

Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

The Native Title Amendment Bill 1997

Michael Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, 3 October 1997

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1. Introduction

As Aboriginal and Torres Strait Islander Social Justice Commissioner, I am required by the *Native Title Act 1993* (Cth) ('NTA') to report on the impact of that Act on the human rights of Australia's Indigenous peoples.¹ I am also charged with a statutory responsibility under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) to promote discussion and awareness of human rights in relation to Aboriginal and Torres Strait Islander peoples, and to examine proposed enactments to ascertain whether they recognise and protect the human rights of Aborigines and Torres Strait Islanders.² In discharging these responsibilities, I am deeply concerned with the subject of this committee's work.

Australia is at a crucial point in its dealings with Aboriginal and Torres Strait Islander peoples. Nothing is more important to the expression of our national character than the way in which we respond to the High Court's decision in the *Wik* case.³ Our Parliament's handling of the Native Title Amendment Bill 1997 ('the Bill') will be a measure of the values by which we live and work together as a nation.

The argument the *Wik* and Thayorre peoples put to the High Court was a moderate one. They did not challenge the validity of the rights conferred by pastoral leases - in fact, they encouraged the Court to confirm those rights. They simply argued that the granting of pastoral leases had not necessarily extinguished all native title rights.⁴

The High Court's acceptance of the potential for co-existing rights to pastoral land reflects the way that the Australian pastoral industry developed. Aboriginal labour and bush skills were crucial to the development of the pastoral industry. Co-existence was a "*daily reality*" on much pastoral lease land, where Aboriginal communities "*lived, worked, hunted, fished and observed their religious obligations.*"⁵

1 s. 209, *Native Title Act 1993* (Cth)

2 *Human Rights and Equal Opportunity Act 1986* (Cth) s 46C(1).

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

4 Pearson, N., 'Fine example of co-operation, not conflict', *The Australian*, 24 December 1996, p. 13.

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

Our Federal leaders could have taken the *Wik* decision as an opportunity to draw Australians together. The Government could have devoted some real time and energy to educating the nation about the issues in a calm and factual way. The common misperception that native title claimants can ‘throw farmers off their land’ could have been comprehensively put to rest. Once people’s fears and misunderstandings about native title are overcome, breakthroughs can be achieved. A fair basis for co-existence could be found.

The *Wik* decision provides an opportunity for Australians to take up the notion of co-existing titles; a basis for developing ways to combine efficiency and certainty with genuine respect for the property rights of all Australians.

Instead, the Government has used *Wik* as an excuse to produce a Bill which completely restructures the way in which native title is accommodated within the Australian legal system, in order to serve the purposes of vested interest groups. The amendments cut away at the protection of native title and greatly increase the potential for it to be extinguished and impaired. I agree with Father Frank Brennan’s view that: “[t]he Government wants to wind back native title as far as the Senate, the High Court and the Constitution will permit”.⁶

The ways in which the Bill erodes the protection of the property rights of native title holders are discussed in detail in the written submission which I have tendered to the Committee, and also in my *Native Title Report* for 1997, which I anticipate will shortly be tabled in Parliament by the Attorney-General. For the moment, I will briefly list some of the most troubling features of the Bill.

- The validation provisions reward non-compliance with the *Native Title Act*, and impair or extinguish native title. Native title holders will have to wait many years for any compensation.
- The Bill purports to ‘confirm’ that a vast array of previously granted titles have extinguished native title. However, the Bill does not merely ‘confirm’ extinguishment which has already taken place under the common law. Instead, it pre-empts the development of the common law and ‘deems’ extinguishment to have occurred in countless situations. There is great potential for the Bill to wrongly anticipate the development of the common law relating to extinguishment, causing native title to be extinguished in circumstances where it would have survived under the common law.
- The Bill clears the way for pastoralists to carry on primary production activities. In doing so it denies procedural rights to native title holders and ignores their co-existing property rights in pastoral land. The dramatic expansion of pastoralists’ rights will lead to an ever-increasing suppression of native title rights, and may ultimately cause the *de facto* extinguishment of native title.
- The compulsory acquisition proposals allow State and Territory procedures to replace the right to negotiate when land is acquired by governments for the benefit of third parties. This will make it significantly easier for governments to upgrade pastoral tenures, at the expense of native title rights.
- The future acts regime is dramatically altered by the Bill. At the moment, the ‘freehold test’ provides a non-discriminatory foundation for the future acts regime. With limited exceptions, a future act is only ‘permissible’ on native title land where it could also be done on freehold land, and native title holders are entitled to the same procedural rights as freeholders. By

⁶ Brennan, F., ‘A certain kind of justice’, *The Canberra Times*, 4 September 1997, p. 9.

contrast, under the amendments a range of future acts affecting native title will be valid regardless of whether or not they could be done on freehold land.

- The Bill dramatically reduces the application of the right to negotiate process. It also clears the way for third parties to construct ‘infrastructure’ for their own projects, outside the right to negotiate.

Perhaps the only thing more obvious than the imbalance of the Bill is its complexity. An Act of 127 pages is to be amended by a Bill of over 300 pages. By way of example, the present *Native Title Act* has two subdivisions relating to future acts, which contain 24 sections. By contrast, under the proposed amendments there would be **17** subdivisions relating to future acts, containing, by my count, **106** sections.

In addition to this, the Bill clears the way for State and Territory legislation to apply in a wide range of situations. The end result is that Australians who want to understand how native title fits into our property law system will have to work their way through an enormous Commonwealth Act **and** an indefinite number of State and Territory statutes. I am at a loss to understand how making the system so overwhelmingly complicated can bring about ‘workability’ or ‘certainty’ for the stakeholders who need to understand the law.

There is no need for such complexity. The High Court has already declared that the rights of leaseholders prevail over native title where there is inconsistency. Indigenous representatives have indicated that they would accept the legislative confirmation of this principle. This could be combined with a range of other initiatives - in particular, to facilitate agreements - to make co-existence workable and protect Indigenous and non-Indigenous property rights.

In my view, the Bill is inconsistent with non-discrimination standards under international law. The Government has relied on a ‘formal equality’ argument to claim that its proposals are consistent with non-discrimination standards. It has suggested that the package will be non-discriminatory so long as it either provides formal equality or constitutes a ‘special measure’ for the benefit of Indigenous peoples. This approach is wrong on two counts.

First, it is clear that a law which requires formal equality between racial groups can be racially discriminatory. It is widely accepted under international law that non-discrimination requires substantive, genuine equality rather than formal equality between racial groups.

Secondly, the Bill fails to satisfy the Government’s own definition of non-discrimination, as it does not guarantee formal equality and cannot be described as a ‘special measure’.

The Bill does not provide formal equality, when, for example, it:

- validates Crown-granted titles at the expense of native title; and
- moves the future acts regime away from a guarantee of formal equality, by winding back the freehold test.

It is impossible to see how the Act amended as proposed could be characterised as a ‘special measure’ for the benefit of Indigenous peoples. As described, the Bill increases the discriminatory aspects of the Act, but it does not ‘balance’ this with beneficial provisions to protect native title and accommodate the needs of native title holders. On the contrary, the Bill dramatically curtails the right to negotiate. The agreements provisions cannot ‘balance’ the rest of the Bill. They are of negligible

value, as the Bill removes any real incentive for governments and other stakeholders to pursue agreements.

As well as breaching international non-discrimination standards, the constitutional validity of the package is also extremely doubtful. The Bill is clearly not a law with respect to external affairs, as there is no treaty or international concern that it gives effect to. The only available head of power is the ability of the Commonwealth to make laws with respect to “*the people of any race*” under s. 51(xxvi) of the Constitution. It has never been conclusively determined by the High Court whether the amended s. 51(xxvi) allows the Commonwealth to make laws which are **detrimental** to Indigenous Australians. The issue is clearly uncertain. It would be the bitterest irony if the races power as amended by the 1967 referendum could be used to wind back the property rights of Indigenous peoples.

Australia’s native title estate hangs in the balance. Enactment of the Bill in its present form would be a severe setback for Aboriginal and Torres Strait Islander peoples. Australia would yet again have allowed the property rights of its Indigenous peoples to be overridden on a massive scale. This would diminish Australia’s standing as a nation and send a clear message, both domestically and internationally, about our national values.

Indigenous people don’t want Australia to come to a standstill - we want it to prosper. But we also want to be able to negotiate and reach agreement about developments that will affect - and possibly extinguish - our property rights. This is no more than any Australian deserves and should be entitled to.

The Parliament and the people of Australia have an opportunity to deliver some justice to the first peoples of this country. We can choose a workable and fair co-existence that protects our human rights, or an unjust and discriminatory re-affirmation of the values which underpinned the concept of *terra nullius*.

I ask Australia’s political leaders what it is they will have history say of them. What is the example and legacy we will give to our children?

2. The *Wik* Case

The Government’s proposed legislation purports to respect and to be founded on the principles of the *Wik* decision. It is my firm view that it does not reflect the principles of the majority judgments.

The *Wik* case explored the principles governing the extinguishment of native title. In framing a response to *Wik* which reflects the common law it is essential that these principles are properly understood and applied.

The Court deliberately left open the possibility that native title may be wholly ‘suspended’ for the duration of an inconsistent grant. The permanency or otherwise of ‘extinguishment’ is, therefore, an open issue. However, the *Wik* decision confirmed that extinguishment will result from the granting of an inconsistent interest in land where there is a clear and plain legislative intention that such action will extinguish native title.

A crucial aspect of *Wik* is the approach taken by the majority judges in determining what will constitute ‘inconsistency’ indicating a legislative intention to extinguish.

‘Inconsistency’ leading to extinguishment

Each of the majority judgments contains a description of when ‘inconsistency’ giving rise to extinguishment will occur. There are marked similarities between the judgments in relation to this issue, which makes it possible to develop principles which are consistent with the approaches of all the majority judges.

In my view, the judgments support a ‘minimalist’ approach to finding inconsistency which leads to extinguishment. The judgments bring out two key points:

- (i) A strict approach is taken to finding ‘inconsistency’ between a Crown-granted title and native title which will give rise to extinguishment.
- (ii) When the extent of any extinguishment has been determined, the surviving native title rights ‘co-exist’ with the rights of the lessee. The exercise of rights under the pastoral lease will not ‘extinguish’ native title in these circumstances but will merely ‘prevail’ over it to the extent of any practical inconsistency.

(i) *The test for determining ‘inconsistency’*

The majority judges explain that to determine whether a grant has caused extinguishment, one must compare the rights granted to the lessee against the native title rights that are claimed and determine whether they are ‘inconsistent’.⁷

The majority stress that ‘inconsistency’ will only be found if rights granted to the pastoralist make it **impossible** for native title rights to be exercised. The fact that there is a potential for the exercise of pastoralists’ rights to clash with native title rights will not give rise to extinguishment of the native title rights in question. There will be no necessary ‘inconsistency’, and thus no ‘extinguishment’ where there is a possibility that the native title rights in question could continue to be exercised.

