading Speech: Native Title Bill 1993’, *Hansard*, House of Representatives, 16 November 1993, p. 2879.

³⁴⁸ Clarke, J., ‘Racial Non-Discrimination Standards and Proposed Amendments to the Native Title Act’, *Lands, Rights, Laws: Issues of Native Title*, Issues Paper no. 16, April 1997, Native Title Research Unit, AIATSIS, Canberra, pp. 4-5.

³⁴⁹ Clarke, J., ‘Racial Non-Discrimination Standards and Proposed Amendments to the Native Title Act’, unpublished paper, CAEPR, ANU, April 1997, p. 8.

³⁵⁰ Note that the phrase ‘compulsory acquisitions’, unless otherwise specified, is used in this section to refer to compulsory acquisitions for the benefit of third parties.

Infrastructure facilities

Under the draft Bill, there will be no right to negotiate where a government compulsorily acquires native title rights in order to grant an interest to a third party, where that grant is for the purpose of providing "infrastructure facilities".³⁵¹

The definition of "infrastructure facilities" is extremely broad. It includes highways, railways, electricity and gas facilities, dams, pipelines, cables and any other similar things which the Minister deems to be infrastructure facilities.³⁵² Beyond this – and most extraordinarily of all – there is no requirement that the facility be intended for a public purpose. A private party can be granted a right to construct an "infrastructure facility" purely for their own use and native title holders whose property rights are affected will have no right to negotiate in relation to the grant.

Under the amendments to the NTA which were tabled in October 1996, the Commonwealth Minister would have been empowered to exclude compulsory acquisitions from the right to negotiate where they conferred rights on third parties for the purpose of constructing and operating "public infrastructure facilities".³⁵³ The justification put forward by the Government for excluding such acts from the right to negotiate was that this reflected an increasing tendency on the part of governments to hire private agencies to construct essential public infrastructure and that such work ought to be able to proceed without having to comply with the right to negotiate.³⁵⁴ The '10 Point Plan' stated that the right to negotiate would be removed "in relation to the acquisition of native title rights for third parties for the purpose of government-type infrastructure".³⁵⁵ However, in the draft Bill all pretence of there being a 'public' or 'government-type' purpose involved has been abandoned. The amendments simply remove the need for governments to negotiate with native title holders when they want to grant private rights to developers.

The Cape York Land Council warned that last year's proposals were drafted so broadly that they gave rise to an "obvious potential...for private profits to be generated from native title land".³⁵⁶ This potential has now been made explicit. It is clearly unreasonable for profits to be made by private developers from the use of native title land without any requirement for negotiation with those holding property rights to that land.

It is clear that the new proposals are intended to remove the need for negotiations over such matters as the Century Zinc pipeline. Such action seems totally unnecessary. While these negotiations took some time to complete, responsibility for this cannot be laid at the feet of native title holders; and the negotiations were ultimately successful. The excessive nature of the amendments is particularly clear when one considers the sweeping pro-development amendments to the NTA which are proposed elsewhere in the draft Bill.

Amendments relating to mining titles

'Once only' right to negotiate

³⁵¹ s.26 (1)(c)(iii)(B), item 10, *NTAB 97*.

³⁵² s.253, item 49, *NTAB 97*.

³⁵³ Commonwealth of Australia *Outline of Proposed Amendments to the Native Title Amendment Bill 1996*, 8 October 1996, p. 7.

³⁵⁴ The Honourable the Prime Minister, John Howard, *Supplementary Explanatory Memorandum: Native Title Amendment Bill 1996 – Amendments and New Clauses to be moved on behalf of the Government*, The Senate, p 19.

³⁵⁵ *The Ten Point Plan, op. cit.*, point 7, p. 2.

³⁵⁶ Cape York Land Council, *Submission to the Parliamentary Joint Committee on Native Title*, 6 December 1996, p. 6.

At present, the right to negotiate applies to the granting of both exploration and production titles, and where a mining title is renewed or extended (if the title does not contain a right of renewal).³⁵⁷ By contrast, the draft Bill aims to ensure that the right to negotiate will apply only once during the life of a project. I will explore several aspects of this proposal.

(i) ‘Approved scheme acts’ – excluding exploration from the right to negotiate

The Government has developed a mechanism which is designed to facilitate the exclusion from the right to negotiate of State and Territory procedures for the granting of exploration titles.

Under the proposed mechanism, the Commonwealth Minister would be able to approve acts for exclusion where:

- the acts are *”unlikely to have a significant impact on land or waters ; and*
- there is a legislative or administrative scheme in place in the relevant State or Territory which will ensure that native title holders:
 - (i) have a right to be notified;
 - (ii) have the same right to be heard by an independent person or body as any other interest holder;
 - (iii) are *”consulted* by the miner or developer about access, site protection and the way in which the act is to be done; and
 - (iv) relevant representative bodies are notified and given a chance to make submissions.³⁵⁸

A number of points are worth making about the proposal outlined above.

Removing negotiation at the exploration stage may decrease the likelihood of parties reaching agreement about the more complex issues involved in production, thus causing a greater number of production proposals to be resolved by arbitration or Ministerial intervention. It is therefore possible that any time advantage achieved by removing the right to negotiate at the exploration stage will be lost during the production stage.

While the proposed section ensures that native title holders will have certain procedural rights, there is no guarantee that they will have equivalent procedural protections to freeholders in relation to acts excluded from the right to negotiate under this mechanism.³⁵⁹ This clearly creates the potential for state regimes which are inconsistent with the RDA.

The proposed mechanism states that acts cannot be excluded from the right to negotiate unless they are *”unlikely to have a significant impact on land or waters* .³⁶⁰ Proper protection of native title requires the protection of the **title**, not just the physical protection of land and waters. The current provisions of the Act are therefore necessary, which state that the Minister must consider that an act excluded from the right to negotiate will have *”minimal impact on any native title concerned*.³⁶¹

The provision states that, in order for exclusion to occur, the relevant State or Territory scheme

³⁵⁷ s.26(2), NTA.

³⁵⁸ s.26A, item 10, NTAB 97.

³⁵⁹ Note that such acts are specifically excluded from the guarantee of procedural equality contained in Subdivision M, which deals with the ‘freehold test’ – see ^375(6), NTAB 97.

³⁶⁰ s.26A(2)(a), item 10, NTAB 97.

³⁶¹ s.26(4), NTA.

must require the miner or developer to "consult with native title holders about various matters."³⁶² This requirement fails to provide any real protection to native title holders, who have no means of ensuring that adequate consultation takes place, or that miners and developers implement the recommendations arising from such consultations.

(ii) Re-grants, renewals and extensions

Under the draft Bill, the right to negotiate will not apply when mining titles are renewed, re-granted or extended where:

- the right to negotiate has already been exercised; or
- the original interest was granted at any time prior to the Wik decision.³⁶³

If these amendments are passed, native title holders will never have a right to negotiate on the renewal, re-grant or extension of mining titles affecting their traditional lands, regardless of the impact or length of those titles.³⁶⁴

Mining titles granted before the Wik decision in breach of the NTA will be renewable indefinitely, without ever having to go through the right to negotiate process. Not only will governments be rewarded for ignoring the law by having such titles 'validated' in a discriminatory fashion (as discussed in Chapter 4), but they shall be permitted to renew, re-grant or extend these titles without ever having to negotiate with the native title holders whose rights are affected.³⁶⁵ Even if there was justification for validating pre-Wik mining titles which are presently operational, it couldn't be argued that it is necessary for these titles to be indefinitely renewable without negotiation.

In many jurisdictions mining titles do not contain legally enforceable rights of renewal. Consequently, the renewal, re-grant or extension of such titles lies within the relevant Minister's discretion. The amendments give rise to a situation in which the mere expectations of mining companies are clearly favoured above the protection of native title holders' property rights.

Mining titles are often of extremely long duration, with standard renewal periods of similar length. This makes it essential for native title holders to have an opportunity to negotiate the terms on which a title is extended or renewed. A mine may have a greater or different impact on native title than can be imagined at the initial negotiation stage.

(iii) Agreements/determinations at the exploration stage

In circumstances where exploration is not excluded from the right to negotiate under the mechanism outlined above, the amendments provide that there would be no right to negotiate at the production stage if the agreement or a determination reached at the exploration stage included conditions relating to production.³⁶⁶

These amendments would lead to 'once only' negotiations over projects which are in very early stages of development, compromising the ability of both native title holders and industry to take a practical and informed approach to negotiations.

³⁶² s.26A(4), (5), item 10, *NTAB 97*.

³⁶³ s.26B(1), item 10, *NTAB 97*.

³⁶⁴ In relation to the renewal of pre-1994 mining titles, see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996, op. cit.*, pp 161-6.

³⁶⁵ Find page refs.

³⁶⁶ ss.26(2)(c), 26B(2), item 10, *NTAB 97*.

Further, the amendment allows the arbitral body to impose conditions about production while making a determination about exploration. The Minister could do likewise in the course of overruling a determination. Despite the fact that these conditions may prove to be unsuitable for any production scheme which ultimately arose, their existence would remove the need for negotiation at the production stage.³⁶⁷

It is also worth noting that *“there is no mention in the amendments of how compliance with agreement conditions negotiated at exploration are to be assessed and enforced over time, or by whom.”*³⁶⁸

Amendments relating to both mining titles and compulsory acquisitions

Leased and reserved areas

Under the proposed amendments, the Commonwealth Minister can determine that a State or Territory law applies in place of the right to negotiate on leased or reserved lands, if that law complies with certain requirements.³⁶⁹

There are four different types of act which could be exempted from the right to negotiate under the proposed s.43A:

- (i) compulsory acquisitions of native title rights on non-exclusive leasehold lands;
- (ii) grants of mining titles on non-exclusive leasehold lands;
- (iii) compulsory acquisitions of native title rights on reserved lands; and
- (iv) grants of mining titles on reserved lands.

Each of these situations will now be briefly explored in turn.

(i) Compulsory acquisition of native title rights on non-exclusive leasehold lands

Allowing acts of this kind to be excluded from the right to negotiate is intended to make it easier for governments to acquire native title rights on pastoral and agricultural properties, so that upgraded forms of tenure can be provided to lease-holders. The exceptional nature of this use of compulsory acquisition powers is discussed in the previous chapter.

(ii) Grants of mining titles on non-exclusive leasehold lands

Under proposed s.43A, the right to negotiate may be avoided when a mining title is granted on leasehold land provided that native title holders have:

- procedural rights which are equivalent to those possessed by the lease-holder; and
- compensation rights.³⁷⁰

Discrimination issues arise from this and other provisions in the draft Bill which equate the rights of native title holders and lease-holders on the basis that this results in ‘equality’. In my view, such a comparison is inappropriate for determining the procedural rights to which native title holders are entitled.

³⁶⁷ Cape York Land Council, Submission to the Parliamentary Joint Committee on Native Title, op. cit., p 7.

³⁶⁸ Smith, DE, The right to negotiate and native title future acts: implications of the Native Title Amendment Bill 1996, Discussion Paper No. 124/1996, Centre of Aboriginal Economic Policy Research, ANU, 1996, p 14.

³⁶⁹ s.43A, item 10, NTAB 97

³⁷⁰ The word ‘leasehold’ is used in this section to refer to ‘non-exclusive leasehold’ as defined in the NTAB 97.

The protection of native title where it survives is one of the stated objects of the NTA.³⁷¹ The right to negotiate is far better suited to protecting native title than are the various regimes which apply to lease-holders in relation to the granting of mining interests. For example, under the right to negotiate, the National Native Title Tribunal ('NNTT') acting as the arbitral body can decide that a proposed grant should not be made.³⁷² Ministers also have this ability in certain circumstances.³⁷³ The right to negotiate provisions also require the NNTT to take into account a lengthy list of criteria, including the effect of the proposed act on the rights, life, culture, traditions, society and economic structure of native title holders.³⁷⁴ By contrast, State and Territory regimes applying to lease-holders make no allowance for the fact that native title has cultural and spiritual significance as well as being a 'property right'.

Allowing different State and Territory regimes to govern the granting of mining titles on leasehold land is inefficient and confusing for the various stakeholders. For example, mining companies would be greatly assisted by the existence of a clear and consistent national regime, rather than having to abide by different processes in each State and Territory.

(iii) Compulsory acquisition of reserved lands

Under proposed s.43A, compulsory acquisitions of reserved lands can be exempted from the right to negotiate if a State or Territory provides an alternative scheme which meets specified criteria.

