

Native Title Report 1998

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Chapter 1: Striking the balance

The spirit of the High Court's Mabo decision will never be achieved simply by court actions or divisive political debate. The essential truth is the unbreakable connection of Aboriginal people to the land. It never will be possible to recognise that adequately in law. It can be achieved at the local level and only by reconciliation founded on agreement.

Noel Pearson, Executive Director of the Cape York Land Council

Our members want to improve the security of their enterprises. That involves resolution of native title and conservation issues and improved tenure. When these things occur, it will be far easier to attract necessary investment.

This agreement is a tremendously significantly step towards achieving our objectives. It will be good for us, good for the land, good for the region.

John Purcell, President of the Cattlemen's Union of Australia¹

Reconciliation between Indigenous and non-Indigenous Australians must be founded on justice if it is to be durable. Reconciliation essentially concerns our future co-existence. Fine words crafted to describe our aspirations will be sterile unless they are supported by an alignment of interests that will draw us together, rather than draw us into conflict and dispute.

The alignment of Indigenous and non-Indigenous rights to land will be a critical part of this balance of interests. It must rest on fairness and equality. This much is self-evident and common ground. What is much more contentious is the concept of equality employed to strike this balance.

¹ Spoken on the signing of the historic Cape York Heads of Agreement regarding future land use on Cape York at Cairns, 5 February 1996. The seeds of the agreement were sown in August 1994 when, against the background of the Wik litigation, the Peninsular Branch of the Cattlemen's Union decided that issues and conflict with Aboriginal people should be resolved by negotiations wherever possible. Subsequent to the High Court's decision in *Wik v Queensland* (1996) 187 CLR 1 ('Wik'), all parties determined they would stand by the agreement.

The Wik decision laid down some straightforward propositions. Native title is not necessarily extinguished by the grant of a pastoral lease. Native title rights can co-exist with pastoral rights. Where there is an inconsistency or conflict between the exercise of these rights, the pastoral rights will take precedence.

It should not be overlooked that, from the very outset, the concept of native title is based on a principle which is unfair from an Indigenous perspective. It was held in *Mabo (No.2)*² that the Crown had a power to extinguish traditional Indigenous ownership of land. ‘Aboriginals were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement.’³ Before the introduction of the Native Title Act 1993 (Cth) (NTA), the only explicit protection against such a discriminatory exercise of sovereign power was the Racial Discrimination Act 1975 (Cth) (RDA). Before 1975, when the RDA was introduced, there was simply no protection.

One of the primary provisions of the NTA enabled the validation of all non-Indigenous interests in land resulting from past acts by the Crown, such as the grant of a pastoral lease, which may have been invalid because of the existence of native title.

Given this validation of pastoral leases, the only live issue in Wik was whether or not the original native title to the land was completely extinguished, or whether native title could in some way survive the grant of a pastoral lease.

The potential co-existence of native title with pastoral interests was a modest recognition and realignment of interests, with limited potential for Indigenous interests to impede the use of the land for pastoral purposes.

Indigenous representatives, in their detailed response to Wik, Co-existence—Negotiation and Certainty,⁴ offered to remove any impediment to the exercise of existing pastoral rights flowing from the NTA. They agreed to:

guarantee under the NTA that the rights of pastoralists under all forms of pastoral leases...are confirmed in the same way as the rights of native titleholders...⁵

It is in this perspective that we must consider the recent amendments to the NTA, which were largely shaped in response to Wik. The High Court of Australia had laid the foundation for the co-existence and reconciliation of shared interests in the land. In many ways the decision presented Australia with a microcosm of the wider process of reconciliation. The final response of the Australian Parliament reveals the great distance we still have to go to achieve, not only a just basis for reconciliation, but also an understanding of the principle of equality on which it must rest.

The recognition of native title by the High Court of Australia in *Mabo (No. 2)* recast the landscape of our country. The judgment not only upheld the existence of common law rights to land predating and surviving the assertion of British sovereignty, the judgment also threw the history of Australia into a different perspective. While native title survived the Crown’s acquisition of sovereign power, as we have already observed, the Crown’s power was untrammelled and was exercised repeatedly to grant Indigenous land to others.

It did not require the recognition of native title to reveal the blunt facts of Indigenous dispossession. Recognition did, however, give a new edge to that history and established in law what Aboriginal and Torres Strait Islander peoples had always known, that:

² *Mabo v Queensland (No.2)* (1992) 175 CLR 1 (‘*Mabo (No.2)*’).

³ *Mabo (No.2)* per Brennan J, p69.

⁴ National Indigenous Working Group on Native Title, Co-existence—Negotiation and Certainty, Canberra, April 1997.

⁵ *ibid.*, pp9–10. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 1996–97, Human Rights and Equal Opportunity Commission (HREOC), Sydney, 1997, pp11–12.

their dispossession underwrote the development of the nation...The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and a retreat from, those past injustices.⁶

This challenge to our national values was met with the passage of the NTA, the establishment of the Indigenous Land Fund and the promise, as yet unfulfilled, of a package of social justice measures.

With the introduction of the NTA, the Australian Parliament endeavoured to accommodate the realities of the past and provide a fair way to deal with land in the future, based on contemporary notions of justice. The validation of 'past acts' conferred the absolute security on all non-Indigenous titles. Provisions dealing with 'future acts' established a framework for the interplay of all land interests in future dealings. The belated recognition of native title necessarily created complexity in the structure of the NTA.

The original Act was by no means perfect. Criticisms of certain core, structural principles of the legislation were made in the Aboriginal and Torres Strait Islander Social Justice Commissioner's First Report 1993.

In the original NTA, the validation of past acts required the unequivocal suspension of the RDA, effected by section 7(2) NTA. This was agreed to by Indigenous representatives in acknowledgment of the legitimate need to provide security for all non-Indigenous titles granted before the recognition of native title. Section 7(1) NTA purported to expressly maintain the protection of the RDA in all other circumstances. It was avowed that the NTA should conform with the principle of non-discrimination.

The procedural protection embodied in the right to negotiate over activities affecting native title land did not satisfy the Indigenous position that such activity should only proceed with the consent of the native titleholders. It was argued that consent was necessary to reflect the traditional right to control access to country. Nonetheless, the right to negotiate formed a core component of the protection of native title interests provided by the NTA. Together with the 'freehold test', it contributed in a major way to the balance between Indigenous and non-Indigenous interests which was agreed in negotiations between the Commonwealth Government and Indigenous representatives.

The right to negotiate was included in the original NTA in recognition of the 'special attachment of Aboriginal and Torres Strait Islander people to their land.'⁷ The Government considered this particular form of procedural protection to be a special measure under Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and section 8 of the RDA.⁸

The Indigenous position held that the right was a diminished statutory reflection of an inherent right of title and was, accordingly, required as a matter of principle. On either analysis the right to negotiate responded to the distinctive character of Aboriginal and Torres Strait Islander laws and customs. It offered some protection based on the recognition of the unique spiritual, social and cultural dimensions of the Indigenous relationship to land.⁹

The grant of a leasehold title was considered by the Commonwealth Government to extinguish native title, and this view is recorded in the preamble to the Act. This view was in contrast to the Indigenous position on the effect of a leasehold grant. No substantive provision of the NTA dealt directly with this matter. It was anticipated that the effect of the grant of various interests in land, and in particular those

⁶ Mabo (No.2) per Deane and Gaudron JJ, p109.

⁷ Commonwealth of Australia, Mabo—The High Court Decision on Native Title. Discussion Paper, Commonwealth Government Printer, Canberra, 1993, p102.

⁸ The RDA implements CERD in domestic law: Preamble, Racial Discrimination Act 1975 (Cth).

⁹ Chapter three of the report argues that the right to negotiate cannot be characterised as a special measure.

interests described as ‘pastoral leases’, would await judicial determination. The Wik proceedings were actually commenced before the passage of the NTA in 1993.

Seen from an Indigenous perspective, these and other aspects of the original NTA rendered it very much a less than perfect legislative response to the recognition of native title. However, overall it achieved a reasonable balance of interests.

After its enactment, several matters created a pressing need for amendment:

- The unexpected implications of the Brandy decision¹⁰ for the role of the National Native Title Tribunal necessitated amendment of the Tribunal’s function.
- The Lane and Waanyi decisions¹¹ suggested a need to revisit those provisions setting the threshold for the registration of native title applications. Registration provided native title claimants with access to the right to negotiate. All stakeholders agreed that the threshold was too low.
- The absence of a sound statutory basis for the negotiation of broad reaching agreements generated an interest among all stakeholders in amendments to support such agreements.
- The decision in *Western Australia v Commonwealth*¹² revealed that the provisions of the NTA override and exclude the RDA from the NTA’s field of operation, despite the apparent protection offered by section 7(1).

In the course of 1996 ‘workability’ became the utilitarian catchcry coined by the Commonwealth Government to justify extensive amendments of the NTA, addressing these and other more contentious matters. It was not proposed to amend section 7 to provide the protection of the RDA to native title.

Then, in late 1996, the High Court delivered its judgment in Wik.

The reaction to the High Court of Australia sparked by the decision was intense. The focus swiftly shifted to the NTA and proposals for its amendment. Legislation designed to protect native title, and to facilitate its accommodation within the Australian legal system, was seen as a potential vehicle for ‘blanket extinguishment’ or, at least, ‘bucketloads’ of extinguishment. A great deal of confusion was created by the rhetoric which characterised the public debate.¹³

‘Certainty’ became the new catchcry for the legislative response to Wik. This apparently neutral word carried a great deal of value laden assumptions concerning the level of protection that native title should be accorded under amendments proposed in the Ten Point Plan.¹⁴

Underpinning these amendments was a major assumption concerning the concept of equality. The Commonwealth Government was, and remains, committed to the notion of formal equality.

Formal equality asserts that all people should be treated in precisely the same way: to recognise different rights is inherently unfair and discriminatory. Emphasis is placed on formal equivalence judged by a narrow, direct comparison of rights. Difference is necessarily discriminatory. Within this

¹⁰ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

¹¹ *Northern Territory v Lane* (1995) 138 ALR 544; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 (‘Waanyi’).

¹² (1995) 183 CLR 373.

¹³ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996–97*, op.cit., considered the rhetoric in detail. See Chapters 1 and 6 in particular.

¹⁴ Senator the Hon N. Minchin, *Federal Government’s Response to the Wik decision: The Ten Point Plan*, Commonwealth of Australia, Canberra, 1997.

construction, any distinctive right accorded to native titleholders or native title applicants is seen as inherently racially discriminatory, unless it is justified as a ‘special measure’ under Article 1(4) of CERD and section 8 of the RDA. This view regards special measures as being discretionary privileges which the Australian parliament is at liberty to reduce or remove completely.

The application of the concept of formal equality is seen most clearly in the amendments to the right to negotiate relating to pastoral leasehold land. Under the Government’s analysis, the right to negotiate was a special measure. Its removal was a matter of pure discretion. In relation to pastoral leasehold land the right was removed so that native titleholders would have the same procedural rights as pastoralists.

Formal equality can be contrasted with substantive equality which has a broader frame of reference. Substantive equality recognises that different treatment is not only permitted, but may be required to achieve real fairness in outcome. Differential treatment may be necessary to respond adequately to the particular circumstances of a person or a group or to reflect the special character of their interests. For example, the particular needs and interests of war veterans are taken into account through special benefits tailored to their particular needs.¹⁵ The recognition of difference applies to all Australians, not just Indigenous Australians. A rational, proportional accommodation of the distinctive rights of native titleholders and native title applicants is not racially discriminatory: in fact, different treatment may be required to avoid racial discrimination.

Indigenous spiritual beliefs are unique in form. Sacred sites and places of ceremony lie embedded within the landscape of Australia. Because of their nature they require special legislative protection. This is not preferential treatment. It is appropriate protection of the common human right to freedom of religious practice under Articles 18 and 27 of the International Covenant on Civil and Political Rights (ICCPR).

Similarly, the right to negotiate is required not as a ‘special privilege’ but as a means of achieving substantive equality in the protection of a distinctive and particularly vulnerable form of property. The direct comparison of the right to negotiate with the rights of pastoral leaseholders compares incommensurable interests only brought together by an accident of history—the grant of a pastoral lease—which has already adversely affected the underlying native title. Even if formal equality were a proper standard to apply, the selection of a pastoral lease as a comparable title or benchmark of native title rights would be inappropriate.

This report primarily examines the concept of formal equality which provides the foundation for the amendments to the NTA by the Australian Parliament.¹⁶ It is contrasted with a broader human rights framework and international standards relating to equality and the principle of non-discrimination. Particular attention is given to the reduction and removal of the right to negotiate and to the national standards set where it is permitted to replace that right with state and territory procedures of objection and consultation. The ‘validation’ and ‘confirmation’ provisions, registration test and other amendments are also considered within this human rights framework.

This report contends that a cascading series of amendments, effected through such devices as ‘validation’ and ‘confirmation’, subordinate the native title interests of Aboriginal and Torres Strait Islander people in a racially discriminatory manner. Through complex and subtle means the amendments either adversely affect or extinguish native title while permitting the expansion of non-Indigenous interests in land. For example, the amendments include provisions which purport to ‘confirm’ the application of the common law to extinguish native title. Various interests granted in the past, often the distant past, are classified as previous exclusive possession acts, with the effect that they are deemed to have permanently extinguished native title. Schedule 1 of the amended Native Title Act 1993 proclaims a list of interests deemed to extinguish native title. The list runs to 50 pages in length. An excerpt from the schedule is reproduced overleaf, by way of illustration.

¹⁵ A further example of differential treatment is programs relating to the particular needs of rural and remote Australians. For example, Prime Minister and Minister for Primary Industries and Energy, Agriculture—Advancing Australia, Rural Communities Program, Commonwealth of Australia, September, 1997.

¹⁶ The Native Title Amendment Act 1998 (Cth) was passed on 8 July 1998 and amends the Native Title Act 1993 (Cth). Most of the amendments came into force from 30 September 1998.

The list of scheduled interests goes far beyond its purported scope of merely confirming the application of the common law.¹⁷ The schedule constitutes the present day extinguishment of native title. It constitutes a repetition of the historical pattern of dispossession. It is by no means a reconciliation or balancing of interests.

The cumulative effect of the various amendments is disturbing. There is, however, room for debate about the precise nature of the future impact of some of the amendments. For example, it is not known at this stage what the effect will be of state or territory based legislation, authorised by the Commonwealth amendments, which may replace the right to negotiate with a right of consultation and objection in certain circumstances. However, it is appropriate that this report considers the human rights implications of the minimum national standards that the Commonwealth legislation establishes.

The actual implementation of several amendments, such as the potential to acquire native title for the up-grading of pastoral leases, will be closely monitored. The degree to which other amendments are racially discriminatory in subordinating and removing the rights of Aboriginal and Torres Strait Islander peoples, may be open to some legitimate difference of opinion.

Of one thing there can be no dispute. The amended Section 7, which deals with the inter-relationship of the Native Title Act 1993 and the Racial Discrimination Act 1975, ensures that native title legislation is unconstrained by the only national standard of non-discrimination available under Australian law.

The RDA was introduced to comply with Australia's obligations as a signatory to CERD. It is our country's primary legislative guarantee to all citizens that they will not be treated in an unequal, racially discriminatory, way: that our law will respect internationally established standards. The absence of such a guarantee for the native title interests of Aboriginal and Torres Strait Islander Australians has been consciously confirmed by the Australian Parliament.

In *Western Australia v Commonwealth* the High Court concluded that section 7, as it was originally enacted, was in fact ineffective to provide general RDA protection in the face of the specific, subsequent provisions of the NTA:

Section 7(1) provides no basis for interpreting the Native Title Act as subject to the Racial Discrimination Act. The Native Title Act prescribes specific rules governing the adjustment of rights and obligations over land subject to native title and s 7(1) cannot be intended to nullify those provisions...¹⁸

Accordingly, 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. The recent amendments to the NTA provided an opportunity to redraft section 7 in order to effectively apply the RDA to the provisions of the NTA.

Appropriately amended, this section could have made it unequivocal that the provisions of the NTA are subject to the provisions of the RDA. There was precedent for this level of protection. The Social Security Legislation Amendment (Newly Arrived Residents' Waiting Periods and Other Measures) Act 1997 (Cth) contained an equivalent section defining the interaction of the RDA with Social Security legislation:

¹⁷ This is discussed further in chapter two in relation to Justice Lee's decision in *Ward* (on behalf of the Miriuwung and Gajerrong People) v *Western Australia* (1998) 159 ALR 483. This decision is currently on appeal to the full Federal Court.

¹⁸ *Western Australia v Commonwealth* (1995) 183 CLR 373, per Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ, p484.

Section 4— Effect of the Racial Discrimination Act 1975

- (1) Without limiting the general operation of the Racial Discrimination Act 1975 in relation to the provisions of the Social Security Act 1991, the provisions of the Racial Discrimination Act 1975 are intended to prevail over the provisions of this Act.
- (2) The provisions of this Act do not authorise conduct that is inconsistent with the provisions of the Racial Discrimination Act 1975.

A similar amendment was not adopted in the amended NTA. Section 7 was amended in the following terms:

7 Racial Discrimination Act

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

As amended, section 7 does not ensure the protection of native title by the general standards of equality and non-discrimination enshrined in the RDA. The exercise of powers unambiguously authorised by the NTA is freed from the constraints of the RDA.

The central, pivotal international standard of non-discrimination has been abandoned by the Australian Parliament in setting the balance between Indigenous and non-Indigenous rights. A void was inadvertently created by section 7 as it was originally drafted. In the recent amendment of the section this void was unambiguously confirmed.

The criterion employed to strike the balance between Indigenous and non-Indigenous interests was home crafted: a notion of 'formal equality' which is out of kilter with the direction of international law and the concept of equality as recognised within the human rights framework. Disregarding the particular character of native title, its source in the traditional laws and customs of Aboriginal and Torres Strait Islander peoples, its spiritual, social and cultural depth, a right to land for the purposes of pasturing sheep and cattle for a period of time, has become a benchmark of equivalence. In other circumstances other, equally arbitrary, benchmarks are used.

The rationale of direct comparison with the rights of the adjacent title, such as a pastoral lease, leads to unnecessary complexity. It creates different rights as between native titleholders depending on where their interests are located. The rights attached to their title change like a chameleon, depending on whether their title stands on a pastoral lease, within a town boundary or on vacant Crown land.

Such local rules for equality are an embarrassment to our national values viewed from an international perspective. Viewed from an Indigenous perspective, they are simply unfair and offer no incentive to make peace with the past. Viewed from a perspective which values the broader, long term interests of all Australians, they are highly regressive in their domestic impact on our potential for reconciliation.

The Mabo decision reflects the values of a modern nation moving forward to achieve a fresh relationship between its original inhabitants and all those who came after. It is a relationship based firmly on genuine principles of equality and non-discrimination. As Justice Brennan stated:

It is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination...Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted...¹⁹

The social division which can arise from the perception that Aboriginal and Torres Strait Islander people hold special rights superior to other Australians, no matter how misconceived this view may be, must be honestly acknowledged as damaging to our sense of community and common purpose. It should also be acknowledged that, in a time of great stress in the rural and remote areas of Australia, the management of the tensions generated by the Wik decision and genuine anxiety about its implications, created a very hard task for the Government. This was particularly so as the amendments were formulated against a backdrop which included the emergence of the One Nation Party.

The practical realities of governance and the importance of perceptions of fairness were certainly not over-looked by the Commonwealth Government. Respect for human rights cannot be considered in some ideal vacuum removed from the real world. As Mick Dodson, the former Aboriginal and Torres Strait Islander Social Justice Commissioner, predicted in his First Report 1993 regarding the original NTA, the final terms of the legislation:

will be determined in the heat of public debate and whatever settlement is arrived at, it will almost certainly represent a compromise between appeals to immutable standards of human rights and the immutable urgings of self-interest.²⁰

To acknowledge that successful political resolutions inevitably represent a compromise is not to abandon regard for principle. It is to recognise that the political process must consist of negotiation to arrive at a point of settlement in which the interests and concerns of all parties are properly valued and taken into account. Where the end point entails significant concessions of fundamental rights, these can only be made by the party affected. The process of negotiation establishes the legitimacy of the end resolution which, in turn, provides a stable, durable basis for future relations. The amendments to the NTA do not rest on such a basis.

While the Commonwealth Government considers that the Ten Point Plan already represented a compromise position, proved by the fact that 'no single interest got all they wanted'²¹ it is clear that the Plan, the process of its translation into legislation and the final terms of the legislation, drew no Indigenous allegiance.

Indigenous representatives rejected both the substance of the Native Title Amendment Act 1998 and the process by which it was arrived at. The National Indigenous Working Group prepared a statement, which was read into the parliamentary record on the penultimate day of debate on the amendments. The statement reads, in part:

We, the members of the National Indigenous Working Group, reject entirely the Native Title Amendment Bill as currently presented before the Australian Parliament.

We confirm that we have not been consulted in relation to the contents of the Bill, particularly in regard to the agreement negotiated between the Prime Minister and Senator Harradine, and that we have not given consent to the Bill in any form which might be construed as sanction to its passage into Australian law.

¹⁹ Mabo (No. 2) per Brennan J, pp41–42.

²⁰ Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 1993–1994, HREOC, Sydney, 1994, p16.

²¹ Senator the Hon N. Minchin, Fairness and Balance — The Howard Government's Response to the High Court's Wik Decision. An Overview of Native Title and the Commonwealth Government's Native Title Amendment Bill 1997, January 1998, para 2.

We have endeavoured to contribute during the past two years to the public deliberations of native title entitlements in Australian law.

Our participation has not been given the legitimacy by the Australian Government that we expected, and we remain disadvantaged and aggrieved by the failure of the Australian Government to properly integrate our expert counsel into the law making procedures of government.

We are of the opinion that the Bill will amend the Native Title Act 1993 to the effect that the Native Title Act can no longer be regarded as a fair law or a law which is of benefit to the Aboriginal and Torres Strait Islander Peoples.

We remind the Australian Government and the Australian Peoples that the Native Title Act is not the mechanism which creates our ownership of land, waters and environment.

Our ownership derives from our ancient title which precedes colonisation of this continent and our ownership must continue, in Australian law, to be recognised in accordance with our indigenous affiliation with the land, waters and environment.

Our relationship with the land, waters and environment is a complex arrangement of spiritual, social, political and economic associations with the land which cannot be replicated, substituted, replaced or compensated.

We regard fair and equal treatment of our indigenous land rights, or native title, in comparison to the land title of other Australians, to be determined by the level of respect and regard for all titles and not by the assimilation of titles.

It is therefore a fundamental flaw of the Australian Government to consider that fairness or equality in the Native Title Act has been achieved by limiting the rights of Aboriginal and Torres Strait Islander Peoples, for example to the rights of pastoral lessees...

The National Indigenous Working Group is extremely disappointed that the Australian Government has failed to confront issues of discrimination in the native title laws and implicitly provoked the Aboriginal and Torres Strait Islander Peoples to pursue concerns through costly and time consuming litigation, rather than through negotiation...

We are determined that the future generations of Australian society are raised and educated in a spirit of tolerance and understanding which will ensure that the measures of justice important to the reconciliation between our peoples can be appreciated and embraced...

The National Indigenous Working Group on Native Title absolutely opposes the Native Title Amendment Bill, calls upon all parliamentarians to cast their vote against this legislation, and invites the Australian Government to open up immediate negotiations with the Aboriginal and Torres Strait Islander Peoples for coexistence between the Indigenous peoples and all Australians.²²

The substance of the assertions in this statement are considered in the body of this report. The immediate purpose of considering the statement here is to demonstrate that the aftermath of the amendment process has been a spoiling of our potential for any reconciliation based on a perceived alignment of interests.

The legislative response to the Wik decision which proffered a basis for the sharing of interests has been lost, at least for the present. Both the process and the substance of the amendments have been destructive of the most valuable resource we have in working towards reconciliation: trust.

It may be thought that the position of Aboriginal and Torres Strait Islander peoples is unreasonable, that their claims are inflated, that they ask too much. There is no doubt that a significant number of Australians believe that. That perception must be acknowledged and addressed constructively. Similarly, the deep sense of grievance felt by many Indigenous Australians must also be acknowledged as sincere.

²² Hansard, Senate, 7 July 1998, pp4352-54. The NIWG statement is reproduced in full in Appendix 1 of this report.

The recognition of native title, together with the ventilation of issues such as the separation of Aboriginal and Torres Strait Islander children from their families and the constant, seemingly intractable, backdrop of Indigenous disadvantage on every social indicator, give some non-Indigenous Australians a feeling that the problems are growing, not diminishing, that they are overwhelming and defy solution. This is said, not to justify the appeasement of prejudice, but to make the point that, as matter of reality, reconciliation will never be imposed, it must be sought. It will require a genuine movement, based on a realisation of our shared interests, by a critical mass of the entire Australian community.

There is tangible proof of this potential for a convergence of interests, worked out in a practical way by ordinary people dealing directly with each other, setting a new basis for their relationship.

The final chapter of this report considers the growing number of agreements which have been negotiated between Indigenous and non-Indigenous people and communities. Not all were specific settlements of native title rights, but in most instances native title was a catalyst. These agreements are the realisation of constructive outcomes through negotiation. When they are considered certain factors become immediately apparent.

The first is that, contrary to the continual claims that the native title process does not work, the past five years have seen the emergence of a large number of highly productive agreements. They represent a positive approach based on mutual respect, co-existence, the recognition and protection of native title.

The second is that the scope and potential of such arrangements could be enhanced and strengthened with the support of a more sophisticated statutory framework. The amendments to the NTA relating to Indigenous Land Use Agreements (ILUAs) provide such a framework.

The ILUA provisions are a positive feature of the amendments. They offer an effective foundation to move beyond reconciliation as an abstract concept: to set about the real task of working out a fair and durable balance between the interests of Indigenous and non-Indigenous Australians. The very process of striking this balance will bring about a new engagement. The difficulties of arriving at agreement should not be underestimated, but the Quandamooka Native Title Process Agreement with Redland Shire Council illustrates the starting point. Goodwill and commonsense may see it through:

8.2 The parties agree that:

- (a) Negotiations shall be conducted in good faith;
- (b) It shall be necessary for the parties to consult with their respective principals prior to the finalisation of any agreements;
- (c) The parties may, by agreement, request the assistance of the National Native Title Tribunal to resolve any negotiation impasse by way of mediation;
- (d) The custodial obligations and the aspirations for self-determination of the Quandamooka people shall be respected;
- (e) The cultural decision making processes of the Quandamooka people shall be respected;
- (f) The rights and responsibilities of the Redland Shire Council shall be respected;
- (g) The negotiations shall foster reconciliation between Aboriginal and non-Aboriginal people; and
- (h) The Agreement on Native Title (Paragraph 6.2(e)) shall require adequate resourcing.²³

²³ The Quandamooka agreement is extracted at Appendix 2. The agreement is available in full on the National Native Title Tribunal's Agreements database on the internet, <www.nntt.gov.au/nntt/ agrment.nsf/area/homepage>.

There is a way forward. There is also a natural bedrock to the Indigenous position:

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.²⁴

Chapter 2: International human rights standards and native title

In 1998 the Federal Parliament enacted the Native Title Amendment Act 1998 (Cth), amending the Native Title Act 1993 (Cth).²⁵ 1998 was also the United Nation's Human Rights Year, a year which marked the fiftieth anniversary of the Universal Declaration of Human Rights (UDHR).

The UDHR remains a profoundly significant instrument of international human rights standards. The Australian government has commented that 'although not legally binding, it carries immense moral force. It is rightly regarded as the foundation of the international human rights system.'²⁶

It is timely to consider the significance of the principles enshrined in the Declaration. The ideals which the UDHR represents, and which have been:

further developed through fifty years of standard-setting and implementation, remain as fundamental now as they have ever been... (they) can play a major role in the strengthening of the rule of law and civil society.²⁷

The international community today remains committed to achieving the aspirations and goals of the Declaration. Unfortunately for some peoples, the principles of the UDHR have not yet been achieved; they remain aspirations. Despite the ideal that human rights are to be enjoyed universally, Indigenous peoples across the globe continue to be treated unfairly. Accordingly, widespread consensus on the need for specific principles protecting the rights of Indigenous peoples from impairment or destruction is now beginning to emerge. The international community is currently working towards developing specific human rights standards and principles to protect the rights of Indigenous peoples through documents such as the Draft Declaration on the Rights of Indigenous Peoples.

Australia can be proud of its role in the development of the international human rights system. Our involvement:

dates from its beginning, with the contribution we made during the crucial negotiations on the UN's Charter to ensure that respect for human rights was placed alongside peace, security and development as

²⁴ Neowarra, P., 'Ngarinyin response to the Wik decision' (1997) 4(1) Indigenous Law Bulletin 16.

²⁵ Herein referred to as the native title amendments or the amended NTA.

²⁶ Department of Foreign Affairs and Trade, Human Rights Manual, 2nd Edition, Commonwealth of Australia, Canberra, 1998, p1. The UDHR, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are often collectively referred to as the 'International Bill of Rights' and comprise the core of the international human rights system.

²⁷ *ibid.*, Foreword by The Hon Alexander Downer MP, piii.

the primary objectives of the United Nations, and our participation in the eight-member committee charged with drafting the Universal Declaration itself...²⁸

Australia's role in promoting and protecting human rights within the United Nations' structure over the past fifty years has led to Australia's reputation as a good international citizen.

Yet Australia's reputation is not without blemishes. As the international community moves towards establishing more sophisticated standards on the enjoyment of human rights by Indigenous peoples, our reputation in this regard is being called into question. These concerns have been heightened by the recent native title amendments.

In August 1998 the Committee on the Elimination of Racial Discrimination (the CERD Committee) instituted an 'early warning' procedure against Australia. The Committee made the following decision on 11 August 1998.

In view of the terms of Article 9, para 1, in particular the provision that the Committee may request further information from the States parties, the Committee requests the Government of Australia to provide it with information on the changes recently projected or introduced to the 1993 Native Title Act, on any changes of policy in the State party as to Aboriginal land rights, and of the functions of the Aboriginal and Torres Strait (Islander) Social Justice Commissioner. The Committee wishes to examine the compatibility of any such changes with Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.²⁹

Australia is the first 'western' country to be placed under an early warning. Countries previously called to account include Rwanda, Burundi, Israel, the Former Yugoslav Republic of Macedonia, the Russian Federation, Algeria, Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro).³⁰

It is within this international context that this chapter evaluates the native title amendments. It defines the key aspects of the international human rights framework, and evaluates how the amended NTA measures up to our international human rights obligations.

The international human rights framework and native title

The following international human rights standards are particularly relevant to native title:

- i) Principles of non-discrimination and equality;
- ii) property rights;
- iii) cultural or minority group rights; and
- iv) participation rights.

The principles of equality before the law and non-discrimination underpin the protection of native title at international law. They stand as independent legal principles, as well as reinforcing the substance of the civil, political, economic, social and cultural rights that are recognised and protected under instruments such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).³¹

²⁸ *ibid.*, p1.

²⁹ Decision 1(53); CERD/C/53/Misc.17/Rev.2, 11 August 1998.

³⁰ Pritchard, S., 'Early warning/ urgent action decision concerning Australia from the UN Committee on the Elimination of Racial Discrimination' (1998) 4(15) *Indigenous Law Bulletin* 17.

³¹ Relevant human rights standards are also contained in documents such as the Charter of the United Nations and the UDHR, although breaches of the principles in these documents do not give rise to legal remedies. It can be argued,

Australia has voluntarily undertaken to meet the obligations that arise from these treaties by ratifying them. Breaches of the obligations in these treaties can give rise to legal or diplomatic censure. Individuals may also lodge complaints to Committees set up under these treaties alleging breaches of Australia's obligations.

i) The principles of non-discrimination and equality

The principle of non-discrimination, and more specifically the principle of racial non-discrimination, are recognised in every major international human rights treaty, convention and declaration. It is recognised and protected in the following instruments:

- Universal Declaration of Human Rights (UDHR), Article 2;
- International Covenant on Civil and Political Rights (ICCPR), Article 2;
- International Covenant on the Elimination of All Forms of Racial Discrimination (CERD), Article 2;
- Convention on the Rights of the Child, Article 2;
- International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2; and
- International Labour Organisation Convention No.169 concerning Indigenous and Tribal Peoples in Independent Countries, Article 2.³²

The principle of racial non-discrimination has also reached the status of customary international law.³³ More significantly, the prohibition of systemic racial discrimination has attained the highest status of international law, *jus cogens*.³⁴ Principles that have reached the status of *jus cogens* are 'peremptory norm(s) of international law from which no derogation is permitted.'³⁵ The principle of racial non-discrimination thus exists independently of the obligations in instruments mentioned above, and cannot be displaced.

In prohibiting discrimination, each of the main international human rights instruments provides for equality before the law. Article 26 of the ICCPR provides that all persons are equal before the law and are entitled without discrimination to the equal protection of the law. Similar protection can be found in:

- United Nations Charter, Article 1(3), 55(c);
- UDHR, Article 7;
- ICESCR, Article 3; and
- CERD, Article 1(4), 2(2), 5.

however, that the principles contained in the UDHR have reached the status of customary international law and accordingly are binding on all nations independently of the operation of the UDHR.

³² Australia has not ratified ILO 169.

³³ McKean, W., *Equality and Discrimination under International Law*, Clarendon Press, Oxford, 1983, pp271–277.

³⁴ Brownlie, I., *Principles of Public International Law*, 3rd edition, Clarendon Press, Oxford, 1979, pp596–598.

³⁵ Triggs, G., 'Australia's Indigenous peoples: Evolving international law', Unpublished Article, 1998, p3. The effects of the discrimination would have to be more than transitory to qualify as systematic in nature. Triggs argues that the wide, long term and discriminatory effects upon Indigenous people of the native title amendments would most likely qualify as systemic in nature. On *jus cogens* generally see Harris, D. J., *Cases and Materials on International Law*, 4th edition, Sweet and Maxwell, London, 1991, pp790–792.