For example, Justice Toohey defines ‘inconsistency’ as being the “*inability*” of native title and other rights to co-exist.⁸ He says that: “[i]f the two can co-exist, no question of implicit extinguishment arises... .”⁹ Justice Gummow says that for there to be inconsistency leading to extinguishment there must be “*clear, plain and distinct authorisation by the relevant grant of acts necessarily inconsistent with all species of native title which might have existed.*”¹⁰ Justice Kirby suggests that ‘inconsistency’ leading to the extinguishment of native title will only occur if the exercise of the leasehold rights would make it “*impossible*” for native title rights to be exercised.¹¹

Thus, for ‘inconsistency’ leading to extinguishment to be found, it must be obvious that the exercise of the grantee’s rights would make it impossible for a claimed native title right to be exercised. Without this, there will be no evidence of a ‘clear and plain legislative intention’ that the grant extinguish the right in question. Extinguishment will not result from the granting of rights which, when exercised, **may** be inconsistent with the exercise of native title rights. Wherever any possibility of co-existence remains, there will be no question of extinguishment.

⁷ See eg the ‘postscript’ to the judgment of Toohey J., *Wik, op.cit.*, p. 190.

⁸ *Wik, op. cit.*, p. 184.

⁹ *Ibid.*

¹⁰ *Ibid.*, pp. 246-247.

¹¹ *Ibid.*, p. 284.

(ii) Prevalence not extinguishment

All of the judges indicate that the question of ‘extinguishment’ must be resolved by reference to the rights of each party, **not** by considering the acts which have been performed by the holders of Crown-granted titles. Once the extent of any extinguishment has been determined by measuring the rights granted against the claimed native title rights, the issue of extinguishment is at an end. Any surviving native title rights ‘co-exist’ with the grantee’s rights. Where the pastoralist’s rights prove in practice to be inconsistent with the exercise of native title rights, they prevail over native title. However, ‘prevalence’ does not amount to ‘extinguishment’.

Some commentators have suggested that *Wik* leaves open the possibility that acts performed under a pastoral lease may ‘extinguish’ native title rights, despite the fact that the granting of the lease did not extinguish those rights. This purported confusion has been created by brief comments of Justices Gaudron and Gummow.¹² However, such an interpretation seems to fly in the face of statements made about this issue by all of the judges, including Justice Brennan.¹³ For example, Justice Gummow states emphatically in his judgment that the question of inconsistency is not determined “by regard, as a matter of fact in a particular case, to activities which are or might be conducted on the land.” Rather, “it requires a comparison between the legal nature and incidents of the existing right and the statutory right.”¹⁴

It seems that confusion has been caused by the unusual circumstances of the *Wik* case. The Court was asked to decide whether grants had necessarily extinguished native title, before the incidents of that title had been determined. This gave the Court’s discussion of extinguishment a hypothetical quality and blurred the distinction between two separate issues, namely:

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

The first step in the claims process is to determine the nature of the claimants’ native title rights. This is a factual issue, which requires the Court to consider all evidence relating to the claimants’ traditional connection to the area.

It is only when the nature of the claimants’ native title rights has been assessed that these rights can be ‘measured’ against grantees’ legal rights, to see whether any native title rights are ‘extinguished’. This is a question of law. As explained, the majority judgments in *Wik* indicate that a strict test of inconsistency will be applied.

Native title rights which are not extinguished will survive alongside the grantee’s rights. The grant cannot cause any further ‘extinguishment’. As the pastoralist continues to exercise his or her rights, these actions will ‘prevail’ over native title to the extent of any inconsistency but will not ‘extinguish’ native title rights. Assessment of any subsequent loss of connection will, again, be a complex factual issue.

In my view, the most coherent analysis of the majority judgments in *Wik* requires that ‘extinguishment’ is given a narrow scope. A logical interpretation of the judgments compels the

¹² *Wik, op.cit.*, per Gaudron J, p. 218; per Gummow J, p. 247.

¹³ See eg *Wik, op.cit.*, per Toohey J, p. 190; per Kirby J, pp. 274, 275, 279; per Gaudron J, p. 193; Brennan CJ, p. 153; also Attorney-General’s Department, ‘Legal Implications of the High Court Decision in *The Wik Peoples v Queensland*: Current Advice’, 23 January 1997, p. 5.

¹⁴ p. 233.

conclusion that inconsistency between co-existing rights leads to the ‘suppression’ of native title, not its ‘extinguishment’. This distinction is essential to the protection of native title. However, as I explain below, it is inconsistent with the approach taken in the Bill.

It is worth noting that the Attorney-General’s Department suggested a similar interpretation of the *Wik* decision in its advice of 23 January 1997. It proposed that an any “*apparent inconsistency*” arising from the judgments:

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

*...In such circumstances, the native title rights must ‘yield’...in the sense of give way to the exercise of the grantee’s rights. However, it may not be appropriate to speak in terms of the extinguishment or impairment of native title rights in such cases. As the High Court appears to contemplate concurrent and potentially overlapping rights in relation to an area of land, the issue at this level may be simply one of **priority** between such rights as opposed to their extinguishment or impairment. Any native title rights which survive the grant of the lease must **give way** to the extent that they are inconsistent with the exercise of the grantee’s rights, but not so as to affect the existence of native title rights for all time (ie their extinguishment). It may mean no more than native title rights being **unenforceable** while inconsistent rights are being exercised, with the possibility that they can once again be enforced if the inconsistency is removed.¹⁵*

3. Validation, Confirmation, Primary Production Activities and Compulsory Acquisitions

The Bill implements the key elements of the Ten Point Plan¹⁶ in a manner which removes and diminishes the property rights of Aboriginal and Torres Strait Islander peoples. The Government’s proposals are not only unjust, they are unnecessary.

Validation

The Bill proposes the validation of specified categories of acts which took place on, or between, the commencement of the *NTA* on 1 January 1994 and the handing down of the *Wik* ruling on 23 December 1996, where those acts are invalid due to native title. Validation can have the effect of permanently extinguishing native title.¹⁷

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

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

17 See ss.22A-22G, item 9 and ss.232A-232E, item 39, Native Title Amendment Bill 1997 (‘*NTAB 97*’). Unless otherwise indicated, all references in this submission are to schedule 1 of the *NTAB 97* as tabled in the Commonwealth Parliament, 4 September 1997.

In both my 1993 and 1994 *Native Title Reports* I raised the risk of governments issuing mining titles without accounting for the potential survival of native title on pastoral lands.¹⁸

The Bill provides dividends to those who ignored such warnings. Post-*Wik* validation is entirely different to the validation of land interests which occurred after *Mabo*. Ignorance of the existence of native title is one thing, denial of its potential existence is another. No doubt many governments had legal advice to which they referred in by-passing the future act procedures. But I expect that such advice would not have been unequivocal and that it was not the only motivation behind the policy of ignoring native title on pastoral leases.

It was a convenient approach for government B accept advice that native title had been extinguished on pastoral leases; meet the concerns of pastoralists; save the compliance costs with respect to the future act regime; ignore Indigenous claims that native title still existed on pastoral lands; and maintain the effect of *terra nullius*.

When their error became clear after *Wik*, State and Territory governments clamoured for immediate validation of their invalid actions. The cost of having to belatedly comply with the future act regime could thus be avoided. What remains are the costs of compensation and of overriding the human rights of native title holders.

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

*The basic unfairness is that blanket validation [as provided for in the Ten Point Plan] damages native title rights [and] potentially provides up-front solutions to non-native title parties, whilst leaving compensation for native title holders to slow and expensive processes, possibly taking years.*¹⁹

In addition, the validation provisions do not explicitly exempt Crown to Crown grants. This is a very significant reversal of the policy in the current *NTA*.

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

*The validation effected by the amendments, together with the ability under these amendments for State and Territory legislation to be passed with similar effect, will give rise to compensation where native title is extinguished. However, the provision for compensation, in relation to unidentified acts, may not constitute just terms compensation because native title holders may not be in a position to know whether their rights have been affected by the validation. Thus a question of constitutional validity arises.*²⁰

Generally the validation proposals are open to constitutional challenge because of the negative effect they will have on native title and the basic unfairness of a blanket validation. The validation proposals

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

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

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

progress the interests of those who have benefitted from governments by-passing the requirements of the *NTA*.

Validated community purpose leases, which permit land or waters to be used for religious purposes, will extinguish native title.²¹ Thus, a community purpose lease for non-Indigenous religious activities will remove the common law rights of native title holders to enjoy their title, including their timeless spiritual practices and ceremonies. Analysis is required of the impact of this proposal under the *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief 1981*.

If, despite Indigenous objections, the Parliament is to pass some form of validation provision then it needs to be accompanied by a statutory scheme that addresses the critical concerns of equity and viability. Subject to the requirement of ‘just terms’ compensation, consideration should be given to the following possible elements of such a scheme:

- Expedited determination of compensation claims under a multi-tiered system that increases the required level of proof of native title in proportion to the amount of compensation likely to be determined.
- Referral of suitable claims by the Federal Court to an appropriate tribunal on the application of the claimants (such claims may be those which are shown to be economically unviable because the cost of the claims is disproportionate to the likely level of compensation).
- Payment of compensation on trust for the benefit of native title holders. Distribution of these monies should balance expedited payment with the need to mitigate the potential uncertainty of any subsequent compensation entitlements which may arise.
- Subject to the previous point, a capacity to pay compensation to native title holders:
 - where the amount paid in the expedited process is less than the amount awarded as a result of any subsequent approved determination of native title; or
 - who become holders of native title under a subsequent approved determination of native title but who did not authorise the application for an expedited determination and are not entitled to benefit from it.

Confirmation of extinguishment

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

Previous exclusive possession acts

The Government is asking the Parliament to ‘confirm’ that “*exclusive possession acts*”²² extinguish native title.

The Bill provides that native title has been extinguished by grants including:

- freehold;
- exclusive agricultural and pastoral leasehold;
- commercial, residential and community leasehold; and
- a range of other titles listed in a schedule to the Bill.²³

21 s.22B(a), item 9; s.232B(3)(e), item 39; s.249A, item 49, *NTAB 97*.

22 See s.23B, item 9, *NTAB 97*.

23 ss.23B(2) and 23C, item 9, *NTAB 97*.

