A Hitchhiker's Guide to the Native Title Act

JUSTICE R.S. FRENCH*

INTRODUCTION

The *Native Title Act* 1993 (Cth) was born in controversy as a legislative response to a fundamental shift in the common law. In 1992, for the first time, the common law of Australia had recognised and given effect to rights and interests derived from the traditional laws and customs of indigenous people. A new range of interests of uncertain scope and content was introduced to continental Australia from the unlikely launching pad of a small island in the Torres Strait.

The Act, the product of strenuously negotiated compromise, sought to establish a framework under which native title interests could be recognised and protected and accommodated within existing legal and constitutional arrangements and consistently with the subsisting complex arrays of non-indigenous interests created under them.

It was inevitable that the Act would continue, after coming into force, to engender significant public debate and that its provisions would be tested in the courts in a variety of ways. It was also inevitable that it would be amended in response to the pressures generated by the debate and the difficulties in its operation exposed by judicial decisions.

In 1998 the *Native Title Amendment Act* 1998 (Cth) was passed. Its passage was a matter of heated political contention which attracted international interest. The practical consequences of the changes are being worked out at this time. It is the object of this paper to record, in outline, the way in which the Act, as passed in 1993 operated, the impact of judicial decisions upon its operation and the ways in which it has been changed by the extensive amendments of 1998.

THE COMMON LAW OF NATIVE TITLE

The fundamentals of the common law of native title in Australia are still for the most part to be found in the High Court's *Mabo* decision.[1] It established the following propositions.

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1 *Mabo* v *Queensland* (No. 2) (1992) 175 CLR 1 commonly referred to as *Mabo (No. 2)*. In the first Mabo case, *Mabo* v *Queensland* (1988) 166 CLR 186, the High Court declared to be invalid a Queensland law which sought to defeat the claim by extinguishing native title. The invalidity was based on the inconsistency of the Queensland law with the *Racial Discrimination Act* 1975 (Cth).

1. The colonisation of Australia by England did not extinguish rights and interest in land held by Aboriginal and Torres Strait Islander people according to their own law and custom.[2]
2. The native title of Aboriginal and Torres Strait Islander people under their law and custom will be recognised by the common law of Australia and can be protected under that law.[3]
3. When the Crown acquired each of the Australian colonies it acquired sovereignty over the land within them. In the exercise of that sovereignty native title could be extinguished by laws or executive acts which indicated a plain and clear intention to do so — eg grants of freehold title.[4]
4. To demonstrate the existence of native title today it is necessary to show that the Aboriginal or Torres Strait Islander group said to hold the native title:
   (a) has a continuing connection with the land in question and has rights and interests in that land under Aboriginal or Torres Strait Islander traditional law and custom, as the case may be;[5]
   (b) the group continues to observe laws and customs which define its ownership of rights and interests in the land.[6]
5. Under common law, native title has the following characteristics:
   (a) it is communal in character although it may give rise to individual rights;[7]
   (b) it cannot be bought or sold;[8]
   (c) it may be transmitted from one group to another according to traditional law and custom;[9]
   (d) the traditional law and custom under which native title arises can change over time and in response to historical circumstances.[10]
6. Native title is subject to existing valid laws and rights created under such laws.[11]

The common law has been developed in further decisions of the High Court and Federal Court since the *Mabo* judgment. In *Western Australia* v *Commonwealth*[12], the High Court was concerned with the validity of the Act and inconsistent State legislation which was struck down. In the joint judgment of all but Dawson J, who dissented, the Court referred further to the doctrine