Article 5 of CERD in particular provides that States must prohibit and eliminate racial discrimination and guarantee equality before the law in relation to:

- the right to equal treatment before tribunals administering justice;
- the right to own property, individually or communally;
- the right to inherit; and
- economic, social and cultural rights such as the right to equal participation in cultural activities.³⁶

The meaning of the principles of equality and non-discrimination have been elaborated upon by treaty-based Committees and international courts. They can be reduced to the following four key propositions.³⁷

1. Equality does not necessarily mean treating everybody in an identical manner

The promotion of equality does not necessitate the rejection of difference.³⁸ In the decision of the International Court of Justice in the South West Africa Case, Judge Tanaka stated:

The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal...To treat unequal matters differently according to their inequality is not only permitted but required.³⁹

This passage identifies the salient features of the two legal models of equality—namely, formal and substantive equality.

A substantive equality model, which is adopted by Judge Tanaka, takes into account ‘individual, concrete circumstances’. It acknowledges that racially specific aspects of discrimination such as cultural difference, socio-economic disadvantage and historical subordination must be taken into account in order to redress inequality in fact.

A formal equality approach relies on the notion that all people should be treated identically regardless of such differences. As I have previously stated, an approach:

which relies on the notion that all people should be treated the same denies the differences which exist between individuals and promotes the idea that the state is a neutral entity free from systemic discrimination. In reality ‘[t]he fact that...Aborigines...have been subjected to appalling inequalities demonstrates that formal equality is compatible with the grossest injustice.’⁴⁰

³⁶ In its General Recommendation on Article 5 the CERD Committee has noted that ‘the rights and freedoms mentioned in Article 5 do not constitute an exhaustive list.’ Article 5 ensures equality before the law in relation to any rights which can be established. It does not create exercisable rights. Committee on the Elimination of Racial Discrimination, General Recommendation XX on Article 5, UN Doc CERD/48/Misc.6/Rev.2 (1996), para 1. Note that the obligation of equality before the law and racial non-discrimination in Article 5 of CERD has been enshrined in domestic Australian law in section 10 of the Racial Discrimination Act 1975 (Cth).

³⁷ Pritchard, S., ‘Special measures’ in Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review*, Human Rights and Equal Opportunity Commission (HREOC), Sydney, 1995, pp189–190. See also Bayefsky, A., ‘The principle of equality or non-discrimination in international law’ (1990) 11 *Human Rights Law Journal* 1, p27. Note that chapter 6 of Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996–97*, HREOC, Sydney, 1997, considers the meaning of non-discrimination and equality at length.

³⁸ Race Discrimination Commissioner, *Alcohol Report*, HREOC, Sydney, 1995, p25.

³⁹ *South West Africa Case (Second Phase) {1966} ICJ Rep 6*, pp303–304, p305.

⁴⁰ Race Discrimination Commissioner, *Alcohol Report*, op.cit., p25 quoting Thornton, M., *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, Melbourne, 1990, p16.

The Human Rights Committee, which oversees implementation of the ICCPR, and the CERD Committee, has adopted a substantive equality approach to the meaning of non-discrimination. The Human Rights Committee has indicated that equality ‘does not mean identical treatment in every instance’, and that the Committee is concerned with ‘problems of discrimination in fact’ not just discrimination in law.⁴¹

The previous chapter also highlighted, in relation to the right to negotiate provisions of the amended NTA, the deficiencies of a ‘formal equality’ approach to native title. Such an approach is insufficient to discharge Australia’s international legal obligations.

2. A differentiation of treatment will not constitute discrimination if the criteria for its adoption is objective, reasonable and pursues a legitimate aim

The Human Rights Committee and the CERD Committee have indicated that there are two types of differential treatment which are permitted under the ICCPR and CERD. These are actions that constitute a legitimate differentiation of treatment (‘reasonable differentiation’), and affirmative action (‘special measures’). A differentiation of treatment does not necessarily have to be characterised as a special measure for it to be permissible:

[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)...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.⁴²

Special measures are considered further below. In relation to a reasonable differentiation, the critical issue is to identify those differences which justify a differentiation in treatment. Judge Tanaka in the South West Africa Case stated that differences which minority groups may choose to protect are the relevant differences, rather than oppressive distinctions ascribed in order to justify the reduction of rights.⁴³ There must be a reasonable, objective and proportionate nexus between the relevant difference and its legal recognition to achieve equality of treatment.

In relation to native title, there are a range of relevant differences between native title and ordinary forms of title that mandate appropriately different treatment to achieve substantive equality. They range from the unique nature of native title through to the practical difficulties of proving and protecting the incidents of native title. They include the following:

- Native title has its ‘origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous... (group).’⁴⁴ Accordingly, ‘the nature and incidents of native title must be ascertained as a matter of fact by reference to those laws

⁴¹ Human Rights Committee, General Comment XVIII, Non-discrimination (1989), paras 8, 9, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1, p26.

⁴² Committee on the Elimination of Racial Discrimination, General Recommendation XIV on Article 1 of the Convention (1993), para 2 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (1994), UN Doc. HRI/GEN/1/Rev.1, p67. Emphasis added. See also: Human Rights Committee, General Comment XVIII, Non-discrimination (1989), paras 10 & 13 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, op.cit., p26; and Race Discrimination Commissioner, *The CDEP and Racial Discrimination*, HREOC, Sydney, 1997, pp41–42.

⁴³ For example, beliefs that ‘some tribes are so low in the scale of social organization that their usages and conception of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society’: Lord Sumner, *In re Southern Rhodesia* [1919] AC 211, at pp233–34, as quoted in *Mabo v Queensland (No.2)* (1992) 175 CLR 1 (‘Mabo (No.2)’) per Brennan J, p39.

⁴⁴ *Mabo (No.2)* per Brennan J, p58.

and customs.⁴⁵ For example, traditions on which native title depends can extend to the sea, reefs and inter-tidal zone, unlike other forms of title.

- The content of native title, and whether ‘a community, group or an individual’⁴⁶ possess it, primarily depends on proof by oral traditions. This may be difficult to establish in a common law court. Oral traditions involve a particular relationship to land, including a religious sense of land ownership that involves land obligations not just land rights.
- ‘Native title, though recognized by the common law, is not an institution of the common law.’⁴⁷ Native title is a pre-existing title. It predates the application of the common law in Australia. Accordingly, when Indigenous people are claiming native title rights and interests, they are in fact seeking recognition of a pre-existing right.
- It has taken over 200 years for native title rights and interests to be recognised by the common law. To treat native title on the basis of formal equality would ignore the impact of the dispossession of Indigenous people in the first 200 years of white settlement. One manifestation of this is that Indigenous Australians can face difficulties in seeking recognition of their title through litigation, due to language and educational barriers.⁴⁸
- As native title is not an institution of the common law, it ‘is not alienable by the common law. Its alienability is dependent on the laws from which it is derived.’⁴⁹ Accordingly, native title ‘cannot be acquired from...Indigenous people by one who...does not acknowledge their laws and observe their customs; nor...unless the acquisition is consistent with the laws and customs of that people. Such a right or interest can be acquired outside those laws and customs only by (surrender to) the Crown.’⁵⁰
- Aboriginal decision making about land is measured, not rushed, and cultural values regarding social relationships are an important part of such decision making.⁵¹

3. *Special measures, or affirmative action, are sometimes required in order to redress inequality and to secure, for the members of disadvantaged groups, full and equal enjoyment of their human rights*

As noted above, special measures are a further type of differential treatment that are not discriminatory. They are aimed at achieving substantive equality. The rationale for allowing ‘special measures’ is that historical patterns of racism entrench disadvantage and more than the prohibition of racial discrimination is required to overcome the resulting racial inequality.⁵²

The Australian government categorised the original NTA as a special measure in 1994. The High Court in *Western Australia v Commonwealth* has held that the original NTA ‘can be regarded either as a special measure...or as a law which, though it makes racial distinctions, is not racially

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ *ibid.*, p59.

⁴⁸ Clarke, J., ‘Racial non-discrimination standards and proposed amendments to the Native Title Act’, *Land, Rights, Laws: Issues of Native Title. Issues Paper No. 16*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1997, p7.

⁴⁹ *Mabo (No.2)*, per Brennan J, p59.

⁵⁰ *ibid.*, p60.

⁵¹ This is discussed further in Chapter three.

⁵² Race Discrimination Commissioner, *The CDEP Scheme and Racial Discrimination*, *op.cit.*, p40.

discriminatory.⁵³ Chapter three of this report and the 1996–97 Native Title Report argue that it is misconceived to categorise the NTA as a special measure.⁵⁴

The main features of a special measure are outlined in Article 1(4) of CERD.⁵⁵ Special measures have key limitations that do not apply to measures that may qualify as a reasonable differentiation of treatment. They must be for the sole purpose of securing the advancement of a particular group; such advancement must be necessary; it must not lead to the maintenance of separate rights for different racial groups; and they shall not be continued once the objective of the measure has been achieved.

Native title is the common law recognition of the pre-existing rights of Indigenous peoples. It is a substantive legal right. It is not a remedial measure. Native title does not contain the key elements of a special measure, as defined by CERD. Accordingly, it cannot be categorised as a special measure.⁵⁶

4. Rights that recognise the distinct cultural identity of minority groups are consistent with and sometimes required by the notion of equality

Specific rights that recognise the distinct cultural identity of minority groups are consistent with a substantive approach to equality. Indeed, it has largely been in the context of the protection of minority groups that the meaning of non-discrimination and equality outlined above have been reached.

For example, in 1935 the Permanent Court of International Justice produced an advisory opinion on *Minority Schools in Albania*⁵⁷ in which they considered the aims of the Minorities Treaties adopted by the League of Nations at the end of the First World War. The Court found that the aim of the treaties was to secure for minorities the ability to live peaceably in society, while preserving their own characteristics. In order to do this, the following factors were required:

The first was to ensure that members of racial, religious or linguistic minorities should be placed in every respect on a footing of perfect equality with the other nationals of the State.

The second was to ensure for the minority elements suitable means for the preservation of their own characteristics and traditions...

These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.⁵⁸

Judge Tanaka in the *South West Africa Case* also commented on the minorities treaties, and explained the protection of minority groups as a relevant difference that would justify a differentiation in treatment:

a minority group shall be guaranteed the exercise of their own religious and education activities. This guarantee is conferred on the members of a minority group, for the purpose of protection of their interests and not from the motive of discrimination itself. By reason of protection of the minority this

⁵³ *Western Australia v Commonwealth* (1995) 183 CLR 373, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, pp483–84.

⁵⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996–97*, op.cit., p116; Chapter 6. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1995–96*, HREOC, Sydney, 1996, Chapter 2.

⁵⁵ Article 1(4) is quoted in Chapter three.

⁵⁶ For a consideration of the inappropriateness of applying the special measures provision to Aboriginal land rights see Nettheim, G., ‘Special measures—A response’ in *Race Discrimination Commissioner, Racial Discrimination Act 1975: A Review*, op.cit., pp233–242.

⁵⁷ *Minority Schools in Albania* (1935) OCJ Ser A/B No 64, p17; See the discussion of the case in Pritchard, S., ‘Special measures’, op.cit., p185.

⁵⁸ *ibid.*, p17.

protection cannot be imposed upon members of minority groups, and consequently they have the choice to accept it or not.⁵⁹

Minority group rights, or cultural rights, are protected in Article 27 of the ICCPR. The Human Rights Committee has indicated that the concepts of minority groups and Indigenous peoples are not mutually exclusive categories. Accordingly, Article 27 provides a level of protection to Indigenous peoples, as minorities.

The protection which minority group or cultural rights provide to Indigenous peoples and their relationship to land is discussed further in section (iii) ('Rights of minorities or cultural rights') below.

The principles of non-discrimination and equality and the native title amendments

Chapter three discusses the formal equality approach taken by the government during the native title amendment process, particularly in relation to changes to the right to negotiate provisions. The government consistently stated that it was seeking to ensure the equal treatment of all Australians, without one group in the Australian community—Indigenous people—having more or 'better' procedural rights than other groups.

This approach does not accord with the meaning of non-discrimination and equality at international law. A formal equality approach ignores the consequences of history and the disadvantaged position of Indigenous Australians. It does not recognise that there are relevant differences that would be justified as a reasonable differentiation of treatment, and which would promote the achievement of equality in fact, not just in law.

A formal equality approach also provides insufficient recognition to the cultural identity of Indigenous Australians, and to the international imperative to preserve and protect characteristics of those cultures. This is discussed further in section (iii) ('Rights of minorities or cultural rights.')

Perhaps most telling, however, is that while professing to meet the standard of formal equality the native title amendments in fact fall short even of that standard. They discriminate against native titleholders and do not provide equality before the law on a formal basis. This is demonstrated by the validation and confirmation provisions.

While the Racial Discrimination Act 1975 (Cth) (RDA) would otherwise provide protection when the standard of formal equality is not met, the amendments fail to enshrine this protection for native title.

The RDA does not protect native title from discriminatory treatment

The RDA implements Australia's obligations under CERD. It incorporates the principles of racial non-discrimination and equality before the law into Australian law. To date, the RDA has been significant in protecting native title from impairment or extinguishment in two ways. First, it applies principles of non-discrimination to actions by the federal government. In doing this, the RDA has a moral as well as a legal dimension. While the RDA is an ordinary piece of legislation, it is symbolic of principles that are fundamental to the Australian ethos, such as equality and fairness. Second, in combination with section 109 of the Constitution it has prevented states⁶⁰ from conducting activities that breach the standards of the RDA.⁶¹ This protection is displaced by the amended NTA.

The principle of parliamentary sovereignty enables the Federal Parliament to pass legislation that overrides previous legislation. Parliament is not bound by its own prior legislation. Accordingly, the Federal Parliament can pass legislation subsequent to the RDA that specifically authorises action inconsistent with the provisions of the RDA. Such later legislation, in the absence of explicit provision

⁵⁹ South West Africa Case (Second Phase) {1966} ICJ Rep 6, p305.

⁶⁰ For convenience, references to the states in this section includes reference to the territories.

⁶¹ This is discussed in detail under section ii) Property rights, commencing on page 45.

to the contrary, overrides or impliedly repeals the RDA to the extent that the subsequent legislation is inconsistent with it.

In *Western Australia v Commonwealth* the High Court considered whether the RDA and the original NTA were two such inconsistent federal laws. The High Court found that the NTA in its original form and the RDA were complementary pieces of legislation in so far as both provide legal protection and standards for dealing with native title. The Court observed that the regime established by the Native Title Act is 'more specific and more complex than the regime established by the Racial Discrimination Act.'⁶²

As a matter of general principle the Court held that, as subsequent legislation dealing particularly with native title, the provisions of the NTA would impliedly repeal the protection of the RDA to the extent that there is inconsistency between the two Acts.

If the Native Title Act contains provisions inconsistent with the Racial Discrimination Act, both acts emanate from the same legislature and must be construed so as to avoid absurdity and to give 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.⁶³

The Court also considered whether a provision of the original NTA, section 7, which explicitly sought to clarify the relationship between the RDA and the NTA, operated to displace the general principle outlined above. The provision read as follows:

7. (1) Nothing in this Act affects the operation of the Racial Discrimination Act 1975.
- (2) Subsection (1) does not affect the validation of past acts by or in accordance with this Act.

Section 7 was inserted in the original NTA to give some guarantee that its provisions would not override the RDA. An explicit exception was agreed to by Indigenous negotiators to enable the validation of titles which had been issued by governments after the commencement of the RDA on 31 October 1975. Such titles were clearly issued at a time when, while native title existed, it had not been recognised under the common law of Australia.

The High Court considered that section 7 of the original NTA was ineffective to provide protection against discriminatory treatment in the face of the specific, subsequent provisions of the NTA:

Section 7(1) provides no basis for interpreting the Native Title Act as subject to the Racial Discrimination Act. The Native Title Act prescribes specific rules governing the adjustment of rights and obligations over land subject to native title and s 7(1) cannot be intended to nullify those provisions. It may be that s 7(2) is otiose but that provision is properly to be seen as inserted out of an abundance of caution.⁶⁴

Accordingly, the NTA was seen as covering the field in matters pertaining to native title while the RDA continued to operate on matters outside the scope of the NTA. Section 7 was amended by the Native Title Amendment Act 1998 (Cth) in the following terms.

7 Racial Discrimination Act

- (1) This Act is intended to be read and construed subject to the provisions of the Racial Discrimination Act 1975.
- (2) Subsection (1) means only that:

⁶² Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, p462.

⁶³ *ibid.*, per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, p484.

⁶⁴ *ibid.*

- (a) the provisions of the Racial Discrimination Act 1975 apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and
 - (b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the Racial Discrimination Act 1975 if that construction would remove the ambiguity.
- (3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.

It is unlikely that this provision offers any greater protection to native title against discriminatory treatment than the original section 7. The specific provisions of the NTA as amended will continue to displace the operation of the general principles of the RDA, as section 7(1) does not explicitly provide that the RDA overrides the provisions of the NTA. Section 7(2) and 7(3) similarly qualify the level of protection against discrimination offered by the RDA. Section 7(2)(b), for example, will only operate where the discriminatory effect of the amended NTA is ambiguous. It will be ineffective to prevent discrimination where a provision of the amended NTA, or of a piece of State or Territory legislation authorised by that legislation, is unambiguously discriminatory.

The second, and related layer of protection afforded by the RDA, is in relation to inconsistent state legislation. Section 109 of the Australian Constitution ensures that federal legislation overrides and invalidates state legislation to the extent that the state law is inconsistent with the federal law. Accordingly, the RDA generally operates to provide protection against state legislation that is racially discriminatory.

This general position is subject to the situation outlined above. If federal legislation subsequent to the RDA, specifically authorises action that is inconsistent with the RDA, and authorises states to act pursuant to this subsequent federal legislation, then state parliaments will be relieved of the constraints normally imposed by the RDA:

If (any provisions) of the NTA be construed as repealing any provision of the RDA, with which the (State or Territory) Act is inconsistent, the question would be whether the (State or Territory) act is inconsistent with the NTA as from the time when its provisions repealed the relevant provision of the RDA.⁶⁵

The amended NTA does just this. It devolves much of the responsibility for native title issues from the national level to each of the states. The amendments authorise the states to conduct a range of activities, so long as they meet the minimum standards laid out in the amended NTA. These activities include validation and confirmation as well as provisions altering the right to negotiate for mining acts and compulsory acquisitions. These provisions are discussed further below and in chapter three.

Accordingly, the amended NTA frees authorised state legislation from the limitations that would ordinarily be provided by the RDA. In practical terms, the states are now able to enact provisions, such as validation, that extinguish or impair native title and do not comply with the principles of non-discrimination and equality.

Validation provisions

The amended NTA contains provisions which validate ‘intermediate period acts’ done by the Commonwealth, and which authorise the States and Territories to introduce similar validating legislation for acts done by those States and Territories.

An ‘intermediate period act’ is an act done by a government between 1 January 1994 (the date that the NTA was introduced) and 23 December 1996 (the date of the Wik decision.) These acts might not have been valid at the time as governments did not comply with the provisions of the NTA. The justification for validating these actions is that governments were guided by the assumption, proven false in the Wik

⁶⁵ *ibid.*, per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, p419.

decision, that pastoral leases extinguished native title. As a result, governments believed that the future act provisions of the NTA did not apply in relation to those acts.

The previous Native Title Report considered in detail the validation provisions of the Native Title Amendment Bill 1997.⁶⁶ Those provisions were similar to the ones that were finally enacted in 1998.

The amended NTA provides that intermediate period acts are valid and are taken always to have been valid.⁶⁷ The effect of such validation extinguishes native title completely; extinguishes to the extent of the inconsistency; or applies the non-extinguishment principle (which renders native title rights unenforceable until such time as the intermediate period act ceases to be in operation). Sections 22E and 22H provide that where an intermediate period act involves the grant of a mining tenement, the Government must provide notification to potential native titleholders within six months of having validated the act. Compensation may become payable for any extinguishing effect on native title rights and interests.

These provisions are discriminatory. Section 7(3) in the amended NTA provides that the provisions which validate intermediate period acts are not to be read and construed in accordance with the RDA.

The validation provisions expressly privilege the rights of all other property holders over those of native titleholders. They extinguish or impair native title while leaving intact those proprietary rights derived from the Crown and enjoyed by peoples of other races. As such, these provisions offend the most basic test for racial non-discrimination on both formal and substantive grounds.⁶⁸

Although the amendments provide for compensation on just terms (if relevant), compensation does not remove the discriminatory effect of the provisions. The discriminatory nature of these provisions is also not ameliorated by the notice provisions in the Act.

The justification put forward for this validation (namely, the false assumption made by governments that native title was extinguished by pastoral leases) also indicates the discriminatory nature of the amendments. This reason cannot justify the full range of actions that various governments have taken, and are now able to validate.

States cannot legitimately claim that they had no knowledge of the prospect that pastoral leases did not extinguish native title. For example, in March 1996 the High Court in the *Waanyi* case⁶⁹ indicated that it was arguable that pastoral leases did not extinguish native title. Similarly, it was the agitation of the Queensland government that saw this very issue brought before the High Court in the *Wik* case before a determination of the facts in the case. Various governments around the country were clearly alive to the possibility that pastoral leases may not extinguish native title, but instead chose to ignore this possibility.⁷⁰

The discriminatory impact of the validation provisions are also brought into sharp focus by the approach of the Western Australian government to native title from 1 January 1994 to 23 December 1996.

The Western Australian government introduced the *Lands (Titles and Traditional Usage) Act 1993* (WA) before the passage of the NTA. The Act extinguished native title across the state and substituted a statutory and inferior right of traditional usage. This right was less secure than native title, and more

⁶⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996–97*, op.cit., Chapter 4.

⁶⁷ NTA, s22A, s22F.

⁶⁸ See the discussion in relation to property rights below on the reasoning of the High Court in *Mabo v Queensland (No.1)* (1988) 166 CLR 186 ('*Mabo No.1*').

⁶⁹ *North Gananja Aboriginal Corporation v Queensland* (1996) 135 ALR 225 ('*Waanyi*').

⁷⁰ Western Australia was the exception to this. Following the High Court's decision in *Western Australia v Commonwealth* that government adopted a policy of issuing section 29 notices on land that included pastoral leases.

capable of being overridden by other interests such as mining rights. The Western Australian government proceeded to deal with native title issues under this Act, rather than in accordance with the NTA, until the High Court's decision in *WA v Cth* in March 1995.

The High Court found that the Lands (Titles and Traditional Usage) Act 1993 (WA) offended the principle of racial non-discrimination and did not provide Indigenous people with equality before the law as required by section 10(1) of the RDA. It was also wholly inconsistent with the NTA, and therefore invalid due to the operation of section 109 of the federal Constitution. This left the 9,828 titles, granted under the Lands (Titles and Traditional Usage) Act 1993 without complying with the future acts regime of the NTA, potentially invalid.⁷¹

The amended NTA authorises the Western Australian Government to introduce legislation validating these 9,828 titles. The Western Australian Government can now legalise the grant of titles which were made under legislation that the High Court declared racially discriminatory.

This can be compared to the approach to validation under the original NTA. The original validation provisions enabled states to validate actions which were taken from 31 October 1975 (the date that the RDA was introduced) and 1 January 1994 (the date that the NTA was introduced). The Federal Parliament was explicit in ensuring that these provisions did not reward states for racially discriminatory acts. As a result, the validation provisions excluded the Queensland Islands Coast Declaratory Act 1985 (Qld), which had been found unconstitutional in *Mabo (No.1)*.⁷² The amended NTA did not exclude the similarly racially discriminatory acts granted by Western Australia.

It has now been revealed that in addition to these 9,828 titles, the Western Australian Government is seeking to validate a further 211 titles which were granted after the High Court's decision without complying with the provisions of the NTA.⁷³ The Western Australian Government has admitted that Cabinet approved the grant of these titles without complying with the provisions of the NTA in order to speed up issuing the titles.⁷⁴ That the Government was aware of the possibility that these actions may impact upon native title rights is demonstrated by the fact that the Government only granted the titles after it had received an indemnity from the recipient mining companies concerned in relation to any future compensation liability.

The Western Australian Bill that proposes to validate these titles is, at the time of writing, before the Legislative Council.

Confirmation (or 'legislative extinguishment') provisions

The amended NTA deems particular tenures granted before 23 December 1996 to have either extinguished or impaired native title. Where those interests were granted by the states the amendments authorise them to introduce complementary legislation to the same effect.⁷⁵

Where an interest is deemed to amount to an exclusive possession, it is confirmed as permanently extinguishing native title, regardless of whether the extinguishing interest continues to subsist on the land or not.⁷⁶

⁷¹ This figure was confirmed in the debate in the Legislative Assembly on the Titles Validation Bill 1998 by the Minister responsible for the administration of the Act up to 16 March 1995. Mr Prince, Hansard, Legislative Assembly (Western Australia), 29 October 1998, p2920.

⁷² Original NTA, s228(10)(a).

⁷³ Mr Prince, Hansard, Legislative Assembly (Western Australia), 29 October 1998, p2920

⁷⁴ *ibid.*

⁷⁵ NTA, s23E, s23I. Such legislation has been passed in the Northern Territory, New South Wales, Queensland and Victoria to date.

⁷⁶ NTA, s23C. Extinguishment is defined in s237A as 'permanent'.

The justification given for prioritising specified titles over native title in this way was that the common law was likely to find that the grant of those titles extinguished native title. Accordingly, such titleholders needed to be given the certainty that their titles were safe and would not be threatened by native title claims. It was said that the legislature was not changing the common law but merely ‘confirming’ the common law position.

The previous native title report critiqued the confirmation provisions at length.⁷⁷ It was noted that they pre-empt the development of the common law. They seek to apply the largely undeveloped common law to a myriad of interests across the country in ways that cannot be done accurately. They apply the wrong test for extinguishment, by not focusing on whether in granting the titles there was a clear and plain intention to extinguish native title. They also deem extinguishment to be permanent where that is not necessarily the understanding at common law. It was argued that instead of operating as a benign confirmation of existing law, these provisions instead operate to perform the extinguishment of native title.

Unfortunately, the recent Federal Court decision in *Ward* (on behalf of the Miriuwung and Gajerrong People) v State of Western Australia⁷⁸ has shown these criticisms to be well founded.

In that case, Justice Lee was required to look closely at special leases that had been granted under Sections 152 of the Land Act 1898 (WA), and Sections 116 and 117 of the Land Act 1933 (WA). The leases were for the purposes of grazing, cultivation and grazing, market gardening, canning and preserving works, concrete production, and for an Aboriginal hostel and inter-cultural centre. These leases were ‘confirmed’ in the amended NTA as extinguishing native title.⁷⁹

Justice Lee found that these leases did not extinguish native title at common law. He also found that the criterion used in order to ‘confirm’ extinguishment was directed at the wrong question. The question is not whether the grant of the title gives rise to a right of exclusive possession, but whether in granting the title there is a clear and plain intention to extinguish native title.⁸⁰

Justice Lee found that these leases amounted to temporary uses of the land, that in many cases the land had not been used for the purpose of the grant, that the grants were made for a limited time period, and that the land had in all cases reverted to vacant Crown land. His conclusion was that in each instance, a clear and plain intention by the Crown to extinguish native title could not be found, and that as a consequence no extinguishment had occurred.

The Western Australian government has lodged an appeal against the decision on 92 grounds, including challenging those findings outlined above. These findings demonstrate, however, that by scheduling these interests to the NTA the Parliament has given priority to the interests of non-Indigenous titleholders over those of native titleholders. It is a clear breach of Australia’s international obligations to treat people equally and without discrimination.

ii) Property rights

The second group of international human rights relevant to the recognition of native title are rights to property. Article 17 of the UDHR provides that:

1. Everyone has the right to own property alone, as well as in association with others.

⁷⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 1996–97, op.cit, pp65–86.

⁷⁸ (1998) 159 ALR 483 (the ‘Miriwung and Gajerrong case’).

⁷⁹ For extinguishment to take place, the Western Australian parliament must pass legislation confirming extinguishment. The Titles Validation Amendment Bill 1998 (WA) is presently before the Western Australian Parliament. Section 12H(1) will have the effect of extinguishing native title in relation to the titles scheduled.

⁸⁰ See the following analysis on this point: Bartlett, R., ‘The Wik Decision and Implications for Resource Development’ (1997) 16 Australian Mining and Petroleum Law Journal 27, p30.

2. No one shall be arbitrarily deprived of his property.

Article 17 does not provide an absolute right to own property. Rather it guarantees that deprivation of property shall not be in an arbitrary manner.⁸¹ When read in combination with the prohibition of racial discrimination in relation to fundamental rights, the definition of ‘arbitrary’ would include deprivation in a racially discriminatory manner.⁸²

Article 5 of CERD requires State parties to ensure equality before the law without distinction as to race, colour or national or ethnic origin in the enjoyment of (among other things) the right to own property alone and in association with others, and the right to inherit.

The CERD Committee’s General Comment on Indigenous peoples also calls on State parties to:

Recognise and protect the rights of Indigenous peoples to own, develop, control and use their communal land, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.⁸³

The recognition of property rights in the UDHR and CERD has been critical in protecting native title in Australia from extinguishment.

In *Mabo (No. 1)*⁸⁴ the High Court had to consider the validity of the Queensland Coast Islands Declaratory Act 1985 (Qld). This act sought retrospectively to abolish any native title rights and interests which the Meriam people of the Murray Islands may subsequently be found to have held. In interpreting the scope of section 10 of the RDA, Justices Brennan, Toohey and Gaudron considered Australia’s obligations under CERD:

Section 10 of the Racial Discrimination Act 1975 (Cth) is enacted to implement Article 5 of (CERD) and the ‘right’ to which s 10 refers is, like the rights mentioned in Article 5, a human right—not necessarily a legal right enforceable under the municipal law. The human rights to which s 10 refers include the right to own and inherit property...rights of that kind have long been recognised (such as in Article 17 of the UDHR)...

Although the human right to own and inherit property (including a human right to be immune from arbitrary deprivation of property) is not itself a legal right, it is a human right the enjoyment of which is peculiarly dependent upon the provisions and administration of municipal law...

When inequality in enjoyment of a human right exists between persons of different races, colours or national or ethnic origins under Australian law, s10 operates by enhancing the enjoyment of the human right by the disadvantaged persons to the extent necessary to eliminate the inequality. As the inequality with which s10 is concerned exists ‘by reason of’ a municipal law, the operation of the municipal law is nullified by s10 to the extent necessary to eliminate the inequality.⁸⁵

The Justices went on to consider whether the Queensland Coast Islands Declaratory Act 1985 (Qld) was an act which prevented the Meriam people from enjoying the human right to own and inherit property, free from arbitrary deprivation, to the same extent as other members of the community. They held that:

⁸¹ Pritchard, S., ‘Native title from the perspective of international standards’, *Australian Yearbook of International Law*, 1998, Forthcoming, p9.

⁸² As noted earlier in this chapter, the principles in the UDHR can be argued to have reached the status of customary international law. Note also that Brennan, Toohey and Gaudron JJ in *Mabo (No.1)* at p216, stated that ‘arbitrarily’ means not only ‘illegally’ but also ‘unjustly’.

⁸³ Committee on the Elimination of Racial Discrimination, General Recommendation XXIII (51) concerning Indigenous peoples, CERD/C/51/Misc.13/Rev.4 (1997), para 5.

⁸⁴ (1988) 166 CLR 186 (‘*Mabo No.1*’).

⁸⁵ *ibid.*, per Brennan, Toohey and Gaudron JJ, pp216–17; see also Deane J, pp229–230.

By extinguishing the traditional legal rights characteristically vested in the Meriam people, the 1985 Act abrogated the immunity of the Meriam people from arbitrary deprivation of their legal rights in and over the Murray Islands. The Act thus impaired their human rights while leaving unimpaired the corresponding human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Meriam people...the 1985 Act has the effect of precluding the Miriam people from enjoying some, if not all, of their legal rights in and over Murray Island while leaving all other persons unaffected in the enjoyment of their legal rights...Accordingly, the Miriam people enjoy their human right of the ownership and inheritance of property to a 'more limited' extent than others who enjoy the same human right.⁸⁶

Accordingly, the Queensland Act was inconsistent with the protection afforded by section 10(1) of the RDA, which:

clothes the holders of traditional native title.. with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community.⁸⁷

By virtue of section 109 of the Constitution, the RDA prevailed over and nullified the operation of the Queensland Coast Islands Declaratory Act.

The international recognition of human rights to property was revisited by the High Court in *Western Australia v Commonwealth*. As discussed above, that case concerned the validity of the Lands (Titles and Traditional Usage) Act 1993 (WA). The High Court affirmed the reasoning of its earlier decision in *Mabo (No.1)*, holding that where:

under the general law, the Indigenous 'persons of a particular race' uniquely have a right to own or to inherit property within Australia arising from Indigenous law and custom but the security of enjoyment of that property is more limited than the security enjoyed by others who have a right to own or to inherit other property, the persons of the particular race are given, by s.10(1)(of the RDA), security in the enjoyment of their property 'to the same extent' as persons generally have security in the enjoyment of their property... Security in the right to own property carries immunity from arbitrary deprivation of the property...⁸⁸

As the effect of the Western Australian act was to prevent native titleholders from enjoying their human rights in relation to land to the same extent as people of other races, the legislation was in conflict with the RDA. It was also wholly inconsistent with the NTA and therefore invalid in its entirety.

Property rights and the native title amendments

The reasoning of the High Court in *Mabo (No.1)* and *WA v Cth* can be directly applied to assess the compliance of the native title amendments with Australia's obligations under Article 5 of CERD. Where the amendments do not meet the standards elucidated in those judgments they will breach section 10 of the RDA and accordingly, Article 5 of CERD.