It is clear from the majority judgments in *Wik* that at common law, native title rights - like other private property rights - will only be 'extinguished' by government action where legislation shows a 'clear and plain' intention that extinguishment shall occur.²⁴

The Government wants to 'confirm' extinguishment by grants that have not yet been found by the Australian common law to have extinguished native title. The legislation authorising the grants will not have expressly stated an intention that the grants will extinguish native title. Rather, the grants will be deemed to have extinguished native title on the grounds that the legislation authorising them 'necessarily implied' that this was intended. The grants in question would have been made under a wide range of Colonial, State, Federal and Territory enactments going back well over a century. There has been no judicial opportunity to decide whether there is any foundation for extinguishment by 'necessary implication' due to "*the language, character and purpose*"²⁵ of this array of statutes. The legislation under which many of these tenures are granted may be lacking any 'clear and plain intention' that extinguishment of native title should result from the grants. It is not the legal effect of grants that is being 'confirmed'. That legal effect - extinguishment - is being created by the Government's proposals. Those proposals will deliver Tim Fischer's "*bucket-loads of extinguishment*"²⁶ if the Parliament and the High Court permit the provisions to stand.

Under the Bill, "*scheduled interests*" which are effectively 'deemed' to confer a right to exclusive possession will permanently extinguish native title.²⁷ Government officers have decided 'on the papers' whether, for example, a prickly pear development interest in far southwest Queensland can extinguish the long-standing property rights of native title holders. Outfitted with the instruments of non-Indigenous land management, they have undertaken the task of determining the subtleties of exclusive possession for thousands of tenures around Australia. To proceed at this level of generality is indeed "*pregnant with the possibility of injustice*".²⁸ This process is designed to enable the Parliament of Australia to dispossess, once and for all, native title holders across this continent. If the national values of this country include genuine respect for justice and equality before the law, then the Federal Parliament must reject the schedule of extinguishment.

It is the Commonwealth's express intention that its 'confirmation' proposals will "*reflect the current state of the common law*."²⁹ The Prime Minister "*has also vowed that the legislation implementing his ten point plan would not extinguish existing native title common law rights*."³⁰

The Bill's focus on the issue of 'exclusive possession' does not accurately "*reflect*" the common law, particularly for statutory titles. The questions put to the High Court in *Wik* linked exclusive possession to extinguishment. However, in Justice Gummow's view "*exclusive possession is of limited utility*" in determining this issue.³¹ Professor Richard Bartlett has explained:

24 See, for example, Kirby J. *Wik*, *op. cit.*, pp. 282-284.

25 *Ibid.*

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

27 ss.23B(2) and 23C, item 9; s.237A, item 45; and s.249C, item 49. *TAB 97*.

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

29 The Ten Point Plan. *op. cit.*

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

31 *Wik*, *op. cit.*, p. 241.

*'Exclusive possession' was not necessarily an element in an inquiry as to extinguishment by the grant of a pastoral lease. ... The relevant inquiry was as to the nature of the relationship between the holder of the pastoral lease and the native title claimants, and in particular did the former have the power to exclude the latter such that a clear and plain intention to extinguish was manifested.*³²

The Bill deems exclusive possession to exist and then equates it with permanent extinguishment under the guise of 'confirmation'. The Bill converts exclusive possession into extinguishment. The Government is disguising its means of extinguishing native title. If the Government was to take a forthright approach it would put before the Parliament legislation expressing a clear and plain intent to extinguish native title on specified tenures. However, such legislation would clearly constitute 'blanket extinguishment'. The Government realises this is not politically or constitutionally sustainable. It would clearly be discriminatory. The resulting compensation would be unquantifiable.

The Government has explained that the basis of its confirmation provisions is:

*... to put beyond doubt that native title has been **extinguished on certain kinds of tenure**. This will ensure certainty for governments and those with interests in land about the legal status of those tenures.*³³

'Certainty' for governments and tenure-holders in this context is code for removing native title. Governments and tenure-holders do not want to deal with native title holders.³⁴ The control of land without the 'nuisance' of native title is the goal of State and Territory administrations; the unhindered use of all leasehold land is the aspiration of lessees.

The British Columbia Court of Appeal has suggested that there will be no extinguishment even where there is clear and plain legislative authority to issue grants which are inconsistent with Aboriginal rights. When an actual conflict in the exercise of rights emerges, the Aboriginal rights are suspended rather than extinguished.³⁵ This illustrates how the common law could develop with respect to extinguishment.

By attempting to 'confirm' extinguishment by inconsistent grants, the Commonwealth is intentionally pre-empting the development of the common law. For all the need for 'certainty' and 'workability', there is the balancing goal of allowing sufficient time to integrate the greatly overdue recognition of native title into Australian's land management system. This does not require the destruction of Indigenous interests so as to favour non-Indigenous interests. Nor does it require endless years of costly litigation. The proper recognition of co-existing native title can be achieved by modest legislative amendments and a suitable balance of case law and negotiated agreements, undertaken with goodwill and in good faith.

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

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

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

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

Previous non-exclusive possession acts

The Bill proposes that any inconsistency between agricultural or pastoral rights granted under a non-exclusive lease and native title rights will result in the permanent extinguishment of native title to the extent of that inconsistency.³⁶ My reading of the majority judgements in *Wik* certainly does not support such an approach.

The Bill ignores a crucial element of the *Wik* decision - that where native title rights are not extinguished by the grant of a lease they co-exist with the rights of the leaseholder. Where inconsistency subsequently arises between the exercise of the pastoralist's rights and native title rights, the rights of the pastoralist 'prevail' but do not 'extinguish' native title. The Bill blurs the distinction between the effect of an inconsistent grant and that of specific inconsistent acts by the grantee.³⁷ To this extent, the proposal has the capacity to allow inconsistency with the specific exercise of the rights of lessees to 'extinguish' native title, when any inconsistent exercise of rights is in fact more appropriately described as requiring native title to "yield" for the duration of the inconsistent action.³⁸

The proposal will contribute very little to 'certainty' and 'workability'. Before inconsistency can be determined, the incidents of native title must be established by evidence.³⁹ Given the long time-lines involved in bringing native title claims to trial, if the provision is to have any operation it will not be for a significant time and will require a case-by-case approach.

The principle that only the grant, and not the exercise, of rights has the potential to 'extinguish' native title surmounts a range of practical problems. If it were the case that particular acts performed under leasehold grants could cause 'extinguishment' in their own right, determining the surviving incidents of native title on leasehold properties would become extraordinarily complex. One would have to gather evidence about the history of all relevant acts performed on a property, determine which of these were 'inconsistent' with native title and calculate the level of extinguishment on this basis. The fact that shearing-sheds once existed on a particular area of a property 95 years ago could lead to the extinguishment of native title over that particular area. A long-disused stock-yard could have the same effect. Obtaining accurate information of this character would be impossible and title holders who wished to clarify their rights would be faced with an incomprehensible 'patchwork' of extinguishment.

In addition, since the issue of suspension of native title rights has been left open at common law, it cannot presently be said that 'extinguishment' will clearly be permanent. The Bill is therefore misconceived in this regard and is an attempt to pre-empt the development of the common law to the potential disadvantage of native title holders.

Primary production

Acts performed after the *Wik* decision on non-exclusive agricultural or pastoral leases⁴⁰ are valid if they permit or require a "*primary production activity*" or another activity associated with or

³⁶ s.23G(1)(a), item 9, *NTAB 97*.

³⁷ See Attorney General's Department, *Legal Implications of the High Court Decision in The Wik Peoples v Queensland: Current Advice*, *op. cit.*, pp. 6-8.

³⁸ *Wik*, *op. cit.*, per Toohey J., p. 185 and 190; and see Attorney General's Department, *Legal Implications of the High Court Decision in The Wik Peoples v Queensland: Current Advice*, *op. cit.*, pp. 7-8.

³⁹ *Wik*, *op. cit.*, see Kirby J., p. 284.

⁴⁰ Which granted on or before the *Wik* ruling and are valid or validated.

incidental to a primary production activity (provided that the majority of the leased land will be used for primary production activities while the other activity is occurring).⁴¹

Future acts of this kind will occur when States and Territories take steps to authorise or require such activities on leasehold lands. The non-extinguishment principle applies and native title holders are entitled to compensation for the impact of such acts on their rights.⁴²

“Primary production activities” include cultivating land; maintaining, breeding or agisting animals; fishing or shellfish operations; forest operations; horticulture; aquaculture and leaving fallow or de-stocking land in relation to these activities.⁴³

Indigenous representatives, in their response to the *Wik* debate, have acknowledged that *“in addition to the question of confirmation of existing rights under pastoral leases there is the question of the definition of these rights.”*⁴⁴ However, the NIWG added that it:

*... believes that the definitional problem has been overstated. Pastoral lease legislation in South Australia, Northern Territory, Western Australia and New South Wales is sufficiently clear in relation to leaseholder rights. It appears that Queensland legislation poses some definitional problems.*⁴⁵

Under the *NTA*, native title holders would have the procedural rights of ordinary title holders in respect of such diversification activities. This is appropriate given native title is the underlying title. The consent of an ordinary title holder would be required to develop a tourist facility on their property. Native title holders should have no lesser rights.

But lesser rights are all that are on offer. Responding to the demands of pastoralists and governments from around the country, the Commonwealth has produced a package that seriously erodes the benchmark of equality that is central to the *NTA*. It paves the way for an tremendous expansion of pastoralists’ rights while removing the legitimate procedural rights of native title holders.

The enjoyment of native title is potentially rendered meaningless by the Commonwealth proposals for primary production activities on non-exclusive pastoral and agricultural leases. The ‘suspension’ of native title during the currency of expanded activities is clearly better than outright extinguishment. But combined with the need to maintain connection with traditional country, the potential for permanent diminishment of native title rights becomes clear. By stating that the ‘non-extinguishment principle’ applies in these situations, the Government claims that it has resisted calls for the blanket extinguishment of native title on pastoral leases. However the Bill will allow large-scale *de facto* extinguishment of our title.

The proposal will deny us the opportunity to participate in decision-making about the diversification of activities on our lands. With our participation and proper heritage protection guarantees, the diversification and sustainable development of the Australian rangelands and tropical coastal belt could be a vision of success, benefiting pastoralists, native title holders and the nation as a whole.

41 s.24GB(1) and (5), item 9, *NTAB 97*.

42 s.24GB(6)-(7), item 9, *NTAB 97*.

43 s.24GA(1), item 9, *NTAB 97*.

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

45 *Ibid.*

The development of significant parts of these vast areas could involve a best-practice balance between cultural, ecological and development values.

The Bill denies native title holders the ability to prevent the conduct of primary production activities even where the leaseholder has not complied with an applicable law. For example, a leaseholder may have failed to obtain authority under his or her lease, or to obtain a permit under applicable State or Territory law. Native title holders B who have legally recognised 'co-existing' rights to the land in question B will be powerless in this situation.⁴⁶

For primary production activities to occur on leaseholds with or without any necessary permits or authorities, diminishes the exercise and enjoyment of native title rights. Only native title holders are denied their procedural rights in these situations. Holders of non-native title property interests which 'co-exist' with pastoral leases will not be affected in the same way. There will be no such impact on co-existing interests such as easements, *profits a prendre*, agistment rights and mining development rights. The proposal is discriminatory.