2 *Mabo* v *Queensland* (No 2) (1992) 175 CLR 1 per Brennan J (with whom Mason CJ and McHugh J agreed) at 57 and 69; per Deane and Gaudron JJ at 81; per Toohey J at 184, 205.
3 Ibid per Brennan J at 60 and 61; per Deane and Gaudron JJ at 81, 82, 86-7, 112-113, 119; per Toohey J at 187.
4 Ibid per Brennan J at 64; per Deane and Gaudron JJ at 111, 114, 119; per Toohey J at 195-196, 205. This may not necessarily apply to Crown freehold grants.
5 Ibid per Brennan J at 59-60, 70; per Deane and Gaudron JJ at 86, 110; per Toohey J at 188.
6 Ibid per Brennan J at 59; per Deane and Gaudron JJ at 110.
7 Ibid per Brennan J at 52, 62; per Deane and Gaudron JJ at 85-6, 88, 119-110.
8 Ibid per Brennan J at 60, 70; per Deane and Gaudron JJ at 88, 110.
9 Ibid per Brennan J at 60; per Deane and Gaudron JJ at 110.
10 Ibid per Brennan J at 61; per Deane and Gaudron JJ at 110; per Toohey J at 192.
11 Ibid per Brennan J at 63, 69, 73; per Deane and Gaudron JJ at 111-112.
12 (1995) 183 CLR 373.

of extinguishment. Native title could be extinguished generally by a valid law expressed to achieve that purpose or on specific land by an act inconsistent with the continued right of enjoyment of native title on that land. A fee simple grant was given as an example of the latter category. The *Native Title Act* was characterised constitutionally however, as removing *"... the common law defeasibility of native title"* and securing to the Aboriginal people and Torres Strait islanders *"the enjoyment of their native title subject to the prescribed exceptions which provide for native title to be extinguished or impaired"*.[13] Constitutional support for the Act was found in s 51(xxvi) of the Constitution.

In *Wik Peoples* v *Queensland*[14] , the relationship between native title and statutory pastoral leases was considered, it being held that the latter, at least in Queensland, did not confer exclusive possession on the lessees and therefore were not necessarily inconsistent with the continued enjoyment of native title rights and interests.

In *Fejo* v *Northern Territory of Australia*[15], the Court confirmed that a grant of fee simple or freehold title extinguished rather than suspended native title rights and interests and that the extinguishment was permanent. There could be no question of those rights springing forth again when the land came to be held again by the Crown. Their recognition had been overtaken by the exercise of the power to create and extinguish private rights and interests in land within the sovereign's territory.[16]

Given the requirements, set out in *Mabo (no 2)*, of the proof of native title at common law and the complexity of its interaction with the whole array of Commonwealth, State and Territory laws and grants made under such laws, litigation on native title questions was always going to be time consuming and expensive. A process was needed to facilitate recognition of native title by agreement where that was possible. In the meantime dealings with land were going on apace and there was a need to protect native title rights pending their recognition at common law and when recognised or otherwise to provide for compensation where such rights were extinguished or impaired.

It was a by-product of the *Mabo* litigation that since the *Racial Discrimination Act* 1975 (Cth) native title rights could not be dealt with under State or Territory law in a way that would discriminate between indigenous and non-indigenous property holders. This was broadly the effect of the decision of the High Court in *Mabo* v *Queensland*[17] (*Mabo* No 1) in which a Queensland law which sought to defeat the claim by global extinguishment of native title in the coastal islands was held to be invalid. The invalidity was based on the inconsistency of the Queensland law with the *Racial Discrimination Act* 1975 (Cth). Issues of validity would also arise in respect of Commonwealth action which had affected native title in such a way as to

[13] 183 CLR at 459.
[14] (1996) 187 CLR 1.
[15] (1998) 195 CLR 96.
[16] 195 CLR 96.
[17] (1988) 166 CLR 186.
[18] *Native Title Act* 1993 (Cth) s 19.

constitute an acquisition of property on other than just terms. These considerations raised a question mark over the validity of past laws and grants affecting native title in a discriminatory way or contrary to the constitutional requirement of just terms compensation where that was applicable.

The primary objectives of the *Native Title Act* 1993 (Cth) reflected the needs emerging from the *Mabo* litigation for validation of past invalid grants, a process for the recognition of native title and a process for its interim protection.