Those amendments that authorise the States and Territories to extinguish native title, in particular the validation and confirmation provisions, were described earlier. Clearly, each of those sets of provisions do not provide native titleholders with equality before the law in the exercise of the human rights to own and inherit property.

The validation provisions favour non-Indigenous interests in land over those of native titleholders based on the dubious justification that Governments had acted in accordance with the assumption (proven wrong in *Wik*) that native title had been extinguished by pastoral leases. The example of validation in

⁸⁶ *ibid.*, pp217–18.

⁸⁷ *ibid.*, p218.

⁸⁸ *Western Australia v Commonwealth*, per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, p437.

Western Australia highlighted the reality that the validation regime goes far beyond the scope of that justification.

The example of the Miriuwung and Gajerrong case demonstrated that the confirmation provisions go beyond confirming the operation of the common law and indeed extinguish native title. Again, these provisions favour the interests, often historic and short-term in nature, of non-Indigenous people over those of Indigenous people. They do not satisfy the reasoning of either *Mabo (No.1)* or *WA v Cth*.

The registration test

The registration test introduced in the amended NTA infringes upon the property rights of native titleholders.

The registration of claimed native title rights and interests by the Native Title Registrar allows a native title claimant to access the right to negotiate and other procedural rights under the NTA. The original NTA provided that in order to be registered, a claim had to meet an acceptance test. The relevant provisions of the NTA were interpreted by the High Court in such a way that there was effectively no barrier to registration. Claimants were able to be registered, and accordingly able to access these rights, provided the claim was not frivolous or vexatious, or could not prima facie be made out.⁸⁹

There was agreement among all interest groups that there was a need for a higher threshold to be established for registration of a claim. This was agreed in order to ensure an efficient and equitable process. The amended NTA introduced a registration test that establishes a higher threshold. This test is to be applied retrospectively to all claims that have been lodged since the inception of the NTA.

In the amended NTA a claimant application must not be accepted, and accordingly must not be registered by the Native Title Registrar, unless it meets the requirements of s190B and s190C of the NTA. The requirements of the registration test include, among other things, that the Registrar be satisfied that:

- the factual basis on which it is asserted that the native title rights claimed exist is sufficient to support the assertions that the claimant group have, and the predecessors of the group had, an association with the area; that there exist traditional laws and customs acknowledged and observed by the group; and that the group have continued to hold native title in accordance with those traditional laws and customs;⁹⁰
- on the face of it, the claimants can establish at least some of the native title rights and interests claimed in the application.⁹¹ Note, however, that section 181(1)(g) of the Act provides that if the claim is accepted for registration, the Registrar must only enter those claimed native title rights and interests that have been established. The right to negotiate and other provisions will be limited to those rights that have passed the prima facie test and have been registered;⁹²
- at least one of the claimants currently has, or previously had, a traditional physical connection with any part of the claimed land or waters.⁹³ There is an exception to this requirement, which allows a claimant to apply to the Federal Court for an order that the Registrar accept the claim for registration, where 'at some time in his or her lifetime, at least one parent of one member of the native title claim group had a traditional physical connection with any part of the land or

⁸⁹ See the *Waanyi* case, *op.cit.* This case and the registration test are discussed further in chapter 3.

⁹⁰ NTA, s190B(5).

⁹¹ NTA, s190B(6).

⁹² See for example NTA, s31(2), s39(1).

⁹³ NTA, s190B(7)(a).

waters and would reasonably have been expected to have maintained that connection but for things done' by the Crown, a statutory authority of the Crown, or a leaseholder;⁹⁴ and

- the application must not disclose that the native title rights and interests claimed have been extinguished, including in accordance with the validation or confirmation provisions.⁹⁵

Where registration of a claim does not meet these conditions and is refused, the claim itself remains on foot. A failure to be registered does not prevent a claimant from having the native title rights and interests claimed ultimately being determined before the Federal Court. However, it does prevent the claimant from accessing the right to negotiate provisions, and most other provisions of the future acts regime. Consequently, it leaves the claimed native title rights and interests vulnerable to impairment or extinguishment in the period before a court may determine whether native title exists.⁹⁶

The registration test sets the threshold to be met by claimants at an unjustifiably high level. It may operate to prevent some claimants from accessing procedures under the NTA designed to protect native title prior to formal determinations of native title. This lack of protection may further operate to deny native title claimants the rights to own and inherit property.

In particular, the registration test may operate as a denial of property rights in the following ways:

- The requirement for claimants to meet a current physical connection test in order to be registered does not accord with the common law test for recognition of native title. In *Mabo (No.2)* the High Court held that claimants need to demonstrate a spiritual or physical connection to the land,⁹⁷ such a connection being proven according to traditional laws and customs. The requirement in s190B(7) of the NTA of a physical connection to the land may operate to disentitle native title claimants, who can demonstrate a continuing spiritual connection to the land, from having their legitimate rights, recognisable at common law, from being protected by the procedures of the NTA. This renders those native title rights more vulnerable to impairment or destruction by proposed grants by governments or activities by third parties under the future acts regime.
- The requirements to be met by a claimant for registration of a claimed interest are onerous. The requirements under s190B(5) and s190B(6) of the NTA, requiring that the claimant application adequately address the criteria that would establish the factual basis of the claim and the requirement to demonstrate proof of each claimed right, are particularly burdensome. The level of detail required is a concern for a number of reasons.

Where a future act is proposed, and a notification period is triggered, claimants must meet the requirements of the registration test within a strictly limited time period. Where a claimant is unable to meet the requirements for registration, within this limited period, they may be denied the protection of the Act. The registration test can thus operate as a fetter that denies native titleholders security of enjoyment of their title.

This is doubly so in circumstances where a claimant is required, within that limited time frame, to obtain a court order for registration of their interests (where they have been locked off the land or forcibly removed from their family (s190D(4))).

- These requirements also do not take account of Indigenous decision-making structures, which may be extensive and time consuming.

⁹⁴ NTA, s190D(4). This is the so-called 'locked gate exception'.

⁹⁵ NTA, s190B(9)(c).

⁹⁶ This is subject to the availability of injunctive relief: see the High Court's consideration of this issue in *Fejo v Northern Territory* (1998) 156 ALR 721.

⁹⁷ This was implicit in the statement by Brennan J that a traditional connection with or occupation of the land was required: *Mabo (No.2)* per Brennan J, p58.

iii) Rights of minorities or cultural rights

The third set of internationally recognised human rights relevant to the native title debate are generally referred to as minority group or cultural rights. These rights recognise and protect the distinct cultural identity of minority groups. The general proposition that such rights are consistent with the notion of equality, as it is understood at international law, was discussed earlier in this chapter.

The principal guarantee of minority group or cultural rights is Article 27 of the ICCPR, which provides that:

Members in ethnic, religious or linguistic minorities shall not be denied the right, in community with the members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.⁹⁸

There has been significant resistance from Indigenous groups to their rights being equated with the rights of cultural minorities within a particular State.⁹⁹ Indigenous people maintain that, as the First Peoples of a territory, with a specific history and relationship to that territory including one of forced colonisation, they have distinct rights in the context of cultural, social, economic and political protection.¹⁰⁰

However, despite this concern the Human Rights Committee has interpreted Article 27 in a way that protects the cultural rights of Indigenous peoples. Minority group rights include Indigenous minority groups, but do not exhaust the rights of Indigenous peoples.

The Human Rights Committee has stated that the cultural rights guaranteed by Article 27 are rights that are:

conferred on individuals belonging to minority groups... distinct from, and additional to, all other rights which, as individuals in common with everyone else, they are already entitled...¹⁰¹

In relation to Indigenous peoples, the Committee continued that:

one or other aspect of the rights of individuals protected under that Article—for example, to enjoy a particular culture—may consist in a way of life which is closely associated with territory and the use of resources. This may be particularly true of members of Indigenous communities constituting a minority...

[T]he Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples. That right may

⁹⁸ Note that Article 5(e)(vi) of CERD guarantees equality before the law in relation to ‘economic, social and cultural rights, in particular...the right to equal participation in cultural activities.’ Other relevant provisions in international instruments to which Australia is a signatory include Articles 3, 15 ICESCR; Article 30 Convention on the Rights of the Child; Articles 2, 4 of the UNESCO Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities; Principle 22 of the Rio Declaration on the Environment and Development; and Chapter 26 of the United Nations Agenda 21. See further Dodson, M., ‘Human Rights and the Extinguishment of Native Title?’ (1996) 2 Australian Aboriginal Studies 12.

⁹⁹ Pritchard, S., ‘Native title from the perspective of international standards’, *op. cit.*, pp25–26.

¹⁰⁰ Recent moves acknowledging that Indigenous people have such distinct rights, such as the developing notion of internal self-determination, and instruments such as the Draft Declaration on the Rights of Indigenous Peoples and ILO Convention 169, are discussed further below.

¹⁰¹ Human Rights Committee, General Comment 23, Article 27 (1994) para 1, in *Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies UN Doc HR/GEN/1/Rev.1*, p40. See also Nielson, J., and Martin, G., ‘Indigenous Australian peoples and human rights’ in Kinley, D., (Ed.) *Human Rights in Australian Law*, Federation Press, Sydney, 1998, p103.

include such traditional activities as fishing or hunting and the rights to live in reserves protected by law.¹⁰²

In order to ensure that such rights are able to be enjoyed, the Committee makes clear that not only are negative forms of discrimination prohibited, but that a substantive approach to non-discrimination may be required through the introduction of positive measures of protection:

positive measures of protection ... not only against the acts of the State party itself, whether through legislation, judicial or administrative authorities, but also against the acts of the other persons within the State party.¹⁰³

Finally, the Committee makes a clear link between recognition of these rights, the requirement of positive legal measures and a requirement of the decision-making participation of the minority group:

The enjoyment of these rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.¹⁰⁴

Several cases, alleging breaches of Article 27, have been considered by the Human Rights Committee under the First Optional Protocol to the ICCPR.¹⁰⁵ The Committee has established the following principles about Article 27.

- For it to be valid and not breach Article 27, a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole.¹⁰⁶
- The right of a member of a minority group to enjoy their own culture must be considered within the relevant socio-economic context. Economic activities may come within the ambit of Article 27 where they are an essential element of the culture of the group.¹⁰⁷
- In considering whether the economic activities of the minority group are being interfered with in such a way as to threaten the way of life and culture of the community, the Committee will take into account historical inequities in treatment.¹⁰⁸
- The types of economic activities of the minority group that are relevant are not limited to activities that support a traditional means of livelihood. They may be adapted to modern practices.¹⁰⁹
- A countervailing consideration will be the role of the State in encouraging development and economic activity.¹¹⁰ In doing so, the State is under an obligation to ensure that such activity has, at most, only a 'limited impact on the way of life of persons belonging to a minority.'¹¹¹

¹⁰² *ibid.*, para 3.2 and para 7.

¹⁰³ *ibid.*, para 6.1.

¹⁰⁴ *ibid.*, para 7.

¹⁰⁵ The First Optional Protocol, which has been acceded to by Australia, allows people within nations to bring complaints before the Human Rights Committee alleging breaches of provisions of the ICCPR by the State.

¹⁰⁶ *Kitok v Sweden*, Communication No. 197/1985, UN Doc CCPR/C/33/D/197/1985 (1988), para 9.2.

¹⁰⁷ *ibid.*, para 9.3.

¹⁰⁸ *Chief Ominayak and the Lubicon Lake Cree Band v Canada*. Communication No 167/1984, Report of the Human Rights Committee, UN Doc A/45/40 (1990).

¹⁰⁹ *Lansman v Finland* No. 1 (24 March 1994) CCPR/C/49/D/511/1992.

¹¹⁰ *ibid.*, para 9.4.

¹¹¹ *ibid.*

Such a ‘limited impact’ would not necessarily amount to a ‘denial’ of the rights under Article 27.¹¹²

- The Committee will consider whether the State has weighed up the interests of the complainant with the benefits of the proposed economic activity. Large scale activities, particularly involving the exploitation of natural resources, could constitute a violation of Article 27.¹¹³
- In assessing activities in the light of Article 27, State parties must take into account the cumulative impact of past and current activities on the minority group in question. Whereas ‘different activities in themselves may not constitute a violation of this Article, such activities, taken together, may erode the rights of (a group) to enjoy their own culture.’¹¹⁴
- The Committee will consider whether the State has undertaken measures to ensure the ‘effective participation’ of members of minority communities in decisions that affect them.¹¹⁵

The CERD Committee recently highlighted the connection between ensuring compliance with the non-discrimination principle and ensuring the survival of the cultural identity of Indigenous peoples:

In many regions of the world Indigenous peoples have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardised.¹¹⁶

The Committee called on State Parties to take all appropriate means to combat and eliminate discrimination against Indigenous people, including by recognising and protecting their cultural identity:

The Committee calls in particular upon State parties to:

- a) recognize and respect Indigenous distinct culture, history, language and way of life as an enrichment of the State’s cultural identity and to promote its preservation;
- b) ensure that members of Indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on Indigenous identity;
- c) provide Indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- d) ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent;
- e) ensure that Indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs, to preserve and to practice their languages.¹¹⁷

The native title amendments and the recognition of cultural or minority group rights

Committing to a formal standard of equality creates difficulties for Australia in meeting its international obligations to protect cultural or minority group rights under Article 27 of the ICCPR. The international

¹¹² In this case the Committee found that the economic activity proposed was of limited impact and did not operate as a denial of the cultural rights of the Sami.

¹¹³ *Lansman v Finland* No. 2, (25 November 1996) CCPR/C/58/D/671/1995, paras 10.5, 10.7.

¹¹⁴ *ibid.*, para 10.7.

¹¹⁵ *ibid.*

¹¹⁶ Committee on the Elimination of Racial Discrimination, General Recommendation XXIII (51) concerning Indigenous Peoples, *op.cit.*, para 3.

¹¹⁷ *ibid.*, para 4.

obligation under Article 27 to protect cultural rights arises from the recognition of two factors. First, that the cultures of Indigenous and minority groups contain relevant differences, as discussed by Judge Tanaka in the South West Africa case.¹¹⁸ Second, that because of the minority status of the group, these differences are vulnerable to being impaired or denied, and accordingly require protection. This vulnerability would also justify 'positive measures of protection' by the State.

The amended NTA has overlooked these factors. Instead of providing such recognition and protection, the amendments provide inadequate protection of the cultural rights of native titleholders.

Chapter three of this report evaluates the amended right to negotiate provisions against this criterion. It notes that the original right to negotiate provisions operated as a protective shield which prevented the impairment or denial of the exercise of the cultural rights of Indigenous Australians. It also noted that the right to negotiate itself constitutes a cultural right as defined in the international arena.

By removing the right to negotiate in many instances and replacing it only with rights of consultation and objection in others, the amended NTA does not adequately protect the cultural rights of native titleholders.

Similarly, the main features of the validation and confirmation provisions of the amended NTA prioritise other proprietary interests ahead of native title interests. In relation to the validation of intermediate period acts, this prioritisation was apparently deemed necessary because governments were not aware of the possible continuance of native title over pastoral land. Consequently, it was the very failure of governments to recognise and provide appropriate protection to native title in certain circumstances that has been used to justify lower priority being given to native title interests.

Native title is derived from, and exercised in accordance with, the traditional laws and customs of the claimants. Native title is, therefore, in essence a cultural right.¹¹⁹ The widespread extinguishment of native title provided for in these provisions constitutes a clear and pervasive denial of cultural rights as understood at international law under both Article 27 of the ICCPR and Article 5 of CERD.

Future acts and the recognition of minority group and cultural rights

In addition to ordering the relationship between native title and previously granted interests, the NTA recognises that there is a present and future dimension to native title. It seeks to determine, through the future acts regime, how native title and other interests in land will interact in the future.

The amendments project the denial of cultural rights of native titleholders into the future in relation to specific interests by prioritising those interests ahead of native title. This is so in relation to the following interests:

- acts permitting primary production on non-exclusive pastoral or agricultural leases (s24GB);
- acts permitting off-farming activities directly connected to primary production activities (s24GD);
- grants of rights to third parties on non-exclusive pastoral or agricultural leases (s24GE);
- management of water and airspace (s24HA);
- acts involving reservations, leases etc (s24JA);

¹¹⁸ See pages 31 and 36 above.

¹¹⁹ The link between the traditional lands of Indigenous people and cultural rights that are protected under Article 27 is also made clear by the Human Rights Committee in its General Comment on Article 27. Human Rights Committee, General Comment 23, Article 27, op.cit.

- acts involving facilities for services to the public (s24KA); and
- acts that pass the freehold test (s24MD).¹²⁰

In relation to each of these interests, native titleholders have a right to be notified of an activity, and an opportunity to have their comments on the effect of the activity considered. That activity may still be done regardless of the existence of native title and consequently, where native title rights are affected, just terms compensation is available.¹²¹

These activities have therefore been given higher priority than native title interests. There is, for example, no right to negotiate or right for an objection to the proposed doing of an act to be heard and decided by an independent body.

This higher priority can be demonstrated by looking at those provisions allowing holders of non-exclusive pastoral or agricultural leases to do future acts at ‘primary production’ levels.¹²² ‘Primary production’ is defined to include agricultural activities (such as cultivating the land, and maintaining, breeding and agisting animals), forestry, aquacultural or horticultural activities, the taking or catching of fish or shellfish, de-stocking of land or leaving fallow, and farmstay tourism.¹²³

Section 24GB provides that leaseholders may do future acts at primary production levels regardless of the effect this may have on any continuing native title rights and interests, so long as the future act was authorised by legislation at some time before 31 March 1998.¹²⁴ Section 24GB(5) provides that ‘if this section applies to a future act, the act is valid.’¹²⁵

The requirement under s24GB that there be State legislation in place before 31 March 1998 authorising activities to be done at primary production levels is significant. This date bears no relationship to that of the handing down of the Wik decision. It is not a date which seeks to clarify any problems that may have arisen from the failure of states to recognise the possible co-existence of native title with other interests prior to 23 December 1996. Instead, it allows amendments to Land Administration Act 1997 (WA) introduced in March 1998, authorising leaseholders to conduct activities at primary production levels where such activities could not previously be done, to come within the federal native title amendments. Consequently, the Western Australian legislation is authorised by the amended NTA and overrides the protection of the RDA, whose standards it would breach.

Primary production activities are far more intensive uses of the land than pastoral activities such as grazing. They each have the ability to transform the nature of the lease and in accordance with the Wik decision, to reduce the possible extent of co-existence with native title.

These provisions constitute a clear favouring of the interests of pastoralists over those of native titleholders. They breach internationally protected property and cultural rights.

¹²⁰ Under the original NTA an act was ‘permissible’ if it was an act that could be done to ordinary title (ie, it passed the freehold test), related to an offshore place or was a low impact future act: see section 235 of the original NTA. Where the proposed act did not fall within these exceptions the act could only be done by compulsorily acquiring the native title. The compulsory acquisition of native title then activated the right to negotiate provisions.

¹²¹ The non-extinguishment principle applies in this circumstance.

¹²² NTA, Part 2, Subdivision G. For example, NTA, s24GB, s24GD, s24GE.

¹²³ NTA, s24GA, s24GB(2).

¹²⁴ Section 24GB(4) of the NTA provides two exceptions to this—(a) where the lease is for an area in excess of 5000 hectares and the future act would convert the use of the majority of the area from pastoral purposes; and (b) where the act would convert the lease into a right of exclusive possession.

¹²⁵ This provision is repeated in relation to each of the acts listed above. See for example, s24GD(2) in relation to off-farm activities; s24GE(2) in relation to grants to third parties over non-exclusive agricultural or pastoral leases; and s24HA(3) for acts in relation to airspace or water.

Provided the Commonwealth Parliament has the constitutional power to legislate, this preferencing of non-native title interests is valid in domestic law. This is despite the existence of section 7(2)(a) of the amended NTA, which states that the RDA applies to the performance of functions and the exercise of powers conferred by or authorised by the NTA.

The authorisation of acts at primary production levels constitutes an exercise of a power within the meaning of section 7(2)(a) of the NTA. However, section 7(2)(a) is ineffective in protecting native titleholders from discriminatory treatment due to section 24GB(5) of the amended NTA. This section provides that ‘if this section applies to a future act, the act is valid.’ As outlined above, the rules of statutory interpretation provide that a later legislative enactment of the same Parliament impliedly repeals an earlier enactment to the extent of any inconsistency. Accordingly, section 24GB(5) overrides the protection of the RDA and permits the favouring of non-native title interests over those of native titleholders.

iv) Participation rights

The fourth set of international human rights standards relevant to native title are those rights associated with the participation of Indigenous groups in decisions that affect them. These are enshrined in:

- Article 1 of the ICCPR; and
- Article 1 of the ICESCR.¹²⁶

The broad principle underlying these rights is that of self-determination. Article 1 of the ICCPR and ICESCR states:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources...In no case may a people be deprived of its own means of subsistence.
3. The State parties to the present Covenant... shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the Charter of the United Nations.

The right of self-determination had its origins in the process of decolonisation. It has generally been applied to effect a transfer of power from colonial powers who have existed as a minority of a population to a local majority.¹²⁷ However, the circumstance where Indigenous people constitute a minority within an established colonial country has proven far more challenging to traditional notions of democratic governance and political participation. As James Anaya has noted:

Indigenous peoples of today typically share much of the same history of colonialism suffered by those still living in this century under formal colonial structures and targeted for decolonisation procedures. But despite the contemporary absence of colonial structures in the classical form, Indigenous peoples have continued to suffer impediments or threats to their ability to live or develop freely as distinct groups...The historical violations of Indigenous peoples’ self-determination, together with contemporary inequities against Indigenous peoples, still cast a dark shadow on the legitimacy of state authority, regardless of effective control [of the State] or the law.¹²⁸

The right to self-determination claimed by Indigenous people in response to their colonial past is not one directed towards the dismantling of the State itself but rather towards the development within the State

¹²⁶ See also Article 1 of the Charter of the United Nations and the Declaration on the Principles of International Law Concerning Friendly Relations and Co-Operation Among States, United Nations General Assembly 2625 (XXV), 24 October 1970, ‘The principle of equal rights and self-determination of peoples’.

¹²⁷ For an overview of the general legal principles of self-determination see Steiner, H., and Alston, P., *International Human Rights In Context: Law, Politics, Morality*, Clarendon Press, Oxford, 1996, pp972–1020.

¹²⁸ Anaya, S. J., *Indigenous Peoples in International Law*, Oxford University Press, New York, 1996, p86.

of economic, social and cultural structures controlled and managed by Indigenous people. In this context human rights institutions have begun defining a more nuanced and sophisticated concept of self-determination, a concept which Professor Erica Irene-Daes calls a form of ‘belated state-building’:

through which Indigenous peoples are able to join with all the other peoples that make up the State on mutually agreed upon and just terms, after many years of isolation and exclusion. This process does not require the assimilation of individuals...but the recognition and incorporation of distinct peoples in the fabric of the State.¹²⁹

In its 1996 General Recommendation on the right of self-determination, the CERD Committee affirmed these different approaches to decolonisation. It stated that the right of self-determination has an external and an internal aspect.¹³⁰

On the internal aspect to self-determination, the CERD Committee stated, in accordance with Article 2 of CERD (concerning a general prohibition on non-discrimination), that:

governments should be sensitive towards the rights of persons of ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth, and to play their part in the government of the country...Government should consider, within their respective constitutional frameworks, vesting persons of ethnic or linguistic groups...where appropriate, with the right to engage in such activities which are particularly relevant to the preservation of the identity of such persons or groups.¹³¹

Significantly, this focus on internal self-determination is not limited to the international arena but mirrors a range of ‘state-building’ developments throughout the world concerning Indigenous peoples. For example, in New Zealand seats in Parliament are reserved for Indigenous peoples. In Canada low population electorates have been devised in specific areas, facilitating the election of Indigenous representatives. In Norway, a Sami Parliament was introduced in 1987 and Sami rights have been constitutionally entrenched since 1988. Sweden has also passed legislation establishing a Sami Parliament. Similar principles of recognition of the right of Indigenous peoples to effective political participation are also present in Australia, through institutions such as the Aboriginal and Torres Strait Islander Commission (ATSIC).

The CERD Committee further strengthened this notion of political participation in its General Comment on Indigenous peoples. Noting that for Indigenous people, culture, historical identity and the right to their lands and resources have been, and remain, jeopardised through histories of colonisation and exploitation, the Committee has called on States parties to (among other things):

ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.¹³²

As noted previously, the Human Rights Committee also elaborated on this issue of political participation in its General Comment on Article 27 of the ICCPR in relation to minority group or cultural rights. In the context of discussing the need to protect the particular cultural relationship of minority groups to the use of land resources, particularly in the case of Indigenous peoples, the Committee stated that the enjoyment of culture may require:

¹²⁹ Daes, E., ‘Some Considerations on the Rights of Indigenous Peoples to Self-Determination’, (1993) 3 *Transnational Law and Contemporary Problems* 1, p9.

¹³⁰ Committee on the Elimination of Racial Discrimination, General Recommendation XXI on self determination, (1996), U.N. Doc. CERD/48/Misc.7/Rev.3, paras 4–5.

¹³¹ *ibid.*, para 10.

¹³² Committee on the Elimination of Racial Discrimination General Recommendation XXIII (51) concerning Indigenous Peoples, *op. cit.*, para 5.

measures to ensure the effective participation of members of minority communities in decisions which affect them.¹³³

The native title amendments and participation rights

The principle of self-determination requires that States also respect other human rights standards. This includes adherence to the following minimum standards:¹³⁴

- The provision of equality before the law;
- non-discrimination, or the absence of laws, policies or practices that invidiously discriminate against individuals or groups;
- the protection of minority cultural rights; and
- the protection of property rights, including Indigenous rights to land and resources.

How the native title amendments violate these principles has been outlined above. To recall, extinguishing native title by validating and confirming provisions violates the non-discrimination principle and does not provide equality before the law. The registration test and those provisions that ensure the validity of certain future acts, regardless of their impact on native title rights and interests, leave native title vulnerable to impairment or destruction and fail to give native title the protection which is required under Australia's international obligations. These amendments to the NTA prevent Indigenous people from exercising their right to participate in decisions which affect them economically, socially and culturally.

By contrast, the amendments also include extensive provisions for the making of Indigenous Land Use Agreements (ILUAs). The ILUA provisions of the amended NTA remedy a defect in the original NTA.

Under the original NTA, agreements could be lodged in accordance with section 21.¹³⁵ This provision was inadequate, however, as it was not capable of providing effective legal support to parties to an agreement.¹³⁶ As a result, no agreements were lodged under section 21.

Despite the ineffectiveness of this section, there have been many positive outcomes achieved through agreements over the past eighteen months. These agreements could simply not be supported by section 21. Chapter four of this report considers the agreement making process in detail. It argues that this process has the potential to contribute to the achievement of self-determination for Indigenous communities.

The ILUA provisions of the amended NTA provide substantial support to the agreement making process. They are consistent with the principle of self-determination. Chapter four also notes, however, that the focus of the amendments on the extinguishment and impairment of native title may well overwhelm the benefits of the ILUA provisions. The amendments overall provide less scope for agreement making.

¹³³ Human Rights Committee General Comment 23, Article 27, op.cit, para 7.

¹³⁴ See Anaya, S. J., op.cit, ch 4.

¹³⁵ The reference to agreements here is to what are generally termed 'regional agreements.' Agreements can also be reached through the right to negotiate provisions, claimant or non-claimant applications (by agreed determinations), or outside the terms of the NTA. Types of agreements that have been reached to date are discussed in chapter four of this report.

¹³⁶ For example, section 21 did not provide a mechanism to ensure that all native title claimants in the area were identified and involved in the agreement process, and consequently bound by any agreement that was reached. Accordingly, non-Indigenous parties could find that despite reaching an agreement over a particular area, further native title claims may arise over that land in the future. See further chapter four of this report.

An example of the reduced scope for agreement making is the reduction and, in significant areas, the removal of the right to negotiate. The right to negotiate provisions set out in the original NTA gave native title parties an opportunity to negotiate with developers at the outset of a mining project about issues of concern to their community. Negotiations generally included issues such as employment, training, contractual arrangements for ancillary work, local investment, social development programs, equity participation and infrastructure development. In short, the right to negotiate provisions in the original NTA gave native title parties an opportunity to participate in the management of their land.

Chapter three outlines in detail the extent to which the amendments to the NTA reduce and remove the right to negotiate in significant areas. The right to negotiate is replaced by a right to be consulted on ways of minimising the impact of the proposed development on native title interests. Such amendments diminish significantly the extent to which native title can be used as a vehicle to facilitate the development of Aboriginal communities. It limits native title rights to the practice of traditions and customs as they existed before colonisation.

In limiting the negotiation process and thus the participation of native title parties in decisions about the use of their land, the amendments treat native title rights as no more than historic rights, isolated from the day-to-day lives of the communities that observe and integrate their traditions into contemporary life. In this way, native title is quarantined from the broader principle of self-determination.

Not only do the amendments themselves violate the right of Indigenous people to participate in decisions which affect them, but the process by which the amendments were agreed upon reflects an indifference to such rights. The most striking example of this was the exclusion of Indigenous representatives from the negotiating table when, in late June and early July 1998 Senator Harradine and the Prime Minister agreed on outcomes which ensured the passage of the Native Title Amendment Act 1998 (Cth).

One of the major differences of opinion between Senator Harradine and the government before this agreement was whether native title parties would have a right to negotiate where their claim was over pastoral leasehold land. Ironically, the very right of Indigenous people to participate in the management of their land through the right to negotiate provisions was negotiated and agreed upon in July 1998 without the direct participation and involvement of Indigenous representatives. The agreement, not surprisingly, allowed the States to introduce legislation that, for native title claims over pastoral leasehold land, substituted a right of consultation for the right to negotiate provisions. The right to negotiate under the original NTA represented the minimum acceptable standards for negotiating with native title claimants or holders about activities that may impact upon their native title rights. By allowing states to replace the right to negotiate with a right of consultation and objection the scope of these minimum standards is reduced and the titles of claimants are vulnerable to impairment.

The National Indigenous Working Group's (NIWG) response to its exclusion from the negotiation process was to issue a statement confirming that it had not been consulted in relation to the contents of the Bill and that they did not consent to its passage into law.¹³⁷

Emerging international standards relating to Indigenous peoples

This chapter has outlined how international human rights standards apply to Indigenous people, individually and communally. They are significant in protecting the unique status of Indigenous people in Australia. These standards, however, were developed at a time when international recognition of the need to protect the rights of Indigenous people was in its infancy. Given the continuing disadvantage of Indigenous people, the international community has begun over the past two decades to develop from these standards, a series of further standards which are specifically targeted to protect the position of Indigenous peoples across the globe.

¹³⁷ See Appendix 1.

These instruments include the International Labour Organisation's Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries,¹³⁸ and the United Nations Draft Declaration on the Rights of Indigenous Peoples.¹³⁹

Australia has not ratified ILO Convention 169 and the Draft Declaration has not yet reached the stage where the General Assembly of the United Nations may consider it. Consequently, these documents are not binding on Australia.

However, both documents represent 'the core elements of a new generation of internationally operative norms',¹⁴⁰ and ILO Convention 169 may represent an emergent minimum body of customary international law on Indigenous peoples.¹⁴¹ Accordingly, these documents represent an emerging international approach to what constitutes appropriate minimum behaviour in relation to Indigenous people. It is appropriate, therefore, to evaluate the native title amendments against the standards in these documents.

Given the international community's recognition of the need to acknowledge the application of the human rights regime to Indigenous peoples, the documents which have resulted are necessarily more specific and extensive in their scope and protection. In summary, ILO Convention 169 and the Draft Declaration include the following relevant protection.

A re-affirmation of the application of the principle of self-determination to Indigenous peoples

The conceptual underpinnings of the principle of self-determination pervade the understanding of Indigenous rights in both the Draft Declaration and ILO Convention 169.

ILO Convention 169 requires that:

- governments develop, 'with the participation of the peoples concerned, coordinated and systematic action to protect the rights of Indigenous peoples and to guarantee respect for their integrity. Such action shall include measures for...promoting the full realisation of the social, economic and cultural rights of (Indigenous) peoples with respect for their social and cultural identity, their customs and traditions and their institutions';¹⁴²
- in applying the provisions of the Convention, 'Governments shall consult the peoples concerned,...whenever consideration is being given to legislative or administrative measures which affect them directly';¹⁴³ and
- 'the peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual wellbeing and the lands they occupy or otherwise use; and to exercise control, to the extent possible, over their own economic, social and cultural development.'¹⁴⁴

¹³⁸ Adopted by the ILO on 27 June 1989, and entered into force 5 September 1991 (Herein ILO Convention 169). The Convention is reproduced at (1996) 1 Australian Indigenous Law Reporter 472.

¹³⁹ UN Doc. E/CN.4/Sub.2/1994/2/Add.1, 20 April 1994 (Herein the Draft Declaration). The Draft Declaration was formulated by the Working Group on Indigenous Populations and is accountable to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities which is established by the UN Commission on Human Rights. The draft declaration was adopted in 1994 by the Sub-Commission. It is extracted at (1996) 1 Australian Indigenous Law Reporter 145. See also Nettheim, G., Governance Structures for Indigenous Australians On and Off Native Title Lands. Discussion Paper 2: Introduction, International Law Standards, University of New South Wales, Sydney, 1998.

¹⁴⁰ Pritchard, S., 'Native title from the perspective of international standards', op.cit.

¹⁴¹ *ibid.*

¹⁴² ILO Convention 169, Article 2.

¹⁴³ ILO Convention 169, Article 6.

¹⁴⁴ ILO Convention 169, Article 7.