A number of explanations come to mind regarding the rationale for this proposal. It might be a means of allowing leaseholders to continue to conduct their enterprises based on the assumptions about the expansive nature of their titles "*which have been relied on for as much as 150 years.*"⁴⁷ If this is case, then it is a typical example of non-Indigenous expectations being given legislative priority over Indigenous property rights.

Off-estate activities

Future acts performed after the *Wik* decision are valid if they permit or require activity where there is a freehold estate or an agricultural or pastoral lease⁴⁸ and the activity:

- is directly connected to primary production activity on the freehold or lease;
- takes place in an area adjoining or near the freehold or lease; and
- does not prevent native title holders from having reasonable access to the area where the activity will take place.⁴⁹

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

Rights to third parties

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

- cut and remove timber;
- extract and remove gravel; or

46 s.24GC(1)-(2), item 9, *NTAB 97*.

47 Love, M., 'Lighting the Wik of Change', *Land Rights, Laws: Issues of Native Title*, Issues Paper No. 14, February 1997, Native Titles Research Unit, AIATSIS, Canberra, p. 10.

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

49 s.24GD(1)-(2), item 9, *NTAB 97*.

- obtain (other than by mining) and remove rocks, sand or other resources.⁵⁰

Before the act is done, notification and an opportunity to comment must be provided to any relevant representative body and any registered native title bodies corporate or claimants.⁵¹

Native title holders should have the protection of the future act procedures of the *NTA* in relation to the conferral of rights for the taking of natural resources.

Renewals

Under the Bill, renewed, re-granted or extended leases, licences, permits or authorities will constitute “*permissible lease etc. renewals*”,⁵² even if:

- they are for a longer term than the earlier interest;
- a lease is renewed as a perpetual lease; and/or
- contrary to the earlier instrument, they permit or require a primary production activity or another activity associated with or incidental to a primary production activity (provided that it is likely the majority of the leased land will be used for primary production activities while the other activity is occurring).⁵³

The ‘open slather’ which is given to leaseholders by the primary production proposal is perpetuated indefinitely by this provision. The upgrading of pastoral leases to perpetual leases was stated in the Ten Point Plan to be subject to compulsory acquisition processes.⁵⁴ Under this substituted proposal, native title holders will be denied their procedural rights in the face of ‘renewals’, even for those which give leases a perpetual status for the first time.

This blatantly favours non-Indigenous interests over Indigenous interests and demonstrates the sterility of the ‘non-extinguishment principle’, which applies to renewals, re-grants or extensions.⁵⁵ While the principle may theoretically preserve native title, the leaseholders will use and enjoy any inconsistent rights and interests in the land in perpetuity.

Compulsory acquisitions to benefit third parties

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

Under the amendments, an act of compulsory acquisition may, subject to conditions, specifically extinguish native title.⁵⁶ Currently, only acts done in giving effect to the purpose of acquisitions are capable of extinguishing native title.⁵⁷

50 s.24GE(1)-(2), item 9, *NTAB 97*.

51 s.24GE(1)(f), item 9, *NTAB 97*.

52 See s.24IC(1), item 9, *NTAB 97*.

53 s.24IC(4), item 9, *NTAB 97*.

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

55 See s.24ID(1)(c), item 9, *NTAB 97*.

56 s.24MD(2), item 9, *NTAB 97*.

Importantly under the Bill, acquisitions are subject to the ‘freehold test’.⁵⁸ Consequently, native title can only be acquired if ordinary title could be acquired.⁵⁹

The Government has stated that governments will need to acquire native title rights “*by agreement or by means of compulsory acquisition*” in circumstances where a leaseholder wishes to “... *undertake activities which make it necessary to have a form of exclusive tenure including freehold (for example to undertake horticulture or other high intensity agriculture) over part or the whole of the lease... .*”⁶⁰

It is likely that the ‘primary production’ provisions will be sufficient to allow pastoralists to perform horticultural, agricultural and other high intensity primary production activities on their leaseholds. In light of the expanded rights provided to pastoralists, I cannot see the necessity for a grant of exclusive possession to undertake high intensity activities. The prime purpose of upgrade by compulsory acquisition would appear, therefore, to be to effect the extinguishment of native title. In view of the reaction by some of the States and Territories to *Wik*, and the ongoing calls for extinguishment from the pastoral lobby, I am very perturbed that the Commonwealth is increasing the access of the States and Territories to another mechanism to extinguish our titles.

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

Even if legislative equality is provided, there will still be discrimination if such ‘non-discriminatory’ amendments are really designed to allow, and are used for, the resumption of native title. Recent history would tend to indicate that this indeed would be the real purpose of any overhaul of State and Territory legislation. In Western Australia, legislative amendments have already been made in order to ensure that all forms of title may be acquired by governments in order to grant benefits to other private citizens.⁶¹ These ‘non-discriminatory’ amendments were clearly made in order to facilitate the acquisition of native title rights for this purpose. The property rights of all West Australian title holders are left dramatically exposed by the new provisions. However, in practical, political terms, it is only the rights of native title holders which are vulnerable to large-scale acquisition by the State government for the benefit of other private citizens.

There are clear prospects for discriminatory acquisitions. For example, a government could acquire co-existent native title and non-exclusive leasehold interests in a piece of land for the fresh granting

57 s.23(3)(a)-(b), *NTA*.

58 See subdivision M, item 9, *NTAB 97*.

59 s.24MB(1), item 9, *NTAB 97*.

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

61 See s.33C(1)-(2) *Land Acquisition and Public Works Act, 1902*, as inserted by s.10 *Acts Amendment and Repeal (Native Title) Act 1995*. The *Public Works Act 1902* was amended in the context of the repeal of the discriminatory *Land (Titles and Traditional Usage) Act 1993* (WA) and was renamed the *Land Acquisition and Public Works Act 1902*. The amendments provided that land would be able to be acquired for private or public purposes. The relevant part of the *Acts Amendment and Repeal (Native Title) Act 1995*, was proclaimed on 9 December 1995. It allowed land to be resumed “*for the purpose of the grant under a written law of any estate, interest, right, power or privilege in, over or in relation to the land*”. That is, if the proposed grant would deliver an economic or social benefit.

of an exclusive interest to the former leaseholder. In such a case native title holders are treated adversely, while leaseholders are given preferential treatment. Over time, it will become clear that the supposedly neutral power of acquisition is being used mainly to extinguish native title. The taxpayer will pay the compensation B there is a specific amendment to ensure this in respect of non-exclusive agricultural and pastoral lessees.⁶²

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

If, despite the objections raised here, acquisitions of native title for the benefit of third parties are able to proceed under approved State and Territory procedures, then a 'best practice' model needs to be applied in all States and Territories. However, the true 'best practice' approach is to maintain the right to negotiate. There are clearly grave problems in allowing the right to negotiate to be replaced by State and Territory procedures in relation to acquisitions for the benefit of third parties. If proper protection is to be provided to native title holders and substantive equality is to be maintained, then the right to negotiate must apply to these acquisitions. The proposal for alternative State and Territory procedures should not be implemented.

4. The future acts regime

One of the central features of the Bill is its overhaul of the existing 'future acts' regime. Under the current Act, this regime is the key source of protection against future discriminatory treatment of native title holders' property rights.

The starting point of the current future acts regime is that native title is to be provided with the same protections as 'ordinary title' - that is, freehold title (or leasehold title in the ACT and Jervis Bay).⁶³ The Bill completely changes the structure and philosophy of the future act provisions. The 'freehold test' no longer provides a non-discriminatory foundation for the regime.

Under the *NTA*, with limited exceptions, a future act will only be 'permissible' on native title land if it could also be done on freehold land. Under the new framework, a future act will be valid if it falls within one of a list of 12 categories.⁶⁴ Acts which pass the 'freehold test' are second last on this list. All of the acts listed above the 'freehold test' category can be done on native title land regardless of whether or not they could be done on freehold land.

It is acceptable for some acts to be exempted from the freehold test - for example, acts which are genuinely 'low impact', acts relating to areas where non-claimant procedures have been followed, or acts to which native title holders have consented under a suitable agreements process. However, the new future acts regime goes beyond this. The freehold test is relegated to a little more than a 'default' requirement. All the kinds of acts listed above it in the new future act provisions will be valid, regardless of whether or not they can be done on freehold land.

In its present form, the *NTA* states that native title holders must be provided with the same procedural rights as freeholders in relation to proposed future acts. This protection is largely

⁶² s.24MD(5), item 9, *NTAB 97*.

⁶³ s.253, *NTA*.

⁶⁴ s 24AA(3) and (4), item 9, *NTAB 97*.

abandoned in the Bill. For example, future acts involving primary production, management of waters, renewals and extensions of grants and the implementation of reservations are simply deemed to be 'valid'. Native title holders have no specified procedural rights in relation to these acts.

The Bill does not facilitate the fair co-existence of different property rights. Instead it is the Government's intention to minimise the procedural protections available to native title holders and to increase the circumstances in which their rights can be overridden, leaving them merely with an ability to apply for compensation for what has been lost.

I will briefly explore a few of the proposed amendments relating to the future acts regime.

Management of water

The Bill allows governments to grant interests over water and water resources without having to consider the rights and interests of native title holders affected by such grants. Under the re-structured future acts regime, governments could make laws or grant rights relating to water and water resources, and such acts would simply be 'valid'. Native title holders would have no procedural rights in relation to them.⁶⁵

There is a clear danger that these amendments will bring about the *de facto* extinguishment of native title. If a government granted exclusive fishing rights over an area to a third party, native title holders would have no procedural rights in relation to this action. Although the non-extinguishment principle would apply, the exclusive rights of the grantee would prevail. The inability of native title holders to exercise their common law native title rights could, over time, lead to a loss of connection and a reduction of the native title rights which could be established at law.

In countries such as New Zealand, Canada and the United States, common law recognition of traditional water rights has led to negotiations about the use of those resources. By contrast, the Bill pre-empts any judicial finding of native title rights to waters under the Australian common law and ensures that there will be no need for any such rights to be taken into account by governments. As ATSIC has explained:

*In contrast to similar overseas jurisdictions, indigenous people will be unable to protect their interests or negotiate settlements with other stakeholders. Indigenous rights will be limited to compensation claims.*⁶⁶

I believe that such an approach is both unnecessary and unjust. Native title rights to water and water resources should be afforded full respect and non-discriminatory protection. The ability of governments to regulate water and water resources should be balanced with the provision of adequate procedural rights for native title holders. For example, where governments are proposing to enact legislation to manage water and water resources, it is appropriate for native title holders to have a statutory right to be consulted. Alternatively, when non-legislative action is proposed, such as the granting of licences and other titles, it is appropriate for the right to negotiate to apply. This would not give native title holders a veto power over the granting of such rights, but would acknowledge the potential importance of water-related rights as incidents of native title.

65 s. 24HA, item 9, NTAB 97.