VALIDATION OF PAST GRANTS UNDER THE ORIGINAL ACT

The *Native Title Act* 1993 (Cth) validated past acts (legislative and executive) of the Commonwealth which were invalid to any extent because of their impact upon native title. It permitted the States and Territories also to pass laws to validate their own past acts.[18] All possible bases for invalidity were covered. Validation effected or authorised by the *Native Title Act* 1993 (Cth) was linked to a statutory extinguishment, partial extinguishment or temporary suppression of native title and compensation rights according to the class of past act validated. Freehold grants and pastoral, residential and commercial leases so validated extinguished native title completely.[19] So the anomaly existed that an invalid pastoral lease validated by, or under the authority of the *Native Title Act* 1993 (Cth), extinguished native title, whereas in the light of the *Wik* decision a valid pastoral lease did not necessarily have that effect at common law.[20] The anomaly might not have been apparent to those who drafted the Act because of the then prevailing belief reflected in its Preamble that:

> . . . native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests such as the grant of freehold or leasehold estates.

To qualify as a lease for the purposes of the validation and other provisions of the Act, it was not necessary that the grant in question bear the attributes of a common law lease. It was sufficient that it be declared or described as a lease in a law of the Commonwealth, a State or a Territory.[21] The invalid freehold and specified leasehold grants which were validated and which extinguished native title by virtue of their validation were described as Category A past acts.[22] They did not include Crown to Crown grants or grants made under laws for the benefit only of Aboriginal peoples or Torres Strait Islanders.[23] Category A past acts also included the construction and establishment of certain public works.

19 *Native Title Act* 1993 (Cth) s 15.
20 *Wik Peoples* v *Queensland* (1996) 141 ALR 129.
21 *Native Title Act* 1993 (Cth) ss 242 and 248.
22 *Native Title Act* 1993 (Cth) s 229(1).
23 *Native Title Act* 1993 (Cth) s 229(3)(d).

Category B past acts comprised grants of leases not in Category A and not mining leases, Crown to Crown grants or grants under legislation for the benefit of indigenous people.[24] Their validation extinguished native title to the extent of any inconsistency between the act and the continued existence, enjoyment or exercise of the native title rights and interests concerned.[25]

The grant of a mining lease was a Category C past act and its validation attracted the application of the non-extinguishment principle.[26] That meant native title was taken to be temporarily suppressed in whole or in part while the relevant act was in effect.[27] Where a mining lease was validated, the native title rights and interests continued to exist, but to have no effect in relation to the lease while it is still in force.[28]

Category D was residual and picked up past acts not in the first three categories.[29] The validation of a Category D act also attracted the operation of the non-extinguishment principle.[30]

The validation provisions created a right to compensation recoverable from the Commonwealth, State or Territory as the case may be, for their extinguishing consequences.[31]

RECOGNITION OF NATIVE TITLE UNDER THE ORIGINAL ACT

Absent the *Native Title Act* the only process for the recognition of native title would be by way of court action naming the relevant State or Territory government and possibly holders of affected private interests as defendants. The *Native Title Act* established the National Native Title Tribunal to receive native title applications, to accept them, to register them,[32] to notify and identify parties[33] and to assist applicants and parties to reach a negotiated outcome. In the event that agreement was not achieved, the application would be referred to the Federal Court.[34] The Tribunal was empowered to deal in a similar way with applications for compensation under the Act. Other applications for which the Act provided were non-claimant applications allowing for a determination of the non-existence of native title in a particular area and applications to revoke or vary a determination.

The Registrar of the Tribunal was responsible for establishing and maintaining a Register of Native Title Claims[35] and the National Native Title

[24] *Native Title Act* 1993 (Cth) s 230.
[25] *Native Title Act* 1993 (Cth) s 15(1)(c).
[26] *Native Title Act* 1993 (Cth) s 15(1)(d).
[27] *Native Title Act* 1993 (Cth) s 238.
[28] *Native Title Act 1993* (Cth) s 238(8).
[29] *Native Title Act* 1993 (Cth) s 232.
[30] *Native Title Act* 1993 (Cth) s 15(1)(d).
[31] *Native Title Act* 1993 (Cth) ss 17 and 20.
[32] *Native Title Act* 1993 (Cth) s 63.
[33] *Native Title Act* 1993 (Cth) ss 66, 68 and 69.
[34] *Native Title Act* 1993 (Cth) s 74.
[35] *Native Title Act* 1993 (Cth) s 185.