The Draft Declaration sets out the right of self-determination in the following terms:

- the right of self-determination, in terms identical to Article 1 of the ICCPR and the ICESCR;¹⁴⁵
- the right ‘to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, social and cultural life of the State’;¹⁴⁶
- the ‘collective and individual right to maintain and develop their distinct identities and characteristics’;¹⁴⁷
- the right ‘to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions’;¹⁴⁸
- the right ‘to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them. States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures’;¹⁴⁹
- the right ‘to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities’;¹⁵⁰ and
- the right to ‘determine and develop priorities and strategies for exercising their right to development... and, as far as possible, to administer such programmes through their own institutions.’¹⁵¹

The Draft Declaration also includes more extensive provisions on self-determination that specifically guarantee Indigenous rights to participate in decisions about land management and resource use (discussed further below).

An affirmation of the importance of the social, cultural, religious and spiritual values and practices of Indigenous people

ILO Convention 169 provides that in applying the provisions of the Convention, ‘the social, cultural, religious and spiritual values and practices of (Indigenous) peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals. The integrity of the values, practices and institutions of Indigenous peoples shall be respected’.¹⁵²

¹⁴⁵ Draft Declaration on the Rights of Indigenous People, Article 3.

¹⁴⁶ Draft Declaration on the Rights of Indigenous People, Article 4.

¹⁴⁷ Draft Declaration on the Rights of Indigenous People, Article 8.

¹⁴⁸ Draft Declaration on the Rights of Indigenous People, Article 19.

¹⁴⁹ Draft Declaration on the Rights of Indigenous People, Article 20.

¹⁵⁰ Draft Declaration on the Rights of Indigenous People, Article 21.

¹⁵¹ Draft Declaration on the Rights of Indigenous People, Article 23.

¹⁵² ILO Convention 169, Article 5.

The Draft Declaration promotes similar respect for the culture of Indigenous peoples. It provides rights to ‘practise and revitalise their cultural traditions and customs’¹⁵³ and to ‘manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies;...maintain, protect and have access in privacy to their religious and cultural sites.’¹⁵⁴

Rights to property

ILO Convention 169 explicitly links the recognition and protection of Indigenous culture with rights to land, including to co-existence over land. It provides that:

- ‘governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories...which they occupy or otherwise use, and in particular the collective aspects of this relationship’;¹⁵⁵ and
- ‘the rights of ownership and possession of (Indigenous) peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken...to safeguard the right of (Indigenous) peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities... Governments shall take steps as necessary to identify the lands which Indigenous peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.’¹⁵⁶

The Draft Declaration also acknowledges this link and provides that Indigenous people:

- ‘have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied and used, and to uphold their future responsibilities to future generations in this regard’;¹⁵⁷
- ‘have the right to own, develop, control and use the lands and territories...which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights’;¹⁵⁸ and
- ‘shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the Indigenous people concerned and after agreement on just and fair compensation.’¹⁵⁹

Rights to participate in land management and resources use

ILO Convention 169 provides that ‘the rights of Indigenous people to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of Indigenous people to participate in the use, management and conservation of these resources...In cases in which the State retains the ownership of mineral or sub-surface resources, Governments shall establish or maintain

¹⁵³ Draft Declaration on the Rights of Indigenous People, Article 12.

¹⁵⁴ Draft Declaration on the Rights of Indigenous People, Article 13.

¹⁵⁵ ILO Convention 169, Article 13.

¹⁵⁶ ILO Convention 169, Article 14.

¹⁵⁷ Draft Declaration on the Rights of Indigenous People, Article 25.

¹⁵⁸ Draft Declaration on the Rights of Indigenous People, Article 26.

¹⁵⁹ Draft Declaration on the Rights of Indigenous People, Article 10.

procedures through which they shall consult with Indigenous peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.’¹⁶⁰

The Draft Declaration seeks to provide Indigenous people with the following rights in relation to land and resource development:

- the right to ‘determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories or other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources’;¹⁶¹ and
- ‘as a specific form of exercising their right to self-determination, ..the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment...’¹⁶²

The native title amendments measured against emerging international standards

The Draft Declaration and ILO Convention 169 provide extensive recognition and protection of the rights of Indigenous peoples. These documents can be described as emerging standards of the international human rights regime. The Draft Declaration in particular represents an emerging set of international best practice standards. Australia, through many of the provisions of the amended NTA, has effectively repudiated these standards.

The key principles exemplified by the Draft Declaration and ILO Convention 169 are the right of self-determination and participation generally. The greatest failing of the native title amendments is their non-participatory nature. This is demonstrated most clearly by those provisions that prioritise other titles over native title (such as the validation and confirmation provisions, primary production upgrades and provisions which ensure the validity of certain future acts regardless of the existence of native title).

The overall effect of the amendments is that they conceive native title as separate and distinct from the broader principle of self-determination. As noted above in relation to the right to negotiate provisions, the amendments quarantine native title from the broader strategy of self-determination. They fail to recognise native title as a basis for Indigenous people to take full responsibility and control for the decisions that intimately affect their families and their children.

In contrast, Chapter four of this report discusses agreements that have been reached in the native title process, and demonstrates the capacity of native title to serve as a vehicle for self-determination. That chapter describes agreements that have been reached concerning issues of heritage protection, land and resource management, health, housing, education, employment, enterprise development opportunities and the development and delivery of culturally appropriate services meeting the specific needs and wishes of particular communities.

Importantly, in addition to the absence of participation in the substance of the native title amendments, there was also an absence of Indigenous participation in the formulation of the amendments. This lack

¹⁶⁰ ILO Convention 169, Article 15.

¹⁶¹ Draft Declaration on the Rights of Indigenous People, Article 30.

¹⁶² Draft Declaration on the Rights of Indigenous People, Article 31. See also the discussion in chapter four on the wide range of subject matters on which agreement has been reached in the native title process to date and its implications for the achievement of self-determination.

of political participation is considered in the introductory chapter of this report. Here it is sufficient to note the failure of the political process to yield any consensus supporting the amendments.

Political participation rights are clearly recognised in the Draft Declaration and ILO Convention 169. As outlined above, both documents uphold the right of Indigenous peoples to participate fully in devising legislative and administrative measures that affect them, and for the State to obtain the free and informed consent of Indigenous peoples before adopting such measures.¹⁶³ The Draft Declaration additionally provides the right to participate fully at all levels of decision-making in matters that affect Indigenous rights, lives and destinies, through representatives chosen by themselves.¹⁶⁴

These provisions constitute an explicit recognition of one aspect of the right of self-determination as it is emerging within the international human rights regime. The recognition of this component of the right of self-determination is not explicit under Australia's existing human rights obligations. It is, however, clearly contemplated as being a constitutive element of the right of self-determination. This is demonstrated by the CERD Committee's General Comment on Indigenous Peoples, which calls on State parties not to make decisions directly relating to the rights and interests of Indigenous people without their informed consent.¹⁶⁵

The native title amendments raise questions about Australia's compliance with international human rights standards. This has been noticed internationally, as demonstrated by the decision of the CERD Committee on 11 August 1998, in which they indicated their intention to examine the compatibility of the native title amendments with the provisions of CERD.

The CERD Committee introduced the 'early warning' procedure in 1993. The Committee examines the situation in States where it considers that there is particular cause for concern that a State is not acting in compliance with the provisions of CERD. Once a State is placed under the procedure, it remains indefinitely on the Committee's agenda and may receive attention at forthcoming sessions.¹⁶⁶

Australia provided its 9th periodic report under CERD in 1994. In assessing Australia's compliance with CERD, the CERD Committee considered the original NTA. The Australian delegation included Mr Michael Dodson, in his capacity as Aboriginal and Torres Strait Islander Social Justice Commissioner. He provided evidence to the Committee supporting the NTA as an example of an overall beneficial measure that had the consent of the Indigenous peoples of Australia.¹⁶⁷

The Committee's concluding comments on Australia's report praised the introduction of the NTA and the land fund legislation, and highly commended the inclusion of the Social Justice Commissioner within the delegation.¹⁶⁸ Australia will shortly be submitting a combined tenth, eleventh and twelfth report under the Convention.¹⁶⁹

The native title amendments discriminate against native title applicants and holders. The validation and confirmation provisions extinguish native title. Changes to the registration test and the right to negotiate

¹⁶³ ILO Convention 169, Article 6; Draft Declaration on the Rights of Indigenous People, Article 20.

¹⁶⁴ Draft Declaration on the Rights of Indigenous People, Article 19.

¹⁶⁵ The relevant excerpt from the General Comment is extracted above at page 54–55.

¹⁶⁶ See further O'Flaherty, M., 'The Committee on the Elimination of Racial Discrimination: Non-governmental input and the early warning and urgent procedure' in Pritchard, S., (Ed.), *Indigenous Peoples, the United Nations and Human Rights*, The Federation Press, Sydney, 1998, pp159–160.

¹⁶⁷ The High Court characterised the original NTA as 'either a special measure under s 8 of the (RDA) or a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the (RDA) or the (CERD)...' *Western Australia v Commonwealth*, per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, p484.

¹⁶⁸ Committee on the Elimination of All Forms of Racial Discrimination, Concluding observations of the Committee on the Elimination of all forms of Racial Discrimination: Australia, 19/09/94. A/49/18, paras 535–551.

¹⁶⁹ Australia is behind in its reporting obligations. Reports under CERD are nominally required every two years, however the Committee is increasingly accepting full reports every four years with interim updates every two years.

provisions provide inadequate protection to native title applicants and holders. The primary production upgrade provisions and those provisions that allow certain future acts to be done regardless of the possible existence of native title prioritise non-native title interests above native title.

The amendments breach international standards on non-discrimination and equality before the law, and fail to respect and protect the property, cultural and participation rights of Indigenous people. These provisions make it difficult to sustain a characterisation of the amended NTA as beneficial in nature.

While the international community works toward a more sophisticated understanding of the application of human rights standards and principles to the protection of Indigenous people across the globe, Australia is failing to meet minimum, existing standards. Indeed, the amended NTA in several ways regresses from those existing minimum standards that have been in place for several decades.

Chapter 3: The amendments to the right to negotiate provisions and the meaning of equality

The Native Title Amendment Act 1998 (Cth) introduces amendments to the Native Title Act 1993 (Cth) (NTA) which significantly reduce the substance and scope of the right to negotiate provisions. Section 43A of the amended NTA permits states and territories¹⁷⁰ to introduce alternative provisions to replace the right to negotiate provisions where the native title interests relate to specified tenures, such as pastoral leaseholds, and within specified areas, such as towns and cities. Where states choose to introduce the alternative provisions, a right of objection and consultation will replace the right to negotiate.

Not all states will adopt the alternative provisions. Some states may adopt some but not all of them. At the time of writing, Queensland and Northern Territory had both passed legislation which was markedly different in its response to the alternative provisions. However, regardless of the particular form that the right to negotiate provisions take at the state level, it is the responsibility of the Commonwealth to ensure that the minimum standards established in the NTA conform with human rights standards.

This chapter of the report examines the extent to which the minimum standards established by section 43A of the amended NTA reduces the substance and application of the right to negotiate provisions. It also considers the concept of equality used to justify the amendments to the right to negotiate provisions and compares it to the concept of equality developed within the international human rights framework.

Rights taken away

The original NTA provided for compulsory negotiation between the government party, the registered native title party and other stakeholders in relation to the following acts:

- the creation, variation or extension of a right to mine;
- the compulsory acquisition of native title interests which were for the benefit of a third party.¹⁷¹

The original Act also provided that the government party must negotiate in good faith with the native title party and the grantee party.¹⁷² Where, after 6 months, negotiations were unsuccessful either party

¹⁷⁰ References in this chapter to states should be taken to refer to states and territories.

¹⁷¹ Original NTA, s26(2).

¹⁷² Original NTA, s31(1)(b).

could apply to an arbitral body for a determination.¹⁷³ The subject of negotiations was not limited by the Act but may have included:

- the amount of profits made;
- any income derived; or
- any things produced.¹⁷⁴

Section 43A of the amended NTA permits states to replace the right to negotiate with a right of objection and consultation on land that is or was pastoral leasehold land, reserved or dedicated land, or is land within a town or city. Where a state introduces alternative provisions the Commonwealth Minister must determine whether they comply with the minimum requirements set out in subsections (4), (6) and (7) of section 43A. The Minister's determination is a disallowable instrument and can therefore be set aside by the Senate.¹⁷⁵

The substance of the objection and consultation process is as follows:

- the right of registered native titleholders or claimants to object to the mining proposal or the compulsory acquisition in so far as it affects their registered native title rights;¹⁷⁶
- the opportunity for registered native titleholders or claimants and the State, in relation to a compulsory acquisition, or native titleholders or claimants and the miner, in relation to rights to mine, to consult about ways of minimising the impact of the acts on registered native title rights;¹⁷⁷ and
- the right of registered native titleholders or claimants to have their objection heard by an independent person or body.¹⁷⁸

Negotiation vs objection and consultation

Native title is derived from the traditions and customs held and observed by the native titleholders. In the 1995–1996 Native Title Report the right to negotiate was characterised as ‘a much diminished reflection of the traditional incident of native title’.¹⁷⁹ For many native titleholders tradition requires that before going onto another group's land, permission should be obtained from the occupying group who had a right to control access to the land and to control the use of resources on the land.

Under the original NTA the negotiations between native title parties, the government party and the miner reflected, to a limited extent, the traditional right to control access to native title land. In specified circumstances native title parties could negotiate at the outset of the project about issues of concern to their community such as: employment provision for the native title community occupying the land; training in a range of skills for the community; contracts for ancillary work; local investment; social development programs; equity participation; infrastructure development as well as issues specific to the native title right being claimed. The traditional rights upon which the right to negotiate is based are discussed later in this chapter as expressions of cultural rights which enjoy protection within the framework of human rights.¹⁸⁰

¹⁷³ Original NTA, s35. The negotiation process extended to only 4 months if the act was the grant of a licence to prospect or explore.

¹⁷⁴ Original NTA, s33.

¹⁷⁵ NTA, s214(a).

¹⁷⁶ NTA, s43A(4)(b).

¹⁷⁷ NTA, s43A(4)(c) and (d).

¹⁷⁸ NTA, s43A(4)(e).

¹⁷⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1995-1996*, Human Rights and Equal Opportunity Commission (HREOC), Sydney, 1996, p18.

¹⁸⁰ See pages 100-102.

While the right to negotiate is a diminished reflection of the traditional right to control access to the land and the use of resources, the right to be consulted about ways of minimising the impact of a mining lease or a compulsory acquisition on native title rights and interests bears even less resemblance to this traditional right.

Under the amendments the native title party must be consulted on ways of minimising the impact of mining on registered native title rights. This implies that native title is no more than a bundle of rights concerning activities which take place on the land. Mining might impair a right to fish or hunt on the land. Consultation might mitigate such effects. Minerals may be found on sites prohibited to the uninitiated. Consultation might result in such areas being avoided. On this construction of native title there is no entitlement to participate in the management of the land or obtain a benefit from the resources that exist on the land even where these rights were traditionally held. Native title is not seen as a right to control access to, or activities on the land.

An alternative approach to this construction of native title is provided by the Canadian Supreme Court decision in *Delgamuukw v British Columbia*.¹⁸¹ In that case the court distinguished Aboriginal title from practices and activities which take place on the land. Aboriginal title is more than a set of site specific rights to engage in particular activities on particular land. It is a right to the land itself.¹⁸²

At one end of the spectrum, there are those aboriginal rights which are practices, customs, and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the 'occupation and use of the land' where the activity is taking place is not 'sufficient to support a claim of title to the land'. Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity... At the other end of the spectrum, there is aboriginal title itself. As Adams makes clear, aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to the land itself.¹⁸³

Under Canadian law once Aboriginal title is shown to exist the titleholders are not restricted to using their land solely to engage in the practices and customs derived from their tradition:

Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures...¹⁸⁴

The 'right to occupy and possess' is framed in broad terms and, significantly, is not qualified by reference to traditional and customary uses of those lands...¹⁸⁵

The operation of the right to negotiate under the original NTA had limited application. However, where it did apply, native title parties were not restricted in the issues which they could bring into the negotiations. By limiting negotiation to a consultation about ways of minimising the impact of particular developments on native title rights, native title is given no role in the development of Aboriginal communities beyond permitting the practice of traditions and customs as they were practised by the

¹⁸¹ *Delgamuukw v British Columbia* [1997] 3 SCR 1010 (*Delgamuukw*). The decision is also extracted 1998 [3] 1 *Australian Indigenous Law Reporter* 35. See also Dick, D., 'Comprehending the genius of the common law – Native Title in Australia and Canada compared post-*Delgamuukw* (1998) 5(1) *Australian Journal of Human Rights* 79.

¹⁸² Justice Lee in *Ward (on behalf of the Miriuwung and Gajerrong People) v Western Australia* (1998) 159 ALR 483 approves of the approach taken in *Delgamuukw*. The decision is currently on appeal to the High Court.

¹⁸³ *Delgamuukw* per Lamer CJ, para 88.

¹⁸⁴ *Ibid.*, para 117.

¹⁸⁵ *Ibid.*, para 119.

predecessors of the native title parties before colonisation. The fact that traditionally Aboriginal and Torres Strait Islander people used their land as a resource for the sustenance and well being of their community, is not, under the amended NTA, translated into a right to participate in the modern management of their land. Native title rights are isolated from the day to day lives of the communities that observe and integrate their traditions into the texture of contemporary life. In this way native title is quarantined from the broader principle of self-determination.

A further factor affecting the negotiation process is the removal of the requirement that the government be a party to the negotiations. Chapter four of this report argues that the involvement of state and territory governments is vital to the native title agreement process. The committed involvement of governments provides the potential to lead to the further integration of native title issues with Indigenous concerns about service delivery and regional development. This is directly linked to further improvement in the socio-economic conditions of Indigenous Australians. By removing the requirement that the government be a party to the consultation process, native title issues are segmented from associated issues that may be of concern to Indigenous people.

Notification

Under the original NTA native title parties who wished to negotiate about the performance of the proposed development were given two months after notification to respond and become registered.¹⁸⁶ The matter would then proceed to negotiation. Where, after six months, negotiations failed to produce an agreement, the original NTA provided for arbitration.¹⁸⁷

Section 43A of the amended NTA requires that the alternative provisions contain ‘appropriate procedures’ for notifying any registered native title applicants, registered native title bodies corporate and the representative body responsible for the particular area that the act is to be done. The native title party must object to the act ‘within a specified time’ although no particular period is stipulated by the amendments.¹⁸⁸ No consultation periods are specified by the amendments.

The new legislation fails to guarantee notification and consultation periods which reflect traditional decision-making processes undertaken by native title parties. Unless reasonable time periods are required by the Commonwealth there is no guarantee that the states will allow native title parties adequate time to protect their rights.

Sutton gives an account of the variable nature of the decisions which native titleholders are likely to make, the most significant of which would require a considerable notification period and consultation period prior to the commencement of any mining activities:

Political responsibility, if that is what one aims to show, is always highly contextual. Such responsibility is normally defined in terms of the making of decisions and the asserting of rights and interests. The size of a decision casts the political net to a certain size also. For example, where the issue is whether or not to allow a dirt track to be graded into a water hole over a few hundred metres, the pool of responsible Aboriginal people making this decision can be expected to be quite small, unless the water hole is, say, a site of major ritual importance on a Dreaming track that connects a chain of groups over a few hundred kilometres. There, ‘traditional owners’ of the water hole may well defer politically to the acknowledged senior exponents of the ritual complex concerned, whose core countries may lie some distant away from the same Dreaming. If, however, the decision is about allowing a major development that will transform a whole region, many groups may again be involved, even where the development site itself may be wholly on one small planned estate and affect no name or focally sacred site. So not only may the

¹⁸⁶ Original NTA, s28(1).

¹⁸⁷ Original NTA, s35(b). The negotiation period for a grant of a licence to prospect or explore was 4 months; Original NTA, s35(a).

¹⁸⁸ NTA, s43A(4)(b).

'politically responsible group' be defined in relation to the character of the land itself, but it may also be defined in relation to the scale of events on the land.¹⁸⁹

Instead of providing a framework with adequate time for native title parties, government parties and miners to talk together and to work together at the commencement of a mining project, the amendments leave this critical issue to the discretion of state governments.

Good faith requirements

Under the right to negotiate provisions in the original NTA, the government party was required to negotiate with native title parties and miners in good faith.¹⁹⁰ There is no good faith requirement in relation to consultations under the alternative provisions of the amended NTA.

The significance of this good faith requirement was reinforced in *Walley v Western Australia*.¹⁹¹ Justice Carr found that the government party must negotiate in good faith before applying to an arbitral body for a determination. Where this did not occur the parties were ordered back to the negotiation table. The delay caused to projects by a failure to negotiate in good faith acted as a powerful incentive to government parties to consult with native title parties in a meaningful way. Without an express provision it is unclear whether the Court will imply a good faith requirement in relation to consultations under the alternative provisions in the amended NTA.

Since the decision in *Walley's* case the content of good faith negotiations has been considered by the National Native Title Tribunal.¹⁹² The Tribunal considered that the following were useful indicia of the absence of good faith negotiations:

- unreasonable delay in initiating communications in the first instance;
- failure to make proposals in the first place;
- the unexplained failure to communicate with the other parties within a reasonable time;
- failure to contact one or more of the other parties;
- failure to follow up a lack of response from the other parties;
- failure to attempt to organise a meeting between the native title and grantee parties;
- failure to take reasonable steps to facilitate and engage in discussions between the parties;
- failing to respond to reasonable requests for relevant information within a reasonable time;
- stalling negotiations by unexplained delays in responding to correspondence or to telephone calls;
- unnecessary postponement of meetings;
- sending negotiators without authority to do no more than argue or listen;
- refusing to agree on trivial matters eg a refusal to incorporate statutory provisions into an agreement;

¹⁸⁹ Sutton, P., *Country: Aboriginal Boundaries and Land Ownership in Australia*, Aboriginal History Inc, ANU Central Printery, Canberra, 1995, p42.

¹⁹⁰ Original NTA, s31(1)(b).

¹⁹¹ (1996) 137 ALR 561 ('*Walley*').

¹⁹² *In the Application of Taylor on behalf of the Njama People* (unreported) WF96/4, 7 August 1996 Sumner CJ.

- shifting position just as agreement seems in sight;
- adopting a rigid non-negotiable position;
- failure to make counter proposals;
- unilateral conduct which harms the negotiating process, eg issuing inappropriate press releases;
- refusal to sign a written agreement in respect of the negotiation process or otherwise; and
- failure to do what a reasonable person would do in the circumstances.¹⁹³

This list of actions indicating the absence of good faith suggests, by contrast, the character of consultations which ought to take place. The absence of any express requirement concerning bona fides leaves this open to doubt.

Arbitration vs hearing by an independent body

Under the original NTA where negotiations failed to produce an agreement, any negotiating party could apply to an arbitral body, usually the National Native Title Tribunal, for a determination.¹⁹⁴ In considering whether the act should be done and if so whether it should be done subject to conditions, the arbitrator had to take into account the effect of the proposed act on the following:

- any native title rights and interests;
- the way of life, culture and traditions of any of the native title parties;
- the development of the social, cultural and economic structures of any of those parties;
- access of native title parties to their land and water, and freedom to carry out rites, ceremonies or other activities in accordance with their traditions;
- access to significant sites;
- the natural environment of the land or water including any previous assessments made by a court, tribunal, the Crown (including commissioned on behalf of the Crown) or statutory authorities in relation to the natural environment;
- the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of the lands and waters concerned;
- the economic or other significance of the proposed act to Australia and to the State or Territory concerned;
- any public interest in the proposed act proceeding; and
- any other relevant matter.¹⁹⁵

¹⁹³ This requirement has been considered recently in *WA v Thomas (Waljen people)* (Unreported, NNTT (WA), Sumner CJ 4 September 1998, WF98/7. The Tribunal found that it is not for it to assess the reasonableness of each offer made, subject to the qualification that the approach taken by the government party must be a genuine attempt to negotiate with a view to reaching agreement.

¹⁹⁴ Original NTA, s35.

¹⁹⁵ Original NTA, s39(1).

The alternative regime set out in Section 43A of the amended NTA provides for objections by native title parties to be heard by an independent person or body.¹⁹⁶ There are no criteria stipulated in the amendments to guide the decision of the independent person or body. In addition to the right of objection there is a right for the native title parties to seek judicial review of the government party's decision to do the act, that is, to grant the mining right or to compulsorily acquire the native title interest.¹⁹⁷

The criteria that guided the arbitrator's decision under the original NTA reflect the extensive breadth of the right to negotiate process. By taking account of 'the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of the lands and waters concerned' matters which concern native title parties are squarely raised without having to decide whether such issues are rights which fall within the native title being claimed. The absence of criteria in the amended NTA means that the independent person or body will not be required to take into account specific matters which concern the native title parties unless such issues are registered native title rights affected by the doing of the act.¹⁹⁸ The scope of the hearing is of a different order.

The limitations inherent in the objection process affect the content of consultations between the parties. Where criteria such as 'the development of the social cultural and economic structures of the native title parties' must guide the arbitrator's decision, then it is likely that these matters will be raised in the negotiations between the parties. The absence of such criteria in the amended Act severely limit the scope of the consultation process.

The limited application of rights

There are two ways in which the amendments to the NTA limit the application of rights to native title parties whose claim is over co-existing tenures or within specified areas.

First, the procedural rights available to native title parties depend on the classification of the land over which they lie. Second, amendments to the Act limit the applicability of both the right to object and consult which replace the right to negotiate under section 43A and the applicability of the right to negotiate itself. For example, certain amendments reduce the acts to which both the right to negotiate and the right to object and consult apply. In addition, amendments to the registration test raise the threshold for native title applicants seeking to exercise either the right to negotiate or the rights to object and consult.

Removal of the right to negotiate on co-existing tenures and specified areas

Section 43A of the amended NTA permits state or territory governments to replace the right to negotiate provisions of the Commonwealth Act with alternative provisions in the following areas:

- areas that are or were covered by freehold land where native title has not been extinguished, eg freehold land held in trust for Aboriginal and Torres Strait Islander people;¹⁹⁹
- areas that are or were covered by leasehold land (including pastoral leasehold land but excluding mining leases) where native title has not been extinguished;
- areas that are or were covered by a reservation, dedication or proclamation etc for public purposes generally or for a particular purpose and are or were in use for that or a similar purpose; or

¹⁹⁶ NTA, s43A(4)(e).

¹⁹⁷ NTA, s43A(4)(f).

¹⁹⁸ NTA, s43A(4)(b).

¹⁹⁹ In *Fejo v Northern Territory* (1998) 156 ALR 721 the High Court held that the grant of freehold title will extinguish native title permanently.

- areas wholly within a town or city.²⁰⁰

An indication of the impact of the above provisions on native title claims and holdings is given in Table 1 which shows the percentage of land presently held as vacant Crown land, Crown leasehold land including pastoral leasehold land and reserve land in each state and territory. The table shows that a significant percentage of land in Western Australia, South Australia, Northern Territory, Queensland and New South Wales is pastoral leasehold land. In Victoria there is a significant proportion of land reserved for public purposes. Where native title is over these tenures, states and territories may introduce alternative provisions under section 43A of the amended NTA. The alternative provisions would also apply to native title claims on land which was once leased or reserved and has since reverted to the Crown. These historical interests are not shown in the table.

Table 1: Crown land on a state by state basis

Land Tenure	WA	SA	NT	Qld	NSW	ACT	Vic	Tas
Vacant crown land	34.2%	0.8%	6.4%	0%	0.2%	0%	0%	0%
Crown leasehold land (mainly pastoral)	36%	42.5%	49.6%	54.4%	38.5%	37.5%	negligible	negligible
Crown land reserved for public purposes	–	–	–	–	–	–	16.3%	–

Source: National Indigenous Working Group, Media Statement, 7 July 1998. Figures based on Auslig Land Tenure Map 93 020²⁰¹

There is insufficient information available to indicate the area of native title land claimed or held which is over pastoral leasehold land or reserved land. Neither the National Native Title Tribunal nor the various state departments administering land and resources can provide this information. It is also difficult to determine conclusively the percentage of native title claims affected by the co-existing tenures and specified areas on which the section 43A alternative provisions are based.

In Western Australia, South Australia, Northern Territory, New South Wales and Queensland, where pastoral leaseholds are a common form of land tenure, the impact of the alternative provisions are likely to be very significant. In South Australia, for example, the native title unit of the Aboriginal Legal Rights Movement has estimated that as at 30 June 1998, 89% of native title claims are affected by pastoral leasehold interests. In Western Australia, the National Native Title Tribunal has estimated that as at 30 June 1998, 85% of native title claims are affected by pastoral leasehold interests. In Queensland it is estimated by the National Native Title Tribunal that, as at 30 June 1998 53% of native title claims are affected by pastoral leasehold interests. Against this trend, in Northern Territory the National Native Title Tribunal has indicated only 2% of Northern Territory claims are affected by pastoral leasehold interests.

Native title: the chameleon title

Section 43A of the amended NTA illustrates the principle which underlies the amendments to the NTA, that native title rights should correspond to 'neighbouring rights to land'.²⁰² The result of applying this

²⁰⁰ The definition of alternative provision area is found in NTA, s43A(2).

²⁰¹ *Hansard*, Senate, 7 July 1998, p4341.

principle to the right to negotiate provisions is that where the native title claim is over land which is, and always has been, vacant Crown land, native titleholders and applicants will have one set of rights, and where native title is over land which is or was pastoral leasehold land or reserve land, or lies within a town or city, native titleholders and applicants will have a different set of rights. Native title, like a chameleon, must change to adapt to its surroundings. The justification for dealing with native title in this way was explained by Senator Minchin in the Senate debate in December 1997:

I would also say on this issue that the fact that native title rights on a pastoral lease cannot by definition, be the same as native title rights on vacant Crown land or Aboriginal land is a matter that we must consider and that the government has considered and has acted accordingly. By definition, native title on Aboriginal land or vacant Crown land can be up to exclusive possession. Therefore, at least the freeholders' rights should attach to activity development on land, but there is this additional right to negotiate which we are essentially leaving on vacant Crown land and Aboriginal lands.

But on pastoral lease land the native title rights by definition, are only what rights survive after you take account of the rights granted to the pastoralist based on the Wik judgement. Any surviving native title rights are subject to the rights of the pastoralists. Therefore the native title on a pastoral lease cannot amount to the same bundle of rights as it can on vacant Crown land or Aboriginal land. Therefore, a different approach to the procedural rights issue is appropriate. On that score of the nature of the native title on a pastoral lease compared with vacant Crown land or Aboriginal land and the fact that you have a situation where other Australians are sharing the land, we do believe—and do hold this view from the basis of a fundamental philosophical position—that the procedural rights should be the same.²⁰³

According to this rationale where there are co-existing tenures, native title is that which is left over once other titleholders' rights are taken into account. It is said that because native title rights on vacant crown land are, by definition, different from native title rights on co-existing tenures, the procedural rights attached to this latter category of native title should also be different to those of other native titleholders. It is further asserted that the procedural rights in this latter category of native title should be the same as those of the co-existing titleholder.

This approach of containing native title rights within the boundaries of the rights associated with the co-existing tenure fails to recognise a fundamental feature of native title. It fails to recognise that native title is a unique title which takes its form from the traditions and customs of those who continue to hold and observe them. Because native title is unique, the protection which is drawn from equating rights with an entirely different order of interests such as pastoral leasehold interests, is inadequate and inappropriate. The two are incommensurable.

Native title is a unique title

The nature of native title is set out in the following passage from Justice Brennan's decision in the Mabo (No.2) case. The common law definition of native title is adopted by section 223 of the amended NTA.

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.²⁰⁴

Where the rights and interests traditionally held and observed today include a right to use the land as a source of sustenance for the group, then, such a right is a native title right recognised by the common law. Where the rights and interests traditionally held and observed today include a right to control access onto all or part of the land, then, such a right is a native title right recognised by the common law. Where the rights and interests traditionally held and observed today include a site specific right to

²⁰² This term was used in a discussion paper by Clarke J., 'The Native Title Amendment Bill 1997: A Different order of uncertainty?' *Discussion Paper No. 144*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 1997, p17.

²⁰³ Senator the Hon N. Minchin, *Hansard*, Senate, 4 December 1997, p10411.

²⁰⁴ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 per Brennan J, p58 ('*Mabo (No. 2)*').

conduct ceremonies on the land, to protect sacred sites on the land, to hunt, gather or fish on the land, then, such rights are native title rights recognised by the common law. Within native title, land can constitute an economic resource, a source of cultural identity, and a source of spirituality.

Clearly native title rights are very different, both in substance and source, to the rights and interests of a pastoral leaseholder. In balancing the interests of a pastoral leaseholder with the interests of miners wishing to come onto the land, the government considers a range of environmental and economic issues. However, in balancing the interests of native title parties against the interests of the same miners a completely different range of issues needs to be taken into account. The impact of mining, for instance, on the spiritual significance of the land could be devastating if native title parties are not given a proper opportunity to protect the unique cultural and spiritual meanings which they attach to their land. Negotiation and arbitration is a better way of ensuring that the cultural bridge between native title parties and developers is crossed to the satisfaction of all the parties than the alternative process of consultation and objection.

Protection of native title

The failure to recognise native title for what it is, in its own terms, according to its own traditions and customs brings with it a failure to understand the meaning of co-existence. Native title does not change ‘by definition’ because it co-exists with pastoral leasehold interests. The content of the title is still derived from, and authorised by, the traditions and customs observed by the native title parties. However, where native title rights are inconsistent with the rights of the leaseholder, the rights of the leaseholder will prevail. Native title rights in such a situation will be unenforceable.²⁰⁵ The question of whether the inconsistency between native title rights and pastoral leasehold rights will result in the permanent extinguishment of the inconsistent native title rights or merely ‘the suspension of native title rights during the currency of the grants’²⁰⁶ has not been finally decided by the High Court.