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

Implementation of reservations / Facilities for services to the public

The amendments provide that where, prior to the *Wik* decision, a government reserved land for a particular purpose, it can act on the basis of that reservation. The government in question does not need to use the land for the same purpose for which it was reserved. It can use the land for an entirely different purpose so long as this is done in good faith and doesn't have a greater impact on native title than the original purpose.⁶⁷ Acts performed on the basis of such reservations will simply be 'valid' under the new provisions. Native title holders will have no procedural rights in relation to them. Where a public work is constructed, native title will be extinguished.⁶⁸

At the moment, Australian governments are able to reserve Crown land for various public purposes. If an area which a government wants to reserve is not Crown land, the land is acquired by the government, by agreement or compulsory acquisition processes.

Prior to the *Wik* decision, governments may have reserved land without following the necessary acquisition processes in relation to native title holders. For example, they might have:

- reserved pastoral lease land, and provided acquisition processes to leaseholders but not to native title holders; or
- reserved 'Crown' land without providing acquisition processes to native title holders.

Under the Bill, these flawed reservations will be 'validated', and governments may act upon them. Where this leads to the construction of a public work, native title will be extinguished. This extinguishment of native title holders' property rights will occur without acquisition processes ever having been followed. The provisions therefore allow the discriminatory extinguishment of native title holders' property rights - something that the future act regime was originally designed to prevent.

A reservation can be 'implemented' by granting rights to a third party. For example, a forestry reservation made before *Wik* could be implemented by granting a lease to a private logging company. The company would be able to carry out activities for its own profit without any form of procedural rights ever being given to native title holders.

I have similar concerns in relation to the amendments to the future acts regime relating to "*facilities for services to the public*". Under the Bill a future act will be valid if it involves the construction, maintenance, etc, of various "*facilities for services to the public*", so long as native title holders retain "*reasonable access*" to the area.⁶⁹ I am concerned that these provisions will allow public facilities to be constructed without acquisition processes being followed, where such processes would be provided to the owners of freehold title. Such a result clearly discriminates against native title holders, and places their property right in a uniquely vulnerable position.

The right to negotiate

The proposed amendments substantially dismantle the right to negotiate. In its original form, the right to negotiate was intended to provide native title with a meaningful level of protection in situations where it was particularly vulnerable to being overridden by governmental use of land and

67 s. 24JA, item 9, *NTAB 97*.

68 s. 24JB, item 9, *NTAB 97*.

69 s. 24KA, item 9, *NTAB 97*.

the granting of rights to third parties. By contrast, the proposed amendments are entirely weighted in favour of governments and developers.

In October 1996, the Government tabled amendments to the *NTA* which contained far-reaching changes to the right to negotiate. I provided two submissions to the Joint Committee discussing these proposals, on 17 October 1996 and 5 November 1996. The Bill extends the previously proposed amendments to the right to negotiate. In view of my previous submissions, I will only comment here on a few aspects of the Bill's contents in this regard.

Leased and reserved areas

The Bill provides that where certain conditions are met, the Commonwealth Minister can determine that a State or Territory law shall apply instead of the right to negotiate on:

- (i) non-exclusive leasehold land; or
- (ii) reserved land.⁷⁰

(i) Non-exclusive leasehold land

Permitting the compulsory acquisition of leasehold land to be excluded from the right to negotiate will make it easier for State and Territory governments to acquire native title rights on leasehold properties, so that upgraded tenures can be provided to lease-holders. This issue has been discussed above.

The Bill also provides that the right to negotiate may be avoided when a mining title is granted on leasehold land, provided that native title holders have procedural rights which are equivalent to those possessed by the leaseholder, and compensation rights.⁷¹ Ironically, this is justified on the basis of equality of treatment.

In my view, it is utterly inappropriate to compare native title holders and non-exclusive leaseholders to determine the procedural rights to which native title holders should be entitled. The protection of native title is one of the principal aims of the *NTA*. The right to negotiate is far better suited to protecting native title than are the various regimes which apply to leaseholders when mining interests are granted. For example, under the right to negotiate, the NNTT acts as an arbitrator, and can decide that a grant should not proceed. The right to negotiate scheme also requires the NNTT to take into account a lengthy list of criteria in making its decisions, such as the effect of the proposed act on the life, culture, traditions and society of native title holders. State and Territory regimes applying to leaseholders make no allowance for the cultural and spiritual significance of native title. Procedural protections applicable to leasehold interests do not reflect the character of native title interests which require legal protection.

Allowing different State and Territory regimes to govern these situations will cause inefficiency and confusion. Mining companies and other stakeholders would be much better served by the current national regime.

⁷⁰ s. 43A, item 9, *NTAB 97*.

⁷¹ s. 43A(4)(a), item 9, *NTAB 97*.

(ii) Reserved lands

The provisions clear the way for native title to be extinguished, by making it easier for governments to acquire reserved lands and use them to benefit private interests. In addition, the Bill specifically provides that an act of compulsory acquisition can extinguish native title.⁷²

Exempting reserved lands from the right to negotiate will lead to an unfair and confusing variation in native title holders' procedural rights around the country. It is hard to see the practical benefits of this result.

There are compelling reasons to retain the right to negotiate on reserved lands. National parks and reserves are places where there is a relatively good chance that native title has survived and may continue to survive. All Australians have an interest in protecting the surviving native title estate in this country. Clearing the way for the right to negotiate to be replaced with a range of weaker State and Territory regimes is fundamentally inconsistent with this goal.

Inter-tidal zone / Town and city limits

The Bill removes the right to negotiate in areas defined as 'towns and cities' and in the area between the high and low water marks, known as the 'inter-tidal zone'.⁷³

These amendments are completely unrelated to the *Wik* decision. They exemplify the Government's attempts to clear native title rights out of the way of development on as much of the Australian continent as possible.

Infrastructure facilities

The Bill provides that there will be no right to negotiate where a government compulsorily acquires native title rights to grant an interest to a third party, where the grant is to enable the third party to construct "infrastructure facilities".⁷⁴

Under the amendments which were tabled in October 1996, the Commonwealth Minister could exclude compulsory acquisitions from the right to negotiate where third parties were granted the right to construct and operate "public infrastructure facilities".⁷⁵ The Government argued that the provision of public infrastructure should be exempted from the right to negotiate, citing an increasing tendency for private organisations to be hired to perform this work.⁷⁶

Under the Bill, there is no requirement that the infrastructure have a 'public' purpose. Native title rights can be compulsorily acquired by governments in order to enable private companies to construct infrastructure purely for their own use. The bias of these provisions could not be more blatant. They run contrary to the commonly accepted principle that compulsory acquisition of property by the State should be for a public purpose.

72 s. 24MD, item 9, *NTAB 97*.

73 s. 26, item 9, *NTAB 97*.

74 s. 26(1)(c)(iii), item 9; s. 253, item 57, *NTAB 97*.

75 Commonwealth of Australia, *Outline of Proposed Amendments to the Native Title Amendment Bill 1996*, 8 October 1996, p. 7.

76 The Honourable the Prime Minister, John Howard, *Supplementary Explanatory Memorandum: Native Title Amendment Bill 1996 - Amendments and New Clauses to be moved on behalf of the Government*, The Senate, p. 19.

Access rights

The Bill provides that a registered native title claimant will have access rights to pastoral lease lands where he or she has “*regularly had physical access*” to the relevant area as at 23 December 1996 and has used this access to perform “*traditional activities*”. These statutory rights also apply to descendants of people who meet these criteria.⁷⁷ Eligible claimants may continue to exercise their access rights “*in the same way and to the same extent*” until determination of their claims. However, their rights are subject to the prevailing rights of the lessee.⁷⁸

Eligibility for access rights under the draft provisions is completely arbitrary. Claimants qualify if they happen to be have been regularly exercising their access rights at a certain date. They will not qualify if they happened to be away from their land at the relevant time. The proposed criteria are blatantly unfair. It must be remembered that many people have been prevented from exercising their common law native title rights by pastoralists, particularly after the ‘equal pay’ case in the 1960s.

The Bill provides that if anyone from a claimant group has access rights under the proposed provisions, no person from that group can enforce any common law native title rights. These rights are suspended while the claim is determined.⁷⁹

Thus, the fact that one claimant happens to satisfy the statutory criteria will lead to the suspension of their common law rights and those of all other claimants. It seems inconceivable that freehold or leasehold rights could be placed at risk of being ‘suspended’ without compensation where a title-holder had done nothing wrong and no inconsistent government action was proposed. It could be argued that the suspension of title rights brought about by this provision constitutes an acquisition of property by the Commonwealth, giving rise to a Constitutional obligation for compensation to be provided on just terms.

Rather than benefiting native title holders, the statutory access provisions may increase the vulnerability of their rights. If one or more claimants were recognised as meeting the statutory criteria, the common law rights of all claimants would be suspended. The extent to which those claimants with statutory rights could actually exercise those rights would depend on the leaseholder’s performance of “*primary production*” activities. A pastoralist who started growing crops, for example, could presumably exclude native title holders from relevant areas. Thus, a situation could arise in which statutory access rights were overridden by the lease-holder, and all common law rights were suspended.

Management of claims

The Federal Court’s way of operating

At present, the NTA provides that “[t]he Court, in conducting proceedings, must take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.”⁸⁰ This provision is changed by the Bill, which says that the Court **may** take these factors into account.⁸¹

⁷⁷ s. 44A, item 9, *NTAB 97*.

⁷⁸ s. 44B, item 9, *NTAB 97*.

⁷⁹ s. 44C, item 9, *NTAB 97*.

⁸⁰ s.82(2), *NTA*.

⁸¹ s.82(2), item 20, sch.2, *NTAB 97*.

The Act also specifies that *A[t]he Court, in conducting proceedings, is **not** bound by technicalities, legal forms or rules of evidence.*⁸² The rules of the non-Indigenous legal system are often poorly suited to regulating evidence of native title, which has its basis in Indigenous laws. For example, the requirement that evidence be given in open court can cause significant problems for native title holders. Despite these issues, the Bill reverses the current provision, stating that *“the Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders.”*⁸³

I can see no reason for these changes. The current provisions, which require the Court to operate in a flexible and culturally sensitive manner, assist all parties by ensuring that claimants can present their cases as effectively and appropriately as possible.

Time limits

The Bill provides that applications under the *NTA* must be made within six years of the commencement of the amending legislation.⁸⁴ The right to negotiate will be unavailable to native title holders who have not filed an application before the ‘sunset’ date. The Bill also states that applications for compensation must be made within six years of the commencement of the amendments or the doing of the relevant act, whichever is later.⁸⁵

Again, these proposals seem inconsistent with the Government’s stated aim of increasing the ‘workability’ of the native title claims process. As ATSIIC has explained, *“[n]ative title is a right of property... [t]he imposition of time limits on the application of certain processes, contained in the Native Title Act, does not affect its existence after the sunset date...”*⁸⁶

The *NTA* provides certainty for governments and developers by registering all native title claimants who have either satisfied a ‘threshold test’ or have been found to possess native title. The continued existence and development of the registers will make it easier for all stakeholders to know the nature and extent of native title interests around the nation. Over time, the right to negotiate process will also help to identify native title holders in different areas and determine the extent of their interests. Allowing the statutory framework to remain in place would be far more conducive to ‘certainty’ than forcing native title holders to turn to the common law to achieve recognition and protection of their property rights.