Register.[36] Entry of a claim in the Register of Native Title Claims was a condition of the right to negotiate in relation to the grant of mining tenements on land subject to the claim or the compulsory acquisition, for the benefit of third parties, of native title rights and interests on such land.[37]

The scheme of the Act seemed to contemplate that acceptance of a claim by the Registrar would precede registration and the rights flowing therefrom. There were, however, two sections of the Act which appeared to contradict each other in this respect.[38] Two judicial decisions, including a decision of the Full Court of the Federal Court, led to the result that registration was effected immediately upon lodgment of an application and prior to consideration of whether the application should be accepted.[39]

The right to negotiate in relation to the grant of mining tenements or certain compulsory acquisitions of native title was therefore able to be enjoyed by a claimant from the point of lodgment of the application as it was the act of lodgment that gave rise to the entitlement for the application to be entered on the Register of Native Title Claims.

The acceptance process was also affected by judicial interpretation. The Act provided that the Registrar was to accept an application unless of opinion that it was frivolous or vexatious or that prima facie the claim could not be made out. If satisfied of one or other of those things, the Registrar was to refer the application to a Presidential Member who, if of the same opinion, was required to invite submissions from the applicants to the contrary.[40] In construing these provisions, the High Court held that neither the Registrar nor the Presidential Member could deny acceptance if there were an arguable question notwithstanding they might be of the view that the application would fail. And in deciding to reject an application they were not entitled to have regard to material other than that which accompanied the application.[41] Extrinsic evidence might be relevant to the question whether an application was frivolous or vexatious. It would, however, relate to some conduct on the part of the applicant or some disqualifying factor personal to the applicant which would not be required to appear on the face of the application or its accompanying material.[42]

The combined effect of these decisions and the absence of any requirement for applicants to submit comprehensive tenure material with their applications[43] was to render the acceptance and registration steps relatively insignificant as screening processes for applications.

[36] *Native Title Act* 1993 (Cth) s 192.
[37] *Native Title Act* 1993 (Cth) ss 29 and 30.
[38] *Native Title Act* 1993 (Cth) s 66(1)(b) and s 190(1).
[39] *Northern Territory* v *Lane* (1995) 59 FCR 332 and *Kanak* v *National Native Title Tribunal* (1995) 61 FCR 103, 110.
[40] *Native Title Act* 1993 (Cth) s 63.
[41] *North Ganalanja Aboriginal Corporation* v *Queensland* (1996) 185 CLR 595 especially at 620-621.
[42] Ibid 622.
[43] *Native Title Act* 1993 (Cth) s 62(1)(b) which requires an application to 'contain all information *known to the applicant* about interests in relation to any of the land or waters concerned that are held by persons other than as native title holders.' (emphasis added)

A further judicial decision of importance was that of Nicholson J in *Western Mining Corporation* v *Lane*[44] which held that it was mandatory for the Tribunal to notify a claim to all persons holding proprietary interests in any of the areas covered by the application where the interest was registered in a Register of Interests in relation to land or waters maintained by the Commonwealth, a State or Territory.[45] While it was generally the practice of the Tribunal to notify individual interest holders it was not always practicable to give individual notifications where there was a large number of interests. In some areas under claim there might be hundreds or even thousands of tenement or leaseholders who could reasonably be expected to be adequately notified of claims by a combination of public notice, electronic media notice and community information programs. As the relevant provisions of the Act have been construed there is no flexibility in the notification process to be used.

The Act conferred on the Tribunal the power to inquire into and make determinations on applications which are unopposed or which lead to an agreement for a determination.[46] Provision was made for such determinations to be registered in the Federal Court and to take effect as orders of the Court.[47] However, the validity of that process became questionable because of a decision of the High Court about analogous processes under the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) — *Brandy* v *Human Rights and Equal Opportunity Commission*.[48] The procedure adopted by the Tribunal in response to the Brandy decision took mediation to the point of an agreed determination and then referred the matter to the Federal Court for a consent order. In the event a Full Court decision of the Federal Court confirmed the invalidity of the registration process.[49]

In processing claims the Tribunal had decision making functions relating to the acceptance of applications, decisions as to who may be a party to them, decisions about the timing of mediation conferences and the termination of mediation.