Given that pastoral leasehold rights prevail over native title rights where there is an inconsistency, it is unfair to further reduce the protection given to those native title rights still able to be exercised. Because of the vulnerability of native title rights on pastoral leasehold land it is fitting that the protection extended to these precious residual rights be proportional to their value. It is misconceived to use pastoral leasehold rights as a benchmark for the rights of the traditional owners. On the basis of a broader notion of equity, negotiation and arbitration provides a far more appropriate degree of protection for native title rights which may be threatened by mining development or compulsory acquisition than the alternative process of objection and consultation.

The transfer of power from the Commonwealth to the states

Past and more recent events have not allayed the apprehension that Indigenous people experience when the legislative mechanism for protecting native title from the impact of mining and compulsory acquisitions is transferred to states and territories from the Commonwealth.

The constitutional amendment of 1967 which gave the Commonwealth joint responsibility for Aboriginal affairs was seen as an advance for Aboriginal people whose lives had previously been completely controlled by state legislation, state bureaucracies and state institutions.

The role that some states have played in undermining the political and legal struggle for the recognition of native title has done little to heal the relationship established before 1967 between state governments and Aboriginal and Torres Strait Islander people. A clear example of this can be found in the *Mabo* (No.2) case itself where, after the Meriam people commenced proceedings, the Queensland Parliament passed the Queensland Coast Islands Declaratory Act 1985 in order to overcome the Meriam people’s action to have their traditional title recognised.²⁰⁷ The legislation, which sought to remove

²⁰⁵ *Wik v Queensland* (1996) 187 CLR 1 per Toohey, p126 (‘*Wik*’).

²⁰⁶ *Wik* per Toohey J, p131.

²⁰⁷ *Mabo v Queensland* (1988) 166 CLR 186.

retrospectively the rights of the Meriam people was found by the High Court to be contrary to the Racial Discrimination Act 1975 (Cth) (RDA).

The Western Australian Government responded to the Mabo (No.2) decision by passing the Land (Titles and Traditional Usage) Act 1993. That Act purported to extinguish native title and replace it with subordinate statutory rights of traditional usage for Aboriginal people. Such rights could be overridden by the responsible Minister in relation to other interests, including mining interests. The High Court found the state legislation to be invalid in that it was contrary to the RDA and inconsistent with the Commonwealth NTA 1993.²⁰⁸ Despite the High Court's decision the Western Australian government subsequently issued a further 211 titles to seven resource projects without observing the required native title processes, seeking indemnities from the mining companies concerned in the event that the land was subject to native title interests. The same government now seeks to have these titles validated through state legislation presently before the Western Australian Parliament.²⁰⁹

A further cause for distrust and the perception of bias by Aboriginal and Torres Strait Islander people is the way in which various states have treated their legal obligations under the NTA prior to the amendments. For instance, Western Australia was forced to withdraw 90%²¹⁰ of its applications to the arbitral body for a determination after the decision in Walley which found that where the government party failed to negotiate in good faith with native title parties the National Native Title Tribunal had no jurisdiction to hear such applications. Yet another example is provided by the Queensland Government which, before the Wik decision, continued to issue mining licenses on pastoral leasehold land without notifying or consulting native title parties as required by the NTA.²¹¹

The shift of control to the states over such a significant matter as the right to negotiate, where the native title interests affected are over pastoral leasehold land, reserve land and within towns and cities, can only be justified if the Commonwealth imposes a sufficiently high standard on state regimes. The minimum standards in section 43A do place limitations on the state's capacity to interfere with native title rights. A further check is provided by making the Commonwealth minister's decision to approve the state regime a disallowable instrument able to be overturned by the Senate. However, the right to negotiate under the original NTA provided the appropriate protection to native title rights. Lowering that standard in relation to specified tenures and areas amounts to an abdication of the Commonwealth's responsibility to Aboriginal and Torres Strait Islander people.

Threshold limitations on the application of the right to object and consult

There are two ways in which the amendments increase the threshold limitations which apply to the right to object and consult. First, in relation to the registration test, stricter conditions will result in fewer applicants qualifying to exercise this right. Second, the category of acts to which either the right to negotiate or the right to object and consult applies is significantly reduced.

The registration test

Native title applicants will have neither a right to negotiate nor, where the alternative provisions apply, a right to object unless their claim is registered. Under the original NTA there were few conditions which applied to the registration of a native title claim. The judicial interpretation of the original registration test eroded its function of ensuring that only those native title parties with a bona fide interest in the land were involved in negotiating and making agreements with other stakeholders. The decision in North Ganalanja Aboriginal Corporation v Queensland held that the prima facie test under

²⁰⁸ *Western Australia v Commonwealth* (1985) 183 CLR 373.

²⁰⁹ The Bill seeking to validate these and other titles is the Titles Validation Amendment Bill 1998 (WA).

²¹⁰ Smith, D., 'The right to negotiate and native title future act: Implications of the Native Title Amendment Bill 1996', *Discussion Paper No. 124/1996*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 1996.

²¹¹ Section 29 of the original NTA required that notification be given to native title parties of these acts.

section 63 was not intended to require a preliminary investigation of an application and was restricted to the material provided by the applicant.²¹² On the basis of this decision very few claims were denied registration.

It was generally agreed by both Indigenous and non-Indigenous groups that because of its ineffectiveness the registration test needed to be revised. The amendments, however, do not provide a sensible filter so much as establish an impediment to the legitimate protection of native title interests.

Under the amended NTA significant barriers must now be overcome before native title claims will be registered. Under sections 190B and 190C, the Registrar must be satisfied that the following conditions are met before registering a native title application.

- Information in the application must:
 - (i) identify the boundaries of the native title area and the area within that boundary which is not claimed, so that it can be said with sufficient certainty that the native title rights and interests are claimed in relation to particular land or water;²¹³
 - (ii) identify by name the persons in the native title claim group so that it can be ascertained whether any particular person is in the group;²¹⁴
 - (iii) identify the native title rights and interests;²¹⁵
 - (iv) provide a factual basis considered sufficient by the Registrar to support the existence of the native title rights and interests claimed.²¹⁶
- Each native title interest must be established on a prima facie basis.

The Registrar must consider that at least some of the native title rights claimed can be established on a prima facie basis. Only those native title rights so established can be entered on the register.²¹⁷ In considering the claim the Registrar is not restricted to the information provided by the applicant but can conduct searches of a register of interests maintained by the Commonwealth or a State,²¹⁸ consider relevant information provided to the Registrar,²¹⁹ and have regard to such other information considered appropriate.²²⁰

- There must be a traditional physical connection to the land.

The Registrar must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with the land or water covered by the application.²²¹ Where the Registrar cannot be so satisfied the native title applicant can apply to the Federal Court for a review of the Registrar's decision not to

²¹² (1996) 185 CLR 595 at 622 (the 'Waanyi' case).

²¹³ NTA, s190B(2) and s62(2)(a) and (b).

²¹⁴ NTA, s190B(3).

²¹⁵ NTA, s190B(4).

²¹⁶ NTA, s190B(5).

²¹⁷ NTA, s190B(6). The right to consult under section 43A is restricted to consultation about ways of minimising the impact of the development on 'registered' native title rights and interests only.

²¹⁸ NTA, s190A(3)(b).

²¹⁹ NTA, s190A(3)(c).

²²⁰ NTA, s190A(3).

²²¹ NTA, s190B(7).

accept the claim.²²² The Court may order the Registrar to accept the claim if at least one parent of one member of the native title claim group had a traditional physical connection with the land or water and would have maintained that connection but for things done by the Crown, a statutory authority, a leaseholder of the land or water concerned or a person acting on behalf of such a leaseholder.²²³

What was previously an ineffective administrative screening test is now a detailed examination of evidence relating to the claim. The quality and quantity of information required to be produced by the applicant in order to have the claim registered has increased considerably, particularly given that the Registrar can base his/her decision on whether to register the claim on information other than that contained in the application.

A serious issue that arises from the amendments is whether the representative bodies responsible for preparing the native title claims have sufficient resources to satisfy the new onerous requirements within the stipulated time after notification of the proposed development. Under the amendments the time allowed to file an application after notification of the act increased from 2 months to 3 months.²²⁴ This period does not reflect the time reasonably required to satisfy the stringency of the conditions imposed. The considerable burden on the economic resources of the representative bodies could result in native title applicants being denied either a right to negotiate, or, where the alternative provisions apply, a right to object and be consulted about the proposed developments on their land.

A further concern that arises from the amendments to the registration test is that native title applicants who cannot satisfy the Registrar that one of their members either has, or previously had a physical connection to the land or water concerned, will be refused registration. This is so even though the native title applicant may have a strong native title claim at common law where the definition of native title is sufficiently wide to support the survival of rights after a period of separation from the land. The amendments to the NTA do not prevent unregistered native title applicants from pursuing a native title application. They will, however, be denied the entitlements which automatically follow from the registration of their application. These entitlements include a right to negotiate, or where the alternative provisions apply, a right to object and consult, and access to the indigenous land use agreement provisions.

Under the amendments, applicants who have maintained a traditional spiritual connection with the land but were denied registration because of a lack of physical connection, would be required to make a separate application to the Court for a review of the Registrar's decision not to register the claim. The Court on hearing such an application would have a discretion to order the Registrar to accept the claim if it could be shown that a parent of the applicant had a physical connection which would have been maintained but for the actions of the Crown or the leaseholder. This is the case even though there is no legislative basis on which the Registrar could accept the claim in the first place.

Where native title applicants are excluded from exercising the right to negotiate with mining companies whose activities threaten their native title rights, they will be forced to seek redress from the court. The basis for court intervention is made clear by the majority decision of the High Court in the Waanyi case:

It is erroneous to regard the registered native title claimant's right to negotiate as a windfall accretion to the bundle of those rights for which the claimant seeks recognition by the application. If the claim is well founded, the claimant would be entitled to protection of the claimed native title against those powers and interests which are claimed or sought by persons with whom negotiations might take place under the Act. Equally, it is erroneous to regard the acceptance of an application for determination of native title as a stripping away of a power otherwise possessed by government to confer mining rights and the other rights to which Subdiv B applies. If the claim of native title is well founded, the power was not available to be exercised to defeat without compensation the claimant's native title. The Act simply

²²² NTA, s190D(2).

²²³ NTA, s190D(4)(b).

²²⁴ NTA, s30(1)(i).

preserves the status quo pending determination of an accepted application claiming native title in land subject to the procedures referred to. The mere acceptance of an application for determination of native title does not otherwise affect rights, powers or interests.²²⁵

The adversarial context of court proceedings will only hamper the development of the project as well as the negotiations between the parties which will inevitably need to take place during the life of the project.

Acts to which the right to object and consult apply

Under the original NTA the right to negotiate provided protection for native titleholders in three categories of future acts:

- (1) the creation, variation, and extension, of a right to mine;²²⁶
- (2) the compulsory acquisition of native title rights and interests for the benefit of a third party;²²⁷ and
- (3) low impact acts approved by the Commonwealth Minister.²²⁸

The trigger activating the right to negotiate was notification of an intention to perform any of the above acts.

Amendments to the NTA make significant inroads into categories (1) and (2) above which limit the applicability of both the right to negotiate and the operation of the alternative provisions under section 43A of the Act.

In relation to category (1) some of the significant exceptions include:

- (a) where the creation of the right to mine is for the sole purpose of the construction of an infrastructure facility;²²⁹
- (b) where the mining right is an exploration approved by the Commonwealth minister;²³⁰
- (c) where, in relation to the renewal, the re-grant, the re-making or the extension of the term of the right to mine such an act does not:
 - extend the area in which the right to mine operates beyond the area defined by the earlier right to mine;
 - extend the term of the right to mine beyond a period equivalent to the term of the earlier right to mine; and
 - create rights that were not created in the earlier right to mine.²³¹

²²⁵ *Waanyi* per Brennan CJ, Dawson, Toohey, Gaudron, Gummow JJ, p235-236.

²²⁶ NTA, s26(2)(a)-(c).

²²⁷ NTA, s26(1)(c)(iii).

²²⁸ NTA, s26(2)(e) and s26(4).

²²⁹ NTA, s26(1)(c). Infrastructure is defined in section 253.

²³⁰ NTA, s26A.

²³¹ NTA, s26D.

In relation to category (2) the significant exception introduced in the amended NTA is a compulsory acquisition for the purpose of providing an infrastructure facility for the benefit of a third party.

Mining

Significant human rights issues are raised by the effect of these amendments on the ability of native titleholders and applicants to protect their property rights against the impact of exploration and mining.

- In relation to (a) above, (the creation of a right to mine for the sole purpose of an infrastructure facility), the amendment fails to recognise the extent to which mining infrastructure is capable of destroying native title rights. While native title parties have certain procedural rights under Section 24MD(6B) including a right to be notified, a right to object and be consulted, and a right to a hearing by an independent person, there is no reason why the right to negotiate should be taken away in relation to these activities, particularly as the size, location and permanence of the construction of an infrastructure can have devastating effects on Indigenous communities. With a right to negotiate native titleholders and applicants can ensure that the mining canteen and accommodation facilities are consistent with community requirements in relation to such issues as alcohol. The plans for a road could incorporate Indigenous training and employment. The removal of the right to negotiate in relation to mining infrastructure is the plain preferencing of mining interests over native title interests.
- In relation to (b) above, (mining exploration), the amendment greatly reduces the ability of native titleholders and applicants to have input into the granting of titles which could significantly affect the enjoyment of their property rights. Exploration may cause irreparable harm to native title, as exploration licences often permit extensive activity, such as the large-scale removal of soil, road grading and tree removal. While the Minister must be satisfied that the exploration is unlikely to have a significant impact on the land or waters concerned, this may not necessarily address native title concerns. Nor does it take account of the social impact of the exploration camp which often include wet canteens.

A right to negotiate at the outset of a project allows the native title parties and the mining parties to build an understanding of each other's interests and develop a workable relationship which can continue into the production stage of the project.

- In relation to (c) above, (renewal of a right to mine which extends the area or the term of the lease, or creates new rights) the amendment fails to recognise that mining titles are often of extremely long duration, with renewal periods of a similar length. Also, a mine may have a greater or different impact on native title rights than was envisaged at the initial negotiation stage. These factors make it essential for native titleholders and applicants to have an opportunity to negotiate the terms on which such titles are extended or renewed.

In many jurisdictions mining titles do not contain legally enforceable rights of renewal, re-grant, or extension leaving the grant of such rights to the exercise of the Minister's discretion in any particular situation. The amendments give rise to a situation in which the mere expectations of mining companies are clearly favoured above the protection of native title rights.

Compulsory acquisition

Under the amended NTA neither the right to negotiate nor the alternative provisions under section 43A would apply where native title rights are compulsorily acquired by governments in order to construct infrastructure facilities for the benefit of third parties. Section 24MD(6B) of the NTA provides a right of objection, consultation and hearing by an independent third person in this situation.

Instead of providing a legislative framework which gives appropriate protection through compulsory negotiation where native title interests are threatened by compulsory acquisitions for the benefit of third parties, the amendments reduce this protection and limit its scope considerably. These amendments therefore give priority to third parties who benefit from a government's acquisition of native title rights and interests.

Equality and the right to negotiate

The justification for the amendments to the right to negotiate where a pastoral leasehold has been granted over native title land, is that it would be unfair if native titleholders and applicants have a right to negotiate in relation to mining and certain compulsory acquisitions while pastoralists do not have the same right. This would be inequitable:

[where] you have a situation where other Australians are sharing the land, we do believe—and we hold this view from the basis of a fundamental philosophical position— that procedural rights should be the same.²³²

The notion of equality underlying this argument is that everyone should be treated in precisely the same way regardless of their cultural or social differences. This is often referred to as ‘formal equality’. Following from this notion of equality is the identification of discrimination as treating people differently.

this [right to negotiate] is the application of quite an extraordinary legalistic process across seventy-nine percent of Australia in a way which discriminates against the pastoral lessees of Australia by granting superior procedural rights to people on the basis of their race.²³³

We take as our premise the starting point of the whole Native Title Act—that equality of procedural rights is the appropriate way to go...We think it is fundamental to coexistence and reconciliation that there be equivalent procedural rights attaching to the statutory rights on the one hand and the native title rights on the other.²³⁴

This approach to equality and discrimination, enshrined in the amended NTA, relies on a narrow frame of reference. It looks primarily to the formal rule applied, rather than its wider context and the impact of the rule. It does not address the question as to whether identical treatment has the effect of impairing or nullifying human rights or fundamental freedoms.

A human rights perspective

Any discussion of the meaning of equality entails a discussion of the meaning of freedom and discrimination. Classical liberal thinking has always appreciated the need to balance the value of freedom against the prospect that the unrestrained exercise of freedom by one person, or group of persons, will impair or extinguish the exercise of freedom by another. This understanding, that within a social context individuals or groups are at risk of being discriminated against when a more powerful group is permitted an unfettered freedom to pursue its interests, is revealed in the writings of classical liberal thinkers such as Thomas Hobbes. Within the Hobbesian model the rationale behind a powerful law-making institution is the insecurity that citizens experience living in a ‘free’ world. The social contract proposed by Hobbes involves the individual giving up some of his/her freedom to the state in exchange for the state protecting the citizen from intrusion by others.

Within this framework, equality would only justify the removal of rights or entitlements when the exercise of such rights or entitlements are seen to harm and intrude upon another person or group of persons. Otherwise, where there is no such discrimination, and in keeping with the goals of our human rights system, the expression of one’s cultural identity, no matter how different it might be from that of the majority, should not be interfered with. If equality is laid as the foundation of the amended NTA and this foundation is found within classical liberal thinking, then the concomitant notion of non-discrimination must be laid with it. When this is done the only justification for the removal of the right to negotiate, based on the rationale of equality, is the harm which the exercise of that right causes others.

²³² Senator the Hon N. Minchin, *Hansard*, Senate, 4 December 1997, p10411.

²³³ Senator the Hon N. Minchin, *Hansard*, Senate, 8 April 1998, p2464.

²³⁴ Senator the Hon N. Minchin, *Hansard*, Senate, 8 April 1998, p2463.

Differentiation and discrimination

Differentiation is integral to the rights and freedoms which the human rights system seeks to protect. In fact in classical liberal thought the rights and freedoms most treasured were those enjoyed by the individual; a highly differentiated unit. In contemporary society the human rights framework has expanded to not only protect the rights and freedoms of the individual, but also to recognise the expression of cultural identity and to protect these rights as human rights. The fact that the expression of cultural identity may take different forms does not place it outside the human rights framework.

Clearly this is not to say that differentiation on the basis of race can never be discriminatory. Indeed the denial of citizens' rights, such as denying Aboriginal people the right to vote, is an example of differentiation based on race which is adversely discriminatory. However, the ultimate source of this unlawful discrimination is not the differentiation as such but the harm that it caused Aboriginal people: the infringement of their civil and political rights as a result of this differentiation.

Conversely, differentiation may actually be required to avoid discrimination. The idea that treating everybody the same is sufficient to ensure that rights are being equally enjoyed does not stand up to scrutiny.

Judge Tanaka's well known dissenting decision in the South West Africa Case recognised respect for difference as essential to equality:

The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal...To treat unequal matters differently according to their inequality is not only permitted but required.²³⁵

Two categories of non-discriminatory differentiation protected within a human rights framework are the right to express one's cultural identity, referred to variously as minority rights, cultural rights or group-based rights, and the provision of measures by governments to facilitate the advancement of members of certain racial groups who historically have been disadvantaged by discriminatory policies. This latter category is commonly referred to as special measures. Both the recognition and protection of distinct cultural rights, and special measures are justified by their objective of ensuring the genuine, substantive enjoyment of common human rights.

Cultural rights

The human rights framework which I have outlined is added to without being structurally altered by the idea of cultural rights. Professor Natan Lerner notes:

In recent years the international community seems more ready to accept the view that the individual-centred system combined with the non-discrimination rule alone are not sufficient to protect the rights of individuals as members of a group and of course not the group as such. Legal literature in recent years reflect more and more the trend to expand the human rights system by giving specific consideration to the needs of minorities and groups qua collectively international instruments adopted before and after the Covenants include different degrees of acknowledgment of group right.²³⁶

This trend towards group based rights is enshrined in Article 27 of the Covenant on Civil and Political Rights. Article 27 provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group to enjoy their own culture, to profess and practice their own religion, or to use their own language.

²³⁵ *South West Africa Case* (Second Phase) [1966] ICJ Rep 6, pp303-304.

²³⁶ Lerner, N., 'The Evolution of Minority Rights in International Law', in Brolmann, C., Lefeber, R. and Zieck, M. (Eds), *Peoples and Minorities in International Law*, Martinus Nijhoff Publishers, Dordrecht, 1993, p91.

The Human Rights Committee observed that Article 27 establishes and recognises a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which as individuals in common with everyone else they are entitled to enjoy under the Covenant.²³⁷

As a development of the notion of minority rights and in recognition of the need for special protection of Indigenous peoples, further international instruments have been or are being developed which seek to deal with distinctive issues such as questions of self-determination, land, language, and culture which arise for Indigenous peoples. These international instruments include International Labour Organisation Convention No.169; UNESCO Declaration of the Principles of International Cultural Cooperation; the Draft Declaration on the Rights of Indigenous Peoples; Article 2 and 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic Minorities; Article 30 of the International Convention on the Rights of the Child; Article 15 of the International Covenant on Economic, Social and Cultural Rights; Principle 22 of the Rio Declaration on Environment and Development; and Chapter 26 of the United Nations Agenda 21.²³⁸

The concept of cultural rights in these instruments recognises that people enjoy their freedom and their rights in a culturally specific way. Just as the enjoyment of rights is culturally specific, so too is the harm consequential on interference with rights that may be experienced in a culturally specific way. While this approach expands the individualist framework in which human rights have previously been constructed, it does not alter the fundamental rationale supporting respect for human rights. The rationale for the facilitation and protection of cultural freedom within the human rights framework is that all cultures are entitled to equal respect regardless of the specific way in which cultural identity is expressed. The only limit to the expression of this cultural freedom is the extent to which it discriminates against another cultural group.

A classic example of a human right which is culturally specific and non-discriminatory is native title. The failure to recognise native title before the *Mabo (No.2)* decision in 1992 can be seen, as it was in that case, as the failure to give equal respect and dignity to the cultural identity of Aboriginal and Torres Strait Islander people; to be racially discriminatory, and a violation of Aboriginal and Torres Strait Islander people's human rights:

Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.²³⁹

The demand by Aboriginal people for equal respect of their cultural identity belongs within the framework of universal human rights. However, there is a limit to the extent to which a non-Indigenous person can know the real human dimension of harm that discrimination has caused Aboriginal people. Only Aboriginal people can talk authoritatively of certain matters. A senior law man of the Ngarinyin

²³⁷ Human Rights Committee, *General Comment 23, Article 27* (1994) para 1, in *Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies* UN Doc HR/GEN/1/Rev.1,p38.

²³⁸ Dodson, M., 'Human Rights and the extinguishment of native title' (1996) 2 *Australian Aboriginal Studies* 1, p12.

²³⁹ *Mabo (No. 2)* per Brennan J, p42.

people expressed both the pain and joy of his identity at the proceedings of an induction course conducted by the National Native Title Tribunal entitled *Native Title: An Opportunity for Understanding*:

The law of the land (I put this drawing here—it is Australia). That is when our ancestors started the sharing and connection in the land, which we call Wunan. All those channels, is the dwelling place of those elders, tribe to tribe, neighbour to neighbour, in the land. Why they did that? This land did not have a boss man to control the whole land, no body ever had one boss looking after the whole land. It is sharing and dividing the land in the Law. Every ‘country’ has its own boss. There may be ‘countries’ and bosses connected together in Wunan.

How did they divide it? Every man had a symbol and a block of land. Another tribe symbol, a big river, another, the plain. Another tribe, a mountain, another, wattle tree, another, long stringy bark trees. So everyone has a symbol to represent blocks of land. Why they did, it became a way to recognise who in those blocks of land. Because it be a board of management, for those little blocks of land. He the boss man, for his own block, we have to go and knock on his door. Each man in the tribe, everybody was elder of the tribe and the elder spread wide across the land...

He the only one who can go to and knock on his door and ask him ‘could I come around and have a look?’ And he says ‘Yes I will take you around.’ I cannot tell him what to do, because he is the owner of the land, the boss man, or boss woman. That it why it is so important, land, because it all connection in this Wunan system throughout the whole land where Aborigines are, right up to the islands there up the end of the reef...

That is why land—we are the land ourselves very important all that connection. Got songs and symbols in the Law, very sacred. Woman business, man business, children business, all one. We was taken away from our home, put in the Burralla Desert where no river, no gorge to go to, no painting, no signal stones, no place to teach our children. They never see their home where they come from, where they belong. They died of alcohol, all bashed up brains. We want to try and take them back to their home, they never reached there home and it is very sad.

They have a home, each of those young people who died, say sixteen years of age, seventeen, nineteen, never seen their country where they belong and they destroyed; early graves, early life wasted. Today is ‘94 now, we still never reach our place where we came from. When we in our home we happy, we are strong because of energy, that land give us, and that why it is important to get it back...

That is why it is very important for us to claim our land, and that is why it really hurts us, because we are not in our land where we belong. Every tribe got its own land, and that is the title, that connection with one another, and board of management, all the tribes all in their own blocks.²⁴⁰

The right to negotiate as a cultural right

Within Ngarinyin culture the right to control access to land is fundamental to the entire structure of land ownership. ‘Every ‘country’ has its own boss’. Access to country is strictly regulated: ‘he the boss man, for his own block, we have to go and knock on his door.’ This phrase establishes the inherent cultural basis for the right to negotiate as codified by the original NTA. The various responsibilities and rights within the laws and customs of particular traditional owners may have distinctive characteristics, and these may affect access rights to their estates, but the existence of the right itself is an essential, common feature of Indigenous laws within Australian Indigenous cultures.

Like native title, the right to negotiate can be seen as an expression of cultural rights by native title parties. In the 1995–1996 Native Title Report the right to negotiate is characterised as an incident of native title, an inherent right:

The right to control access to and activities on traditional estate is a consistent feature of Australian Indigenous law. It is what a Pitjantjatjara man once defined as ‘the first law of Aboriginal morality—

²⁴⁰ Proceedings of an induction course conducted by the National Native Title Tribunal. *Native Title: An Opportunity for Understanding*. Held at the University of Western Australia, pp59-60.

always ask',²⁴¹ Absolute control of access would be more consistent with Indigenous law. As it stands the right to negotiate accorded in the Native Title Act is a much diminished reflection of this traditional incident of title.²⁴²

A Jinibra elder of south-east Queensland put it this way:

Each tribe knew its own boundary quite well, and sure cause of trouble for a man of one tribe to be caught trespassing on a neighbour's territory. Gaiarabu says that the first time they might be let off with a caution. If it happened again, they would not approach him directly but would report the matter to the leader of their tribe. This leader would then meet and then question the leader of the other tribe. If the matter could not be settled peaceably, they would agree to fight...If, however, one of the Dugidau members wished to make a journey to Bundaberg he would first go to the neighbouring tribes boundary and give the Jinibara cry which was:

'Jinibara Gari Garunbai Douwu: nu ngaringu'. This Jinibara cry means 'I am giving a call from my home' (while travelling through a strange tribe's territory, a man would not be allowed to camp in the local tribal camp itself but must pitch his temporary sleeping place at least a mile away from the others). He would then, in his tribe, get in touch with a member of his own totem, 'I want to get to Bundaberg. Will one of you take me there?' This man would conduct him to the next boundary, give his own tribal cry, and then pass him onto a man of similar totem in the next tribe with the same request.

Gaiarabu states that these things were taught to the boys during their initiation ceremonies in the Bora Ring...²⁴³

A more recent expression of the cultural underpinning of the right to negotiate was presented in the evidence in the Croker Island case.²⁴⁴

In that case Mary Yarmirr stated that the Yuwurrumu members of an estate had the right to make decisions about all aspects of the estate including a right to be asked and to apply conditions to entry:

In respect of my law and my culture, as I have respect for another culture, I'd ask them to come towards us and ask permission.

Q: All right. And if they ask permission, what rights would you have by your law in the way that you responded to their request?

A: As a yuwurrumu holder I would then sit down and negotiate and come to a settlement.

Q: Would you be able to say by your law 'No' to them?

A: Yes I have done that on numerous occasions.

Q: In respect of what?

A: In respect to oil exploration at Summerville Bay.

Q: So there have been requests for oil exploration at Summerville Bay?

A: That is correct.

²⁴¹ Meyers F., 'Always ask: Resource use and land ownership among Pintupi Aboriginals of the Australian desert' in Williams, N. and Hunn, E., (eds) *Resource Managers: North American and Australian Hunter Gatherers*, Australian Institute of Aboriginal and Torres Strait Islander Studies and Australian National University, Canberra, 1982, p184.

²⁴² *Native Title Report 1995-96, op.cit.*, p18.

²⁴³ Quoted in Memmott, P., *Elements of Native Title Application: the Issue of Exclusive Possession, in the Heritage and Native Title Anthropology and Legal Perspective*, Workshop conducted by the Australian Anthropology Society and Australian Institute of Aboriginal and Torres Strait Islander Studies, Australian National University, Canberra, 14-15 February 1996, pp179-180.

²⁴⁴ *Yarmirr v Northern Territory* (1988) 156 ALR 370 ('the Croker Island case').

Q: And what has happened on these occasions?

A: On those occasions, because they identify where they like to explore and it was on some of our sacred areas, we said to them due to respecting our old traditional laws and our culture we'd ask you to reconsider, maybe looking at another to avoid those sacred areas, which they did.

Q: All right. If the area was a suitable area as far as your yuwurrumu was concerned would you have the right to say not 'no' but 'yes'?

A: Yes.

Q: And you have spoken negotiation. Would you have the right to say yes but subject to conditions?

A: That's correct.²⁴⁵

There is no doubt in Mary Yarmirr's mind that according to her yuwurrumu there was a right in her people to control entry onto their seas and to apply conditions to that entry.

Establishing a right to negotiate at common law

Despite Mary Yarmirr's evidence, Justice Olney found in the Croker Island case that the claim for exclusive possession, occupation, use and enjoyment of the waters could not be made out. A significant reason for this conclusion was his finding of fact that the traditional laws which require a person to obtain permission from the Croker Island community before entering the land, applied only to Aboriginal people rather than non-Aboriginal people. On this point he said:

Doing the best I can, I understand the witness to be saying that a non-Aboriginal person who did not know of the traditional Aboriginal law, and thus would be unaware of the need to seek permission from the clan owner, should be allowed to go through...

The claim that by their traditional laws and customs the applicants enjoy exclusive possession, occupation, use and enjoyment of the waters of the claimed area is not one that is supported by the evidence. At its highest the evidence suggests that as between themselves, the members of each yuwurrumu recognise and defer to, the claims of the other yuwurrumus, to the extent on occasions permission is sought before fishing, hunting or gathering on another sea clan's country. By inference, although the evidence is not strong, other Aboriginal people from outside the claimed area probably do likewise.²⁴⁶

The Croker Island case illustrates how difficult it is to establish at common law a traditional right to control access and exclusive possession which will be effective against non-Aboriginal people or entities such as mining companies. Such rights have to be proven not only as inherent to the tradition and customs of the native title applicants, but as rights enforced in a traditional form against non-Indigenous users of the land in the post-sovereignty period, despite the fact that such users neither knew of, nor cared about, Aboriginal law.

This legal requirement overlooks the political, social, legal and physical circumstances which affected the entry of non-Indigenous people onto Aboriginal land during the colonial period. When these circumstances are taken into account it is not surprising that the traditional right to control access onto Aboriginal land was not exercised consistently against non-Indigenous people who entered Aboriginal land equipped with British law and arms. It utterly ignores the radical power imbalance which characterised Indigenous and non-Indigenous relations. The past denial of Indigenous rights becomes a platform for their cultural denial.

If the Croker Island decision is indicative of a trend in the common law, Aboriginal people would be required to show to a court not only the existence of a traditional right to control access to their land,

²⁴⁵ *Ibid.*, p415.

²⁴⁶ *Ibid.*, p422.

not only the ongoing exercise of this right as it was traditionally practised between Aboriginal people, but also that the native title applicant and his forebears, in the face of inordinate risks, asserted this right against non-Indigenous people throughout the post-sovereignty period. While Indigenous people may continue to observe their laws, previous non-Indigenous disrespect for their rights provides a basis for the further denial of Indigenous rights.

The approach taken by the Court to proving exclusive possession in the Croker Island case is in stark contrast to the approach taken to proving exclusive possession in the Delgamuukw case referred to previously. Aboriginal title encompasses a right to exclusive possession which in turn is established if the following criteria are satisfied:

- the land must have been occupied prior to sovereignty;
- if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation; and
- at sovereignty, that occupation must have been exclusive.²⁴⁷

Given the potential difficulty of proving a right to control or negotiate access as an incident of native title at common law in Australia, it is fitting that the federal Government, as a party to various international instruments which require the protection of the right of Indigenous peoples to enjoy their own culture, should provide such protection through legislation. In curtailing the right to negotiate, the amended NTA falls short of these international obligations.

The right to negotiate as a protection of native title

While the right to negotiate can be seen as a cultural right and an incident of native title itself, it can also be seen as native title's protective shield against extinguishment. When native title is extinguished a human right is violated. I have already mentioned the general right to enjoy one's culture under Article 27 of the International Convention on Civil and Political Rights. More specifically, protection against the arbitrary deprivation of property rights is articulated in Article 17 of the Universal Declaration of Human Rights and required by Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination. The Draft Declaration on the Rights of Indigenous Peoples also reflects the significance of the relationship between land and Indigenous peoples. It is important that the right to enjoy one's culture and one's land is not only recognised but that it is also effectively protected. The negotiation process under the original NTA, although very limited in its application, enabled native titleholders and applicants to meet with other stakeholders to discuss how native title rights could be protected in the context of the proposed development and to involve Aboriginal owners in the management of the land.