5. Human Rights and Constitutional Issues

The principle of non-discrimination

The principle of non-discrimination is one of the fundamental doctrines of the international legal order. Article 55 of the United Nations’ *Charter* states that one of the objectives of the United Nations is to promote:

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

82 s.82(3), *NTA* (emphasis added).

83 s.82(1), item 20, sch.2, *NTAB 97* (emphasis added).

84 s.13(1A), item 3, sch.2, *NTAB 97*.

85 s.50(2A), item 9, sch.2, *NTAB 97*.

86 ATSIIC, *Preliminary Critique, op.cit.*, pp. 13-14.

The principle of non-discrimination is contained in all major human rights treaties and Declarations.⁸⁷ Further, the International Court of Justice and eminent jurists and commentators have repeatedly observed that the principle of racial non-discrimination has the status of customary international law and is *jus cogens* and non-derogable.⁸⁸

As *jus cogens*, the principle of non-discrimination is considered a norm of such significance that States cannot derogate from it even in time of war or national emergency. In the *Barcelona Traction case* (second phase) the majority of the International Court of Justice, supported by twelve judges, described the prohibition against racial discrimination as an obligation that arises independently from specific treaty obligations and is owed “*towards the international community as a whole.*”⁸⁹

The importance of the principle of non-discrimination is reflected in the existence of a specific multilateral treaty dealing with racial discrimination, the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD). The *International Covenant on Civil and Political Rights* (the ICCPR) also contains an express provision dealing with non-discrimination.⁹⁰

CERD has wide acceptance among the international community. Currently, 148 countries have ratified CERD.⁹¹ The Commonwealth of Australia signed CERD on 13 October 1966 and ratified it on 30 September 1975. The Commonwealth of Australia is also a State Party to the *International Covenant on Civil and Political Rights* (ICCPR) and the First Optional Protocol to the ICCPR.

Accordingly, the Commonwealth of Australia is internationally accountable for breaches of the principle of non-discrimination, including by State and Territory governments. Importantly, the Commonwealth of Australia has accepted the jurisdiction of the United Nations Human Rights Committee under the First Optional Protocol to the ICCPR and the Committee on the Elimination of Racial Discrimination (the CERD Committee) under article 14 of CERD. The significance of Australia’s acceptance of the jurisdiction of these two international bodies is that individuals (and groups in the case of the CERD Committee) may make complaints to one of these bodies if their rights under CERD or the ICCPR have been violated and there is no adequate remedy within the Australian legal system.

A breach of the principle of non-discrimination in relation to Indigenous land rights would be likely to offend both CERD and the ICCPR and give rise to a capacity for Indigenous people to lodge complaints to either UN Committee. There is a significant and established body of law in this area. Any derogation from the principle of non-discrimination is a matter of domestic and international concern.

87 For example: *Universal Declaration of Human Rights*, Articles 2, 7 & 17; *International Covenant on Civil and Political Rights*, Articles 2, 26 & 27; *Proclamation of Tehran*, Item 1; *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 2; *Convention on the Rights of the Child*, Article 2.

88 Ian Brownlie, *Principle of Public International Law*, Fourth Edition, Clarendon Press, 1990, p. 513; Warwick McKean, *Equality and Discrimination under International Law*, First Edition, Clarendon Press, 1983, p. 277; Judge Tanaka, *South West Africa case* (second phase) ICJ Reports (1966) 298; Judge Ammoun, *Barcelona Traction case* (second phase) ICJ Report (1970) 304; Judge Ammoun, *Namibia Opinion* ICJ Report (1971) 78-81.

89 ICJ Reports (1970) 3. p. 32.

90 Article 2(1).

91 United Nations Committee on the Elimination of Racial Discrimination, Press Release, 28 February 1997, RD/874.

The content of the principle of non-discrimination

The principle of non-discrimination is broader than the prohibition of racial discrimination. International law's treatment of non-discrimination involves the setting of standards and positive obligations in terms of the treatment states must accord minorities and Indigenous peoples.

In the *South West Africa case* Judge Tanaka outlined three basic principles of non-discrimination. The three principles are:

- To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently.⁹²
- To treat unequal matters differently according to their inequality is not only permitted but required.⁹³
- The principle of equality does not mean absolute equality, but recognises relative equality, namely different treatment proportionate to concrete individual circumstances. Different treatment must not be given arbitrarily; it requires reasonableness, or must be in conformity with justice. In these cases, the differentiation is aimed at the protection of those concerned, and is not detrimental and therefore not against their will.⁹⁴

Accordingly, the principle of non-discrimination requires equal treatment of equals and consideration of difference in assessing the need for different treatment. Different treatment is appropriate when it allows groups to maintain their own traditions and practices. Additionally different treatment can be an important element in achieving effective or substantial equality.

It is widely accepted that the principle of non-discrimination in international law is concerned with substantive equality rather than formal equality as "*the principle of equality of individuals under international law does not require a mere formal or mathematical equality but a substantial and genuine equality in fact.*"⁹⁵

The International Convention on the Elimination of All Forms of Racial Discrimination

CERD is the specific international instrument that deals with racial discrimination. Australia is a party to CERD which is, in part, implemented into Australian law by the *RDA*.

CERD defines racial discrimination in Article 1(1) as:

... any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

92 ICJ Reports 1966 305.

93 *Ibid.*

94 *Ibid.*

95 *McKean, Equality and Discrimination under International Law*, Clarendon Press Oxford, 1983, p. 288; see also: Vierdag, *The Concept of Discrimination in International Law*, Martinus, The Hague, 1973, p. 165.

The definition of racial discrimination, at section 9, of the *RDA*, replicates the Article 1(1) definition of racial discrimination with some very minor rewording.

One of the features of CERD is that it allows, and in some circumstances demands, that positive action be taken to assist disadvantaged racial groups. The rationale for imposing such obligations is that historical patterns of racism entrench disadvantage and more than the prohibition of discrimination is required to overcome the resulting racial inequality.

The main example of CERD's concern with positive action is the Article 1(4) notion of "*special measures*". CERD also contains provisions that demand positive actions by State Parties in eradicating racial discrimination as defined by Article 1. Article 2 outlines a number of positive activities that States Parties must "*pursue by all appropriate means*". For example, Article 2(1)(d) requires States Parties "*to undertake to pursue by all appropriate means and with out delay ... to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.*" Laws that deny a racial group recognition of their ownership of land would fall within the ambit of Article 2(1)(d) of CERD.

Article 2 measures, special measures and the relationship of these practices with unlawful racial discrimination is a source of confusion in Australian law. Special measures and Article 2 measures are not racially discriminatory. This does not mean special measures and Article 2 measures are the only way that distinctions based on race can be lawfully maintained.

It is widely recognised that CERD is concerned with substantive equality rather than just formal equality. The CERD Committee in its general recommendations XXIV observes:

1. *Non-discrimination, together with equality before the law and equal protection of the law without any discrimination constitutes a basic principle in the protection of human rights ...*
2. *The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4 (special measures) of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.*⁹⁶

Significantly, the CERD Committee in this general recommendation acknowledges that differential treatment, if appropriate, does not constitute racial discrimination and does not have to be characterised as a "*special measure*".

Native title and the principle of non-discrimination

Native title is an interest in land specific to Aboriginal and Torres Strait Islander peoples. It is a *sui generis* title derived from the traditional laws and customs of Indigenous Australians. Any activity by

⁹⁶ *Report of the Committee on the Elimination of All Forms of Racial Discrimination*, Official Records of the General Assembly, Forty-Eighth Session, Supplement No. 18 (A/48/18), p. 115 (emphasis added).

government that affects native title raises concern about racial discrimination. The situation is compounded by the position of Aboriginal and Torres Strait Islander peoples as the most disadvantaged group in Australian society.

The significance of Land for Indigenous people

In her preliminary working paper on *Indigenous people and their relationship to land* the United Nations' Special Rapporteur, Mrs Erica-Irene Daes, explained:

*Indigenous peoples have emphasized the fundamental issue of their relationship to their homeland. They have done so in the context of the urgent need for understanding by non-indigenous societies of the spiritual, social, cultural, economic and political significance of land, territories and resources to the continued survival and vitality of indigenous societies. Essentially, indigenous peoples have illustrated the need for a different conceptual framework and the need for recognition of the cultural differences that exist because of the profound relationship that indigenous peoples have to their lands, territories and resources. Indigenous peoples have urged the world community to attach positive value to this distinct relationship.*⁹⁷

It is important to be aware that recognition of Indigenous peoples land rights is critical to their survival as distinct economic, political and social entities. The ability of Indigenous peoples to preserve their distinct identity has legal ramifications in international human rights law. In this respect, the proscriptions against genocide, ethnocide and the right of minorities to a distinct social, economic and cultural life are the most critical.⁹⁸

The significance of a substantive justice approach to native title

Not all measure or practices involving native title that differ from those applied to non-indigenous interests in land must be classified as “*special measures*”. Differentiation is permissible to reflect the actual nature of native title and the situation of those Indigenous groups who possess native title. It is my view that governments should apply a substantive justice approach when formulating policy involving native title.

The Commonwealth Government has repeatedly stated that it only considers itself bound to ensure that formal equality is provided in the context of native title. For example, the desire to achieve formal equality has been used by the Government as a justification for altering the right to negotiate.⁹⁹ One of

the Government's chief legal advisors has stated that compliance with the *RDA* requires that a provision be either a special measure or consistent with formal equality.¹⁰⁰

Indigenous peoples have generally had great difficulty in gaining recognition of their right to land. These difficulties often relate to systemic biases in the municipal legal system of States with Indigenous populations. Legal doctrines premised on formal equality can function as an impediment

⁹⁷ *Human Rights and Indigenous peoples - Indigenous peoples and their relationship to land*, preliminary working paper prepared by Mrs Erica-Irene Daes, 20 June 1997, E/CN.4/Sub.2/1997/17 para 5.

⁹⁸ *The Convention on the Prevention and Punishment of the Crime of Genocide* and Article 27 of the *International Covenant on Civil and Political Rights*.

⁹⁹ Senator the Hon Nick Minchin, *Sydney Morning Herald*, 1 June 1996, p. 138.

¹⁰⁰ Mr Robert Orr, General Counsel, Attorney-General's Department, *Hansard*, Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Wednesday, 27 November 1996, p. NT3599.

to the recognition of Indigenous peoples' distinct interests in land. Accordingly, the application of policies that rely on formal equality should be assessed very carefully. The use of such a benchmark provides no opportunity to recognise Indigenous peoples' unique relationship and title to land. In my view, the application of policies premised on the provision of formal equality are extremely dangerous to Indigenous peoples legitimate entitlements and interests.