Mediation Practice under the Original Act

The statutory framework for mediation of native title applications prior to the amendments was spare. It was almost entirely encompassed by s 72 of the Act. That section provided in substance that where an application was neither unopposed nor resolved by the parties themselves within two months of the close of notification the President of the Tribunal was to '... direct the holding of a conference of the parties or their representatives to help in resolving the matter'. The purpose of the conference was not spelt out beyond the broad object of helping to resolve the matter.

[44] (1997) 143 ALR 200.
[45] The decision concerns the construction of s 66 of the Act.
[46] *Native Title Act* 1993 (Cth) ss 70, 71, 73 and 139(a).
[47] *Native Title Act* 1993 (Cth) ss 160, 166 and 167(1).
[48] *Brandy* v *Human Rights and Equal Opportunity Commission* (1994-95) 183 CLR 245.
[49] *Fourmile* v *Selpam Pty Ltd* (1998) 80 FCR 151

The single conference concept was expanded in practice to a series of meetings between all or some of the parties convened or programmed by the Tribunal over an extended period. The outcomes contemplated included:

1. An agreed native title determination.
2. Agreements as to elements of the native title determination.
3. Withdrawal of some parties.
4. Agreements as to issues.
5. Withdrawal of the application in consideration of some form of recognition other than native title, eg a land rights outcome.
6. Resolution of differences between indigenous parties who were in dispute about the claim, some of whom might have registered as respondents.

In these processes, as is still the case, a frequent threshold issue was the resolution of intra-indigenous conflict. Thereafter the major players in the negotiation processes tended to be the applicants and the State or Territory Government. The Commonwealth became involved in claims with offshore elements or where Commonwealth land was concerned.

The termination of mediation and referral to the Court was a matter for the Tribunal under s 74 of the Act. There was no facility for questions of law or fact to be referred to the Court for determination. The Tribunal had no coercive power which could be exercised in connection with the conduct of the mediation. While there was a provision in s 72 that statements and evidence given in a mediation conference were without prejudice there was no statutory prohibition upon disclosure in public of matters raised in the mediation process. The privacy of the mediation process depended entirely upon the attitude of the parties. In some cases, of course, mediations involving a wide range of interests in particular communities, having the character of public issue dispute resolution, had little prospect of maintaining high levels of confidentiality.[50]

Protection of Native Title and the Right to Negotiate Process

The Act provided from the outset for the protection of native title. Governments proposing to pass laws or do executive acts affecting native title were required to observe a non-discrimination principle in relation to native title holders. Onshore dealings with land affecting native title holders were to be done in a way that would not discriminate between them and freeholders.[51] Entitlements to compensation were created.[52]

The acts to which these protective provisions applied were called "future acts". These could be legislative acts or any other act which affected native title by extinguishing native title rights and interests or by inconsistency with

[50] For example the Yorta Yorta application which covered areas of reserve and State forest and waterways in Northern Victoria and Western New South Wales attracted more than 400 respondent parties.

[51] *Native Title Act* 1993 (Cth) s 23(6).

[52] *Native Title Act* 1993 (Cth) ss 23(4) and 23(5), 24(2) and 25(1).

their continued existence, enjoyment or exercise.[53] Non-discriminatory onshore future acts were permissible future acts.[54] Permissible future acts were also defined to cover the renewal, regrant or extension of the terms of a commercial, agricultural, pastoral or residential lease provided there was not thereby created a proprietary interest where none was created before or a larger proprietary interest than before.[55]

In addition to the general protection of native title against discriminatory action the Act introduced a specific protective process known as the right to negotiate process. It required compulsory negotiation and, in default of agreement, arbitration to be undertaken before governments could validly do certain acts onshore for the benefit of third parties where those acts would affect native title rights and interests.[56] The acts to which the process applied were the grant of mining and mining exploration tenements and the acquisition of native title rights and interests under a compulsory acquisition act where the purpose of the acquisition was to confer rights or interests on a third party.[57]