It is hard to see the practical benefits of the proposed approach, which will lead to an inequitable and confusing variation in native title holders' procedural rights around the country. By allowing the right to negotiate to be replaced with weaker State and Territory regimes, the proposed amendments make it easier for governments to acquire reserved lands and use them to benefit private interests. The uniquely vulnerable position of native title in relation to acquisitions for the benefit of third parties is discussed in Chapter 4, above. The potential for extinguishment of native title to occur as the result of a compulsory acquisition is increased by the draft provision at ^375(2), which reverses the current provisions of the NTA in order to permit an act of compulsory acquisition to extinguish native title.

There are particularly compelling reasons for retaining the right to negotiate on reserved lands. National parks and forest reserves are places where there is a relatively good chance that native title has survived and could continue to survive. Justice Brennan specifically mentioned in the *Mabo* case that reservation of land for a national park would not extinguish native title.³⁷⁵ All Australians have an interest in protecting the surviving native title estate in this country; a fact which is recognised in the NTA, the primary purpose of which is "to provide for the recognition and protection of native title".³⁷⁶ Permitting the right to negotiate to be replaced with a hodge-podge of weaker State and Territory regimes on reserved lands is fundamentally inconsistent with this goal.

(iv) Grants of mining titles on reserved lands

The granting of mining titles on reserved lands may be exempted from the right to negotiate if a State or Territory provides an alternative scheme which, in the opinion of the Commonwealth

³⁷¹ s.3, *NTA*.

³⁷² s.38(1), *NTA*.

³⁷³ s.42(1) and (2), *NTA*.

³⁷⁴ s.39(1), *NTA*.

³⁷⁵ *Mabo [No.2]*, *op cit*, per Brennan, J., p.68.

³⁷⁶ s.3(a), *NTA*.

Minister, provides:

- *”appropriate procedures* for the notification of native title holders;
- an *”opportunity* for native title bodies corporate and registered claimants to reach agreement with the Government party;
- a right to object and to be heard for native title bodies corporate and registered claimants; and
- compensation.³⁷⁷

The requirements set down for alternative State or Territory regimes are very vague and permit a significant move away from the right to negotiate framework. For example, no criteria are specified for determining when notification procedures are *”appropriate* . Similarly, no requirements are prescribed for the objection and hearing process. There is nothing to stop unrealistic time limits being set or inappropriate people being given the role of hearing objections.

It is quite possible that State and Territory regimes which meet the specified requirements will provide inferior procedural protections to those possessed by freeholders on the granting of mining titles. Where this is the case, the new regimes would be inconsistent with the RDA and liable to be struck down on that basis.³⁷⁸

As discussed above, the application of differing State and Territory regimes to mining grants over native land will create confusion and inefficiency for mining companies and other stakeholders.

The inter-tidal zone

The amendments dramatically reduce the ability of native title holders to protect their property rights in the area between the high and low water marks, known as the inter-tidal zone.

In last year’s amendments, the inter-tidal zone was re-classified as ‘waters’ instead of ‘land’. This significantly reduced the protection provided to native title holders by the freehold test in relation to proposed future acts.³⁷⁹ Under the freehold test, if an act affects native title ‘land’ it will only be valid if it could also be done if the land was freehold. However, if an act affects native title ‘waters’, it will be valid so long as it could be done if the land **adjoining** the waters was freehold.³⁸⁰ In addition to this, the draft Bill proposes to entirely remove the right to negotiate in relation to *acts within the inter-tidal zone*.³⁸¹

I am unaware of any explanation for the need to remove the right to negotiate in these circumstances. It seems to be completely unrelated to the Wik decision. In combination with the amendments put forward last year, it will leave native title holders with no meaningful ability to have any say about future acts which affect their property rights in the inter-tidal zone. When a future act is proposed in an inter-tidal zone area, native title holders will be treated as if they hold freehold title to the land **adjoining** the area in question. In most situations, this will mean that they have no relevant rights whatsoever. The inter-tidal zone amendments are an example of how the draft Bill attempts to clear native title rights out of the way of development on as much of the Australian continent as possible.

³⁷⁷ s.43A(3)(b), item 10, *NTAB 97*.

³⁷⁸ Note that acts to which subdivision P applies are specifically exempted from the procedural equality test in subdivision M – ^375(6), *NTAB 97*.

³⁷⁹ See s.253, item 119, sch. 2 and s. 253, item 124, sch. 2, *NTAB 97*.

³⁸⁰ This issue was discussed at length in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996, op. cit.*, at pp. 183 – 185.

³⁸¹ s.26(3), item 10, *NTAB 97*.

Town/city limits

The amendments also provide that the right to negotiate is removed for all acts relating to land or waters "wholly within a town or city".³⁸² Presumably the rationale for this change is to make it easier for governments to acquire native title rights where they survive in towns and cities, in order to grant rights to third parties over these areas. Again, the imbalance of the provisions is clear. Our rights are limited to the fringes of towns: a graphic demonstration of the marginalisation of native title interests under the Government's proposals.

Ministerial intervention

(i) Early Ministerial intervention

It is proposed that at any time after the end of the three-month notification period set down in the right to negotiate, the relevant Minister shall be able to intervene to make a determination, if the Minister considers that:

- the act will be of "substantial economic benefit to Australia ;
- this economic benefit will be substantially reduced or will not arise if a determination is not made at that time;
- if the act is done, there will be significant benefits to the native title holders in relation to the land or waters concerned; and
- it is in the national and/or State or Territory interest to make a determination at that time.³⁸³

This amendment clearly undermines the right to negotiate process and greatly increases the opportunity for development to be quarantined from negotiations. The condition that the act provide "significant benefits to native title holders would allow profitable projects to be given the go-ahead, regardless of any detrimental impact on native title itself or on the communities to whom that title belongs. Further, where State governments have created native title regimes, State ministers will be able to authorise projects on the basis of "economic benefit to Australia".³⁸⁴

Use of the intervention mechanism is bound to lead to challenges of the Minister's interpretation of the provision. Indigenous parties may feel that their native title is placed in such jeopardy by ministerial 'green lighting' of acts that they have no alternative to legal action.

It is notable that when industry and Indigenous representatives met during June 1996 to discuss the amendments at a meeting organised by the Council for Aboriginal Reconciliation, the published outcomes included a joint statement of concern about the proposal for Ministerial intervention.³⁸⁵ It is also significant that prior to this meeting CRA/Century Zinc had rejected the Federal Government's offer of special legislation to authorise a mining project on land under native title claim in the Gulf of Carpentaria. The company realised that agreement, not the exercise of executive power, is the most solid foundation for large-scale, long-term projects. It also understood that premature ministerial intervention is simply not required in order for the future act processes to be

³⁸² s.26(2)(e), item 10, *NTAB 97*.

³⁸³ s.34A, item 10, *NTAB 97*.

³⁸⁴ s.34A(3)(a), item 10, *NTAB 97*.

³⁸⁵ Council for Aboriginal Reconciliation, *Native Title Stakeholders Meeting – Outcome on Workability of the Act*, Sunday 16 June 1996, point 3.

workable, provided that they are initiated in a timely fashion.

(ii) Intervention after consideration by the arbitral body

It is proposed that at the end of the notification period the relevant Minister will be able to set a time limit of not less than four months within which the arbitrator must make a determination. The Minister will be able to intervene to make a determination if this time limit is not met, where the Minister believes that the body is "unlikely to make its determination within a reasonable period" and that intervention is in the national and/or State or Territory interest.³⁸⁶

In a submission to the Parliamentary Joint Committee on Native Title, John Basten QC explained the inappropriateness of this intervention power, as follows:

Future acts will usually involve development activities in particular States and Territories, which will often be treated as requiring expeditious treatment by the government of the State or Territory concerned. That government will also be a party to negotiations. Giving a Minister of such a government a power to intervene in circumstances which will readily be fulfilled and a power to make a determination untrammelled by the criteria to be considered by the Tribunal, is to allow the negotiation process to be sidestepped by one party. The role of the independent arbiter is thus severely undermined. The possibility of such intervention will have a chilling effect on all negotiations... Any party which believes its interests are more likely to be met by a relevant Minister is likely to resist reaching a negotiated agreement on terms less favourable than those it expects from the Minister... .³⁸⁷

The negotiation process

(i) Time limits

At present, negotiation and arbitration periods are four months where an exploration licence is proposed and six months in other cases. The negotiation time frames have the potential to cause enormous difficulties for native title claimants who are often widely dispersed and economically disadvantaged. It is now proposed that there will be a time limit of four months for all negotiation and arbitration.³⁸⁸

The negotiation period commences at the time that notice of the proposed act is given. Under the proposed amendments, claimants must then respond within three months. Due to the considerable work involved in responding to future act notices, it will, realistically, often take longer than this for a claim to be organised and lodged. Indeed, if the onerous new registration test is enacted, most claimants will find it extremely difficult to compile registrable claims within the three-month time period. Where, against the odds, claims are lodged within time, they are most likely to be lodged just inside the three-month period. This will potentially leave a period of one month after lodgement during which negotiation can take place. The prospects of anything productive resulting from this are remote, taking into account the number of parties, the distances, and the complexity of the issues which may be involved in large-scale mining projects. As the Cape York Land Council has explained:

This proposal is particularly regressive when the government has simultaneously increased the potential scope for negotiations. Allowing 30 days for a 'once only' negotiation of an agreement

³⁸⁶ s.36A, item 10, NTAB 97.

³⁸⁷ Basten QC, J, *Further Submission to the Parliamentary Joint Committee on Native Title*, *op. cit.*, p 10. As is indicated by this paragraph, the Minister is not required to take into consideration the criteria which are laid down for consideration by the arbitral body in making a determination – see s.39, NTA.

³⁸⁸ s.35, NTA.

*for a mine which might involve a bundle of project acts, which might have a life of 50-100 years and where there is no second chance at the renewal stage is a sick joke.*³⁸⁹

(ii) Expedited procedure and interference with community life

In order to attract the ‘expedited procedure’ and avoid the right to negotiate process, a relevant future act must not “directly interfere with the community life of native title holders.”³⁹⁰ It has been held by the Federal Court in *Ward v Western Australia*³⁹¹ that in determining whether such interference may occur, the impact of proposed acts on a community’s spiritual attachment to land is a relevant consideration. It is now proposed to amend the Act so that the only kind of ‘interference’ which is relevant is direct **physical** interference with the community life of native title holders.

In my view, this proposal completely fails to understand the nature of native title as defined by the High Court in the *Mabo* decision. It shows a total lack of comprehension and respect for Indigenous culture and trivialises Indigenous attachment to land. For many native title holders, spirituality is at the heart of their native title.³⁹²

This amendment clearly breaches the Coalition’s election promise that its approach to the NTA would recognise “[t]he special relationship between Indigenous people and land which is at the core of Indigenous culture.”³⁹³ Further, the amendment is inconsistent with the Government’s obligations under the RDA and CERD to eliminate racial discrimination in the enjoyment of human rights such as freedom of religion and participation in cultural activities. It also runs contrary to Article 27 of the International Covenant on Civil and Political Rights, which provides that minorities shall not be denied the right to enjoy their own culture and religion.³⁹⁴ It may, therefore, attract challenges at the international level.

(iii) Duty of all parties to negotiate in good faith

The Federal Court has found that under s.31(1)(b) of the NTA, the NNTT’s jurisdiction to arbitrate does not arise unless the Government party has negotiated in good faith.³⁹⁵ It is now proposed to require all parties to negotiate in good faith, while providing that the NNTT must arbitrate where the party applying for a determination has negotiated in good faith, even where other parties have not done so.³⁹⁶

This will create the potential for Governments and grantee parties (miners and developers) to hobble the negotiation process. As explained by John Basten QC:

It is plausible to assume that the Government and grantee parties will share a common interest in having the act go ahead. It is not satisfactory that one could stall negotiations while the other presses ahead in apparent good faith and makes application to the Tribunal. It would be more appropriate if the amendment read: (1A) The arbitral body shall not make a determination that

³⁸⁹ Cape York Land Council, Submission to the Parliamentary Joint Committee on Native Title, op. cit., p. 8.

³⁹⁰ s.237(a), item 38, NTAB 97.

³⁹¹ (1996) 136 ALR 557.

³⁹² See Aboriginal and Torres Strait Islander Social Justice Commissioner, Further Submission on the Commonwealth’s Proposed Amendments to the Native Title Amendment Bill 1996, 5 November 1996, p 5.

³⁹³ Federal Liberal and National Parties, Policies for a Coalition Government, February 1996.

³⁹⁴ For further discussion see Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 1994-1995, AGPS, 1995, p. 144.

³⁹⁵ *Walley v WA* (unrep. 20 June 1996).

³⁹⁶ ss.31, 36(2), item 10, NTAB 97.