A number of concerns with the Bill relate to whether the measures proposed are “fair” or “just”. This has legal significance.

The definition of racial discrimination contained in the *RDA* and CERD requires that an act based on race nullifies or impairs the “*recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.*”

The High Court has found that Article 17 of the *Universal Declaration of Human Rights* contains the primary right that is impaired or nullified by acts of governments that are detrimental to native title.¹⁰¹ Article 17 states:

1. *Everyone has the right to own property, alone as well as in association with others.*
2. *No one shall be arbitrarily deprived of his property.*

Article 17 provides protection for the individual and group ownership of property by outlawing arbitrary deprivations of property. ‘Arbitrariness’ in Article 17 is not limited to actions that are illegal. It extends to expropriations of property that are “unjust”, disproportionate or lacking in legitimate policy justification.¹⁰²

In *Mabo [No.1]*, the majority of the Court found that the attempt by the State of Queensland through the *Queensland Coast Island Declaratory Act 1985* to extinguish the native title rights of the Miriam people of the Murray Islands was inconsistent with section 10 of the *RDA* and inoperative in accordance with section 109 of the *Constitution*. The majority characterised the effect of the *Queensland Coast Island Declaratory Act* as an “*arbitrary deprivation of property*” in terms of article 17 of the *Universal Declaration of Human Rights*. The majority commented:

*... the 1985 Act destroys the traditional legal rights in and over the Murray Islands possessed by the Miriam people and, by an arbitrary deprivation of that property, limits their enjoyment of the human right to own and inherit it. ... It is the arbitrary deprivation of an existing legal right which constitutes an impairment of the human rights of a person in whom any legal right is vested.*¹⁰³

In *Mabo [No.1]*, the type of arbitrary deprivation of property that the court was concerned with was the extinguishment of native rights without consent or compensation. But for the operation of the

101 *Mabo v Queensland [No. 1]* (1988) 166 CLR 186 (*Mabo [No.1]*).

102 Parvez Hassan, “The word “arbitrary” as used in the Universal Declaration of Human Rights : Illegal or Unjust”, *Harvard International Law Journal*, (1969), vol. 10, No. 2, 225. It was the clear intention of the *Universal Declaration of Human Rights* that “arbitrary” should mean more than just illegal. This is illustrated by the proposal of the Soviet Union’s delegate, Pavlos, that the phrase “*that is, contrary to the laws*” be added after “arbitrary”. This amendment was rejected by the majority of the drafting committee on the understanding that “arbitrarily” carried the meaning of both “illegal” and “unjust”. The International Court of Justice has also interpreted the word “arbitrary” as involving expropriations of property that are either illegal or unjust (*Case concerning Elettronica Sicula S.p.A.(ELSI)* (United States of America v. Italy) I.C.J. Reports (1989) 15, p. 76).

103 *Mabo v Queensland [No. 1]*, *Ibid*, p. 218.

RDA, the extinguishment of the native title of the Miriam people would have been legal as there was no entrenched right to ‘just terms’ compensation in Queensland law. The Court acknowledged that an arbitrary deprivation of property is wider than an illegal (without compensation) deprivation of property and encompasses ‘unjust’ extinguishment of native title.¹⁰⁴

The *European Convention on Human Rights* contains a provision similar to article 17.¹⁰⁵ The European Court of Human Rights has applied a test of proportionality in assessing whether a deprivation of property complies with the Convention. In the *Scollo Case* the Court stated:

*... an interference must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole ... There must be a reasonable relationship of proportionality between the means employed and the aim pursued.*¹⁰⁶

Accordingly, the reasonableness and proportionality of a government's policy objectives and procedures are relevant in the context of racial discrimination law.

General discriminatory impact of the Bill

The principle of non-discrimination demands that native title be treated in a non-discriminatory manner or through beneficial special measures. A number of provisions in the Bill, if enacted, will fail to satisfy this principle.

In her preliminary working paper on *Indigenous people and their relationship to land* the United Nations' Special Rapporteur, Mrs Erica-Irene Daes, points out:

*The problem of extinguishment is related to the concept of Aboriginal title. The central defect of so-called Aboriginal title is that it is, by definition, title that can be taken at will by the sovereign - that is, by the colonial government, or nowadays, by the State. Like Aboriginal title, the practice of involuntary extinguishment of Indigenous land rights is a relic of the colonial period. It appears that, in modern times, the practice of involuntary extinguishment of land titles without compensation is applied only to Indigenous peoples. As such, it is discriminatory and unjust ...*¹⁰⁷

The discriminatory biases that Madame Daes raises relate to the conceptualisation of Indigenous peoples' interests as subsidiary and capable of being displaced arbitrarily in favour of non-Indigenous land owners.

One of the purposes of the *NTA* was to stop parcel by parcel dispossession of Indigenous Australians and apply to Indigenous proprietary interests equal security of tenure as enjoyed by other Australians who own land.¹⁰⁸

¹⁰⁴ *Ibid*, p. 217.

¹⁰⁵ Article 1 of the First Protocol to the *European Convention on Human Rights*.

¹⁰⁶ Eur. Court of HR, *Case of Scollo v. Italy*, judgment of 28 September 1995, Series A no. 315-B, § 32.

¹⁰⁷ *Human Rights and Indigenous peoples - Indigenous peoples and their relationship to land*, preliminary working paper prepared by Mrs Erica-Irene Daes, 20 June 1997, E/CN.4/Sub.2/1997/17 para 33.

¹⁰⁸ For a discussion of the recognition and protection afforded native title by the *NTA*, see *Western Australia v Commonwealth*, (1995) 128 ALR 1, pp. 36-45.

One of the positive features of the *Wik* decision was the approach of the majority to the issue of extinguishment. The majority approach in *Wik* is to accord native title “*equal status*”.¹⁰⁹

By contrast, the Bill signifies a return to the practice of according native title lesser status than Crown grants. The Commonwealth Government’s current actions are in the colonial tradition of treating native title as a subsidiary and inferior type of land-holding. Indigenous peoples’ rights are being overridden to accommodate the interests of other property interests. In the case of the proposed validation provisions, Indigenous peoples’ rights are being disregarded because a law of the Commonwealth Parliament was not obeyed by some State and Territory governments.

Indigenous people lost certain rights when the *NTA* was enacted in 1993. The provisions of the *NTA* that discriminate against native title holders were portrayed as being ‘balanced’ by ‘beneficial’ provisions, such as the right to negotiate, that accommodated the particular needs of native title holders.

The notion that the *NTA* constitutes a compromise has some legal recognition. The High Court in *Western Australia v Commonwealth* very clearly acknowledged that underscoring this mixture of detrimental and beneficial treatment in the *NTA* is a non-discriminatory standard. The Court’s general approach in *Western Australia v Commonwealth* exhibits a willingness to allow governments a margin of latitude in dealing with native title. As long as native title is treated fairly and equally, there are a number of permissible strategies that governments can use when dealing with the land management issues raised by the existence of native title.

Such an approach to native title is completely undermined by the character and imbalance of the amendments contained in the Bill. The Bill contains few positive provisions for native title holders to ‘balance’ its detrimental aspects. The amendments allow native title holders to be treated less favourably than other land owners in a range of situations, and winds back the right to negotiate to a point where it is rarely applicable at law and virtually unusable in practice.

It is impossible to see how the *NTA*, once amended in this fashion, could be characterised as a ‘special measure’ for the benefit of Indigenous peoples or as a balanced approach to the land management issues raised by the existence of native title.

Certainty and Workability

Contrary to the Government’s claim, the Bill will not produce ‘certainty’. Many of the amendments are impractical and will disrupt the current evolution of procedures for the recognition of native title. Further, the government’s proposals are so punitive to native title holders that only one result is certain: the provisions will be challenged.

The *Wik* decision continues the Australian legal system’s recognition of native title, as started by the *Mabo* judgment and continued in the *NTA*. Recognising native title and incorporating it into Australian property law is a complex process, but should not be beyond the capabilities of the Australian legal and political systems. ‘Working through’ the recognition of native title should not be confused with ‘workability’ achieved by overriding native title rights.

The *NTA* as developed in 1993 sought to provide parameters within which the incorporation of native title into Australia’s legal and land management systems could take place. In order to achieve

¹⁰⁹ Richard Bartlett, *Wik: Equality and the fallacy of ‘extinguishment’*, *Indigenous Law Bulletin*, vol. 4, Issue 1, April 1997, 11, p. 12.

certainly the system needs time to develop and work itself out. Some amendments are necessary (for example to accommodate the High Court decision in *Brandy*¹¹⁰) but the main principles of the 1993 Act should remain.

The Bill will radically change the rules before they have been given time to become settled. The principle of co-existence expressed by the Court in *Wik* may require some changes to be made to the legislation for it to work efficiently, but not a complete over-turning of the system. The Bill will detrimentally affect many people - not just Indigenous people - involved in native title procedures. Established native title processes will be de-railed. Moreover, the Bill will force Indigenous people into protracted litigation, because of the ways in which it denies them equality before the law.

If human rights are to be honoured in this nation, then the response to *Wik* must be a just and fair co-existence between Indigenous and non-Indigenous interests. Discriminatory laws are not acceptable. As pointed out by the United Nations Expert Seminar on Indigenous Land Rights and Claims:

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

- (a) *The doctrine of terra nullius;...*
- (e) *Doctrines and policies imposing an extinguishment of indigenous land rights, title or ownership;*
- (f) *Policies which exclude some indigenous peoples from the land claims processes established by the State.*¹¹¹

The Race Power

There are constitutional issues with the Bill as it is an exceptional piece of legislation in the degree to which it detrimentally affects the rights of Indigenous Australians. The constitutionality of the Government's proposed amendments, if enacted, will be litigated with an inevitable result - in the immediate future there will be uncertainty in relation to the native title process.

The *NTA* and the amendment Bill are considered to rely on the head of power provided by section 51(xxvi) - the race power.

The original section 51(xxvi) of the Constitution stated that the Parliament shall have power to make laws with respect to “[T]he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.” The exclusion concerning Aboriginal people was deleted as a result of the 1967 referendum.

The purpose of the power was explained by Quick and Garran as enabling “*the Parliament to deal with the people of any alien race after they have entered the Commonwealth; to localise them within defined area, to restrict their migration, to confine them to certain occupations, or to give*

¹¹⁰ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

¹¹¹ United Nations Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims, ‘The Whitehorse Conclusions and Recommendations on Indigenous Land Rights and Claims’, Whitehorse Canada, March 1996, *Australian Indigenous Law Reporter*, (1997) 2 (1), p. 189.

them specific protection and secure their return after a certain period to the country whence they came."¹¹²

In its original form, section 51(xxvi) empowered the Commonwealth to make laws which would adversely impact or affect a particular racial group.¹¹³ The question in relation to the amended section is whether it would support a law adversely discriminating against Aboriginal people.