The erosion of this protection by reference to rights held by other landholders is a non sequitur. The adequacy of protection should be gauged against how well the Indigenous relationship to land is protected: not how well this protection parallels the right of other landholders with different interests in land. Protection should derive from what is sought to be protected: not by reference to the historical accidents of previous Crown grants in the vicinity of native title. The latter approach is entirely arbitrary in its affect on the pre-existing native title.

The need for a protective shield against the destruction of native title is demonstrated by the ease with which and the extent to which native title may be extinguished. In the Wik case the majority of the High Court agreed that in order to extinguish native title the legislation must show a clear and plain intention to do so. Such an intention need not be expressly stated but can be implied from an inconsistency between the grant (such as the grant of a pastoral lease) and the continued existence of native title. Where native title is able to co-exist with the granted interest no such intention is manifest.²⁴⁸ The court left for future determination the basis on which an inconsistency will result in the extinguishment of

²⁴⁷ *Delgamuukw* per Lamer CJ, paras 43-59.

²⁴⁸ *Wik* per Toohey J, p126.

native title as distinct from its suspension for the duration of the grant. The High Court has decided this issue in favour of complete extinguishment, without revival, where a grant in fee simple is made.²⁴⁹

While there are still issues to be decided by the courts concerning the effect on native title of various inconsistent grants, it is clear that native title rights will always be relegated to the lower peg, either permanently or for the duration of the grant, where their exercise is inconsistent with any other interest. Pastoralists were assured of this supremacy in the *Wik* decision. Given the vulnerability of native title rights at common law, it is fitting and consistent with the internationally recognised rights to enjoy one's culture and not be arbitrarily deprived of property, that native title should be provided particular protection.

The legislative response to this vulnerability, withdrawing the right to negotiate over significant areas of native title land and allowing states to pass extinguishing legislation, does not accord respect to the human rights of Aboriginal and Torres Strait Islander people. Nor is compensation, monetary or otherwise, an appropriate substitution for rights which go beyond their material equivalent. A human rights model of cultural rights is concerned with both the active expression of cultural identity and its active protection. The Human Rights Committee commented on Article 27 of the International Convention on Civil and Political Rights as follows:

The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end.²⁵⁰

By withdrawing the right to negotiate on pastoral leasehold land and substituting a weaker form of protection for native titleholders and applicants Australia's international obligations have been ignored. I have already referred to the various international instruments designed to define and protect cultural rights.²⁵¹ It is incumbent on Australia to ensure that it maintains the standards recognised throughout the world as appropriate to ensuring recognition and respect for Indigenous culture. This is certainly not achieved by withdrawing rights which ensure that native title is integral to the subsistence and the development of Aboriginal and Torres Strait Islander cultures.

Removing the right to negotiate and the human rights framework

The six month period permitted under the unamended NTA for native title holders to sit down and talk with miners on issues significant to the affected Indigenous community meant that agreements between native title parties and other stakeholders offered a basis for the protection and development of Indigenous social, cultural and economic structures. The specific content of some of these agreements and the process by which such agreements were arrived at is discussed in chapter four of this Report.

The interdependency of economic well-being and flourishing cultural and social structures was recognised in the Government's National Aboriginal and Torres Strait Islander Rural Industry Strategy.²⁵² The aim of the Strategy is to strengthen rural enterprises involving Indigenous participation, with a view to meeting social and cultural objectives. The strategy states:

Achievement of this vision will result in Aboriginal and Torres Strait Islander people deriving economic benefits from their land and sea resources, whilst living within the carrying capacity of these resources.

²⁴⁹ *Fejo v Northern Territory of Australia, op.cit.*

²⁵⁰ Human Rights Committee, *General Comment 23, Article 27, op.cit.*, para 9.

²⁵¹ Page 97.

²⁵² Aboriginal and Torres Strait Islander Commission and the Department of Primary Industries and Energy, *National Aboriginal and Torres Strait Islander Rural Industry Strategy*, Commonwealth of Australia, Canberra, 1997.

It will result in both short and long term empowerment by providing a degree of self-sufficiency, and reducing dependency on welfare...²⁵³

This strategy recognises that acquisition of land and claims over territorial waters are not sought solely for economic reasons, but to meet a broader range of social and cultural objectives. The challenge for the Strategy is to present opportunities for economic development in this context.²⁵⁴

The strategy lists the benefits that Indigenous communities may enjoy as a result of negotiation as:

- training in a variety of skills, including management scholarships;
- employment within mining operations at all levels (subject to training completion);
- assistance in establishing contracting enterprises;
- preferential contracting arrangements providing services to the mine;
- joint venture arrangements in relation to ancillary enterprises such as tourism;
- preferential supplier arrangements for food supplies to the mine; and
- compensation for unforeseen adverse impacts.²⁵⁵

The amended NTA contains extensive provisions which could give effect to the objectives of the Rural Industry Strategy. The Indigenous Land Use Agreements (ILUAs) provisions remedy the defect in the original NTA which did not provide effective support to agreements made about native title. However, instead of increasing the opportunities for ILUAs to form the basis for ongoing relationships on native title land, section 43A has reduced the issues which need to be negotiated between the parties and thus the potential scope and content of the agreements themselves.

Within a human rights framework equality is a means of ensuring that the interests of one group do not intrude unfairly or in a discriminatory way upon the interests of another. Equality would only justify the removal or diminution of the right to negotiate if the exercise of the right to negotiate, and the freedom which this right permits, is outweighed by the harm that it causes others. It is to this issue we now turn.

The impact of the right to negotiate on non-Indigenous people

Impact of the right to negotiate on mining

The most obvious impact of the exercise of the right to negotiate is its effect upon the mining industry. Ian Manning's report entitled *Native Title, Mining and Mineral Exploration* concluded that the benefits of mining can be shared with native title holders without impacting significantly on the profits of mining companies or the growth of the Australian economy.²⁵⁶

There is very little evidence for depressed exploration activity in Australia following the historic High Court Mabo Native Title ruling in 1992. In fact, mineral exploration expenditures revived in 1993 after a lull during the recession in the early 1990s and since then have been running at levels to rival the boom of the late 1980s.²⁵⁷

²⁵³ *Ibid.*, p1.

²⁵⁴ *Ibid.*, p5.

²⁵⁵ *Ibid.*, p25.

²⁵⁶ Manning, I., *Native Title Mining and Mineral Exploration*, National Institute of Economic and Industry Research, Canberra, November 1997.

²⁵⁷ *Ibid.*, p15.

Specifically:

The paper finds that in return for their investment in negotiation and their setting aside a small share of cashflow for local Indigenous people, mining companies stand to gain guaranteed legal access to the resource, an improvement in the social environment in which they operate, and an opportunity to develop a local labour force and perhaps eventually to reduce their reliance on very high cost labour recruited in the cities.

Governments are found to potentially gain a reduction in Indigenous dependence on social security and welfare payments, a reduction in the demand for Government-financed development projects in remote areas and an improvement in the social environment in remote areas, with the potential to reduce the costs of social problems.

In general, the research uncovers strong evidence that the benefits of the rights of Indigenous people to negotiate with the components of mining projects significantly outweigh the costs. Economic and social benefits accrue not just to Indigenous people themselves, but also to the mining industry and to the national economy.²⁵⁸

A contrary view has been expressed by Wayne Lonergan estimating the loss of value of a mining project as result of the unamended NTA at 28%:²⁵⁹

The potential costs to the mining industry as a result of the enactment of the Native Title Act and the uncertainties which remain, particularly in light of the Wik decision are numerous and include the cost of:

- (a) significant time delays
- (b) higher costs for debt and equity
- (c) compensation payments to Native Title applicants
- (d) management time and associated costs
- (e) reduced flexibility
- (f) reduced management productivity
- (g) miscellaneous costs—due diligence, prospectus disclosure, etc
- (h) cost of investigating possible claims
- (i) increased uncertainty.²⁶⁰

The above list and Lonergan's analysis generally fails to distinguish between the effect on the costs of a mining project as a result of the unamended NTA and the effect on the costs of a mining project as a result of the recognition of native title. For instance the cost of compensation payments to native titleholders (item (c)) is a cost that flows from the damage that mining activities cause to native title interests. The NTA merely codifies the right to be compensated for such damage. Similarly the cost of investigating possible claims (item h) is not one which flows primarily from the NTA but from the recognition of native title itself. Unless the mining industry is advocating the wholesale extinguishment of native title, which it is presumed is not the case, then it is difficult to see the precise point demonstrated by Lonergan's analysis.

The only item of Lonergan's analysis which is directly attributable to the unamended NTA is the delay caused by exercising the rights of negotiation and arbitration which is analysed under item (a) above.

²⁵⁸ *Ibid*, p6.

²⁵⁹ Lonergan, W., 'Native Title, The financial time bomb' *Australian Journal of Mining*, July 1997, p35.

²⁶⁰ *Ibid.*, p37.

Loneragan fails here to compare the cost of such delays with the delays that might be caused if the right to negotiate was not included in the NTA and native title parties were forced to rely on the injunctive process to intervene where exploration and mining projects threaten their native title interests. As indicated earlier, the High Court has made it clear that the injunctive process is available to native title applicants who can show that their native title interests are at risk.²⁶¹

In fact the NTA confers many benefits on non-Indigenous parties such as mining companies, which Lonergan's analysis also fails to take into account. A major benefit to mining companies and other parties seeking to use the land for commercial purposes is that the Act validates acts done by governments which, because of a failure to recognise the existence of native title would otherwise be invalid. Without the validation provisions many more mining projects than those currently affected could be delayed while native title claims were investigated.

The Centre for Aboriginal Economic Policy Research has carried out a further study into the right to negotiate and the utilisation by the Queensland government in 1997 of the section 29 notification process after the decision in the Wik case was handed down.²⁶² Two of the recommendations of the study were:

- that in order to facilitate industry development especially in mining, State Governments need to engage with native title processes in a timely and administratively efficient manner across all sectors of the mining industry;
- that the mining industry is increasingly apprehensive about the capacity of governments to support industry development, not least because of the kind of political strategies currently used to deal with native title issues.²⁶³

The study criticises the delays caused by inefficiencies in the issuing of section 29 notifications by the Queensland state department rather than the delays caused by the rights which the NTA conferred on native titleholders. Similar criticisms of inefficiencies were directed at the Western Australian Government by De Soyza in relation to its failure to negotiate in good faith with native title parties, in the first instance, and its adoption of an inflexible position when it eventually did engage in negotiations.²⁶⁴ One of the results of these strategies is that they have rendered the negotiation provisions of the NTA unworkable and 'given credence to the state's claims that the problem lies with the RTN and the NTA'.²⁶⁵

The State's strategy has now paid its dividend, as the amendments to the NTA have excoriated the limited right to negotiate, through which Aboriginal people could seek at least some recompense for the continued diminution of their property rights. In addition, if the State establishes an alternative process pursuant to s43A, it can do away with the RTN altogether in most areas of Western Australia.²⁶⁶

These studies show that the right to negotiate is not unfairly onerous on mining companies, particularly when the negotiation process is triggered in a timely way and carried forward in good faith. On the contrary, there are many advantages to mining companies negotiating agreements with native title parties where they intend to carry out activities on native title land.

²⁶¹ Page 91.

²⁶² Finlayson, J.D., 'The right to negotiate and the miner's right: A case study of native title future act processes in Queensland', *Discussion Paper No.139/1997*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra 1997.

²⁶³ *Op.cit.*, pvi.

²⁶⁴ DeSoyza, A., 'Engineering unworkability: The Western Australian State Government and the right to negotiate' in *Land, Rights, Laws: Issues of Native Title, Issues Paper 26*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1998.

²⁶⁵ *Ibid.*, p8.

²⁶⁶ *Ibid.*

Impact of the right to negotiate on pastoralists' rights

The instrumental rationale for the removal of the right to negotiate on pastoral leases is not its impact on mining but rather its inequity and consequent unfairness to pastoralists. Can this 'unfairness' be seen as discrimination in the sense that the exercise of a right to negotiate intrudes upon the interests of pastoralists?

The answer must be an unequivocal 'no': the right to negotiate has no direct impact on the performance of pastoral activities. The amended NTA ensures that pastoralists can carry out not merely those activities specified in their leases, but also an extended range of activities called 'primary production activities' without having to consider native title rights. This additional freedom afforded pastoral leaseholders at the expense of native title rights was a focus of the 1996–1997 Native Title Report and as outlined there the protection of pastoralists' rights under the amendments go beyond that contained in most pastoral leases.²⁶⁷

Nor has there been an impact on the market value of pastoral leaseholds as indicated by John Sheehan, native title spokesperson of the Australian Property Institute.²⁶⁸ Ironically, a clearly identified source of a direct impact on pastoral leaseholder rights flows from mining projects. Senator Woodley referred to this impact in the Senate debate on 8 April 1998 where he described how limestone quarrying on dairy farms in central Queensland has drastically affected the water table with the result that farms are less productive. Again, in Central Queensland, the Senator referred to a dispute between grain growers and coal mining companies over the effect of subsidence on farming and grazing areas.²⁶⁹

Of course, any impairment of pastoral activities by mining activities cannot justify the removal of a right to negotiate from native title parties. It can only support an argument that pastoralists also need protection when it comes to the intrusion of mining projects. If anything, pastoralists may benefit from native title parties having a right to control the damaging effects of mining activities on pastoral leasehold land. This was pointed out by two pastoralists from Queensland's Central Highlands, Bood and Bloss Hickson of the Rural Landholders for Co-existence who recommended to farmers the benefits of an alliance with native title parties not only in relation to mitigating the effect of mining projects but also in relation to rejuvenating the land.²⁷⁰

The argument that pastoralists are discriminated against because native titleholders have a right to negotiate while pastoralists do not, is based on a definition of discrimination which equates it with differentiation. On this view, the source of the discrimination is not the adverse impact of the right to negotiate on the exercise of pastoralists' rights. The source of the discrimination is that pastoralists are treated differently. It has been suggested that the mere existence of difference may have an indirect impact on the social cohesion of the community. It is said if native titleholders have a right which pastoralists do not have then this will arouse antagonism. The argument was put by Senator Minchin in the following terms:

To have differential and indeed preferential procedural rights for one group of people based on their race when the people next door have different rights because they are of a different race we think is highly explosive, inflammatory and dangerous from a moral and philosophical point of view...²⁷¹

We think the only fair and equitable approach is to say that there should be equivalent procedural rights—that the rights granted to lessees should be the rights granted to the native titleholders so that

²⁶⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996-97*, HREOC, Sydney, 1997, pp86-93.

²⁶⁸ John Sheehan, at *Native Title Symposium*, University of New South Wales, 30 May 1998.

²⁶⁹ Senator J. Woodley, *Hansard*, Senate, 8 April 1998, p2426.

²⁷⁰ *Stories of Reconciliation from Queensland Central Highlands*, workshop conducted at University of New South Wales, 1 May 1998.

²⁷¹ Senator the Hon N. Minchin, *Hansard*, Senate, 8 April 1998, p2437.

together in their co-existence, they have equal rights. Any other approach is impracticable, unworkable, and potentially quite damaging to good relations in rural Australia.²⁷²

I have argued throughout this report that the right to negotiate provisions are inherent to native title itself and that it is necessary to protect native title from further destruction. To deny native titleholders a right to negotiate because having it will be perceived to elevate native titleholders above the broader community in which for two hundred years they have been so chronically disadvantaged and in which they remain so disadvantaged on every social indicator available, is simply unjust. Nonetheless, the issue of social harmony is certainly a real one not only for pastoral leaseholders, but for the entire community of which Aboriginal and Torres Strait Islander people are a part.

The very fact that genuine social and economic fragmentation has triggered an outburst of anxiety and resentment in the bush does not warrant the removal of the right to negotiate, but calls for a more far-sighted policy to address the real causes of anger and despair in rural and remote Australia. Such a policy should promote understanding and draw together the interests of Indigenous and non-Indigenous Australians living in the bush. The characterisation of the right to negotiate as being discriminatory does not promote these goals.

The need for an appropriate recognition of different circumstances and different entitlements should be appreciated by all those in rural and remote Australia. After all, the very appreciation and accommodation of difference forms the basis of rural Australians' demand to take their particular needs and interests into account to achieve genuine equality with the level of services and support received by urban Australians. The recognition of difference is integral to the effective enjoyment of human rights. This has implications for all Australians.

Special measures

Special measures constitute another category of non-discriminatory differentiation protected within the human rights framework. While cultural rights recognise that values and identity are culturally determined, special measures recognise that the present enjoyment of one's culture is determined by the extent to which it has been recognised and protected in the past. Where there has been ongoing and systematic discrimination against a particular group, whether it be on the basis of their race, sex, religion, etc, there needs to be a period whereby such a group is given a chance to catch up. Otherwise mere formal equality of treatment will result in a further entrenchment of the discrimination which such a group has inherited.

Native title offers a good illustration of this point. The fact that native title has only recently been recognised has meant that for 200 years prior to its recognition Aboriginal people have been discriminatorily and wrongfully dispossessed of their land. To view native title as the same as any other property interest cannot restore the majority of Aboriginal people to the position they would have been in if such discrimination had not occurred. Plain justice, resting on a broader notion of equality requires that measures be put in place which deal with the illegal and wrongful effects of past dispossession. The proposed social justice package and the land fund, established under the NTA, are examples of measures originally intended to overcome the destructive cultural, social and economic impact of dispossession on Aboriginal and Torres Strait Islander people. The social justice package, of course, never developed beyond a proposal. The land fund has been a useful measure in achieving economic equality for Aboriginal people.

The need for special measures in addressing racial discrimination is recognised in Article 1(4) of the Convention on the Elimination of All Forms of Racial Discrimination and is defined as follows:

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 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

²⁷² Senator the Hon N. Minchin, *Hansard*, Senate, 8 April 1998, p2464.

maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Even though the Article makes it clear that a special measure is a non-discriminatory form of racial differentiation, it is the primary position of this and previous Native Title Reports that the right to negotiate is not a special measure. It is not a measure taken by government in order to redress the injustice of historical dispossession even though it may co-incidentally have this effect. It is a measure designed to recognise the traditional rights and protect the cultural identity of Aboriginal people.

However, if one identifies the right to negotiate as a special measure such an identification can in no way justify the withdrawal of this right on the basis of equality. Special measures by definition are differential treatment specifically designed to provide targeted assistance to particular disadvantaged groups. Special measures by design differentiate between those who have been historically disadvantaged by prior regimes of discrimination and those who have not. To argue that, as a special measure, the right to negotiate is not acceptable because it differentiates on the basis of race is to argue against the inherent character of a special measure. The argument that the right to negotiate should be withdrawn on the basis of equality is an argument against the legitimacy of special measures as a matter of principle.

It is deeply ironic that, even if one is to accept the proposition that the right to negotiate is a special measure, the main attack on the measure applying specifically and exclusively to Aboriginal people is based on equality; a notion which comes from a history of struggle against racial discrimination and which is now employed to deny the rights of those who struggled for so long. Sadursky makes this point in relation to the assertion in the case of *Gerhardy v Brown*²⁷³ that Section 19(1) of the Pitjantjatjara Land Rights Act 1981 is discriminatory because it makes it an offence for a person other than a Pitjantjatjara person to enter the land without permission:

It would be ironic to defeat this protective regulation on the basis of the argument deriving from the history of invidious racial discrimination, and it would be perverse if the evils visited upon Aborigines in the past lent moral force to the claims of non-Aborigines to prevent even a partial redress for those evils.²⁷⁴

The same criticism can be made of the argument that the right to negotiate on pastoral leasehold land should be repealed because it is discriminatory against non-Indigenous leaseholders whose interest is actually founded on the past dispossession of Indigenous people.

The categorical justification for the withdrawal of special measures is that they have done their job. They have broken the cycle of discrimination and the target group is no longer in need of special treatment. There is certainly no evidence that Aboriginal and Torres Strait Islander people no longer suffer the effect of past discrimination on pastoral leasehold land. In fact, the amended NTA ensures that the historical disadvantage that Aboriginal and Torres Strait Islander people have suffered, substantially as a result of the unauthorised settlement of their land by squatters, and later the distribution of tenures including pastoral leasehold tenures over their land without the consent of Aboriginal and Torres Strait Islander people, has been enshrined in legislation. This has been done through a series of amendments which include:

- the amendments which validate all pastoral leases granted invalidly by state governments in the period between 1 January 1994 and 23 December 1996;²⁷⁵
- the amendments which validate activities not authorised by the lease carried out by pastoral leaseholders prior to the Wik decision without going through the NTA;²⁷⁶

²⁷³ (1985) 59 ALJR 311.

²⁷⁴ Sadursky, W., '*Gerhardy v Brown* v the concept of discrimination: Reflection on the landmark case that wasn't (1985) 11 *Sydney Law Review* 5, p5.

²⁷⁵ NTA, Division 2A.

²⁷⁶ NTA, Division 2A.

- the amendments which allow leaseholders to carry out an extensive range of activities (primary production activities) in addition to those activities authorised by their lease without negotiating with native titleholders and with only a right to native title parties to be notified and an opportunity to comment on the act.²⁷⁷ Primary production activities include the cultivating of land; maintaining, breeding or agisting animals; taking or catching fish or shellfish; forest operations; horticultural activities; aquacultural activities and leaving fallow or de-stocking any land in connection with the doing of anything that is a primary production activity;
- the amendments which allow off-farm activities which are connected to primary production to take place with only a right to native titleholders to be notified and an opportunity to comment on the act;²⁷⁸
- the amendments which permit the taking of timber and the removal of sand, soil and gravel from a pastoral lease with only a right to native titleholders to be notified and an opportunity to comment on the act;²⁷⁹
- the amendments which allow leases to be renewed for a longer term than the original lease, including lease upgrades to a perpetual lease.²⁸⁰ In relation to such lease renewals, native titleholders are given limited procedural rights, including a right to notification, consultation and objection.²⁸¹

The above amendments to the NTA amount to a redistribution of property rights in favour of pastoral leaseholders at the expense of native titleholders. This redistribution mimics rather than changes the pattern of discrimination which has dominated the relationship between Indigenous and non-Indigenous people in the colonial period.

The greatest benefits of such a transfer would occur on those properties which profit the most from the expanded range of activities. Moreover, if properties with the greatest potential for conversion to other profitable uses (such as say cotton cultivation) are owned by individuals with higher levels of income and wealth, then this transfer of property rights will be highly regressive'.²⁸²

Native titleholders bear the greater and more direct burden of the cost of the transfer of property rights to pastoralists as a result of the upgrade of their leasehold interests than do the rest of Australians because to the extent that there is an inconsistency between the new primary production activity and the native title rights, the primary production activity will prevail over those rights. Where farm-stay tourism prevents native titleholders from exercising their native title rights the farm-stay tourism activity prevails. Where agricultural production, such as cotton growing, is over land otherwise used by native titleholders, the cotton production prevails.

If the right to negotiate is seen as a special measure then the substantive rationale for its original introduction has become more rather than less persuasive. In so far as the justification for its removal in respect of pastoral leases rests on an argument of equality, the argument is logically and substantively empty. It is the very nature of special measures that they positively differentiate on the basis of race to redress the effects of past adverse discrimination.

The notion of equality is a guiding moral principle to striking a balance between conflicting interests within society. To isolate and detach this principle from the historical and social determinants of

²⁷⁷ NTA, s24GA-s24GC.

²⁷⁸ NTA, s24GD.

²⁷⁹ NTA, s24GE.

²⁸⁰ NTA, s24IC(1), 24IC(3) and 24IC(4).

²⁸¹ NTA, s24ID(4) applies the procedural rights outlined in Section 24MD(6B) to these lease renewals.

²⁸² Damania, D., 'The economic effects of the *Wik* legislation', (Summer 1998) *15 Policy Organisation and Society*, 172.

discrimination and reduce it to the blind application of a single rule does not accord with the principles and standards which have evolved in the human rights framework. Discrimination cannot be defined solely as difference. The recognition of native title is also the recognition of and respect for cultural difference. Such recognition is essential to equality between Indigenous and non-Indigenous people in Australia.

Chapter 4: Achieving ‘real outcomes’: Agreements and native title

The past year has seen a continuation of the acrimonious, divisive debate on native title at the national level. For the duration of this debate, a bleak picture has been painted of the effectiveness of the processes under the Native Title Act (NTA) as it was originally enacted. It has been argued that not only was the Act unworkable and lacking in certainty for industry, but that it had not produced ‘any real outcomes for Aboriginal people.’²⁸³ This was because despite having had the NTA for more than four years, and the expenditure on the National Native Title Tribunal (NNTT), there had only been two formal determinations of native title.²⁸⁴

While it is unrealistic to expect that in such a short time frame the native title process could possibly resolve the manifold issues intimately connected to the history of dispossession and marginalisation of Indigenous people in this country, the native title process has clearly begun to realise very real outcomes. This approach, which seeks to measure the success of the native title process purely according to the number of agreed determinations of native title, does not acknowledge the extent of these achievements. In fact, the ensuing community friction that has emerged during the native title debate has masked the very real outcomes which have been and are continuing to be realised at the ground level across Australia.

This chapter considers the increasing number of agreements that have been reached across the country, both within and outside the provisions of the NTA. Many agreements reached outside of the Act have emerged from negotiations which were initially conducted within the processes of the NTA. Others were negotiated entirely outside the NTA, with the provisions of the NTA operating as a catalyst. Such agreements, concerning a diverse range of issues, have been reached between Indigenous groups, local governments, miners, other resource developers and commercial enterprises. The results of these agreements are a testament to the commitment, the imagination and the goodwill of the parties.

The extent of agreement making both within and outside of the Act can be demonstrated by the following figures. The NNTT reported in September 1998 that, in addition to the three determinations of native title which have been made to date, there have been 1244 agreements reached concerning native title. 80% of these agreements relate to future acts and 20% to applications for a native title determination.²⁸⁵ At 30 June 1998, 308 of these agreements which related to future acts had been lodged with the NNTT under section 34 of the NTA.²⁸⁶ Similarly, approximately 47% of ‘objection applications’²⁸⁷ lodged with the NNTT in Western Australia in March 1998 and 10% of applications

²⁸³ Senator the Hon N. Minchin, Hansard, Senate, 6 July 1998, p 4194.

²⁸⁴ The Federal Court made a third agreed determination of native title on 28 September 1998 in relation to a cattle property at Mt Carbine in northern Queensland. This determination, involving the Yalanji (Sunset) people, is discussed further below.

²⁸⁵ National Native Title Tribunal, Native title agreements top 1200, Press Release, 11 September 1998; See also French, R., ‘A new dawn or more of the same?’ Conference Paper, 41st Annual Pastoral Conference, Karratha, 11 September 1998.

²⁸⁶ National Native Title Tribunal, Future Acts (National Cumulative Summary)—as at 30 June 1998, Future Acts Unit, NNTT, Perth, 1998.

²⁸⁷ Under section 32 of the Act, a State or Territory government can state that the right to negotiate provisions of the Act do not apply, and that instead, the proposed grant attracts what is known as the ‘expedited procedure’. If a native title claimant or holder does not object to this claim within two months (through the lodgment of an objection application), then the government may proceed with the proposed grant or future act, and is not required to comply with the right

lodged in June 1998 have been withdrawn following agreement, or had an agreement pending and the objection application was expected to be withdrawn shortly.²⁸⁸

This chapter provides examples of the types of agreements that have been reached in relation to native title over the past year and highlights the impact of these agreements on the enjoyment of human rights by Aboriginal and Torres Strait Islander people.

These agreements demonstrate the reality that the mechanisms of the NTA are instrumental to the process of reconciliation through the forging of new relationships, understanding and respect, and are leading to a 'pervasive and sustainable realignment of the relationship between Indigenous and non-Indigenous Australians.'²⁸⁹

The chapter also considers how the Native Title Amendment Act 1998 (Cth) has altered the legislative framework against which negotiations take place, and the likely effect this will have on the agreements process.

Agreements—challenges and achievements

This is a difficult time in our country's history. Hopevale knows about difficulties, division and friction. Its achievement has been to rise above these things, to make an agreement which respects co-existence and establishes ways of living together in the future. To the vendors of false fears, the cynical and the selfish, you are a rebuke. To the timid, the uninspired and the unimaginative, you offer a challenge, and to all of us, men and women of goodwill, you offer hope.²⁹⁰

The native title process is fundamentally based upon the consensual resolution of land use issues through negotiation and agreement. It is mandatory for parties to a native title claim to participate in mediation²⁹¹ and parties are also required to negotiate in certain circumstances under the right to negotiate provisions, a task for which they can request the mediation assistance of the NNTT.

The mediation provisions of the NTA and the emphasis on negotiated, agreed outcomes, has acted as a catalyst for the widespread involvement of Indigenous people, industry, local government and other interest groups in the negotiation of broad based agreements, with native title as the initial focal point. A particular feature over the past year has been the growing awareness of the advantages of making such agreements,²⁹² and the recognition that the subjects of agreement may often transcend land use issues.

to negotiate provisions. There have been an increasing number of objection applications lodged over the past eighteen months.

²⁸⁸ National Native Title Tribunal, Percentage Breakdown of Outcomes for Objections to Inclusion in an Expedited Procedure Lodged with the Tribunal During Indicated Sample Month in Western Australia—As at 30 June 1998, Future Acts Unit, NNTT, Perth, 1998. Note: 83% of objection applications lodged in June 1998 remain active, with the likelihood that many will be withdrawn following the reaching of an agreement.

²⁸⁹ Padgett, A., 'Native title—Negotiations, agreements, opportunities' Conference Paper, On the Edge—7th Asian Pacific Specials, Health and Law Librarians Conference and Exhibition, Perth, 14 October 1997. <www.nntt.gov.au/nntt/publicn.nsf/area/homepage> (10 January 1998).

²⁹⁰ Justice Robert French, cited in Clark, G., 'Techniques in managing a mediated determination of native title', Conference Paper, Working with Native Title and Reaching Agreements, Brisbane, 29 April–1 May 1998. Justice French's comments were made in relation to the Hopevale agreement, following the determination of native title by Justice Beaumont in the Federal Court on 8 December 1997.

²⁹¹ Mediation is mandatory in the sense that the Tribunal and, under the amended Act, the Federal Court, are required to send the parties to mediation to attempt to reach agreement. Parties, however, cannot be compelled to participate in mediation. The resolution of native title issues by mediation might appear strange to Indigenous people who are, after all, seeking the registration of their title and not the resolution of a dispute: Wooten, H., 'Mediating between Aboriginal communities and industry' in Meyers, G., (Ed) Implementing the Native Title Act: The Next Step—Facilitating Negotiated Agreements, NNTT, Perth, 1997, p169.

²⁹² This recognition has been accompanied by a growing literature examining processes surrounding the making of agreements, for example, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Regional Agreements Papers series; Edmunds, M., (Ed.), Regional Agreements: Key Issues in Australia—Volume 1 Summaries, AIATSIS, Monash University Press, Melbourne, 1998 (herein AIATSIS, Regional Agreements Vol.1); Edmunds, M., (Ed.), Regional Agreements: Key Issues in Australia — Volume 2 Case Studies, Draft, Forthcoming

‘To the timid, the uninspired and the unimaginative’ - Achievements through agreements

Within the provisions of the original Native Title Act, agreements finalised include agreed determinations of native title, agreements under the right to negotiate provisions allowing certain ‘future acts’ to proceed and agreements lodged in relation to the ‘expedited procedure’ following the making of an objection application.²⁹³

There were no agreements reached under section 21 of the original NTA. This is because of the deficiencies of that provision, most notably that it could only provide legally enforceable rights in relation to native title rights which were formally determined. In this way, the agreements process under the original NTA was not truly an alternative to the litigation process, but instead integrated with that process. This deficiency has no doubt contributed to a large proportion of agreements being concluded outside the mechanisms of the NTA.

Agreements that have been reached outside the NTA have provided variously for the withdrawal of native title claims or objection applications under the Act, or agreement with Indigenous groups not to proceed with lodging a native title claim. There are also agreements which take the opportunity presented by community awareness of native title issues to facilitate reconciliation with local Indigenous groups.

Alternatively, some agreements which have been reached outside the Act are expressed so as to not affect native title rights. Such agreements, instead of focusing on native title, tend to focus on outcomes for Indigenous people which do not involve the recognition (or conversely, the potential extinguishment or impairment) of native title. However, these agreements remain intimately connected to the native title process—it is this process and the potential existence of native title rights and interests that act as a catalyst for negotiations. In these agreements, the native title process lays down ‘general principles that act as a baseline from which parties commence negotiations.’²⁹⁴

Outcomes which have been realised in various agreements negotiated to date, within and outside the Act, include the following:

Statements of intent or commitment with local councils

Statements of commitment are exemplified by those made by Newcastle Shire Council, the City of Bunbury and Cardwell Shire Council. Statements of intent or commitment are reciprocal statements between the representative local government authority and local Indigenous groups which on the one hand recognise the original ownership of the area and the ongoing custodial obligations of the local Indigenous people, while on the other hand acknowledge the statutory rights and responsibilities of the local government authority. These statements can alter the political status of Indigenous people in the local community and open up the possibility for further, more detailed agreements in the future.²⁹⁵

(My thanks to AIATSIS for providing draft copies of the papers in this volume) (herein AIATSIS, Regional Agreements Vol.2); Meyers, G., (Ed.) *Implementing the Native Title Act: The Next Step*, op.cit.; Australian Local Government Association, (ALGA), *Working out Agreements Between Local Government and Indigenous Australians*, ALGA, Canberra, 1998. The NNTT has also developed an interactive agreements database accessible on the internet at <www.nntt.gov.au/nntt/agrment.nsf/area/homepage>.

²⁹³ Both types of agreements, which are made under s31(1)(b) and s32(5) respectively, are lodged with the NNTT under s34 of the NTA.