*the act may be done unless satisfied that the Government and grantee parties each negotiated in good faith as required by s.31(1)(b).*³⁹⁷

Transitional provisions

The proposed amendments contain extensive transitional provisions outlining how native title claims which have already been lodged will be dealt with, should the amending legislation come into force. These provisions will significantly reduce the application of the right to negotiate, by applying the ‘registration test’ to claims which have already been made.

It is proposed that the registration test will be applied to **all** claims lodged on or after 27 June 1996, which was the date on which the Native Title Amendment Bill 1996 (Cth) was tabled.³⁹⁸ If a ‘s.29 notice’ advising of a future act which attracts the right to negotiate is issued after commencement of the amendments, the Registrar must try to apply the registration test within three months, or as soon as reasonably practicable after this.³⁹⁹ All post-27 June 1996 claims which do not pass the test will be removed from the Register. The right to negotiate will be lost in relation to all relevant matters, even those of which notice was given prior to the commencement of the amendments.⁴⁰⁰

Further, it is proposed that the registration test shall be applied to claims lodged **prior** to 27 June 1996 where a new s.29 notice which relates to the area is issued after commencement of the amendments.⁴⁰¹ The Registrar will be obliged to try and make a decision within three months or as soon as possible after this. The registration test must also be applied to all pre-27 June 1996 claims which cover non-exclusive agricultural or pastoral leases. This must occur within one year of the commencement of the amendments or as soon as reasonably practicable after this.⁴⁰² If such a claim fails the test it will retain the right to negotiate for any acts of which notice was given before commencement of the amendments but lose it for all other proposed acts.⁴⁰³

In all cases, the Registrar must advise the claimant that the test is being applied and provide a ‘reasonable time’ for additional information to be provided.⁴⁰⁴

As well as creating an administrative nightmare for the NNTT, the provisions are likely to cause other practical problems. Where, after commencement of the amendments, a s.29 notice is issued which applies to an area in which a native title claim has been accepted, the Registrar must determine whether the claim satisfies the registration test and must try to make this decision within three months. As outlined above, it is proposed to reduce the negotiation period in the right to negotiate process to four months in all cases. This period is likely to elapse while the registration test is applied, particularly as the Registrar must provide a ‘reasonable opportunity’ for the claimants to provide additional information. During the negotiation period all parties will, therefore, be uncertain as to whether they are actually obliged to negotiate, and no time for meaningful negotiations will be left once this issue has been resolved.

The proposed amendments would also disrupt negotiations which have already been commenced. Any claim lodged after 27 June 1996 which fails the registration test will lose the right to negotiate,

³⁹⁷ Basten QC, J., *Further Submission to the Parliamentary Joint Committee on Native Title*, *op.cit.*, pp. 7-8.

³⁹⁸ item 135(5), sch.2, *NTAB 97*.

³⁹⁹ item 135(6), sch.2, *NTAB 97*.

⁴⁰⁰ item 135(11), sch.2 *NTAB 97*.

⁴⁰¹ item 135(3), sch.2, *NTAB 97*.

⁴⁰² item 135(4), sch.2, *NTAB 97*.

⁴⁰³ item 135(10), sch.2, *NTAB 97*.

⁴⁰⁴ item 135(7), sch.2, *NTAB 97*.

even where it has passed the acceptance test and even in relation to matters for which negotiations are already underway. The Government has justified this situation by stating that "*[a]ll claimants lodging claims after 27 June 1996 would have been aware that the Government intended that the claim be subject to the new registration test – this was announced in the discussion paper released on 22 May*".⁴⁰⁵ This argument fallaciously equates discussion papers, bills and exposure drafts with law. It is self-evident that until the matter is finally dealt with by Parliament, there can be no certainty as to which, if any, of the proposed transitional arrangements will become law.

The complex transitional arrangements appear to fly in the face of the Government's purported desire for 'workability'. A genuinely more workable approach would be to provide that any amendments which are made to the threshold for the right to negotiate should only become effective after the commencement of the new legislation.

Access rights

Point 5 of the '10 Point Plan' stated that registered claimants who could demonstrate current physical access to pastoral lease lands would have their continued access rights *legislatively confirmed* until the determination of their claims.⁴⁰⁶ Provisions dealing with the access rights of claimants are contained in Subdivision Q of the draft Bill. In order for a native title holder to have access rights under these provisions, he or she must:

- be a registered claimant;
- have "*regularly had physical access* to the relevant area as at 23 December 1996; and
- have used this access to perform "*traditional activities* (hunting, fishing, camping, gathering plants, performing ceremonies or visiting significant sites).⁴⁰⁷

These statutory rights also apply to descendants of people who meet the above criteria.⁴⁰⁸

Eligible claimants may continue to exercise their access rights "*in the same way and to the same extent* until determination of their claims.⁴⁰⁹ However, their rights are subject to the prevailing rights of the lessee.⁴¹⁰ Agreements can be made as to the way in which access rights are to be exercised.⁴¹¹ Reservations for the benefit of Indigenous peoples, and the application of heritage protection legislation, are not affected by the existence of statutory access rights.⁴¹²

Crucially, if even one person from a claimant group has rights under these provisions, no person from that group can enforce any common law access rights. These native title rights are suspended while the claim is determined.⁴¹³

The proposed statutory access regime raises more questions than it answers. For example, it is unclear how eligibility for statutory rights will be determined. The Federal Court has jurisdiction over any disputes that arise but no procedure is set down for 'applying' for recognition of such rights.

⁴⁰⁵ The Honourable the Prime Minister, John Howard, Supplementary Explanatory Memorandum: Native Title Amendment Bill 1996 – Amendments and New Clauses to be moved on behalf of the Government, p. 104.

⁴⁰⁶ The Ten Point Plan, op. cit., point 5, p. 1.

⁴⁰⁷ ^390, NTAB 97.

⁴⁰⁸ ^390, NTAB 97.

⁴⁰⁹ ^395, NTAB 97.

⁴¹⁰ ^395(2), NTAB 97.

⁴¹¹ ^395(3), NTAB 97.

⁴¹² ^405(a) and (b), NTAB 97.

⁴¹³ ^400, NTAB 97.

This lack of clarity is all the more surprising when one considers the consequences which flow from even a single claimant satisfying the statutory requirements.

As explained, the fact that one claimant happens to meet the statutory criteria will lead to the suspension of their common law access rights, **and** the common law access rights of all **other** claimants. It seems inconceivable that freehold or leasehold rights could be placed at risk of being ‘suspended’ without compensation where a title-holder had done nothing wrong and no inconsistent government action was proposed. It could be argued that the suspension of title rights brought about by this provision constitutes an acquisition of property by the Commonwealth, giving rise to a Constitutional obligation for compensation to be provided on just terms.

Suspension of native title holders’ common law rights of access could contribute to loss of connection with their traditional lands, thus making it more difficult for people to establish their native title. Rather than benefiting native title holders, the statutory access provisions may actually increase the vulnerability of their rights. If one or more claimants were recognised as meeting the statutory criteria, the common law access rights of all claimants would be suspended. The extent to which those claimants with statutory rights could actually exercise those rights would depend on how the lease-holder carries out ‘primary production’ activities.⁴¹⁴ Pastoralists who decided to plant crops, for example, could presumably exclude native title holders from relevant areas, on the basis of their prevailing rights. Thus, a situation could arise in which statutory access rights were overridden by the lease-holder, and all common law access rights were suspended. In such a situation native title claimants would be left with no access rights at all for the duration of the claims process, thereby increasing the difficulty of proving their continued connection to the area.

Eligibility for access rights under the draft provisions is completely arbitrary. Claimants qualify if they happen to be have been regularly exercising their access rights at a certain date. They will not qualify if they happened to be away from their land at the relevant time. What about people who happened to be sick, traveling, working elsewhere, visiting relatives, or pursuing their education during late 1996? More importantly, what about the many people who have been prevented from exercising their common law access rights by pastoralists, as often happened after the ‘equal pay’ case in the 1960s?⁴¹⁵ It must also be remembered that Aboriginal people have regularly been prevented from exercising the access rights which are ‘reserved’ for their benefit by various pieces of State and Territory legislation.

The proposed criteria are blatantly unfair. In addition, the provisions seem very likely to give rise to legal challenges about issues such as the identity of claimants who had regular access at the date of the *Wik* decision and the meaning of *regular physical access*.

There is no need for any of these problems to arise. All claimants who satisfy the registration test should be entitled to have access while their claims are determined. This argument is particularly compelling in light of the extremely onerous requirements of the proposed new registration test. The identity of registered claimants is clearly defined, thus reducing the likelihood of legal challenges relating to the issue of which claimants have access rights. There is no need to provide that native title holders’ common law access rights are suspended. Anyone who is not a registered claimant and who purports to have common law access rights would presumably be required to establish these rights before a lease-holder could be compelled to grant access.

Management of claims

The Federal Court’s way of operating

⁴¹⁴ See Chapter 4 above.

⁴¹⁵ See discussion in Chapter 2.

At present, section 82 of the *NTA* provides that “[t]he Court, in conducting proceedings, **must** take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders”.⁴¹⁶ This provision is changed by the draft Bill, which says that the Court **may** take these factors into account.⁴¹⁷

The Act also specifies that “[t]he Court, in conducting proceedings, is **not** bound by technicalities, legal forms or rules of evidence”.⁴¹⁸ The rules of the non-Indigenous legal system are often poorly suited to regulating evidence of native title, which has its basis in Indigenous laws. For example, rules against hearsay evidence and the requirement that evidence be given in open court can cause significant problems for native title holders. Despite these issues, the draft Bill reverses the current provision, stating that “the Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders”.⁴¹⁹

I can see no reason for these changes. The current provisions, in requiring the Court to operate in a flexible and culturally sensitive manner, assist all parties by ensuring that claimants can present their cases as effectively and appropriately as possible. As ATSIIC has explained:

Twenty years of experience under the Northern Territory Land Rights Act has shown that the best evidence from indigenous people is taken via non-adversarial processes. Such processes are best achieved outside the rules of evidence, through indigenous people giving evidence about their connection to country in a way which best reflects that connection, unconstrained, as far as possible, by legalistic rules.

*The possible imposition of strict adherence to the rules of evidence will make proceedings more adversarial and technical, and thus more time consuming and costly for all concerned. There appears to be no good reason to change the current s.82.*⁴²⁰

Time limits

The draft Bill provides that applications under the *NTA* must be made within six years of the commencement of the amending legislation.⁴²¹ The right to negotiate will be unavailable to native title holders who have not filed an application before the ‘sunset’ date. The Bill also states that applications for compensation must be made within six years of the commencement of the amendments or of the doing of the relevant act, whichever is later.⁴²²

Again, these proposals seem opposed to the Government’s stated aim of increasing the ‘workability’ of the native title claims process. As ATSIIC has explained:

Native title is a right of property. It does not depend on the Native Title Act for its existence, as is the case for land rights under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). The imposition of time limits on the application of certain processes, contained in the Native Title Act, does not affect its existence after the sunset date. The Act provides a process for the recognition and protection of native title. The major outcome of the process for determining

⁴¹⁶ s.82(2), *NTA* (emphasis added).

⁴¹⁷ s.82(3), item 22, sch.2, *NTAB 97*.

⁴¹⁸ s.82(3), *NTA* (emphasis added).

⁴¹⁹ s.82(1), item 22, sch.2, *NTAB 97* (emphasis added).

⁴²⁰ ATSIIC, Preliminary Commentary, op. cit., p 14.

⁴²¹ s.13(1A), item 5, sch.2, *NTAB 97*.

⁴²² s.50(2A), item 11, sch.2, *NTAB 97*.

native title, as far as government is concerned, is to provide certainty, through a Register of where and what native title is in respect of particular areas of land and waters.

*Accordingly, the proposals for a cut-off date...will not add to certainty but will prevent native title holders from using the provisions of the NTA which have been developed to assist them in respect of native title matters. This proposal appears to be ill-advised, and would be better abandoned.*⁴²³

The NTA provides certainty for governments and developers by registering all native title claimants who have either satisfied a ‘threshold test’ or have been found to possess native title. The continued existence and development of the registers will make it easier for all stakeholders to know the nature and extent of native title interests around the nation. Over time, the right to negotiate process will also help to identify native title holders in different areas and determine the extent of their interests. Allowing the statutory framework to remain in place would be far more conducive to ‘certainty’ than forcing native title holders to turn to the common law to achieve recognition and protection of their property rights.

Chapter 6: Discrimination and uncertainty

Introduction

The Commonwealth Government asserts its amendments to the *Native Title Act 1993 (Cth)* (‘NTA’) are non-discriminatory. However, the Prime Minister has also expressly discounted the provisions of the *Racial Discrimination Act 1975 (Cth)* (‘RDA’) as having nothing “sacrosanct” about them.⁴²⁴ He maintains that the amendments somehow comply with the ‘principles’ of the RDA.⁴²⁵

In this chapter I review the principle of non-discrimination and conclude that the Native Title Amendment Bill 1997 (Cth) (‘the Bill’)⁴²⁶ violates this principle as it is understood in international jurisprudence. The Government’s benchmark of ‘formal equality’ results in the substantially adverse treatment of the interests of native title holders. The Bill is discriminatory.