During the Parliamentary debate that proceeded the 1967 referendum, it was decided it would be desirable for the Commonwealth Parliament to have the power to legislate "*special laws*" for the benefit of Aboriginal people throughout Australia. As Sadler notes, the Parliamentary debates show that the principal object of the Referendum was to enable the Commonwealth to overcome inequality in the treatment of Aboriginal people in the States.¹¹⁴

Father Frank Brennan has noted that since the 1967 referendum there are three possible interpretations of the race power. These are:

- the power can be exercised to the benefit or detriment of people of a particular race;
- it can be exercised only for the benefit of people of a particular race; or
- it can be exercised to the benefit or detriment of people of particular races, other than Aborigines; but it can be exercised only for the benefit of Aborigines.¹¹⁵

In *Koowarta v Bjelke Petersen*, Justice Murphy stated that the race power would not support laws intended to adversely affect the people of any race.¹¹⁶ Justice Stephen observed that section 51(xxvi) requires a law to be necessary for people of a particular race. He said:

*I regard the reference to special laws as confining what may be enacted under this paragraph to laws which are of their nature special to the people of a particular race. It must be because of their special needs or because of the special threat or problem which they present that the necessity for the law arises, without this particular necessity as the occasion for the law, it will not be a special law such as s.51(26) speaks of..*¹¹⁷

This approach was endorsed by Justices Mason, Deane and Murphy in the *Tasmanian Dams Case* in the context of legislating to protect and preserve the cultural heritage of Aboriginal people.¹¹⁸ In that case, Justice Brennan acknowledged that in its original form section 51(xxvi) was thought to authorise the making of laws which adversely discriminated against a particular racial group. He then addressed the effect of the 1967 amendment and said:

112 Quick, J. and Garran, R., *The Annotated Constitution of the Australian Commonwealth*, Legal Books, Sydney, 1976, p. 622.

113 See Sadler, R. J., 'The Federal Parliament's Power to Make Laws "With Respect to ... The People of Any Race...."' (1982) 10(2) *Sydney Law Review*, p.591.

114 *Ibid*, p. 594.

115 Father Frank Brennan SJ, 'The Will of the People in 1967 and the Law of the Land in 1997', *op. cit.*, p. 3.

116 (1982) 158 CLR 168, p. 242 and noted by Gaudron J in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, p. 56.

117 *Koowarta, op.cit.*, p. 210. In *Western Australia v Commonwealth*, (1995) 183 CLR 373 at p. 460, the Court noted Justice Stephen's comments and qualified the extent to which the Court was required to evaluate the needs of the people of a race or of the threats or problems of the people of a particular race in determine whether the law was 'necessary'. The Court considered that this would involve a political judgment and that was a matter for the Parliament not the Court.

118 *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dams*').

*The approval of the proposed law for the amendment of para (xxvi) by deleting the words "other than the aboriginal race" was an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial. The passing of the Racial Discrimination Act manifested the Parliament's intention that the power will hereafter be used only for the purpose of discriminatorily conferring benefits upon the people of a race for whom it is deemed necessary to make special laws.*¹¹⁹

In *Western Australia v Commonwealth*, the Court considered the scope of section 51(xxvi) in relation to the *NTA*. It confirmed that the *NTA* was a valid law supported by the race power because it conferred a benefit on native title holders. The Court noted that the race power is a general power that may support laws which discriminate against or benefit the people of any race, but did not examine the issue in any detail. Therefore, the extent to which the race power may be used to legislate to the detriment of Aboriginal people, in particular, is uncertain. The scope and meaning of section 51(xxvi) is currently under consideration in a case before the High Court concerning the validity of the *Hindmarsh Island Bridge Act 1996* (Cth).¹²⁰

It is notable that Justice Kirby emphasised as recently as 14 August 1997 that where the Constitution is ambiguous, the Court should adopt that meaning which conforms to the principles of fundamental rights, as recognised in international law, rather than an interpretation which would involve a departure from such rights.¹²¹ In his words:

Where there is an ambiguity in the meaning of the Constitution, as there is here, it should be resolved in favour of upholding such fundamental and universal rights... . The Australian Constitution should not be interpreted so as to condone an unnecessary withdrawal of the protection of such rights. At least it should not be so interpreted unless the text is intractable and the deprivation of such rights is completely clear.

In that case, his Honour considered the scope of the Commonwealth's power to legislate under section 51(xxxi), the acquisition of property power. He construed the provision having regard to article 17 of the Universal Declaration of Human Rights which provides that everyone has the right to own property alone as well as in association with others and that no one shall be arbitrarily deprived of his property.

The significance of the argument that the race power must be exercised beneficially is that in the absence of another head of power, the Commonwealth Parliament would not be able to make a 'special law' for a racial group that is detrimental to that group. This argument has a number of important implications for native title and the Commonwealth's ability to amend the *NTA*. Essentially, it supports the contention that if the *NTA*, as amended, cannot be characterised as a law for the benefit and or advancement of Indigenous Australians, it is invalid or any parts severable are.

It is my view that because of the detrimental nature of the Bill, the amended *NTA* could not be characterised as beneficial. In view of the undeniable uncertainty in this area of the law, the Bill cannot deliver certainty.

119 *Ibid*, p. 242.

120 *Doreen Kartinyeri and Neville Gollan v Commonwealth of Australia*, High Court of Australia, No. A29 of 1997.

121 *Newcrest Mining (WA) Limited v Commonwealth* (unreported 14 August 1997, High Court of Australia, Kirby J at 160)

When considering constitutional issues it is important to note that there may be other restraints on the Commonwealth's power to enact laws under section 51(xxvi) in the form of other express or implied guarantees in the Constitution. In *Kruger & Ors v Commonwealth*, Justice Gaudron suggests that the heads of power in the Constitution do not extend to laws authorising gross violations of human rights and dignity, as recognised in international human rights instruments and the common law.¹²²

The guarantee of equality of all people, which arises either expressly through the operation of section 117 or by implication in the Constitution, remains the subject of debate. In *Leeth*, Justices Deane and Toohey in a dissenting judgment considered that there was a guarantee of equality of all persons under the common law and by necessary implication in the Constitution. The guarantee operates as a restraint on the Commonwealth's power to legislate in a way which undermines equality. They said that laws which discriminate may do so only to the extent that there are rational and relevant grounds for discrimination.¹²³ In the same judgment, Justices Brennan and Gaudron also recognised the importance of the principle of equality before the law.¹²⁴

Justice Toohey continues to assert the inherent equality of people governed under the Australian Constitution. In *Kruger & Ors v Commonwealth*¹²⁵ he specifically referred to the operation of the race power and noted that section 51 (xxvi) necessarily authorises discriminatory treatment of members of a particular race to the extent that the discriminatory treatment is reasonably capable of being seen as appropriate and adapted to the circumstances of that racial group. He said that this proposition is one which supports the enactment of laws which discriminate beneficially.¹²⁶ A law which is appropriately adapted is one which is proportional to achieving the object or purpose of the legislative head of power.¹²⁷ The 'proportionality' issue should be considered where an enactment interferes with an implied constitutional guarantee. In the context of the *NTA* and recognition of equality before the law, it must be asked if the proposed amendments to the *NTA* are reasonably capable of being seen as necessary, appropriate and adapted to the circumstances of Indigenous people and their interests.

The Bill's relationship with the RDA

As a general principle, all the measures contained in the Bill, if enacted, will be subsequent specific enactments and will override the *RDA*. Section 7(1) of the *NTA* currently states "[n]othing in this Act affects the operation of the Racial Discrimination Act 1975." Subsection 7(2) contains an exception in relation the validation of 'past acts'.

In *WA v Commonwealth*, the High Court observed that subsection 7(1) provides no basis for interpreting the *NTA* as subject to the *RDA* and that both Acts:

122 *Kruger & Ors v Commonwealth* (1997) 146 ALR 126, p. 190 ('*Kruger v Commonwealth*') where her honour's discussion was in the context of the operation of s.122 of the Constitution and whether it could support a law authorising acts of genocide. She said that acts of genocide are so fundamentally abhorrent to the principles of common law, that it would be impossible to construe s.122 as extending to laws of that kind. While she did not discuss other legislative powers, but it is open to argue that this principle would apply to all heads of power in the Constitution, especially s.51(xxvi).

123 *Leeth v Commonwealth*, (1992) 174 CLR 455, at pp. 488-9.

124 *Ibid*, pp. 475 and 502.

125 *Ibid*, p. 179.

126 *Leeth v Commonwealth*, *op.cit.*, p. 489 and repeated in *Kruger v Commonwealth*, *op. cit.*, p.181.

127 See *Leask v Commonwealth* (1996) 140 ALR 1, p. 9 per Brennan C.J., pp. 13 – 17 per Dawson J., pp. 24 – 26 per Toohey J. and pp. 41-42 per Kirby J.

*...emanate from the same legislature and must be construed so as to avoid absurdity and to give to each of the provisions a scope for operation ... The general provisions of the Racial Discrimination Act must yield to the specific provisions of the Native Title Act in order to allow those provisions a scope for operation.*¹²⁸

What subsection 7(1) ensures is that the *NTA* is not construed as impliedly repealing the *RDA*. The *NTA* covers the field in matters pertaining to native title while the *RDA* continues to operate on matters outside the scope of the *NTA*. Currently, the *NTA* and the *RDA* are complimentary pieces of legislation insofar as both provide legal protection and standards for dealing with native title. The *NTA* provides more elaborate protection than the *RDA* as it is ‘purpose built’ to deal with native title and the issues around it.

However the discriminatory nature of an enactment (such as the Bill) could affect the enactment’s constitutionality and that of the *RDA*. Mr John Basten QC argued last year to the Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund that:

... the Racial Discrimination Act ... does not arise under any specific constitutional head of power in section 51 [of the Constitution]. It relies on the external affairs power and gives effect to the Convention [on the Elimination of All Forms of Racial Discrimination]. As I am sure you all are aware, that is a very special form of legislative power, because the Parliament does not in effect have power to enact laws with respect to racial discrimination but only to give effect to the Convention.

*Immediately one starts to interfere with the scope, purpose and the intent of the Racial Discrimination Act, there is a very live danger that the High Court will at some stage say, ‘The act no longer accords sufficiently closely to the terms of the Convention and, therefore either the amendments to it express or implied will be invalid or the whole act itself will be invalidated.’ So that is my concern about fears arising in relation to implicit amendment to the *RDA* by later legislation. It is not a fear which would arise normally in relation to a principle which we all accept, that later legislation can impliedly repeal or vary earlier legislation.*¹²⁹

128 *WA v Commonwealth*, op.cit., p. 61.

129 Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Hansard*, 27 November 1996, p. NT 3609.