²⁹⁴ Macklem, P. ‘What’s law got to do with it? The protection of Aboriginal title in Canada’ (1997) 35(1) *Osgoode Hall Law Journal* 125, p132. Macklem’s comment is made in describing the approach of the Canadian Royal Commission into Aboriginal Peoples in 1996. This approach is highly illuminating when contrasted with the Australian approach to native title issues.

²⁹⁵ See ALGA, op.cit., sections 5.1 and 5.4 for some examples.

Management, joint management and consultative arrangements

These agreements relate to Crown lands including involvement in land use planning and service delivery to Indigenous communities. There are a growing number of agreements between Indigenous groups and local government. For example, the Quandamooka process agreement (discussed further below and extracted at Appendix three) and the Rubibi Interim Agreement (see case study next page).

Settlement of heritage protection issues

These include site clearance and site protection agreements. For example, the access agreement between the Far West Coast Working Group and fourteen mining companies in South Australia (discussed further below), and the agreement between Amity Oil and the Nyoongar community in Busselton in Western Australia.

In the 1996 review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) (the 'Heritage Act') by Elizabeth Evatt it was noted that there is a complex relationship between native title and heritage protection issues:

Certainly, the recognition that there is a place of particular significance in an area may make it easier to succeed in a native title claim...Although views differ as to whether the existence of a site of significance in a particular area is a form of native title interest or not there may be a connection. On the other hand, the (Heritage) Act is not a form of proprietary interest in land. Native title procedures are likely to be the first mechanism native titleholders, claimants or potential claimants use to protect their heritage from changes to land use.²⁹⁶

Native title mechanisms are likely to continue to be used in heritage protection for several reasons. Heritage protection issues are particularly significant to applications for the doing of a proposed future act where it is claimed that the 'expedited procedure' of the NTA is attracted. Such applications assert that there will be no impact on native title rights resulting from the conduct of the proposed future act and accordingly the right to negotiate provisions do not apply.

The Federal Court has indicated that in determining whether the expedited procedure applies, the NNTT must assess, on the balance of probabilities, whether an act would interfere with sites of particular significance.²⁹⁷ The Court held that the NTA is 'beneficial and protective in character' and accordingly, the opportunity for statutory negotiations (under the right to negotiate provisions) should not be displaced lightly.²⁹⁸

The NNTT has, in applying this test, determined that the expedited procedure will not apply where, for example, there is evidence that there are sites of significance in the area and the applicants have expressed concern that these sites may be damaged if the act proceeds.²⁹⁹ There have been a number of agreements reached, some which have been lodged under the NTA and others which provide for the withdrawal of an objection application, following the implementation of appropriate protection mechanisms for heritage sites.

The NTA will also continue to be used in heritage protection matters due to the ineffectiveness of the Heritage Act. This ineffectiveness has been highlighted by the decision of the High Court in April 1998 that the Hindmarsh Island Bridge Act 1997 (Cth), an Act with the sole purpose of disentitling local

²⁹⁶ Evatt, E., Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, AGPS, Canberra, 1996, p26. See also Finlayson, J., 'Indigenous heritage protection, native title and regional agreements: The changing environment' Centre for Aboriginal Economic Policy Research Discussion Paper 145/1997, Australian National University, Canberra, 1997.

²⁹⁷ Dann v Western Australia (1997) 144 ALR 1, Tamberlin J, p13 (Wilcox, Nicholson JJ concurring).

²⁹⁸ *ibid.*, p9.

²⁹⁹ See for example Dann (No.2)/State of Western Australia/GPA Distributors Pty Ltd (NNTT Determination, Unreported, Hon CJ Sumner, NNTT Perth, 10 June 1997, File: W095/19); and Billy Oscar & Ors/Bazco (NNTT Determination, Unreported, K Wilson, NNTT Sydney, 5 August 1998, File: W098/164).

Indigenous groups from the protection afforded by the Act in relation to the building of the Hindmarsh Island bridge, was a valid Act.³⁰⁰ The decision allows the Commonwealth government, at any expedient time, to lawfully remove the protection of the Heritage Act in relation to a development proposal.³⁰¹ Even where the Heritage Act does apply, protection under the Act remains discretionary. Agreements concerning the impact of certain acts on native title rights and interests offers a more certain form of protection.³⁰²

Co-existence agreements

These agreements seek to reconcile Indigenous and non-Indigenous rights to country. Examples of these include the Cape York Heads of Agreement and the agreement on North Stradbroke Island between Redland Shire Council and the Quandamooka Land Council Aboriginal Corporation. The Quandamooka agreement establishes a process to develop and negotiate a native title agreement. It includes the principles underpinning the process and the issues to be considered during negotiations, which include access, capital works and infrastructure, cross-cultural training, resource management and development approval processes, environmental assessment, employment, law enforcement, public health, reserve management, service delivery, tourism, water management and zoning issues. The agreement also provides that the parties will jointly undertake a planning and management study to identify environmental, cultural, social and economic concerns. The agreement is extracted at Appendix 3.³⁰³

Access and usage rights

Such agreements may secure for Indigenous people access to country already allocated for other purposes (such as national parks and pastoral leases): for example, an agreement between the Arakwal people, NSW government and Byron Bay Shire Council resulted in joint management arrangements for a State Recreation area in Byron Bay;³⁰⁴ an agreement between the Western Yalanji (Sunset) people, the Queensland government, a miner and a pastoralist family (the Pedersons) resulted in the third determination of native title by the Federal Court on 28 September 1998. The determination provides for 315 hectares of the land to be held under perpetual leasehold by the Yalanji people, with the pastoralists having their title to 25 000 hectares upgraded from an occupational to a perpetual leasehold. Sacred sites will be protected and the Yalanji will be provided with access, fishing, hunting and camping rights on the property. The agreement provides a code of conduct detailing obligations for exercising these rights, down to practical matters such as the closing of gates, guarding against bushfires, and removing garbage from the land.³⁰⁵

Transfer of land under freehold or perpetual lease

The transfer of title to land may be agreed on terms and conditions as to its future management. For example, following an announcement in October 1997, the New South Wales government transferred ownership of the Mutawinjti National Park (in the north-west of the State, near Broken Hill) back to the Bandjikalii, Wilkyakali, Malyakapa and Wanyuparlka groups on 5 September 1998. The park was then leased back to the State to be jointly managed by the National Parks and Wildlife Service and the

³⁰⁰ *Kartinyeri v Commonwealth* (1998) 152 ALR 540.

³⁰¹ The proposed amendments to the Heritage Act currently before Parliament do not instil confidence in the Act to adequately and appropriately address cultural and heritage concerns. See: Joint Parliamentary Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 12th Report—Report on the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998, Commonwealth of Australia, Canberra, May 1998.

³⁰² However, native titleholders or claimants will also be able to seek to protect sites of significance through state or territory heritage legislation.

³⁰³ See also ALGA, *op.cit.*, p115.

³⁰⁴ Sproull, R., 'Pearson sends a yorker down the native title pitch' *The Weekend Australian*, 18 October 1997 p58 (herein 'Pearson sends a yorker...').

³⁰⁵ O'Malley, B., 'Native title deal pleases all' *The Courier Mail*, 29 September 1998, p1; Lampthakis, P., 'Native title deal on pastoral property' *The West Australian*, 29 September 1998, p9.

Aboriginal owners. The transfer is seen as potentially increasing the popularity of the park as a cultural heritage destination.³⁰⁶

Settlement of land rights claims under State legislation

Under the Century Zinc agreement, the Queensland government has committed to provide funding to progress claims under the Aboriginal Land Act 1991 (Qld) with respect to Lawn Hill National Park.³⁰⁷

Transfers of Crown land and the acquisition of lands for Indigenous groups

The acquisition of land has been funded by state or territory governments or private parties under joint venture arrangements: for example, the Alcan agreement on Cape York, the purchase of pastoral leases to be administered by Land Councils in the Northern Territory and the transfer of land under the Century Zinc agreement.

The provision of Indigenous employment, education and training, and enterprise development opportunities

There have been several agreements which have secured such opportunities for Indigenous communities. For example, the Tjupan Ngalia agreement in Western Australia, an agreement outside of the NTA framework, allows the future acts regime of the NTA to be bypassed with grants of tenements fast-tracked, provided the companies to the agreement have regard to Aboriginal culture, employment, training and business enterprise opportunities; the Murrin Murrin project agreement in the Western Australian goldfields provides local communities with 20 per cent employment on the mine and contracts to be set aside for Aboriginal construction firms;³⁰⁸ and the Century Zinc project, concluded within the NTA process, provides significant employment and enterprise opportunities for Indigenous people, as well as the commitment of funding by the Queensland government for a variety of education and training programs aimed at providing local Indigenous people with employment skills that will allow them to enter the workforce generally and the pastoral industry in particular (the agreement also provides funding to a proposed out-station development on land held by an Aboriginal Land Trust).³⁰⁹

Similarly, the Yandicoogina agreement between Hammersley Iron and Gumula Corporation in the Pilbara region includes provision for investment in business development and infrastructure projects. As at 4 July 1998, Gumula Enterprises had entered into three joint ventures for earth-moving, equipment hire and camp management, and services companies. Assistance for these ventures was provided by ATSIC (business incentive grants), DEETYA (funding for training positions) and the Western Australian Department of Commerce and Trade (business planning assistance). To date over fifty jobs have been created as a result.³¹⁰

Such opportunities are invaluable to Indigenous communities in rural and remote areas, where there are limited economic opportunities. The emphasis on the provision of such opportunities is a reflection of a fundamental feature of the agreements making process, namely, that for agreements to be successfully negotiated they must provide each party to the negotiations with a bargaining position and accordingly, with tangible benefits.

³⁰⁶ Hartgerink, N., 'Land of their ancestors' *The Illawarra Mercury*, 18 October 1997; Clennell, A., 'Praise and harmony as Mutawintji handed back' *The Sydney Morning Herald*, 7 September 1998. The park is one of five that the NSW Government announced it would be handing back to traditional owners.

³⁰⁷ The Hon R. Borbidge, *Hansard*, Queensland Parliament, 20 August 1997.

³⁰⁸ Sproull, R., 'Pearson sends a yorker...', *op.cit.*, p58.

³⁰⁹ The Hon R. Borbidge, *Hansard*, *op.cit.*

³¹⁰ ATSIC, *Media Reports of Land Use Agreements in 1997 and 1998*, <www.atsic.gov.au/native/land_agreements.htm>, 18 September 1998.

From an Indigenous perspective, it is often assumed that regional agreements are an appropriate and acceptable way in which to proceed. However:

It ought not be assumed that from an Aboriginal perspective a regional agreement will be an ideal or comfortable 'solution' to the inevitable multiple pressing issues which confront Indigenous groups and communities. In our experience, the processes involved, from inception to termination, are complex, difficult and socially intrusive.³¹¹

Accordingly, for Indigenous people to see agreement making as a valuable experience, worthy of their full attention and commitment, any proposed agreement 'must be firmly grounded in the circumstances of Aboriginal (and Torres Strait Islander) people's lives and priorities and must strategically seek to change their adverse dimensions.'³¹² Indigenous people may therefore seek agreements that address the difficulties which they face in day-to-day life, such as inadequate housing and health and the lack of economic opportunities.

Employment and enterprise opportunities for the local Indigenous community can also be advantageous to a mining company and the government. It can, in addition to providing a legally certain title, provide a mining company with the potential to develop a localised, lower cost workforce and localised supporting enterprise facilities. It can also provide benefits to government such as a reduction in Indigenous dependence on welfare payments, reduced demand for government financed development projects in remote areas and potential improvements in the social environment (with the consequence of potentially reduced costs for social problems).³¹³

The development of Indigenous employment, education and training, and enterprise development strategies

In addition to employment opportunities on a project specific basis, there have also been broader strategies developed to increase economic opportunities for Indigenous people in rural and remote areas in the longer term. For example, the Aboriginal Mining Enterprise Taskforce, a loose coalition of Indigenous people and representatives from business, government, community organisations in the Northern Territory, has as its broad aim increasing the percentage of Aboriginal employees in the Northern Territory mining industry from 7% to approximately 16% by the year 2000.³¹⁴ The taskforce has identified opportunities in areas which service mines such as security, cleaning, catering, rehabilitation, construction and exploration. The Taskforce seeks to reduce barriers to Aboriginal job creation within Aboriginal communities such as low literacy and numeracy levels, while also identifying and reducing barriers within companies, such as a lack of cross-cultural training, management commitment and flexible working arrangements. The taskforce also sees a need for better integration between the mining industry and the Community Development Employment Program (CDEP). To this end some companies, such as Normandy Gold, are considering proposals to integrate the CDEP with the company's employment requirements.

Rio Tinto has signed a Memorandum of Understanding with ATSIC which outlines initiatives to develop employment and business opportunities for Indigenous people in their mining operations nationally. The Memorandum states that Rio Tinto will establish baseline employment levels for each of its mines, while also supporting enterprise opportunities that were sustainable beyond the life of the mine.³¹⁵ A similar Memorandum of Understanding was signed on 3 September 1998 by Rio Tinto and the federal Department of Employment Education Training and Youth Affairs aimed at developing

³¹¹ Blowes, R. and Trigger, D., 'Negotiating the Century Mine agreement: Issues of law, culture and politics', in AIATSIS, Regional Agreements Vol. 2, op. cit., p2.

³¹² Martin, D., 'Regional agreements in Cape York' in AIATSIS, Regional Agreements Vol. 1, op.cit., p40.

³¹³ See further Manning, I., Native Title, Mining and Mineral Exploration, ATSIC, Canberra, 1997; and Manning, I., Native Title, Mining and Mineral Exploration—A Postscript, ATSIC, Canberra, 1998.

³¹⁴ Slumping gold prices over the past eighteen months have meant that it will be unlikely that the target will be achievable. Sproull, R., 'Mine closures sink job creation for Aborigines', The Australian, 25 February 1998, p32.

³¹⁵ Sproull, R., 'Rio signs with ATSIC on Aboriginal opportunities', The Australian, 27 May 1998, p26.

specific employment and training opportunities for Indigenous people at Rio Tinto's mine sites at Yandicoogina, Hail Creek, Weipa and the Argyle Diamond mine.³¹⁶

As noted in chapter two, a four year National Rural Industry Strategy was also developed by ATSIC and the government in 1997.³¹⁷ The four key objectives of the strategy are the economic empowerment of Indigenous people through the development of sustainable enterprise opportunities; strengthened access and coordination of financial support, expert advice and service and programs for rural industries and infrastructure; the enhancement of ecologically sustainable development; and resources to assist community decision-making processes to develop rural industries. The strategy envisages a more labour intensive enterprise model, based upon a mixture of minimal capital investment requirements, and reliance upon the CDEP. The strategy is not a native title initiative per se, although it is relevant to communities negotiating in a native title context.³¹⁸

Financial compensation for extinguishment of native title.

The size of compensation payments are often exaggerated in the media. For example, of the \$30 million committed by the Queensland government to the Century Zinc project, \$40,000 is allocated as compensation for the acquisition of native title in the proposed transport infrastructure corridor. The focus of the agreement, as noted above, is on the provision of services, infrastructure and employment and enterprise opportunities.³¹⁹ This reflects the fact that Indigenous people are generally not opposed to mining per se, but instead wish that any mining activities be conducted in a manner that allows them to continue to exercise their responsibilities for country (ie, extinguishment is the least desirable outcome) and includes them in the benefits of the development.³²⁰

Facilities and services which address the particular cultural concerns of local Indigenous communities

There are numerous agreements which address the unique cultural concerns and priorities of local Indigenous communities. For example, the Century Zinc agreement provides funding for the establishment of Aboriginal women's centres for culturally appropriate birthing services, as well as a men's centre providing training in matters such as traditional land care, ceremonies and the protection of sacred sites, in order to revitalise traditional cultural beliefs. Similarly, an agreement between Griffith University and the Kombumerri people provides for the granting of land to the university in return for the acknowledgment of the traditional owners through naming of facilities, inclusion of their history and culture in the curriculum, lectureships and scholarships for Indigenous students. The university also agreed to approach museums to collate a register of materials reflecting Kombumerri cultural heritage, and to help repatriate cultural artefacts and store them in a purpose built facility.³²¹

Intra-Indigenous agreements

The need to reach agreements amongst Indigenous groups has arisen primarily due to the lodgment of multiple, overlapping native title claims. Such overlapping claims arise from factors ranging from

³¹⁶ Sproull, R., 'Rio Tinto in Indigenous jobs pact' *The Australian*, 4 September 1998, p23.

³¹⁷ ATSIC and the Department of Primary Industries and Energy, *The National Aboriginal and Torres Strait Islander Rural Industry Strategy*, Commonwealth of Australia, Canberra, 1997.

³¹⁸ The strategy is considered in relation to the right to negotiate in chapter 3.

³¹⁹ The agreement also provides \$7.56 million for the conduct and implementation of a social impact assessment and \$15.5 million for the upgrade of roads and bridges to the Century Zinc mine: The Hon R. Borbidge, Hansard, op.cit.

³²⁰ The Crescent Head agreement is often cited as evidence of a large compensation liability in relation to native title. This agreement is often cited without reference to the context in which it was negotiated —that is, over land which had been granted to a third party without complying with the provisions of the NTA, where that third party had subdivided and commenced development on the land. Had agreement not been reached, the development would have been held up and procedures would have been initiated to ensure that the land was compulsorily acquired.

³²¹ Illing, D., 'Native title pact first for Griffith', *The Australian*, 29 July 1998, p34.

family and other group conflicts, differing traditional and historical connections to the land, through to the existence of areas of shared responsibility or differing responsibilities over the same country.³²² Many of these factors are not necessarily the product of the native title process but are instead ‘symptomatic of a history of dispossession and relocation of Aboriginal and Torres Strait Islander people from their traditional country.’³²³

Intra-Indigenous agreements reached to date have been principally of two types — agreements between groups that they will amend the boundaries of their respective native title claims in order to reduce overlapping areas, as well as recognising the traditional obligations of other groups within claim areas (see for example the Worrora agreement in the Kimberley region between the Ngarinyin and Worrora people)³²⁴ and framework agreements providing for the formation of working groups to resolve intra-Indigenous conflict and present a coordinated response to other parties in negotiations.

The native title agreement making process and the enjoyment of human rights by Indigenous people

The agreements detailed above are not an exhaustive list of outcomes reached in agreements to date. The diversity and extent of these examples should, however, fill us with hope.³²⁵

The agreements process is leading to a substantive change in the political relationship between Indigenous and non-Indigenous people across the country. This changing relationship is most clearly demonstrated in relation to the mining industry. The history of mining in Australia has primarily been one of conflict with Indigenous people, with few benefits and much social disruption flowing to Indigenous communities. Data from the 1996 Census, for example, indicates the extent of the problem—non-Indigenous towns in mining rich areas recorded the highest median income levels in Australia, while the neighbouring Indigenous communities recorded among the lowest.³²⁶

The native title process has produced a change of ethics by some mining companies and a recognition that Indigenous people are legitimate stakeholders in development. This change represents good business practice from a mining industry perspective, not philanthropy.³²⁷ It recognises that absolute certainty can only be achieved through genuine negotiations with Indigenous groups, not through back door deals or special legislation.

Contrary to the often simplistic assertions made at the national level, the native title process is, quietly and incrementally, beginning to redress the disadvantage faced by Indigenous people in Australia. It is leading to the recognition of and improvements in the enjoyment of human rights by Indigenous Australians. These developments must be seen as real outcomes.

‘Two way respect’: Native title and self-determination

In his First Report — 1993, former Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Michael Dodson, explained the fundamental significance of self-determination in the following way:

³²² The registration test under the amended NTA prevents multiple and overlapping claims from being registered on the Register of Native Title Claims. While the need for such a test is not disputed, chapter four argues that the registration test has been set at too high a level under the amended NTA.

³²³ National Native Title Tribunal, Annual Report 1996–97, NNTT, Perth, 1997, p31.

³²⁴ *ibid.*

³²⁵ These examples also highlight the nonsense of measuring the effectiveness of the native title process according to how many determinations of native title have been made. Rather, the absence of determinations may, on one measure, be an indication of the success of agreement processes inspired by the native title framework.

³²⁶ Manning, I., *Native Title, Mining and Mineral Exploration*, op.cit, p17.

³²⁷ Eggleston, P., ‘Gaining Aboriginal community support for a new mine development’, Conference paper, Beyond Wik, Perth, 29 April 1998.

Correctly understood, every issue concerning the historical and present status, entitlements, treatment and aspirations of Aboriginal and Torres Strait Islander peoples is implicated in the concept of self-determination. The reason for this lies in the fact that self-determination is a process. The right to self-determination is a right to make decisions. These decisions affect the enjoyment and exercise of the full range of fundamental freedoms and human rights of Indigenous peoples...³²⁸

The absence of self-determination is experienced by Aboriginal and Torres Strait Islander people in an intimate, daily way. Confinement to mainstream government services relating to health, housing, education and employment is, to many Indigenous people, reminiscent of the missionary days... The exercise of self-determination by Aboriginal and Torres Strait Islander communities most frequently centres on the provision of community services. The aim is not merely to participate in the delivery of those services, but to penetrate their design and inform them with Indigenous cultural values.³²⁹

It is in this context that the achievements of the agreements process should be viewed and assessed. The numerous examples provided above demonstrate the ways in which the process of agreement has begun to alter the political relationship between Indigenous and non-Indigenous people. The process has also begun to place Indigenous people in a position in which they can determine their priorities for service delivery, be listened to, and subsequently be involved in the design of programs. To some this may seem unremarkable, but placed within its historical context it is, in fact, extraordinary. It is an outcome which has led some Indigenous people to describe agreements as 'a sort of two way citizenship ceremony', leading to 'two way respect.'³³⁰

What is further encouraging, and equally significant, is that the agreements process is leading to the development of Indigenous governance structures.³³¹ The development of such structures is vital in ensuring that Indigenous groups are able to harness the improved bargaining position that the recognition of native title can provide.³³² It is also vital to consolidate the gains which have been made in agreements. For example, Senator Charlie Watt, a leader of the Quebec Inuit in Canada in the mid-1970s, has said that in their push for land rights, his people did not get nearly as much as they wanted in negotiations. What they did get, however, were sufficient 'tools' to work towards their other goals in their own way.³³³

As Gary Meyers has said,

Viewed optimistically, the emerging model for settling Indigenous land claims...(through) consensual approaches...provides Indigenous communities (with) real and meaningful opportunities to control their destinies and manage their lands according to their customs and traditions. (These)...agreements provide the option for a truly pluralistic approach to accommodating Aboriginal land management laws, customs and traditions in shared resource management regimes...(N)egotiated settlements, whether local or regional, offer the opportunity to develop, at a very important level, systems for self-government and self-management of traditional homelands. If that comes to pass in a meaningful way, Aboriginal

³²⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner, First Report 1993, AGPS, Canberra, 1993, p41. Emphasis added.

³²⁹ *ibid.*, pp 55–56.

³³⁰ Havnen, O., 'Regional agreements: Panacea or political process?' Conference paper, Working with Native Title and Reaching Agreement, Brisbane 29–30 April 1998; see also Maher, L., *op.cit.*, p9.

³³¹ Equally important is the acceptance of the legitimacy of these structures by non-Indigenous people, a factor which is frequently undermined by the 'accountability' stance of the current federal government towards Indigenous representative bodies and ATSIC.

³³² Note, however, that issues of power imbalance in native title negotiations remains a significant issue: Dodson, M., 'Power and cultural difference in native title mediation' (1996) 3 (84) *Aboriginal Law Bulletin* 8; Australian Law Reform Commission, Issues Paper 25, *Alternative Dispute Resolution—Its Role in Federal Dispute Resolution*, ALRC, Sydney, 1998, paras 4.66– 4.75.

³³³ Jull, P. and Craig, D., 'Reflections on regional agreements: Yesterday, today and tomorrow' (1997) 2 *Australian Indigenous Law Reporter* 475, p493.

and Torres Strait Islander peoples in Australia will, for the first time since colonisation, stand on an equal footing with other Australians before the law...³³⁴

If the Canadian experience is anything to go by, then the development of self-governance structures (accompanied by the continual increases in the skills and confidence levels of Indigenous people in asserting their rights) will exponentially increase the ability of Indigenous people to secure further improvements in conditions and the enjoyment of human rights.³³⁵

The achievements of the agreements process to date must, however, be placed in context. These achievements have been reached against the backdrop of a highly divisive debate on native title and repeated attacks on Indigenous organisations at the national level and at times strident opposition of State governments. The attitudes and actions of various governments have acted as a constraining influence on the potential of the agreements process.

The role of governments in the agreements process

*'People who sit tight usually remain where they are'*³³⁶

The involvement of State and Territory governments in the native title process is essential to the workability of the NTA. This is due to the government's role as the provider of essential services, as well as the design of the right to negotiate provisions of the NTA, which provide State and Territory governments with an integral role in the process.

The right to negotiate provisions can only be 'triggered' by the State (or Territory) government issuing a notice under section 29 of the Act. Without this notice, the right to negotiate provisions do not come into effect, and the time limits under the provisions do not commence. Under the original NTA the grant of a title without complying with the right to negotiate provisions could invalidate the grant. A refusal by a State government to provide notice effectively operated as a veto on the negotiation process.

Once a notice was issued, the government party was required to negotiate in good faith with the Indigenous group with a view to reaching an agreement that the future act could be done, with or without conditions.

Through both these requirements—the issuing of notices and the subsequent negotiation period—the State or Territory governments are able to significantly influence the workability of the NTA provisions. It has been through these two processes, for example, that the Queensland³³⁷ and Western Australian governments have rendered the NTA process less workable.

As a response to the Wik decision, the Queensland government took the deliberate, strategic decision to place an administrative freeze on the processing of all current and future exploration licences and mining leases. Consequently, the Queensland Government decided not to utilise the right to negotiate provisions of the NTA and issued very few notices under section 29.³³⁸

³³⁴ Meyers, G., 'Incorporating Indigenous land management traditions and values in resource allocation and land management regimes: The emerging Australian experience' in Meyers, G. (Ed.), op.cit., p139.

³³⁵ On the Canadian experience see, for example, Webber, J., Conference paper, Beyond Wik, Brisbane, 20 April 1998.

³³⁶ Mills, F. J, quoted in Eggleston, P., op.cit.

³³⁷ There have now been three governments in Queensland since the inception of the NTA in 1994. References to the Queensland government in this section refer to the Goss and Borbidge governments, not the recently installed Beattie government.

³³⁸ Since commencement of the NTA the Queensland government has issued 11 notices, 3 of which were issued in the period following the Wik decision: Figures supplied by NNTT Brisbane Registry.

The impact of this approach can be demonstrated by the circumstances of Union Mining.³³⁹ Union Mining is a small scale gold mining company with interests in Australia and abroad. The company had exploration licences over widely dispersed land with ore deposits in Queensland. The most economically viable way to proceed was to maintain exploration licences over the ore deposits and then upgrade these to leases when necessary. To maintain project viability, they required the grant of approximately 10 leases per year. When the government introduced the administrative freeze the company had 16 applications at various stages of the approval process.

The Queensland government actively discouraged Union Mining from seeking a section 29 notice and advised them that they could not be compelled to issue such a notice. Instead they advised the company to attempt to reach a section 21 agreement under the NTA or to make a non-claimant application under the NTA. In April 1997, the government finally agreed to issue the section 29 notices and trigger the right to negotiate provisions. However, the government issued these too late and left the company in the position that they would be facing at least temporary closure of the processing plant until the leases could be validly granted. The company decided to close down operations and has stated that the strategic behaviour of the Queensland government was a significant factor in this decision. The company continued to negotiate with the Ewamian peoples and in November 1997 reached an agreement that allowed the grant of the sixteen mining leases to proceed, while also providing site protection, the involvement of the Ewamian people in the project, and employment and enterprise opportunities.

Western Australia took almost the opposite approach to Queensland. Following the High Court's decision in 1995 that the alternative legislative regime to the NTA was constitutionally invalid, the government embarked on a policy of issuing section 29 notices, often accompanied by an assertion that the expedited procedure applied in relation to the proposed future act.³⁴⁰ When the required time for negotiations ended, as set out in section 35 of the NTA, the government then applied to the NNTT to make an arbitral determination on the basis that there had been no agreement reached.

In a decision of the Federal Court in 1996 it was held that the government was required to negotiate in good faith with a view to reaching agreement with the native title parties prior to lodging an application to the tribunal for a determination.³⁴¹ Following the subsequent decision in the Njamal people case,³⁴² the Western Australian government withdrew most applications for the tribunal to make a determination, on the basis that they had failed to meet this good faith requirement.³⁴³

In mid 1997 there was a noticeable shift in the Western Australian government's stance. They were now willing to enter into negotiations with claimant groups, subject to those groups satisfying a set of conditions. These include that:

- there are no overlapping claims, except to the extent that any overlap represents shared responsibility for country;
- claimants could provide evidence to demonstrate their continuous traditional connection with land claimed;

³³⁹ See further Finlayson, J., 'The right to negotiate and the miner's right: A case study of native title future act processes in Queensland' Discussion Paper No 139/1997, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 1997, and Murdoch, R., 'Case study: Union Mining NL' Conference paper, Working with the Native Title Act, Brisbane, 16–18 June 1997.

³⁴⁰ Since May 1995 the Western Australian government has issued 13605 notices under s29, 6147 of which were issued in the period following the Wik decision: Figures supplied by NNTT Perth Registry.

³⁴¹ *Walley v Western Australia* (1996) 137 ALR 561.

³⁴² *Western Australia v Taylor* (on behalf of the Njamal people) (unreported) WF96/4, 7 August 1996, Sumner CJ.

³⁴³ A recent determination of the NNTT has re-evaluated the obligations imposed by this good faith requirement: see *WA v Thomas (Waljen People) & Ors* (Unreported, NNTT (WA), Sumner CJ, 4 September 1998, WF98/7). Under section 31 of the original NTA, this good faith requirement only applied to the government.

- the claims do not extend to exclusive possession;
- rights claimed in regard to non-exclusive tenures are clarified and limited to those rights which do not conflict with the interests of other parties; and
- the claimants acknowledge that any native title rights will be subject to any State law of general application.³⁴⁴

Aside from the requirement that intra-Indigenous issues be resolved before coming to the negotiating table, these requirements are onerous and impose a standard which is stricter than the common law test as laid down in *Mabo* and *Wik*. For example, the criteria that native title claims not extend to exclusive possession does not acknowledge that native title rights may extend to full occupation and ownership at one end of the spectrum, while at the other end are capable of co-existing with other validly granted interests, to the extent that such interests are consistent.³⁴⁵

There are some common features between the Western Australian and Queensland governments, despite their differing approaches. Both governments have adopted a public stance that the NTA is unworkable, yet they have both clearly refused to try to make it work. This unwillingness to participate in the processes of the NTA has undermined its workability.

Both governments have not really been prepared to acknowledge that native title is a legitimate interest recognised in our property system. This is comparable to the attitudes initially displayed by many provincial governments in Canada, particularly British Columbia, where the emergence of native title was seen as a threat to sovereignty.³⁴⁶ This dimension is also at play in Australia — after all, the recognition of native title reduces the quantity of land held exclusively by the States, as well as reducing authority to grant new titles to other parties.³⁴⁷

The approach of both governments is in stark contrast to the achievements reached through the agreements process to date. They are out of step with the reality of the changing relationships which are taking place at the ground level between Indigenous people, industry and the community generally. While it is ‘good business’ to negotiate with Indigenous people regarding native title issues, it is yet to become ‘good government.’

The failure of State governments generally to embrace the native title process has had the unfortunate result of limiting the extent of the achievements which can be reached through the native title process. While not discounting those achievements reached to date, there is no doubt that with the committed involvement of State governments, the agreements process could potentially lead to the further integration of native title issues with Indigenous concerns about service delivery and regional development. Accordingly, the attitudes of State governments to date are constraining not only the agreements process, but also the further improvement in socio-economic conditions and the enjoyment of human rights by Indigenous Australians.

The attitudes of State governments have led other parties in native title matters to attempt to reach agreements without government involvement. A number of agreements have been concluded in which

³⁴⁴ Muir, K., ‘Negotiating regional settlements on native title: Perspectives from the Goldfields of Western Australia’, in *AIATSIS, Regional Agreements Vol.2*, op. cit., p14. The Western Australian government’s checklist of criteria to indicate an ongoing traditional connection with land is reproduced at (1997) 3(9) *Native Title News* 132.

³⁴⁵ Where there is an inconsistency, the non-native title interest prevails, but only to the extent of that inconsistency. Note, however, that issues relating to the burden of proof expected of native title claimants in demonstrating a continued connection to land have also been problematic in other States. For example, claimants in settled regions, such as the Yorta Yorta claimants in Victoria, have faced the entrenched view that Aboriginal people in settled regions have been stripped of cultural identity and meaningful connection to traditional lands: Finlayson, J., ‘The potential for regional agreements in Victoria’ in *AIATSIS, Regional Agreements Vol. 2*, op. cit., p3. Finlayson notes that the Hindmarsh Island Bridge inquiry has had an impact in reinforcing these stereotypes.

³⁴⁶ See further Webber, J., op.cit.

³⁴⁷ Manning, I., op.cit.

the other parties finalise agreements and then seek to involve the relevant State government in the process. As an example, Hammersley Iron Pty Ltd reached agreement with the local Indigenous groups in negotiating the Yandi Land Use Agreement in Yandicoogina in Western Australia prior to approaching the State government to issue the section 29 notice.³⁴⁸ Agreements continue to be finalised, despite the stance of various State governments.

The Native Title Amendment Act 1998 (Cth): Likely impact on agreement making

After two and a half years of public debate, amendments to the NTA were finally passed through the federal Parliament in July 1998. The amendments were passed in very different circumstances to those which existed when the original Act was passed in December 1993.