I turn then to the practical criterion of ‘certainty’ which the Government considers will be achieved through its amendments. The slogan of ‘certainty’ has been employed to justify the need for a broad legislative response to the Wik decision. In reality, this objective is camouflage for a wide-ranging assault on native title and the balance of interests currently embodied in the NTA. If passed into law, the Government’s amendments will fail to meet its own objective. The only certainty will be protracted litigation.

While I consider the principle of non-discrimination and the criterion of ‘certainty’ separately, they are inter-linked. The greater the degree of discrimination, the more vulnerable the legislation will be to challenge. The Bill is objectionable on the grounds of both principle and practicality.

Non-discrimination

Non-discrimination – recent comments from the United Nations

⁴²³ ATSIC preliminary critique, sent to PM on 25 July, p 13-14

⁴²⁴ ‘PM defends Nats’ stand on Wik issue’, *The Sunday Mail*, Adelaide, 9 February 1997, p. 10.

⁴²⁵ The Prime Minister, the Hon. J. Howard, MP, stated in reply to a question from Mr Daryl Melham MP, “the Government has no intentions to introduce amendments to the RDA : *Hansard*, House of Representatives, 6 May 1996, p. 346.

⁴²⁶ Working draft of 25 June 1997 (‘NTAB 97’).

The Wik judgment and the Government's proposed extinguishment of native title over pastoral leases needs to be seen in the context of the world-wide struggle for recognition of Indigenous peoples' land rights and the persistence of 'doctrines of dispossession' in the legal treatment of Indigenous peoples. Developments in Australia and elsewhere in the world have recently been the subject of debate and comment at the United Nations Working Group on Indigenous Populations. It is worthwhile examining some of that commentary as it places in perspective the actions contemplated by the Australian Government.

Madame Erica-Irene Daes, Special Rapporteur, United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, in a preliminary working paper titled *Indigenous people and their relationship to land*, highlights the persistence of 'doctrines of dispossession', such as the doctrine of conquest and *terra nullius*, in the legal and administrative systems of many States. Madame Daes notes that there persists in many States with Indigenous populations a power to extinguish the land rights of Indigenous peoples without consent and, sometimes, without compensation.

In respect of Australia's recognition of Indigenous peoples' rights to land, despite recent positive developments, the very basis of recognition contains discriminatory biases. Madame Daes notes:

*... the High Court of Australia in its 1992 decision in Mabo v Queensland discussed the legal and other effects of the doctrine of Terra Nullius. The Court essentially denounced the doctrine by concluding that this "unjust and discriminatory doctrine ... can no longer be accepted. This decision gave rise to the Native Title Act ... Australian Aboriginal people have reported to the [United Nations Indigenous Populations] Working Group that they have great difficulties with the [Native Title] Act, and are concerned at the assumed and unfounded State authority to extinguish land rights recognised in the Mabo decision. This demonstrates that Eurocentrism continues to be evident in legal theory and thought and that such attitudes have trapped indigenous peoples in a legal discourse that does not embrace their distinct cultural values, beliefs, institutions or perspectives.*⁴²⁷

Madame Daes goes on to observe that many of the criteria established to assist in the bringing of claims to land in Australia "are wrought with discriminatory and colonial biases".⁴²⁸ The Special Rapporteur particularly notes reports of the proposed extinguishment of native title over pastoral leases as an example of the persistence of 'doctrines of dispossession' in the legal and administrative arrangements dealing with the recognition of the land rights of Indigenous peoples.⁴²⁹

One of the matters that has become clear through the work of international bodies such as the United Nations' Working Group on Indigenous Populations is that Indigenous peoples' legal treatment and relationships with government remain permeated by discrimination. Many of these discriminatory practices are historical and systemic. In many States, discrimination is reflected in the legal structures that Indigenous peoples are forced to deal with when seeking recognition of their rights to land. In the Australian context, the doctrine of terra nullius was long used to deny Indigenous people land rights. But, there are also more subtle forms of discrimination. Overt or 'blanket' extinguishment of property rights is not necessary to raise the issue. Any actions that detrimentally affect native title raises the issue of racial discrimination. Indigenous peoples' historical disadvantage and dispossession further compounds the importance of the recognition of native title and the form of that recognition.

⁴²⁷ Daes, E., Human Rights and Indigenous peoples – Indigenous peoples and their relationship to land, preliminary working paper, 20 June 1997, E/CN.4/Sub.2/1997/17, para 24.

⁴²⁸ Ibid, para 48.

⁴²⁹ Ibid, para 37.

The principle of non-discrimination

The principle of non-discrimination is generally considered to be one of the fundamental doctrines of the international legal order. Article 55 of the United Nations' Charter states that one of the objectives of the United Nations is to promote:

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

The principle of non-discrimination is contained in all major human rights treaties and Declarations⁴³⁰ and there is a specific treaty dealing with racial discrimination, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Furthermore, the International Court of Justice and eminent publicists have repeatedly observed that the principle of racial non-discrimination has the status of customary international law and is jus cogens and non-derogable.⁴³¹

The non-derogable nature of non-discrimination derives from the principle's status as jus cogens. The principle of non-discrimination is considered a norm of such significance that States cannot derogate from it even in time of war or national emergency. In the *Barcelona Traction case* (second phase) the majority of the International Court of Justice, supported by twelve judges, described the prohibition against racial discrimination as an obligation that arises independently from specific treaty obligations and is owed "towards the international community as a whole". The Court observed:

*Such obligations derive, for example, in contemporary international law from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.*⁴³²

Accordingly, the principle of non-discrimination provides inviolable parameters within which governments must act. The principle cannot be set aside merely because it is inconvenient and does not accord with the policy of the day.

The Commonwealth of Australia is a State Party to both the International Covenant on Civil and Political Rights (ICCPR) and CERD. Accordingly, Australia is internationally accountable for breaches of the principle of non-discrimination, including by State or Territory governments. Importantly, the Commonwealth has accepted the jurisdiction of the United Nations Human Rights Committee under the First Optional Protocol to the ICCPR and the Committee on the Elimination of Racial Discrimination (CERD Committee) under Article 14 of CERD. The significance of Australia's acceptance of the jurisdiction of these two international bodies is that individuals (and groups in the case of the CERD Committee) may make complaints to one of these bodies if their rights under CERD or the ICCPR have been violated and there is no adequate remedy within the Australian legal system.

A breach of the principle of non-discrimination in relation to Indigenous land rights would likely offend both CERD and the ICCPR and give rise to a capacity for Indigenous people to lodge complaints to either the United Nations Human Rights Committee or the United Nations Committee on the Elimination of Racial Discrimination. Such a breach will expose Australia to direct

⁴³⁰ For example: Universal Declaration of Human Rights, Articles 2, 7 & 17; International Covenant on Civil and Political Rights, Articles 2, 26 & 27; Proclamation of Tehran, Item 1; International Convention on the Elimination of All Forms of Racial Discrimination, Article 2; Convention on the Rights of the Child, Article 2.

⁴³¹ Brownlie, I., *Principle of Public International Law*, Fourth Edition, Clarendon Press, 1990, p. 513; McKean, W., *Equality and Discrimination under International Law*, First Edition, Clarendon Press, 1983, p. 277; Judge Tanaka, *South West Africa case* (second phase) ICJ Reports (1966) 298; Judge Ammoun, *Barcelona Traction case* (second phase) ICJ Report (1970) 304; Judge Ammoun, *Namibia Opinion* ICJ Report (1971) 78-81.

⁴³² ICJ Reports (1970) 3. p. 32.

international scrutiny.

It is necessary to examine the principle of non-discrimination in detail.

Discrimination and equal treatment

The principle of non-discrimination is broader than the prohibition of racial discrimination. International law's treatment of non-discrimination involves the setting of standards and positive obligations in terms of the treatment which States must accord minorities and Indigenous peoples. In this context, it is useful to examine the genesis of the principle of non-discrimination.

At the conclusion of World War I, the newly established League of Nations adopted a treaty system which sought to protect racial, religious and linguistic minorities.⁴³³ From this system, a principle of non-discrimination, or equal treatment, emerged. Accordingly, public international law's treatment of discrimination is closely tied to the protection of the social, political, cultural and economic situation of minorities and the preservation of their distinct entitlements and identity.

The Permanent Court of Justice tackled this issue in its famous advisory Opinion concerning the *Minority Schools in Albania* in which it stated that the underlying object of the League of Nations' treaties protecting minorities was to ensure members of racial, religious or linguistic minorities are "in every respect on a footing of perfect equality with the other nationals of the State" and were able to preserve "...their racial peculiarities, their traditions and their national characteristics."⁴³⁴ The desire to protect the integrity of minorities necessarily gives rise to questions about the various possible forms of discrimination. The most obvious ways that members of a minority will not be protected is if they are subject to different treatment that disadvantages them as individuals. A further, and more subtle form of persecution, comes from measures which deny members of a minority the capacity to be different from the majority, namely they are forced, to their disadvantage, to be the same as the majority.

The relationship between non-discrimination and minority rights was further refined in the *South West Africa case*.⁴³⁵ In Judge Tanaka's famous dissenting judgment, three basic principles were stated that have shaped understanding of the principle of non-discrimination. The three principles are:

- To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently.⁴³⁶
- To treat unequal matters differently according to their inequality is not only permitted but required.⁴³⁷
- The principle of equality does not mean absolute equality but recognises relative equality: namely different treatment proportionate to concrete individual circumstances. Different treatment must not be given arbitrarily; it requires reasonableness, or must be in conformity with justice, as in the treatment of minorities, different treatment of the sexes regarding public conveniences, etc. In these cases, the differentiation is aimed at the protection of those concerned and is not detrimental and therefore not against their will.⁴³⁸

⁴³³ See generally: McKean, W., *Equality and Discrimination under International Law*, *op cit*, Chapters 1 and 2; Vierdag, *The Concept of Discrimination in International Law*, Martinus, The Hague, 1973, Chapter 6.

⁴³⁴ *Minority Schools in Albania* P.C.I.J. Series A/B No. 64 (1934), p.17.

⁴³⁵ ICJ Reports 1966 248.

⁴³⁶ ICJ Reports 1966 305.

⁴³⁷ ICJ Reports 1966 305.

⁴³⁸ ICJ Reports 1966 305.

Accordingly, the principle of non-discrimination requires equal treatment of equals and consideration of difference in assessing the need for different treatment. Different treatment is appropriate when it allows groups to maintain their own traditions and practices. Additionally different treatment can be an important element in the provision of effective or substantive equality.

It is widely accepted that the principle of non-discrimination in international law is concerned with substantive inequality rather than formal inequality as "the principle of equality of individuals under international law does not require a mere formal or mathematical equality but a substantial and genuine equality in fact."⁴³⁹

The International Convention on the Elimination of All Forms of Racial Discrimination

CERD defines racial discrimination in Article 1(1) as:

... any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The definition of racial discrimination at Section 9 of the RDA replicates the Article 1(1) of racial discrimination with some very minor rewording.

One of the important features of CERD is that it contains positive obligations to assist racial groups that are disadvantaged. The rationale for imposing such obligations is that historical patterns of racism entrench disadvantage and more than the prohibition of discrimination is required to overcome the resulting racial inequality.

The main example of the concern with positive measures expressed in CERD is the notion in Article 1(4) of "special measures". Article 1(4) states:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives of which they were taken have been achieved.

CERD also contains other provisions that demand positive actions by States Parties in eradicating racial discrimination as defined by Article 1. Article 2 comprises the central obligation in CERD in relation to the eradication of racial discrimination. For example, Article 2(1)(d) requires States Parties "to undertake to pursue by all appropriate means and without delay ... to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists". This obligation is not a special measure but a distinct treaty based obligation. Article 2(2) of CERD requires:

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of

⁴³⁹ McKean, W., *Equality and Discrimination under International Law*, op. cit., p.288; see also Vierdag, *The Concept of Discrimination in International Law*, op. cit., p. 165.

guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Mr Michael O’Flaherty, Secretary, CERD Committee, observed:

Article 2(1) comprises the Convention’s central obligation on States Parties to eradicate all vestiges of racial discrimination (as defined by Article 1) within their jurisdiction. ... While Article 1(4) [special measures] allow for the continuation in a State Party of certain affirmative programs for groups which have suffered from discriminatory practices, Article 2(2) actually imposes an obligation to undertake such affirmative actions.⁴⁴⁰

Article 2 measures, special measures, and the relationship of these practices with unlawful racial discrimination, have been a source of confusion in Australian law. Special measures and Article 2 measures are not racially discriminatory. This does not mean special measures and Article 2 measures are the only way that distinctions based on race can be lawfully maintained. The recognition of native title involves accepting a form of land title that derives from the traditional laws and customs of indigenous people. The protection of native title must reflect the substance of those traditional rights and customs. Different rights require different forms of protection to achieve substantive equality of treatment. Much confusion, both legally and politically, stems from the High Court’s judgment in *Gerhardy v Brown*⁴⁴¹ that deals with the character of special measures.