Moments before the final vote on the Bill in the Senate, a statement by the National Indigenous Working Group (NIWG) was read into Hansard by members of the opposition parties. The statement highlighted the political disenfranchisement which many Indigenous people felt during the passage of the amendments from their conception until their translation into law:

The National Indigenous Working Group...confirm that we have not been consulted in relation to the contents of the current Bill, particularly in relation to the agreement negotiated between the Prime Minister and Senator Harradine, and that we have not given consent to the Bill in any form which might be construed as sanction to its passage into Australian law...Our participation has not been given the legitimacy by the Australian Government that we expected, and we remain disadvantaged and aggrieved by the failure of the Australian Government to properly integrate our expert counsel into the lawmaking procedures of government.³⁴⁹

The amendments substantially implement the Howard government's '10 point plan'.³⁵⁰ They significantly alter the original NTA framework. This section highlights some of those amendments which are likely to impact upon the capacity for native title issues to be resolved through agreement making processes.

Indigenous Land Use Agreements (ILUAs)

In light of the deficiencies of section 21 of the Act, the amendments include a revised agreements structure for the making of Indigenous Land Use Agreements. These provisions are largely based on those originally suggested by the NIWG in response to the Native Title Amendment Bill 1996 and are a singular welcome addition to the native title process.

The amendments provide statutory support for three types of agreements—body corporate, area and alternative procedure agreements.³⁵¹ Table One of Appendix Three details those matters which can be the subject of each type of agreement, while Table Two of Appendix Three outlines the key requirements of each type of agreement.

³⁴⁸ See Eggleston, P., op.cit.; Senior, C., 'The Yandicoogina process: A model for negotiating land use agreements', Regional Agreements Paper No.6, Australian Institute for Aboriginal & Torres Strait Islander Studies, Canberra, 1998.

³⁴⁹ Statement issued by the National Indigenous Working Group (NIWG), 7 July 1998: Hansard, Senate, 7 July 1998, p4352. Note that the response to the statement by the Government challenged the legitimacy of the NIWG to make the statement: Senator the Hon N. Minchin, Hansard, Senate, 7 July 1998, p4354. It has also been reported that during the reading of the statement 'Coalition senators walked out (of the chamber)—or stood around chatting, ignoring (the statement)...' Parry Agius, Letter to the Editor, The Australian, 15 July 1998, p12.

³⁵⁰ For a critique of the 10 Point Plan see Native Title Report 1996–1997, and Australian Law Reform Commission Submission to the Senate Legal and Constitutional Legislation Committee inquiry into the Constitutionality of the Native Title Amendment Bill 1997, ALRC, Sydney, 1997(ALRC submission).

³⁵¹ NTA, Div.3, Subdivs. B-E.

These provisions provide for a process of notification and registration of agreements. Once a party has requested the Registrar to place the agreement on the Register of Indigenous Land Use Agreements, the Registrar must notify all interested people and organisations of the agreement. If no objection is received to registration of the agreement within a specified time (which varies according to the type of agreement being registered) and all other specified requirements have been met, then the agreement is placed on the Register.

The effect of registration of the agreement is to ensure the legality of future acts authorised by the agreement (section 24EB(2)). The non-extinguishment principle also applies, unless the agreement explicitly states that a surrender of native title rights and interests is intended to extinguish those rights and interests. The ILUA provisions also place restrictions on the ability of native title parties to claim compensation, in addition to that compensation which has been agreed upon in the registered agreement (section 24EB(4)–(6)).

ILUAs can be made either with or without government as a signatory, although if native title is extinguished under the agreement then government must be a party. Under these provisions, many of the agreements discussed earlier, which are unprotected by the NTA, would now be able to be registered under the Act.

Notably, the amendments allow parties to an agreement to alter the effect of a ‘validated intermediate period act’³⁵² on native title.³⁵³ It is particularly encouraging that the legislation provides support for parties to enter into such agreements, although the focus on extinguishment in the amended Act significantly reduces the need for non-claimant parties to negotiate about such matters.

A significant problem which remains with these provisions from an Indigenous perspective is that they set out a process of notification and registration which is entirely focused on ensuring the validity of future acts. The provisions do not provide any additional support for obligations of non-Indigenous parties and government to Indigenous parties. The NNTT argued that agreements need to be given the force of statutory instruments to remedy this defect.³⁵⁴

Reduced scope for agreement making

The Government has indicated that it expects voluntary negotiated agreements about native title to become the primary way of resolving native title claims and for allowing proposed ‘future acts’ to proceed. However, the amendments to the NTA run contrary to this aim. The agreements structure in the Act is overwhelmed by the focus of those amendments on the extinguishment of native title rights and interests, and through the significant amendments to the negotiation provisions of the NTA. The amendments also refocus negotiations that do take place on dispute settlement rather than agreement making (as discussed in chapter 2).

The extinguishment of native title pervades the entire amended Act.³⁵⁵ It includes the provisions of the Act authorising the upgrade of non-exclusive tenures to ‘primary production’ levels,³⁵⁶ the validation of

³⁵² An ‘intermediate period act’ is an act that was undertaken between 1 January 1994 and 23 December 1996 which may be invalid for failure to comply with the provisions of the NTA. The revised NTA validates these acts and, according to how the intermediate period act is categorised under section 22 of the NTA, impacts upon any native title rights that may have continued over the same land (by either extinguishing native title completely, to the extent of the inconsistency, or not at all). Intermediate period acts are defined in s232A of the Act. Note: the NIWG had argued that there should not be blanket validation of intermediate period acts, which are, after all, acts undertaken without compliance with the legal obligations of the NTA.

³⁵³ NTA, s24EBA.

³⁵⁴ French, R., ‘Local and Regional Agreements’, Regional Agreements Paper 2, AIATSIS, Canberra, 1997; ALRC submission, *op.cit.*, para 8.5.

³⁵⁵ This focus on extinguishment has been criticised extensively. See for example, Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 1996–97, HREOC, Sydney 1997, chapters 3 and 4; ALRC, *ibid.*

³⁵⁶ NTA, Div. 3, Subdiv. G.

intermediate period acts,³⁵⁷ and the list of scheduled interests.³⁵⁸ These provisions progressively extinguish native title over potentially large areas of land, exempting titleholders from the need to negotiate with Indigenous interests.

Where native title has not been extinguished, the amendments to the Act substantially alter the framework against which negotiation takes place, with the potential to significantly reduce the scope for agreement making. The new mediation provisions of the Act provide that the Federal Court may rule, on its own motion or upon application of a party, that mediation should cease after 3 months.³⁵⁹ Similarly, under the right to negotiate³⁶⁰ the requirement to negotiate in good faith under s31(2) has been reduced in scope;³⁶¹ certain activities, which were previously covered, have been excluded;³⁶² and the Act authorises the removal of the right to negotiate on pastoral leases where alternative state based provisions are established under s43A.³⁶³

These changes remove the onus on mining companies and government to negotiate with Indigenous groups. It is not acceptable to suggest that they will continue to negotiate regardless as it is good business to do so. After all, the provisions of the Act regulate what is acceptable and unacceptable behaviour in negotiations about the legal rights of Indigenous people. The amendments reduce the obligations of non-native title parties. This is not to say that agreement making will not continue, but it will continue, unjustifiably, on terms more favourable to non-Indigenous parties and with reduced bargaining power for Indigenous claimants.

Compensation and agreements

The corollary of extinguishment of native title is the requirement to provide just terms compensation. Potentially large numbers of applications which were formerly native title claims will now be converted into compensation claims. The revised NTA processes will require Indigenous groups to make compensation applications to the Federal Court for determination.³⁶⁴ These applications will then be referred to the NNTT for mediation in order to assist the parties to reach agreement on the area of land and incidents of native title that have been extinguished, the amount or kind of compensation payable, and other related issues.³⁶⁵

At this stage, there is very little guidance on what just terms in relation to native title involves.³⁶⁶ There has been to date perhaps an undue emphasis on the monetary dimension of compensation. The concept

³⁵⁷ NTA, Div. 2A.

³⁵⁸ Under s23B(2)(c)(i) of the Act an interest which is included in Schedule 1 of the Act will be a 'previous exclusive possession act' and will accordingly extinguish all native title rights and interests.

³⁵⁹ NTA, s86C(2),(3). The presumption is that if the native title claimant or government makes the application, then the Federal Court will order that mediation cease, unless it is satisfied that mediation should continue.

³⁶⁰ The changes to the right to negotiate provisions are considered in detail in chapter three.

³⁶¹ This provision has been altered to provide that where any of the parties to the negotiations refuses or fails to negotiate about matters which are 'unrelated to the effect of the future act' on a determined or claimed native title right, then they will not be held to have failed to negotiate in good faith: NTA s31(2).

³⁶² For example, private sector infrastructure facilities under s24MD (as defined in s253 NTA—these include roads, railways, bridges, ports, airstrips, gas or oil facilities and pipelines. Agreements have been struck involving many of these matters to date), primary production upgrades (s24GB, 24GD) and approved exploration acts under s26(2)(b).

³⁶³ To be considered adequate, alternative State or Territory regimes must provide judicial review mechanisms for decisions of the Mining Warden or Arbitral body. This judicial review may provide Indigenous people with a 'de facto' right to negotiate: see Noel Pearson and Frank Brennan's comments on *The Law Report: Native Title Forum*, Radio National, 14 July 1998.

³⁶⁴ NTA, Pt 2, Div. 5.

³⁶⁵ NTA, s86A(2), 86B.

³⁶⁶ From a valuer's perspective see Sheehan, J., 'Towards a methodology for the valuation of coexisting rights and the assessment of compensation for the expropriation of Indigenous property rights', Conference Paper, *Beyond Wik*, Melbourne, 23 April 1998.

of extinguishment at common law is problematic when what is extinguished is the ability of Indigenous people to practice their cultural and religious beliefs and customs. The solution that money will compensate for such loss is misguided and fundamentally misunderstands the nature of Aboriginal belief systems and respect for human rights.³⁶⁷

A more suitable analogy is that the loss of the ability to exercise native title rights is akin to a resumption of personal possessions, not merely house and land.³⁶⁸ Accordingly, compensating for the extinguishment of native title should focus upon agreement that allows traditional owners to continue to exercise their practices, traditions and customs, and to continue to shoulder their responsibilities for country—for while native title may be extinguished in the eyes of the ‘white man’s law’, the obligations and responsibilities of Indigenous groups will continue regardless.

Should this understanding become the prevailing interpretation of how to provide adequate and just terms compensation through agreement, we may still see agreements reached which provide for the co-existence of native title and other interests.

The amended Act provides mechanisms through which this understanding could be brought into practice. It provides, for example, that parties to a compensation negotiation must, if one of the other parties raises it, consider requests for non-monetary forms of compensation and negotiate in good faith in relation to such requests.³⁶⁹

Accordingly, it can be expected that the mediation of compensation applications will, like negotiations in the agreement process to date, raise issues of Indigenous participation in regional governance and development as non-monetary compensation. It can be expected that matters such as land transfers, access and other co-existence arrangements, and provisions for the rehabilitation of land after development will be on the table for negotiation and consideration.³⁷⁰

It is quite possible, however, that such negotiations will take place with a fundamental imbalance of bargaining power. With the non-native title interest having already been validated, some parties may approach such negotiations as a matter of benevolence or favour, rather than motivated by a real need to resolve the issues. A failure to resolve the issues will simply transfer the matter to the Federal Court for determination, where it is more likely that the Court will not order non-monetary forms of compensation (particularly if such compensation imposes obligations on unwilling third parties).

The ‘essence of what native title can be’³⁷¹

Native title has been recognised in the Australian legal system for just six years. In that time, we have seen dramatic changes in the political status of Indigenous Australians and are beginning to see improvements in socio-economic conditions and the enjoyment of human rights by Indigenous people.

These achievements have been made in difficult circumstances and with great tenacity and determination by the parties involved. In many ways, the amendments to the NTA adopt a position suggesting that a maintenance of this trend is ‘too hard’. Native title appears to be treated in precisely

³⁶⁷ See further Muir, K., ‘The earth has an Aboriginal culture inside: Recognising the cultural value of country, in *Land Rights Laws: Issues of Native Title*, Issues Paper 26, AIATSIS, Canberra, 1998.

³⁶⁸ Lavarch, M. and Riding, A., ‘A new way of compensating: Maintenance of culture through agreement’, *Land Rights Laws: Issues of Native Title*, Issues Paper 21, AIATSIS, Canberra, 1998, p5.

³⁶⁹ NTA, s79.

³⁷⁰ Farley, R., McCrae, T. and Lane, P., ‘Outlook for regional development: Opportunities for regional agreements’ Conference paper, Northern Australia Regional Outlook Conference, Darwin 24 September 1997.

³⁷¹ Senator J. Woodley, Hansard, Senate, 28 November 1997, pp 9399-9400.

the same way as Indigenous issues have been consistently treated throughout our history as ‘as an administrative problem to be managed and controlled by effective administrative structures.’³⁷²

But, as Olga Havnen has pointed out, it is in circumstances of similar difficulty and tension that the agreements process has achieved perhaps its greater gains in the Canadian context. Agreements:

Grew out of a poisoned and angry political climate just like that we have today in Australia. They were a way to move forward from entrenched positions.³⁷³

This chapter has highlighted the real outcomes which have been achieved to date through the native title negotiation process. By comparison, the remainder of the report has noted the deficiency of the focus of the recent amendments to the NTA on the extinguishment of native title and the preferencing of the rights of non-Indigenous Australians over those of Indigenous Australians.

Fundamentally, native title is about the recognition of the special place of Indigenous Australians in our nation, and about the inclusion of Indigenous people in our common future. As this chapter has shown, this is something that will be best achieved through common respect, understanding and negotiation. It will not be achieved by forcing Indigenous people to continually resort to litigation for the recognition and enforcement of their rights. We should celebrate the fact that some Australians have begun to recognise this fact, and are working towards achieving co-existence.

Appendix 1: National Indigenous Working Group Statement

Senate Hansard Tuesday 7 July 1998

The National Indigenous Working Group considers that the commentary and judgements expressed in this statement are a true and accurate reflection of the opinions of the Aboriginal and Torres Strait Islander Peoples as can be expressed at the national level.

The National Indigenous Working Group affirms that the Aboriginal and Torres Strait Islander Commission is an active participant in the Working Group.

We, the members of the National Indigenous Working Group, reject entirely the Native Title Amendment Bill as currently presented before the Australian Parliament.

We confirm that we have not been consulted in relation to the contents of the Bill, particularly in regard to the agreement negotiated between the Prime Minister and Senator Harradine, and that we have not given consent to the Bill in any form which might be construed as sanction to its passage into Australian law.

We have endeavoured to contribute during the past two years to the public deliberations of Native Title entitlements in Australian law.

Our participation has not been given the legitimacy by the Australian Government that we expected, and we remain disadvantaged and aggrieved by the failure of the Australian Government to properly integrate our expert counsel into the lawmaking procedures of government.

We are of the opinion that the Bill will amend the Native Title Act 1993 to the effect that the Native Title Act can no longer be regarded as a fair law or a law which is of benefit to the Aboriginal and Torres Strait Islander Peoples.

³⁷² Sullivan, P., ‘Beyond native title: Multiple land use agreements and Aboriginal governance in the Kimberley’, Discussion Paper No.89, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 1995, p8.

³⁷³ Havnen, O., *op.cit.*, p2.

We remind the Australian Government and the Australian Peoples that the Native Title Act is not the mechanism which creates our ownership of land, waters and environment.

Our ownership derives from our ancient title which precedes colonisation of this continent and our ownership must continue, in Australian law, to be recognised in accordance with our indigenous affiliation with the land, waters and environment.

Our relationship with the land, waters and environment is a complex arrangement of spiritual, social, political and economic associations with the land which cannot be replicated, substituted, replaced or compensated.

We regard fair and equal treatment of our indigenous land rights, or Native Title, in comparison to the land title of other Australians, to be determined by the level of respect and regard for the titles and not by the assimilation of titles.

It is therefore a fundamental flaw of the Australian Government to consider that fairness or equality in the Native Title Act has been achieved by limiting the rights of Aboriginal and Torres Islander Peoples, for example to the rights of pastoral lessees.

On this basis we reject as repugnant the proposal that the Native Title rights of Aboriginal and Torres Strait Islander people must now be reduced where pastoral leases occur.

We also consider the requirement that we must prove contemporary physical association with our land to be unacceptable.

Although the Australian Government has sought means to ›soften‹ the impact of this requirement, it nevertheless limits our Common Law rights, and it deliberately lessens our access to lands, water and environment.

The invidious intent of the ›physical association‹ test is to validate the past ›locked gate‹ policies of the pastoralists, to exploit the 100 years of imprisonment of our people under the ›reserves‹ system, and to despoil the rights of the ›Stolen Generation‹.

We are absolutely of the view that the Native Title Act, once it is amended, will no longer reflect the negotiated outcomes of 1993, when Aboriginal and Torres Strait Islander people did participate in the construction of the statute, and ultimately agreed to the implementation of that law.

The agreement was founded upon basic principles which are no longer maintained. These principles include:

- the legislation would not preempt or alter the Common Law definition of Native Title;
- the Commonwealth retained responsibility for Native Title procedures and instruments; and
- the Racial Discrimination Act would apply, except in the situation of validation of grants of interests over Native Title from 1975 to 1994.

We remain concerned that the Australian Government has ignored its commitments to implement a ›social justice package‹ for the Aboriginal and Torres Strait Islander peoples as a compensatory measure.

We are also concerned that existing and relevant measures for the benefit of Aboriginal and Torres Strait Islander peoples such as ATSIC, heritage protection laws, the Indigenous Land Corporation, the Aboriginal and Torres Strait Islander Social Justice Commissioner and the Council for Aboriginal Reconciliation are being seriously eroded and impaired.

These measures have been developed by the Australian Government in a non partisan approach to mitigating the effects of past colonisation and racial exploitation of the Aboriginal and Torres Strait Islander peoples.

We are offended by the extremely partisan approach of the current Australian Government which has caused the Aboriginal and Torres Strait Islander Peoples to be political victims, subjected to racial vilification by some Australian institutions and citizens.

This vilification has, in the opinion in the Working Group, been incited by the Australian Government's bent to denigrate Native Title rights, and has not been adequately addressed by the Australian Government under the goal of eradicating racial prejudice.

We remind the Australian Government of the international standards on human rights which it has failed to observe in the making of this new Native Title law.

The Australian Government signed in 1979 the Lusaka Declaration of the Commonwealth on Racism and Racial Discrimination.

Under the terms of this declaration the Australian Government accepted an international responsibility of governments to work together to eradicate racial discrimination.

The statement, in part, reads ...

We attach particular importance to ensuring that children shall be protected from practices which may foster racism or racial prejudice. Children have the right to be brought up and educated in a spirit of tolerance and understanding so as to be able to contribute to the building of future societies based on justice and friendship.

We believe those groups who may be especially disadvantaged because of residual racist attitudes are entitled to the fullest protection of the law.

We recognise the history of the Commonwealth and its diversity require that special attention should be paid to the problems of Indigenous minorities ...

We agree that special measures may in particular circumstances be required to advance the development of disadvantaged groups in society. We recognise that the effects of colonialism or racism in the past may make desirable special provisions for the social and economic enhancement of Indigenous populations.

Inspired by the principles of freedom and equality which characterise our associations, we accept the solemn duty of working together to eliminate racism and racial prejudice. This duty involves the acceptance of the principle that positive measures may be required to advance the elimination of racism, including assistance to those struggling to rid themselves and their environment of the practice.

Being aware that the legislation alone cannot eliminate racism and racial prejudice, we endorse the need to initiate public information and education policies designed to promote understanding, tolerance, respect and friendship among peoples and racial groups.

We are particularly conscious of the importance of the contribution the media can make to human rights and the eradication of racism and racial prejudice by helping to eliminate ignorance and misunderstanding between people and by drawing attention to the evils which afflict humanity. We affirm the importance of truthful presentation of facts in order to ensure that the public are fully informed of the dangers presented by racism and racial prejudice.

The Working Group is not intimidated from speaking of racial discrimination in the Native Title legislation.

We are guided by the United Nations definition of 'racial discrimination' as it is defined in the International Convention on the Elimination of All Forms of Racial Discrimination.

The Australian Government has ratified this Convention by enactment of the Racial Discrimination Act 1975. This legislation is fundamental to the proper treatment of Native Title interests by all Australian governments.

We consider that the Australian Government should recall its intention to meet international standards on human rights, and must renew its commitment to respect these standards in domestic law and other dealings.

Article 1.1 of the Convention describes 'racial discrimination' as meaning:

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.

Under the terms of the ratified Convention the Australian Government 'undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions' [Article 2.1(b)] and 'to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination'. [Article 4]

The National Indigenous Working Group is disappointed that the Australian Government has relegated the position of the Working Group to one of opposition to the Government and, in this situation, the Australian Government has not endeavoured to address the concerns of the Aboriginal and Torres Strait Islander Peoples regarding racial discrimination.

The National Indigenous Working Group is extremely disappointed that the Australian Government has failed to confront issues of discrimination in the Native Title laws and implicitly provoked the Aboriginal and Torres Strait Islander Peoples to pursue concerns through costly and time consuming litigation, rather than through negotiation.

We particularly condemn the Prime Minister, the Hon. John Howard, for his personal failure to display leadership to the parliament, to vested interests, to Australian citizens, and to the Aboriginal and Torres Strait Islander Peoples for a just and reconciled nation by the Year 2001.

We consider that the Prime Minister holds an obligation through his high office to personally advocate the principles of freedom and equality for the Aboriginal and Torres Strait Islander Peoples, and to personally campaign for the elimination of ignorance and misunderstanding between peoples.

Finally the National Indigenous Working Group notes that much attention has been given to Senator Harradine and Senator Colston to defeat the Native Title Amendment Bill.

While we continue to urge these individuals to respect our position in the legislation and oppose the Bill, we do not intend to amplify their roles in relation to all parliamentarians.

The National Indigenous Working Group does thank Senator Harradine for his staunch support of the Native Title Act 1993, recognising his role in strengthening that legislation, and on his principled stands during the previous Senate considerations of the Native Title Amendment Bill.

However we remind Senator Harradine and all parliamentarians that Australian history is in the making, and that future generations will be examining today's actions in the context of justice towards Aboriginal and Torres Strait Islander Peoples.

History will not record the technical details of draft legislation, but will record the outcomes of the legislation and whether Australia faced up to its long term neglect or turned back the clock on reconciliation.

We insist that our children and their descendants enjoy their lawful rights as revealed in the 1992 High Court decision on the Mabo case. We also insist our children be safeguarded from the same racism, racial prejudice, and racial vilification which we are experiencing today.

We are determined that the future generations of Australian society are raised and educated in a spirit of tolerance and understanding which will ensure that the measures of justice important to the reconciliation between our peoples can be appreciated and embraced.

We call upon all parliamentarians to give serious thought to the responsibility of the Australian Government to eradicate racial discrimination in this country.

The National Indigenous Working Group on Native Title absolutely opposes the Native Title Amendment Bill, calls upon all parliamentarians to cast their vote against this legislation, and invites the Australian Government to open up immediate negotiations with the Aboriginal and Torres Strait Islander Peoples for coexistence between the Indigenous Peoples and all Australians.

Appendix 2: Extracts from a Native Title Process Agreement

Note: the following excerpts are from the Quandamooka Native Title Process Agreement. They are reproduced here as an example of the terminology used by the parties to the agreement and to highlight the scope of the subject matter of agreements. This agreement is not reproduced as a model, nor is it to be taken as representative of other agreements which have been reached to date.

Native Title Process Agreement: Quandamooka Land Council Aboriginal Corporation and Redland Shire Council 4 August 1997.³⁷⁴

1. Parties

1.1 The parties to this agreement are:

- (a) Quandamooka Lands Council Aboriginal Corporation (? QLC?); and
- (b) Redland Shire Council (? RSC?).

2. Acknowledgments

2.1 The parties acknowledge that:

- (a) The QLC represents Aboriginal people traditionally and historically associated with Quandamooka lands and waters, including people comprising the traditional clans of Nunukual, Nugi and Gurenpul ('Quandamooka people');
- (b) The Quandamooka people are the original inhabitants of Quandamooka and by their traditional laws and customs, hold inherent rights, interests and custodial obligations in relation to Quandamooka lands and waters;
- (c) The RSC is a duly constituted Local Government under the *Local Government Act*; and

³⁷⁴ The agreement is available in full on the National Native Title Tribunal's Agreements database on the internet, *op.cit.*

- (d) The RSC has statutory rights and responsibilities in relation to Quandamooka lands and waters.

3. Purpose

- 3.1 The purpose of this agreement is to record an understanding between the parties as to:
 - (a) a process (paragraph 6) leading to an Agreement on Native Title;
 - (b) the subject matters for negotiation (paragraph 7); and
 - (c) the principals (paragraph 8) underpinning the process (paragraph 6) leading to an agreement on Native Title...

6. Process

- 6.1 The parties agree to a Process leading to an agreement on native title (paragraph 6(2)(e).)
- 6.2 In particular the parties agree to:
 - (a) Undertake a Planning and Management Study for North Stradbroke Island (Minjerrabah) in accordance with the Project Brief (Attachment 2);
 - (b) Jointly appoint a Project Coordinator and Primary Consultancy to undertake the day to day management of the negotiations and the Planning and Management Study;
 - (c) Establish a Steering Committee, comprised of a balanced representation of the parties, to:
 - (i) negotiate on issues arising from the Subject Matters for Negotiation (Paragraph 7);
 - (ii) negotiate on issues relevant to the Planning and Management Study;
 - (iii) instruct, direct and monitor the Project Coordinator and Primary Consultancy;
 - (iv) evaluate reports, proposals and recommendations of the Planning and Management Study;
 - (v) determine any recommendations of the Planning and Management Study;
 - (vi) liaise with the parties; and
 - (vii) facilitate consultation with relevant stakeholders and the general public, as agreed to by the parties;
 - (d) Utilise the recommendations, findings and information produced by the Planning and Management Study and any other information to negotiate:
 - (i) a strategic plan;
 - (ii) a Management Framework Agreement; and
 - (iii) any other matters as agreed to by the parties; and
 - (e) Negotiate an Agreement on Native Title, incorporating:
 - (i) a Strategic plan;
 - (ii) a Management Framework Agreement; and
 - (iii) any other matters as agreed by the parties.

7. Subject matters for negotiation

- 7.1 The following is a list of subject matters that the parties intend to address during the negotiation of an Agreement on Native Title (Paragraph 6(2)(e)):
 - (a) Access
 - (b) Administration
 - (c) Capital Works and Infrastructure
 - (d) Community Development
 - (e) Cross Cultural Training

- (f) Cultural Heritage Protection
- (g) Cultural Resource Management
- (h) Development Approval Procedures
- (i) Dispute Resolution
- (j) Economic Development
- (k) Environmental Assessment
- (l) Employment
- (m) Financial Resourcing
- (n) Future Act Processes
- (o) Intellectual and Cultural Property Protection
- (p) Land and Natural Resources Management
- (q) Land Tenure
- (r) Law Enforcement
- (s) Outstation Development
- (t) Planning
- (u) Public Health
- (v) Research and Monitoring
- (w) Reserves Management
- (x) Service Delivery
- (y) Third Party Interests
- (z) Tourism Management
- (aa) Water management
- (bb) Zonings

8. Principles

- 8.1 The parties aim to reach an Agreement on native Title (Paragraph 6(2)(e)) incorporating a culturally appropriate holistic planning and management strategy based on the principles of environmental, cultural, social and economic sustainability.
- 8.2 The parties agree that:
- (a) Negotiations shall be conducted in good faith;
 - (b) It shall be necessary for the parties to consult with their respective principals prior to the finalisation of any agreements;
 - (c) The parties may, by agreement, request the assistance of the NNTT to resolve any negotiation impasse by way of mediation;
 - (d) The custodial obligations and the aspirations for self-determination of the Quandamooka people shall be respected;
 - (e) The cultural decision making processes of the Quandamooka people shall be respected;
 - (f) The rights and responsibilities of the RSC shall be respected;
 - (g) The negotiations shall foster reconciliation between Aboriginal and non-Aboriginal people;
and
 - (h) The Agreement on Native Title (Paragraph 6.2(e)) shall require adequate resourcing.

Appendix 3: Indigenous land use agreement provisions

Table 1 - Coverage of Indigenous Land Use Agreements

Coverage of agreements/Type of agreement	Body Corporate Agreements (s 24BB, NTA)	Area Agreements (s 24CB, NTA)	Alternative Procedure Agreements (s 24DB, NTA)
The doing of future acts. The future acts can be particular acts or those falling into a class. The doing of the future act may be subject to conditions (which may be about procedural matters). Agreements can be made validating a future act that was done invalidly because of the provisions of the NTA.	/	/	/
The doing of anything in relation to either an application for a determination of native title, revocation or variation of an approved determination of native title, or a determination for compensation. This can include withdrawing, amending or varying an application.	/	/	/
The way in which native title rights and interests and other rights and interests in relation to an area will be exercised.	/	/	/
The relationship between native title rights and interests and other rights and interests in relation to an area.	/	/	/
The extinguishment of native title in relation to land or waters by surrendering it to the Commonwealth, State or Territory government.	/	/	
The provision of a framework for the making of other agreements about native title			/
Any other matter concerning native title in relation to the area.	/	/	/
Compensation for any past, intermediate period or future act	/	/	/
Any matter concerning rights of access, for certain persons with registered native title claims, to land or waters covered by non-exclusive agricultural and pastoral leases.		/	/
Agreements changing the effect of a validated intermediate period act on native title from that which applies under section 22B of the Act or the equivalent State or Territory provision.	/	/	

Table 2: Summary of Indigenous Land Use Agreements provisions

Subject of agreement/ Type of agreement	Body Corporate Agreements (Pt 2, Div 3, Subdiv B NTA)	Area Agreements (Pt 2, Div 3, Subdiv C NTA)	Alternative Procedure Agreements (Pt 2, Div 3, Subdiv D NTA)
Parties to the agreement	<p>The parties must include:</p> <ul style="list-style-type: none"> all of the registered native title bodies corporate for the area; the Commonwealth, a State or Territory where the agreement makes provision for the extinguishment of native title by surrendering it to the Commonwealth, State or Territory. <p>Any other person or persons may be parties to the agreement (eg local government)</p> <p>The Commonwealth, a State or Territory can be a party to the agreement even if native title is not to be extinguished by the agreement.</p> <p>Section 24BD</p>	<p>The parties must include:</p> <ul style="list-style-type: none"> The ‘native title group’ in relation to the area (as defined in section reference) the Commonwealth, a State or Territory where the agreement makes provision for the extinguishment of native title by surrendering it to the Commonwealth, State or Territory. <p>Any other person or persons may be parties to the agreement(see section reference for some examples)</p> <p>The Commonwealth, a State or Territory can be a party to the agreement even if native title is not to be extinguished by the agreement.</p> <p>Section 24CD</p>	<p>The parties must include:</p> <ul style="list-style-type: none"> The ‘native title group’ in relation to the area (as defined in section reference) The ‘relevant government or governments’ as defined in section reference <p>Any of the following may also be a party:</p> <ul style="list-style-type: none"> any registered native title claimant in relation to lands or waters in the area; any other person who claims to hold native title in relation to land or waters in the area; or any other person. <p>Section 24DE, NTA</p>
Can the agreement provide for the extinguishment of native title?	<p>A Body Corporate Agreement can extinguish native title, but it need not do so.</p> <p>Section 24BB(e)</p>	<p>An Area Agreement can extinguish native title, but it need not do so.</p> <p>Section 24CB(e)</p>	<p>An Alternative Procedure Agreement cannot extinguish native title, although it can otherwise deal with acts that affect native title (subject to the non-extinguishment principle):</p> <p>Section 24DC</p>
Consideration and conditions of the agreement	<p>The agreement may be given for any consideration, or subject to any conditions, agreed by the parties.</p> <p>The consideration may include the grant of a freehold estate in any land, or any other interests in land (whether or not statutory).</p> <p>Section 24BE</p>	<p>The agreement may be given for any consideration, or subject to any conditions, agreed by the parties.</p> <p>The consideration may include the grant of a freehold estate in any land, or any other interests in land (whether or not statutory).</p> <p>Section 24CE</p>	<p>The agreement may be given for any consideration, or subject to any conditions, agreed by the parties.</p> <p>The consideration may include the grant of a freehold estate in any land, or any other interests in land (whether or not statutory).</p> <p>Section 24DF</p>

<p>Notification and registration requirements</p>	<p>Any party to an agreement may apply to the Registrar for the agreement to be registered on the Register of ILUAs: Section 24BG</p> <p>The Registrar must notify interested people and organisations specified in section 24BH</p> <p>After one month notification, the Registrar must register the Agreement on the Register of ILUAs unless</p> <ul style="list-style-type: none"> • a party to the agreement advises that they do not wish the agreement to be registered; or • the relevant Aboriginal and Torres Strait Islander representative body was not adequately informed and consulted (as required by s 24BD(4)): Section 24BI 	<p>Any party to an agreement may apply to the Registrar for the agreement to be registered on the Register of ILUAs: Section 24CG</p> <p>An application must be accompanied by certification of all representative Aboriginal / Torres Strait Islander bodies, or a statement that all reasonable efforts have been made to identify potential native title holders and they have authorised the agreement: Section 24CG(3)</p> <p>The Registrar must notify interested people and organisations specified in section 24CH</p> <p>After the notification period of three months the Registrar must register the agreement if the conditions in section 24CK or section 24CL have been met.</p>	<p>Any party to an agreement may apply to the Registrar for the agreement to be registered on the Register of ILUAs: Section 24DH</p> <p>The Registrar must notify interested people and organisations specified in section 24DI</p> <p>Any person claiming to hold native title in relation to any of the lands or waters covered by the agreement may lodge an objection to the registration of the agreement within the 3 month notification period: Sections 24DI, 24DJ</p> <p>After the notification period of three months the Registrar must register the agreement if the conditions in section 24DL have been met.</p>
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