It is widely recognised that CERD is concerned with substantive equality rather than just formal equality. The United Nations Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee) in its general recommendations XXIV observed recently:

1. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination constitutes a basic principle in the protection of human rights ...

2. The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of Article 1, paragraph 4 (special measures) of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.⁴⁴²

Significantly, the CERD Committee in this general recommendation acknowledges that differential treatment, if appropriate, does not constitute racial discrimination and does not have to be a ‘special measure’.

What should be clear from this brief discussion of the principle of non-discrimination is that there is a significant and established body of law in this area. The Commonwealth of Australia has ratified both CERD and the ICCPR. Accordingly, there is an issue of State responsibility and Australia’s

⁴⁴⁰ O’Flaherty, M., *The International Convention on the Elimination of All Forms of Racial Discrimination: the Substantive Provisions*, paper presented at the ‘United Nation Human Rights Procedures and Indigenous Australians’ Conference, Sydney, 28-30 June 1995, p. 8

⁴⁴¹ (1985) 159 CLR 70.

⁴⁴² *Report of the Committee on the Elimination of All Forms of Racial Discrimination*, Official Records of the General Assembly, Forty-Eighth Session, Supplement No. 18 (A/48/18), p. 115.

compliance with CERD and the ICCPR in the current debate over native title and pastoral leases. The government can criticise Indigenous leaders for going overseas and raising human rights issues at international conferences and fora but the Commonwealth of Australia has accepted the jurisdiction of bodies such as the United Nations Human Rights Committee precisely because it is committed to respect the human rights of persons within Australia's territorial competence. The human rights standards discussed in this report are not changeable in response to the demands of interest groups. The principle of non-discrimination is widely considered as having the status of jus cogens. Any derogation from the principle of non-discrimination is a matter of both domestic and international concern.

It is useful to examine some of the principles that the current Commonwealth Government sees as applicable to Indigenous people.

The current Government's understanding of the principle of non-discrimination

The current debate over native title and pastoral leases is occurring in a political climate that is increasingly antagonistic to any perception that 'special rights' are being given or maintained for any group within Australia. There is much emphasis on the desirability of equality without a clear understanding of what equality actually means.

One of the most disturbing aspects of the current debate over native title and pastoral leases is the use of concepts borrowed from equality and non-discrimination law to justify the extinguishment and impairment of Indigenous peoples' property rights. Some have even gone so far to say that native title is inherently discriminatory as only Indigenous people can possess it.⁴⁴³

The Government has repeatedly stated that it considers itself only bound to observe that formal equality is complied with. The desire to achieve formal equality has been expressly stated by the Government as the justification for dismantling the right to negotiate.⁴⁴⁴ In defending amendments put forward in 1996 – in particular, those that curtailed the right to negotiate – the Government argued that in order to honour its promise to respect the RDA, it was merely required to ensure that native title holders were left in a situation of formal equality with other title holders. On this basis, it was suggested, the "special right provided by the right to negotiate scheme could be wound back or removed without giving rise to racial discrimination."⁴⁴⁵

One of the Government's chief legal advisors has stated that whether a matter is a special measure, or consistent with formal equality, provides the test as to compliance with the RDA. Mr Robert Orr, General Counsel, Attorney-General's Department, observed in his evidence to the Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund last November:

In assessing the current government amendments, therefore, and advising in relation to them, the approach has been taken that the amendments need to leave the [Native Title] Act either as a special measure or provide formal equality. Provided that the amendments maintain provisions as special measures or provide formal equality, they comply with the Racial Discrimination

⁴⁴³ Mr P. P. McGuinness stated "[N]ative title is inherently discriminatory, since it can only be vested in Aboriginal communities. By contrast, individual title to land, like torrens title ... is non discriminatory ... the race discrimination legislation as it now stands makes it impossible to make general rules regarding native title which may be seen as in any way restrictive of it. : 'Native Title and discrimination', *Sydney Morning Herald*, 25 January 1997. p.36.

⁴⁴⁴ Senator the Hon Nick Minchin, *Sydney Morning Herald*, 1 June 1996, p. 138.

⁴⁴⁵ The Attorney-General and Minister for Justice, the Hon Daryl Williams AM QC MP, Second Reading Speech, Native Title Amendment Bill 1996, p. 17. See the discussion of this issue in Chapter 5.

*Act.*⁴⁴⁶

Significantly, this approach provides no secure way to recognise Indigenous peoples' unique relationship to land and land rights. The Government's misunderstanding of the content of the notion of equality and how the principle of non-discrimination applies is a fundamental flaw in its current approach to native title.

There is genuine doubt whether formal equality has any relevance to native title. As the High Court has repeatedly stated, native title is an interest *sui generis* and by implication native title cannot be directly compared with other interests in land. The Government's equality jurisprudence relies heavily on the High Court decision in *Gerhardy v Brown*⁴⁴⁷ that conceptualises the RDA as involving a generalised prohibition of measures that are formally racially discriminatory with an exception for matters capable of characterisation as 'special measures'.

There has been persistent criticism of the High Court's approach to racial discrimination in *Gerhardy v Brown* as being broadly out of step with accepted international approaches to non-discrimination and providing no clear way to recognise the unique position of Australia's Indigenous peoples other than through charitable 'special measures'.⁴⁴⁸

In subsequent cases, the High Court has employed a less formalistic approach to equality. A more sophisticated approach to native title and discrimination issues occurs in *WA v Commonwealth*.⁴⁴⁹ It is noted that the High Court has not made definitive pronouncements concerning how native title 'fits in' to racial discrimination law. The unsettled nature of the law in this area is illustrated by the majority in *WA v the Commonwealth* that observed "*the Native Title Act can be regarded as either a special measure under the RDA or a law which, though it makes racial distinctions, is not racially discriminatory*".⁴⁵⁰

In *Gerhardy v Brown*, the Court was dealing with a legislative scheme to 'give' the Pitjantjatjara people rights to their traditional land. This was done in a context where Indigenous people had no recognised right to land independent of a crown grant. After *Mabo [No.2]*,⁴⁵¹ the situation fundamentally changed. Native title is a common law right and not a political 'gift' of government. Native title exists because of Indigenous peoples' continuous and unbroken connection with their land. The High Court of Australia as early as 1988 in *Mabo [No.1]* acknowledged that in the case of native title "*it is not the source or history of legal rights which is material but their existence*".⁴⁵²

Accordingly, the Commonwealth government is seeking to rely on *Gerhardy v Brown* when the case is of dubious authority and little relevance to native title. *Gerhardy v Brown* provides no answers in the current debate over native title and pastoral leases. The Bill, if enacted, will be a subsequent specific enactment to the RDA. The RDA will not apply to the Government's amendments. The main issue in terms of racial discrimination is the Bill's compliance with Australia's international obligations concerning non-discrimination and most significantly CERD. It is the Bill's compliance

⁴⁴⁶ *Hansard*, Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Wednesday, 27 November 1996, p. NT3599.

⁴⁴⁷ (1985) 159 CLR 70.

⁴⁴⁸ See: Brownlie, I., 'The Rights of Peoples in International Law', *op. cit.*, p.9; Nettheim, G., 'Indigenous Rights, Human Rights and Australia', (1987) 61 *Australian Law Journal*, 291, p.299; Sadurski, W., 'Gerhardy v Brown: Reflections on a Landmark Case that Wasn't', (1986) 11 *Sydney Law Review*, p.30; Pritchard, S., 'International Law' in *Aborigines and Torres Strait Islanders, Laws of Australia*, Law Book Company, 1993, pp.34-35.

⁴⁴⁹ (1995) 183 CLR 373.

⁴⁵⁰ (1995) 183 CLR 373 at 483.

⁴⁵¹ *Mabo v Queensland [No.2]* (1992) 175 CLR 1 ('*Mabo [No. 2]*').

⁴⁵² *Mabo v Queensland [No. 1]* (1988) 166 CLR 186, p. 218 ('*Mabo [No. 1]*').

with international human rights law that the Government must address if it is concerned with acting in a non-discriminatory manner.

As a distinct interest in land that is racially based, native title must be accorded ‘full respect’ on a par with other interests in land. The fact that native title is a unique type of proprietary interest that non-Indigenous people cannot hold does not mean that it, or its protection, is a ‘special measure’ or racially discriminatory. It must be stressed that the principle of non-discrimination does not require that the interests of all groups in society be formally the same. One feature of the principle of non-discrimination is that it is designed to accommodate different groups having different practices and rights that flow from their particular histories. This is obviously relevant to Indigenous Australians who because of their unique history and cultural traditions, possess *sui generis* entitlements. The incidents of native title are determined by traditional laws and customs and warrant full protection according to the particular terms of those laws and customs.

One further matter that must be stressed is that the principle of non-discrimination is more than just about prohibiting discriminatory acts. It seeks to set the acceptable standard of treatment for preserving the distinct status of racial, ethnic, religious and linguistic minorities. This feature of the principle of non-discrimination is illustrated by its genesis in the League of Nations’ treaty system that sought to protect racial, religious and linguistic minorities as discussed above.

The Commonwealth Government has ignored this feature of the principle of non-discrimination. It appears to believe that non-discrimination is merely the prohibition of invidious discriminatory acts and that somehow everything else is permissible as long as formal equality is satisfied. International law’s treatment of racial discrimination does not neatly fall into a negative rights analysis because racial discrimination law imposes positive obligations on governments. The obligations contained in Article 2 of CERD spell out this aspect of racial discrimination law.

The CERD Committee in its general recommendation XXIV acknowledges that differential treatment, if appropriate, does not constitute racial discrimination. Accordingly, special measures are not the only way that lawful distinctions can be made on the basis of race. The principle that the Government has sought to extract from *Gerhardy v Brown*, and apply generally to native title, is beside the point.

The discriminatory impact of the Bill

There are a number of senses in which the Government’s proposals for native title are discriminatory. I have already noted in this report many of the specific features of the Bill and how they will seriously disadvantage and discriminate against Indigenous people. It is important to realise that there are broader discrimination issues in the Commonwealth’s general approach to native title. I want to talk about some of the general elements of the Commonwealth’s current treatment of native title and how it can be characterised as discriminatory. In this context, there are two themes that I wish to develop.

The Native Title Amendment Bill:

- 1 signifies a return to the use of ‘doctrines of dispossession’; and
- 2 denies native title holders equality before the law.

Doctrines of dispossession

A central issues for Indigenous people world-wide is the ease with which their traditional rights to lands can be expropriated and extinguished by governments. In her preliminary working paper on *Indigenous people and their relationship to land*, the United Nations’ Special Rapporteur, Mrs

Erica-Irene Daes, observes:

The problem of extinguishment is related to the concept of aboriginal title. The central defect of so-called aboriginal title is that it is, by definition, title that can be taken at will by the sovereign – that is, by the colonial government, or nowadays, by the State. Like aboriginal title, the practice of involuntary extinguishment of Indigenous land rights is a relic of the colonial period. It appears that, in modern times, the practice of involuntary extinguishment of land titles without compensation is applied only to Indigenous peoples. As such, it is discriminatory and unjust ...

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The discriminatory biases that Madame Daes notes relate to the conceptualisation of Indigenous peoples' interests as subsidiary and capable of being displaced arbitrarily in favour of non-Indigenous land owners. Madame Daes in the working paper observes:

*... it is critical to underscore the cultural biases that contributed to the conceptual framework constructed to legitimize colonization and the various methods used to dispossess Indigenous peoples and expropriate their lands, territories and resources. It is safe to say that the attitudes, doctrines and policies developed to justify the taking of lands from Indigenous peoples were and continue to be largely driven by the economic agendas of States.*⁴⁵⁴

In Australia, the fragility of native title is clearly evident in the common law's approach to the recognition of Indigenous rights to land. At common law, native title is extinguished by an inconsistent crown grant. In *Mabo [No.2]*, Justices Deane and Gaudron in their joint judgment highlighted the historically vulnerable situation of Indigenous people:

*... common law native title holders in an eighteenth century British colony were in an essentially helpless position if their rights under their native title were disregarded or wrongfully extinguished by the Crown. Quite apart from the inherent unlikelihood of such title-holders being in a position to institute proceedings against the British Crown, the vulnerability of the rights under native title resulted in part from the fact that they were personal rights susceptible to extinguishment by inconsistent grant by the Crown, and in part from the [then] immunity of the Crown from court proceedings.*⁴⁵⁵

For most of the post-1788 history of Australia, native title was purportedly 'extinguished' in complete ignorance of its existence. One of the purposes of the NTA was to protect native title from potential extinguishment by according it a status equivalent to freehold titles.⁴⁵⁶ The NTA sought to stop the parcel-by-parcel dispossession of Indigenous Australians and apply to their proprietary interests the same effective protection accorded to other Australians who own land.

In the *Mabo* case, a number of the Justices in the majority did seek to accord native title equal status. For example, Justice Deane and Gaudron noted that native title rights are "*true legal rights* and can be "*vindicated, protected and enforced by proceedings in the ordinary courts.*"⁴⁵⁷

One of the positive features of the *Wik* decision was the approach of the majority to the issue of extinguishment. As Professor Richard Bartlett has noted, the majority approach in *Wik* is to accord

⁴⁵³ Daes, E., *Human Rights and Indigenous peoples – Indigenous peoples and their relationship to land*, op.cit., para 33.

⁴⁵⁴ *Ibid*, para 16.

⁴⁵⁵ *Mabo [No.2]*, op.cit., p. 112.

⁴⁵⁶ For a discussion of the recognition and protection afforded native title by the NTA see *WA v Commonwealth* (1995) 183 CLR 373 ('*WA v Commonwealth*') at pp.452 – 463.

⁴⁵⁷ *Mabo [No.2]*, op.cit., p. 112.

native title "equal status". Professor Bartlett observes:

*The Justices [Gaudron, Toohey, Gummow and Kirby] formed a majority of four in concluding that a Crown grant can only unilaterally terminate native title by virtue of inconsistency if legislation has manifested a clear and plain intention that extinguishment should result from the grant. The majority applied the principles governing expropriation of all other rights and interests to native title. They rejected the application of a unique and arcane jurisprudence that relies upon a lesser unequal status for native title.*⁴⁵⁸

The Bill signifies a return to the colonial and discriminatory practice of according native title lesser status than interests in land which emanate from the Crown.

The Commonwealth Government's current actions are in the colonial tradition of treating native title as a subsidiary and inferior type of land-holding. In Australia today, Indigenous peoples rights as determined by the courts and the Commonwealth Parliament are being arbitrarily altered to accommodate the interests of other property owners. In the case of the proposed validation provisions, Indigenous peoples' rights are being disregarded because a law of the Commonwealth Parliament was not obeyed by some State governments.

Indigenous people did give up something when the NTA was enacted in 1993. The provisions of the NTA that discriminate against native title holders were portrayed as being 'balanced' by 'beneficial' provisions such as the right to negotiate which accommodated the particular needs of native title holders. The notion that the NTA constitutes a compromise has some legal recognition. The High Court in *WA v Commonwealth* very clearly acknowledged that underscoring this mixture of detrimental and beneficial treatment in the NTA is a non-discriminatory standard. The Court noted:

*The Native Title Act provides the mechanisms for regulating the competing rights and obligations of those who are concerned to exercise, resist, extinguish or impair the rights and interests of the holders of native title. In regulating those competing rights and obligations, the Native Title Act adopts the legal rights and interests of persons holding other forms of title as the benchmark for the treatment of the holders of native title.*⁴⁵⁹

The Court's general approach in *WA v Commonwealth* exhibits a willingness to allow governments some margin of appreciation in dealing with native title. As long as native title is treated fairly and equally, there are a number of permissible strategies that governments can use when dealing with the land management issues raised by the existence of native title.

In Australia, such an approach to native title is completely undermined by the character of the amendments which have been put forward since the *Wik* decision.

A prime example of the Bill's lack of balance and fairness is its proposed validation regime. The Bill's validation of all non-Indigenous titles granted between the commencement of the NTA and the handing down of the *Wik* decision is fundamentally unfair and has no legitimate justification.

The current future act provisions of the NTA were designed to protect native title and provide procedures to allow dealings in land where native title exists. Accordingly, there have been clear and fair procedures that governments could use when dealing with land where native title exists. As long as governments complied with the procedures in the NTA they were not restricted in their dealings in land. The need for this current round of validation arises because certain State and Territory governments ignored the future act provisions of the NTA and continued to grant titles without

⁴⁵⁸ Bartlett, R., 'Wik: Equality and the fallacy of "extinguishment"', *Indigenous Law Bulletin*, vol. 4, Issue 1, April 1997, p. 12. See the discussion of this issue in Chapter 3, above.

⁴⁵⁹ *WA v Commonwealth*, op.cit., p.483.

reference to it. This blatantly favours Crown-granted titles over native title and fails to provide native title with any protection at all, let alone equal protection.

The validation proposed by the Bill also seeks to absolve government from a failure to comply with explicit statutory provisions. Accordingly, the use of validation provisions in this context is discriminatory as it favours the interests of government and those individuals who were granted titles post-1 January 1994 over native title holders. It is unjust, deeply objectionable and damages the rule of law in Australia. The provision of compensation to native title holders does not remedy the clear preference conferred on non-Indigenous titles granted during the validation period. Human rights require respect: not obliteration followed by compensation.

Further, the Bill contains few positive provisions for native title holders to ‘balance’ its detrimental aspects. On the contrary, the amendments allow native title holders to be treated less favourably than other title holders in a range of situations and wind back the right to negotiate to a point where it is rarely applicable and virtually unusable in practice.⁴⁶⁰

It is impossible to see how the NTA, once amended in this fashion, could be characterised as a ‘special measure’ for the benefit of Indigenous peoples or as a balanced approach to the land management issues raised by the existence of native title.

Equality before the law

One feature of the principle of non-discrimination is that it does not suppose all groups and individuals in society to have identical interests but requires that different interests be accorded full respect and equality before the law. Equality before the law is a fundamental component of international human rights law and common law. Equality before the law is about procedural rights and recognition, and critical in the context of native title.

Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Appreciation of a specific right to equality in relation to property is found in the Article 17 of the *Universal Declaration of Human Rights*:

1. *Everyone has the right to own property alone as well as in association with others.*
2. *No one shall be arbitrarily deprived of his property.*

In CERD’s definition of racial discrimination, enjoyment of equality before the law is noted as the pre-eminent human right. Article 5 of CERD prefaces its list of specific rights and fundamental freedoms with a general statement concerning the need for respect for equality before the law.

The notion of equality before the law is also recognised as part of the common law of Australia. In *Leeth v the Commonwealth*, Justices Deane and Toohey in their joint judgment note:

The essential or underlying theoretical equality of all persons under the law and before the courts is and has been a fundamental and generally beneficial doctrine of the common law and a

⁴⁶⁰ See Chapter 5 for a discussion of these issues.

basic prescript of the administration of justice under our system of government. ⁴⁶¹

In Australian racial discrimination law, the primacy of equality before the law is reflected in Section 10 of the RDA that provides a specific guarantee of equality before the law. Further, equality before the law has played a significant role in determining the standards that State and Territory governments must meet in dealing with Indigenous peoples' rights and entitlements. In *Mabo [No.1]*, the majority found the attempt by the State of Queensland through the *Queensland Coast Island Declaratory Act 1985* to extinguish the native title rights of the Miriam people of the Murray Islands was inconsistent with Section 10 of the RDA and inoperative. The majority characterised the effect of the *Queensland Coast Island Declaratory Act 1985* as an arbitrary deprivation of property in terms of Article 17 of the *Universal Declaration of Human Rights*. The majority observed:

... the 1985 Act destroys the traditional legal rights in and over the Murray Islands possessed by the Miriam people and, by an arbitrary deprivation of that property, limits their enjoyment of the human right to own and inherit it. ... It is the arbitrary deprivation of an existing legal right which constitutes an impairment of the human rights of a person in whom any legal right is vested. ⁴⁶²

In *Mabo [No.1]*, the type of arbitrary deprivation of property that the court was concerned with was the extinguishment of native rights without consent or compensation. It is important to realise that the notion of an arbitrary deprivation of property is wider than just the illegal (without compensation) deprivation of property and encompasses the 'unjust' extinguishment of native title. In *WA v Commonwealth*, the Court observed that the RDA "precludes both a bare legislative extinguishment of native title and any discrimination against the holders of native title which adversely affects their enjoyment of their title in comparison with the enjoyment by other title holders of their title." ⁴⁶³

Equality before the law is central to the notion of non-discrimination and equal treatment. For most Indigenous peoples equal recognition and protection of the law has been historically denied. In Australia, the application of the doctrine of terra nullius is the glaring example of the manner in which the Australian legal system condoned discrimination and dispossession. Recently, there have been positive developments in Australian judicial methods and the Commonwealth Parliament's approach to Indigenous rights.

The current Government's actions signal very clearly a rejection of this trend towards institutionalising non-discrimination in Australian law and practice in relation to native title and Indigenous rights generally.

In a basic sense, the Government's response to the High Court Wik decision exhibits an unwillingness to give to native title the same respect that the law accords other interests in land. The NTA did not represent the final and definitive statement as to the content and extent of native title in Australia. Many important issues were deliberately left unresolved with the expectation that in the course of time they would be resolved by the courts within the broad parameters set up by Parliament. There is nothing unusual in this approach.

One of these unresolved issues was the extent of native title's continued existence on land that had been the subject of a grant of a pastoral lease.

The Australian newspaper's legal correspondent recently observed:

⁴⁶¹ *Leeth v Commonwealth* (1992) 174 CLR 455.

⁴⁶² *Mabo [No. 1]* op. cit., p. 218.

⁴⁶³ *WA v Commonwealth*, op.cit., at p. 418.

*Many conservative lawyers do not find activism in Wik. Look at the judges' methods they say, it is arguably good old-fashioned black-letter law. But the state premiers such as Borbidge are not interested in the method, they are dismayed by the awkward politics and the economics of the result.*⁴⁶⁴

In many respects the High Court's Wik judgment is a very ordinary one. Wik involved the construction of a lease so as to determine the true extent of parties' legal interests in a piece of land. Except here the government and some pastoralists have refused to accept the umpire's decision and one group, pastoralists, will potentially receive a huge windfall benefit not only at the expense of Indigenous Australians but Australians generally.

Equality before the law demands that the interests of all groups and individuals be accorded full respect and that government should not intervene to massively advantage one group at the expense of others when that group did not get the decision it would have liked. Adjustments to accommodate an unexpected decision are one thing. The substantial reworking of the entire system is another. The Bill will completely alter the native title process in Australia.

Procedural equality is a basic component of equality before the law. In the context of native title, *this* does not involve obliterating the ways in which it is different from other interests in land but according it equal respect in terms of procedural rights required for its protection.

As already discussed, one of the cornerstones of the NTA is that it applies an 'ordinary title' test to future actions involving native title. The NTA applies the same standards and procedures to native title as would be applied to ordinary titles to land. The whole purpose of incorporating this test in the NTA is to ensure that the principle of non-discrimination is applied.

The proposed provisions governing future acts over native title land are no longer built around a guarantee of procedural equality with ordinary title holders. The Bill proposes to restructure the future act regime so that a long list of proposed acts will be valid, regardless of whether or not they can be done over ordinary title or whether native title holders have been provided with equivalent procedural protections to ordinary title holders. In fact, the theme of the amendments is a move away from a non-discriminatory approach to native title to one characterised by varying State and Territory procedures and pragmatism. Native title holders are potentially offered less protection than other title holders and are merely offered compensation for the impact of acts on their rights.⁴⁶⁵

There are other aspects of the Bill that fail to accord native title holders equality before the law. The 'confirmation' of exclusive tenures is one such example.

To avoid 'uncertainty' the Government intends to declare that certain types of land tenure provide 'exclusive possession'. A grant of an interest in land that is deemed to give exclusive possession will extinguish native title.

Apart from the validation provisions of the NTA, the current NTA does not deem any interest as extinguishing native title. The NTA relies on accepted principles of land law and statutory interpretation to determine whether native title exists over particular pieces of land. Currently there needs to be judicial determination of whether an interest actually extinguishes native title. This is what happened in the Wik case. Given the diversity of pastoral and leasehold interests in Australia, many other types of interest in land will need to be construed by the courts to conclusively determine whether native title has been extinguished.

⁴⁶⁴ Lane, B., 'Reserving Judgment', *The Weekend Australian*, 16-17 August 1997, p. 24.

⁴⁶⁵ See the discussion of the proposed amendments to the future acts regime in Chapter 5, above.

The Government's proposed provisions will allow the deeming of certain interests to give exclusive possession when, on proper construction, this might not be the result of the interest. This possibility is obviously contemplated by the Government as the exposure draft of the Bill contains a provision for compensation for extinguishment resulting from this supposed 'confirmation' of the common law.⁴⁶⁶

This bogus act of 'confirmation' proposed by the Government denies Indigenous people equality before the law. It denies native title claimants access to the courts and the opportunity to present their native title claims. Any 'exclusive tenure' will function as a bar to Indigenous groups registering claims and will allow for existing claims to be struck out where the claim involves land where the tenure has been declared 'exclusive'. This is not about 'certainty' but denying Indigenous people access to procedures designed to facilitate the determination of native title.

If tenures are declared 'exclusive', one group's rights to have their interests determined by the courts is abrogated. Confirmation will only affect native title. The discrimination is plain. No other title holder will be adversely affected by confirmation, only Indigenous people who possess native title *over land where a co-existent interest is declared to be 'exclusive' with consequential extinguishment of the native title.*

The Bill also favours Crown-granted titles over native title by clearing the way for leaseholders to perform very broad-ranging 'primary production' activities, regardless of whether or not they were originally granted such rights under their leases. It allows the rights of leaseholders to be increased at the expense of native title holders, without native title holders having any ability to object or negotiate. This framework clearly fails to provide native title holders with equality before the law.

Further, the Bill allows States and Territories, with respect to certain lands or waters, to establish legislative regimes to facilitate the compulsory acquisition of native title rights for the benefit of third parties. By contrast, legislative schemes applying to the compulsory acquisition of other forms of title do not generally authorise land to be acquired for private purposes.⁴⁶⁷ These amendments will place the property rights of native title holders in a particularly vulnerable position – which, again, is inconsistent with the principle of equality before the law.

The discriminatory nature of the amendments as a package, as outlined above, significantly increases their vulnerability to legal challenge and prevents them from providing 'certainty'. This issue is discussed in more detail immediately below. Even if the amendments were to survive the inevitable legal challenges in our domestic courts, however, they will very likely not survive international scrutiny. Australia faces the shameful probability of being found to have breached the fundamental, *jus cogens* principle of racial non-discrimination under international law.

Certainty

Introduction

Contrary to the Government's claim, the Bill will not produce 'certainty'. Many of the amendments are impractical and will disrupt the current evolution of procedures for recognition of native title. Under the guise of providing certainty, the Government's proposals are so essentially punitive to native title holders that only one result is certain; the provisions will be challenged.

The two concerns that I wish to raise relate to workability and the Bill's constitutional validity. Both

⁴⁶⁶ ^80, *NTAB* 97.

⁴⁶⁷ See the discussion of this issue in Chapter 4, above.

matters go to the very core of the issue of certainty.

Workability

The NTA is, of necessity, a revolutionary statute. It seeks to provide an orderly and balanced procedure to accommodate native title into Australian land law. That the native title process has had some teething problems is inevitable. Whilst Indigenous people welcomed the Wik decision it is understandable that pastoralists were dismayed by it.

The Wik decision is part of the process of recognition of native title that was started in the Mabo judgment and continued with the NTA. Fundamental to the recognition of native title is the incorporation of native title into the land law and practices of Australia. This is a complex process but not beyond the capabilities of the legal and political systems of Australia. 'Working through' the recognition of native title should not be confused with 'workability' which achieves its end by neutralising native title rights.

The notion of the original NTA as a settlement between Indigenous and non-Indigenous peoples is important in terms of the practical working of the native title process. The 1993 Act sought to provide parameters within which the process of incorporation of native title into Australia's legal and land management systems could take place. In order to achieve certainty the system set up by the 1993 Act needs time to develop and work itself out. Some amendments are necessary (for example to accommodate the High Court decision in *Brandy*⁴⁶⁸) but the structural principles of the 1993 Act should remain.

What the Bill will do is radically change the rules before they have been given time to become settled. The principle of coexistence expressed by the Court in Wik may require some changes for the legislation to work efficiently but not a complete over-turning of the system. The Bill does not make minor technical amendments to the NTA but fundamentally alters it. The rewriting of the future act provisions is a glaring example of this fundamental shift. Established native title processes will be de-railed. The Bill will detrimentally affect many people – not just Indigenous people – involved in native title procedures. Moreover, the Bill will force Indigenous people into protracted litigation because it denies them equality before the law. The Bill, if enacted, will be challenged.

Constitutional validity

The Bill has constitutional problems. It is obviously difficult to say with any degree of certainty what the High Court will decide one way or another. It is nevertheless possible to say that there are distinct constitutional issues arising from the degree to which it detrimentally affects the rights of Indigenous Australians. The constitutionality of the Government's proposed amendments, if enacted, will be litigated with one inevitable result – in the immediate future there will be uncertainty in relation to the native title process.

I will examine two distinct constitutional issues:

- the scope of the race power; and
- the Bill's relationship with the RDA.

The race power

It needs to be asked under what constitutional head of power can the Bill be characterised. The Bill is clearly not a proposed law with respect to external affairs. There is no treaty or international

⁴⁶⁸ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

concern that the Bill gives effect to. Accordingly, the only remaining head of power is Section 51(xxvi) – the race power.

The original Section 51(xxvi) of the Constitution stated that the Parliament shall have power to make laws with respect to "[T]he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws. The exclusion concerning Aboriginal people was deleted as a result of the 1967 referendum.

The original purpose of the power was explained by Quick and Garran as enabling "*the Parliament to deal with the people of any alien race after they have entered the Commonwealth; to localise them within defined area, to restrict their migration, to confirm them to certain occupations, or to give them specific protection and secure their return after a certain period to the country whence they came.*"⁴⁶⁹

So in its original form, Section 51(xxvi) empowered the Commonwealth to make laws which would adversely impact or affect a particular racial group.⁴⁷⁰ The question today is whether the race power would support a law adversely discriminating against Aboriginal people.

This issue will turn on the approach the Court takes in interpreting the scope of Section 51(xxvi). In this respect the 1967 amendment is significant. The 1967 referendum repealed both Section 127 of the Constitution and deleted the exclusion concerning Aboriginal people in Section 51(xxvi) of the Constitution. In 1965, a bill was introduced into the Commonwealth Parliament to give effect to the desire to remove discriminatory references in the Constitution to Aboriginal people. The 1965 bill initially sought only to repeal Section 127.⁴⁷¹ During the Parliamentary debate that preceded the 1967 referendum, it was decided it would be desirable for the Commonwealth Parliament to have the power to legislate "special laws for the benefit of Aboriginal people throughout Australia. As Sadler notes, the Parliamentary debates show that the principal object of the Referendum was to enable the Commonwealth to overcome an inequality in the treatment of Aboriginal people by the States."⁴⁷²

In the context of the current debate over equality and 'privilege' it is interesting to note the views, in 1967, of, the Hon Billy Wentworth MP⁴⁷³, concerning why the Commonwealth Parliament should have the power to pass 'special laws' for Aboriginal people. The Liberal member for McKellar noted:

Some people say – I think wrongly – that no discrimination is necessary in regard to the Aboriginal people. I think that some discrimination is necessary. But I think it would be favourable, not unfavourable. ... it is not right to say to these people: "we will treat you as we would treat any other Australian . To do this would submerge and destroy their culture. ... I do not mean to say they are worse people than we are. What I am saying is that they have a background which is different from ours. Ours is the dominant background in Australia and they are compelled, as it were, to fit into it."⁴⁷⁴

The scope of Section 51(xxvi) has never been conclusively determined by the High Court although

⁴⁶⁹ Quick, J. and Garran, R., *The Annotated Constitution of the Australian Commonwealth*, Legal Books, Sydney, 1976, p. 622.

⁴⁷⁰ See Sadler, R. J., 'The Federal Parliament's Power to Make Laws "With Respect to ... The People of Any Race....' (1982) 10(2) *Sydney Law Review* 591.

⁴⁷¹ Constitution Alteration (Repeal of Section 127) Bill 1965.

⁴⁷² Sadler, R. J., 'The Federal Parliament's Power to Make Laws "With Respect to ... The People of Any Race....', *op. cit.*, note 45 at 594.

⁴⁷³ Later, the Hon Billy Wentworth MP was the Minister for Social Services and the first Minister for Aboriginal Affairs between 1968-72.

⁴⁷⁴ *Hansard*, House of Representative, 1967, 54, 281.

the Prime Minister, the Hon John Howard MP, noted recently when ruling out blanket extinguishment of all native title in Australia that the High Court "*as currently constituted could well decide that the race power as currently phrased does not support a detrimental act in relation to one particular race within the Australian community.*"⁴⁷⁵

Father Frank Brennan SJ has noted that since the 1967 there are three possible interpretations of the race power. These are:

- the power can be exercised for the benefit or adverse to the interests of people of a particular race;
- it can be exercised only for the benefit of people of a particular race; or
- it can be exercised for the benefit or adverse to the interest of people of a particular race, other than Aborigines, but it can be exercised only for the benefit of Aborigines.⁴⁷⁶

In *Koowarta v Bjelke Petersen*, Justice Murphy considered that the race power would not support laws intended to adversely affect the people of any race.⁴⁷⁷ Justice Stephen observed that the Section 51(xxvi) requires the law to be necessary for people of a particular race. He said:

*I regard the reference to special laws as confining what may be enacted under this paragraph to laws which are of their nature special to the people of a particular race. It must be because of their special needs or because of the special threat or problem which they present that the necessity for the law arises, without this particular necessity as the occasion for the law, it will not be a special law such as s.51(26) speaks of...*⁴⁷⁸

This approach was endorsed by Justices Mason, Deane and Murphy in the *Tasmanian Dams* Case in relation to legislation that protected the cultural heritage of Aboriginal people.⁴⁷⁹ In *Tasmanian Dams*, Justice Brennan acknowledged that the original Section 51(xxvi) authorised the making of laws which could adversely discriminate against a particular racial group. He then addressed the effect of the 1967 amendment and said:

*The approval of the proposed law for the amendment of para (xxvi) by deleting the words "other than the aboriginal race" was an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial. The passing of the Racial Discrimination Act manifested the Parliament's intention that the power will hereafter be used only for the purpose of discriminatorily conferring benefits upon the people of a race for whom it is deemed necessary to make special laws.*⁴⁸⁰

In *WA v Commonwealth*, the Court considered the scope of Section 51(xxvi) in relation to the NTA.

⁴⁷⁵ As cited in Father Frank Brennan SJ, 'The Will of the People in 1967 and the Law of the Land in 1997', paper prepared for *Aboriginal Nations and the Australian Constitution Conference*, Old Parliament House, Canberra, 23 May 1997, p. 8.

⁴⁷⁶ Father Frank Brennan SJ, 'The Will of the People in 1967 and the Law of the Land in 1997', *op. cit.*, p. 3.

⁴⁷⁷ (1982) 158 CLR 168 ('*Koowarta*') at p. 242 and noted by Gaudron J in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 56.

⁴⁷⁸ *Koowarta*, *op. cit.*, p. 210. In *WA v Commonwealth*, *op. cit.* at p. 460, the Court noted Justice Stephen's comments and qualified the extent to which the Court was required to evaluate the needs of the people of a race or of the threats or problems of the people of a particular race in determine whether the law was 'necessary'. The Court considered that this would involve a political judgment and that was a matter for the Parliament not the Court.

⁴⁷⁹ *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dams*').

⁴⁸⁰ *Tasmanian Dams*, *op. cit.*, p. x.

It confirmed that the NTA was a valid law supported by the race power because it conferred a benefit on Aboriginal and Torres Strait Islander native title holders. The Court noted that the race power is a general power which may support laws which discriminate against or benefit the people of any race but did not examine the issue in any detail. At best the extent to which the race power may be used to legislate to the detriment of Aboriginal people is not certain.

With respect to the interpretative approach of the Court to this issue, Justice Kirby emphasised as recently as 14 August 1997 that where the Constitution is ambiguous, the Court should adopt that meaning which conforms to the principles of fundamental rights, as recognised in international law, rather than an interpretation which would involve a departure from such rights. He said:

*Where there is an ambiguity in the meaning of the Constitution, as there is here, it should be resolved in favour of upholding such fundamental and universal rights... . The Australian Constitution should not be interpreted so as to condone an unnecessary withdrawal of the protection of such rights. At least it should not be so interpreted unless the text is intractable and the deprivation of such rights is completely clear.*⁴⁸¹

In that case, his Honour considered the scope of the Commonwealth's power to legislate under Section 51(xxxi) – the acquisition of property power – and construed the provision having regard to Article 17 of the Universal Declaration of Human Rights which provides that everyone has the right to own property alone as well as in association with others and that no one shall be arbitrarily deprived of his property.

If one takes into account the purpose of the 1967 amendment, judicial comment in *Koowarta and Tasmanian Dams* and the interpretative approach of Justice Kirby, there is powerful argument that the race power would not support the withdrawal of the protection of the rights of Aboriginal people. Accordingly, the race power would only support beneficial laws.

The whole issue of the scope and meaning of Section 51(xxvi) is currently under consideration in a case before the High Court concerning the validity of the *Hindmarsh Island Bridge Act 1996*.⁴⁸² The significance of the argument that the race power must be exercised beneficially is that, in the absence of another head of power, the Commonwealth Parliament would not be able to make a 'special law' for a racial group that is detrimental to that group.

This argument has a number of important implications for native title and the Commonwealth's ability to amend the NTA. Essentially, it supports the contention that if the NTA, as amended, cannot be characterised a law for the benefit and or advancement of Indigenous Australians, it is invalid or any such parts severable are. It is my view that because of the detrimental nature of the Bill, it can not be characterised as a 'special law' for Indigenous people. In view of the undeniable uncertainty in this area of the law, the Bill cannot deliver certainty.

When considering constitutional issues it is important to note, without considering them in detail, that there may be other restraints on the Commonwealth's power to enact laws under Section 51(xxvi) in form of other express or implied guarantees in the Constitution. In *Kruger & Ors v Commonwealth*, Justice Gaurdon suggests that the heads of power in the Constitution do not extend to laws authorising gross violations of human rights and dignity, as recognised in international human rights instruments and the common law.⁴⁸³

⁴⁸¹ *Newcrest Mining (WA) Limited v Commonwealth* (unreported 14 August 1997, High Court of Australia, Kirby J at 160)

⁴⁸² *Doreen Kartinyeri and Neville Gollan v Commonwealth of Australia*, High Court of Australia, No. A29 of 1997.

⁴⁸³ *Kruger & Ors v Commonwealth* (1997) 146 ALR 126 at p. 190 ('*Kruger v Commonwealth*') where her honour's discussion was in the context of the operation of s.122 of the Constitution and whether it could support a law authorising acts of genocide. She said that acts of genocide are so fundamentally abhorrent to the principles of common law, that it would be impossible to construe s.122 as extending to laws of that kind. While she did not discuss other legislative powers, but it is

The guarantee of equality of all people, which arises either expressly through the operation of Section 117 or by implication in the Constitution, remains the subject of debate. In *Leeth*, Justices Deane and Toohey in a dissenting judgment considered that there was a guarantee of equality of all persons under the common law and by necessary implication in the Constitution. The guarantee operates as a restraint on the Commonwealth's power to legislate in a way which undermines equality. They said that laws which discriminate may do so only to the extent that there are rational and relevant grounds for discrimination.⁴⁸⁴ In the same judgment, Justices Brennan and Gaudron also recognised the importance of the principle of equality before the law.⁴⁸⁵

Despite criticism by fellow judges,⁴⁸⁶ Justice Toohey continues to assert the inherent equality of people governed under the Australian Constitution in *Kruger & Ors v Commonwealth*.⁴⁸⁷ He specifically referred the operation of the race power and noted that Section 51 (xxvi) necessarily authorises discriminatory treatment of members of a particular race to the extent that the discriminatory treatment is reasonably capable of being seen as appropriate and adapted to the circumstances of that particular racial group. He said that this proposition is one which supports the enactment of laws which discriminate beneficially.⁴⁸⁸ A law which is appropriate and adapted is one which is proportional to achieving the object or purpose of the legislative head of power.⁴⁸⁹ The 'proportionality' issue should be considered where an enactment interferes with an implied constitutional guarantee. In the context of the NTA and recognition of equality before the law, it must be asked if the proposed amendments to the NTA are reasonably capable of being seen as necessary, appropriate and adapted to the circumstances of Aboriginal people.

The Bill's relationship with the RDA

Generally, all the measures contained in the Bill, if enacted, will be subsequent specific enactments and will override the RDA. Section 7(1) of the NTA currently states "*[n]othing in this Act affects the operation of the Racial Discrimination Act 1975*". Subsection 7(2) contains an exception in relation the validation of 'past acts'.

In *WA v Commonwealth* the High Court observed that Subsection 7(1) provides no basis for interpreting the NTA as subject to the RDA and that both Acts:

*...emanate from the same legislature and must be construed so as to avoid absurdity and to give to each of the provisions a scope for operation ... The general provisions of the Racial Discrimination Act must yield to the specific provisions of the Native Title Act in order to allow those provisions a scope for operation.*⁴⁹⁰

What Subsection 7(1) of the NTA ensures is that the Act is not construed as impliedly repealing the RDA. The NTA covers the field in matters pertaining to native title while the RDA continues to operate on matters outside the scope of the NTA.

open to argue that this principle would apply to all heads of power in the Constitution, especially s.51(xxvi).

⁴⁸⁴ *Leeth v Commonwealth*, *op.cit.*, at pp. 488-9.

⁴⁸⁵ *Ibid* at pp. 475 and 502.

⁴⁸⁶ *Kruger v Commonwealth*, *op.cit.*, at pp.155 – 159 per Dawson, J., and pp. 227 – 228 per Gummow J., although Gaudron J. does provide some support for a limited guarantee of equality at pp. 194 – 195.

⁴⁸⁷ *Ibid* at p. 179.

⁴⁸⁸ *Leeth v Commonwealth*, *op.cit.*, p. 489 and repeated in *Kruger v Commonwealth*, *op. cit.*, p.181.

⁴⁸⁹ See *Leask v Commonwealth* (1996) 140 ALR 1 at p. 9 per Brennan C.J., pp. 13 – 17 per Dawson J., pp. 24 – 26 per Toohey J. and pp. 41-42 per Kirby J.

⁴⁹⁰ *WA v Commonwealth*, *op.cit.*, p. 62.

Currently, the NTA and the RDA are complimentary pieces of legislation insofar as both provide legal protection and standards for dealing with native title. The NTA provides more elaborate protection than the RDA as it is ‘purpose built’ to deal with native title and the issues around it. The majority of the High Court observed in *WA v Commonwealth* that the regime established by the Native Title Act is ‘more specific and more complex than the regime established by the Racial Discrimination Act.’⁴⁹¹

One matter that has been raised by a number of eminent lawyers is that the discriminatory nature of an enactment (such as the Bill) could affect the enactment’s constitutionality and that of the RDA. Mr John Basten QC observed last year in his evidence to the Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund that:

... the Racial Discrimination Act ... does not arise under any specific constitutional head of power in Section 51 [of the Constitution]. It relies on the external affairs power and gives effect to the Convention [on the Elimination of All Forms of Racial Discrimination]. As I am sure you all are aware, that is a very special form of legislative power, because the Parliament does not in effect have power to enact laws with respect to racial discrimination but only to give effect to the Convention. Immediately one starts to interfere with the scope, purpose and the intent of the Racial Discrimination Act, there is a very live danger that the High Court will at some stage say, ‘the act no longer accords sufficiently closely to the terms of the Convention and, therefore either the amendments to it express or implied will be invalid or the whole act itself will be invalidated.’ So that is my concern about fears arising in relation to implicit amendment to the RDA by later legislation. It is not a fear which would arise normally in relation to a principle which we all accept, that later legislation can impliedly repeal or vary earlier legislation.’⁴⁹²

Conclusion

Currently, Indigenous peoples in Australia are looking at the possibility of losing many protections necessary for the recognition of our rights to land. If the Bill is enacted it will be a severe set back for the Indigenous peoples of Australia. It is no exaggeration to say that it will signify a return to terra nullius and the institutionalisation of discrimination in Australia’s legal and administrative systems.

The current debate over pastoral leases highlights the precarious situation of Indigenous peoples’ rights and the need for their effective protection. If the Bill is enacted without substantial ameliorating amendments, the Australian political process will be shown to be deficient in a fundamental sense as it will have allowed the abrogation of the human rights of Australia’s Indigenous peoples. It would diminish Australia’s standing as a nation and send a clear message, both domestically and internationally, concerning our national values.

This possibility emphasises the need for entrenched constitutional protection of human rights and Indigenous rights. Perhaps it is ironic to note that a former Chief Justice of the High Court, Sir Harry Gibbs, considered the race power would allow the Parliament to enact a bill of rights for people of a particular race.⁴⁹³ Such use of the race power would fulfill the purpose of the 1967 Referendum. It would be the bitterest irony if the power were used to strip Aboriginal and Torres Strait Islander peoples of their legitimate rights.

⁴⁹¹ *Ibid*, p. 41.

⁴⁹² *Hansard*, Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Wednesday, 27 November 1996, p. NT3609.

⁴⁹³ Sadler at 612 referring to Sir Harry Gibbs, ‘The Constitutional Protection of Human Rights’ (1982) 9 *Monash Law Review* 1 at p. 9.

Appendix – The Ten Point Plan

1. Validation of acts/grants between 1/1/94 and 23/12/96

Legislative action will be taken to ensure that the validity of any acts or grants made in relation to non-vacant crown land in the period between passage of the Native Title Act and the Wik decision is put beyond doubt.

2. Confirmation of extinguishment of native title on ‘exclusive’ tenures

States and Territories would be able to confirm that ‘exclusive’ tenures such as freehold, residential, commercial and public works in existence on or before 1 January 1994 extinguish native title. Agricultural leases would also be covered to the extent that it can reasonably be said that by reason of the grant or the nature of the permitted use of the land, exclusive possession must have been intended. Any current or former pastoral lease conferring exclusive possession would also be included.

3. Provision of government services

Impediments to the provision of government services in relation to land on which native title may exist would be removed.

4. Native title and pastoral leases

As provided in the Wik decision, native title rights over current or former pastoral leases and any agricultural leases not covered under 2 above would be permanently extinguished to the extent that those rights are inconsistent with those of the pastoralists.

All activities pursuant to, or incidental to, ‘primary production’ would be allowed on pastoral leases (i.e. the right to negotiate in relation to such activities would be completely removed), including farm-stay tourism, even if native title exists, provided the dominant purpose of the use of the land is primary production. However, future government action such as the upgrading of title to perpetual or ‘exclusive’ leases or freehold, would necessitate the acquisition of any native title rights proven to exist and the application of the regime described in 7 below (except where this is unnecessary because the pastoralist has an existing legally enforceable right to upgrade).

5. Statutory access rights

Where registered claimants can demonstrate that they currently have physical access to pastoral lease land, their continued access will be legislatively confirmed until the native title claim is determined. This would not affect existing access rights established by state or territory legislation.

6. Future mining activity

For mining on vacant crown land there would be a higher registration test for claimants seeking the right to negotiate, no negotiations on exploration, and only one right to negotiate per project. As currently provided in the NTA, states and territories would be able to put in place alternative regimes with similar right to negotiate provisions.

For mining on other ‘non-exclusive’ tenures such as current or former pastoral leasehold land and national parks, the right to negotiate would continue to apply in a state or territory unless and until that state or territory provided a statutory regime acceptable to the Commonwealth which included procedural rights at least equivalent to other parties with an interest in the land (e.g. the holder of the pastoral lease) and compensation which can take account of the nature of co-existing native title rights (where they are proven to exist).

7. Future government and commercial development

On vacant crown land outside towns and cities there would be a higher registration test to access the

right to negotiate, but the right to negotiate would be removed in relation to the acquisition of native title rights for third parties for the purpose of government-type infrastructure. As currently provided in the NTA, state and territories would be able to put in place alternative regimes with similar right to negotiate provisions.

For compulsory acquisition of native title rights on other 'non-exclusive' tenures such as current or former pastoral leasehold land and national parks, the right to negotiate would continue to apply in a state or territory unless and until that state or territory provided a statutory regime acceptable to the Commonwealth which included procedural rights at least equivalent to other parties with an interest in the land (e.g. the holder of the pastoral lease) and compensation which can take account of the nature of co-existing native title rights (where they are proven to exist).

The right to negotiate would be removed in relation to the acquisition of land for third parties in town and cities, although native title holders would gain the same procedural and compensation rights as other landholders.

Future actions for the management of any existing national park or forest reserve would be allowed.

A regime to authorise activities such as the taking of timber or gravel on pastoral leases, would be provided.

8. Management of water resources and airspace

The ability of governments to regulate and manage surface and subsurface water, off-shore resources and airspace, and the rights of those with interests under any such regulatory or management regime would be put beyond doubt.

9. Management of claims

In relation to new and existing native title claims, there would be a higher registration test to access the right to negotiate, amendments to speed up handling of claims, and measures to encourage the States to manage claims within their own systems.

A sunset clause within which new claims would have to be made would be introduced.

10. Agreements

Measures would be introduced to facilitate the negotiation of voluntary but binding agreements as an alternative to more formal native title machinery.