The parties to the negotiation and arbitration processes were:

(a) the Government proposing to do the act;
(b) the beneficiary of the act (the grantee);
(c) any registered native title body corporate holding title in relation to land or waters affected by the act;
(d) any person who was or became a registered title claimant within two months of the giving of notice by the government.[58]

A person or persons other than a registered holder of native title could become registered as a native title claimant and thereby acquire status as a native title party by lodging a native title claim with the National Native Title Tribunal prior to or within two months of publication of the notice of the proposed act.[59]

There were minimum periods prescribed under the Act within which the State Government, the grantee and the native title party could negotiate an agreement about the proposed grant of the tenement or acquisition of the native title rights and interests.[60] If agreement were unable to be reached within that time, then any of those parties could apply to the Tribunal to conduct the inquiry and make a determination of whether or not the act could be done and, if so, on what conditions.[61]

The relevant government was required under the Act to give all native title parties an opportunity to make submissions to it. It was also required to negotiate in good faith with the native title parties and the grantee parties with a view to obtaining the agreement of the native title parties to the doing of the

[53] *Native Title Act* 1993 (Cth) ss 233 and 227.
[54] *Native Title Act* 1993 (Cth) s 235.
[55] *Native Title Act* 1993 (Cth) s 235.
[56] *Native Title Act* 1993 (Cth) ss 31 and 33.
[57] *Native Title Act* 1993 (Cth) s 26.
[58] *Native Title Act* 1993 (Cth) ss 29 and 30.
[59] *Native Title Act* 1993 (Cth) s 30(a).
[60] *Native Title Act* 1993 (Cth) s 35.
[61] *Native Title Act* 1993 (Cth) ss 35, 36 and 38.

proposed act either unconditionally or subject to conditions. Unless the good faith negotiation requirement had been satisfied, the Tribunal did not have jurisdiction to embark upon an arbitral inquiry.[62]

The content of the good faith requirement would vary according to the circumstances of the case. In some "right to negotiate" mediations there was a difference of view between State Governments and native title parties about what constituted good faith negotiations. In some cases native title parties proposed that the State address questions relevant to the particular grant which raise policy issues of general application. Such discussions had the potential to extend or defeat the particular negotiation process.

The good faith requirement led, in Western Australia, to the State developing its own protocol for negotiation with native title parties. The requirement did, to some extent, result in a bureaucratisation of the negotiating process. In the event the Federal Court held that the words "negotiate in good faith" in s 31(1)(b) of the Act, incorporated a requirement of subjective honesty of intention and sincerity. Negotiating conduct was also to be judged objectively for reasonableness. However it was not for the Court or the Tribunal to assess the reasonableness of offers made in negotiations but rather the total conduct constituting the negotiation. To require the government to make "reasonable substantive offers" required a further unnecessary level of complexity and application to the interpretation of the words of the Act.[63]

When a determination was made by the Tribunal that an act could be done or that it could not be done it was subject to a ministerial override to be exercised within two months.[64] The Act allowed for States to establish their own arbitral bodies. The jurisdiction of such bodies in the right to negotiate process would be exclusive of the National Tribunal and the relevant State Minister would have the power to override the determination of the State body.[65]

A government party could seek an exemption from the right to negotiate process in respect of a particular future act on the basis that it did not directly interfere with the community life of the native title holders in relation to the land or water concerned, did not interfere with areas or sites of particular significance and did not involve major disturbance to the land or waters concerned. The procedure under which the right to negotiate could be bypassed on these grounds was called "the expedited procedure".[66] A registered native title claimant could object to the application of the expedited procedure and it was for the arbitral body to hear and determine such objection.[67] It was held by the Full Court that the Act in this context directed attention to the legal effect of the proposed future act although it was still necessary to assess its physical

62 *Walley* v *State of Western Australia* (1996) 137 ALR 561. Under the amendments to ss. 31 and 36 of the Act the obligation to negotiate in good faith has been imposed on all parties. The jurisdiction of the Tribunal as an arbitral body is now conditioned upon the applicant for a determination having negotiated in good faith.

63 *Strickland* v *Minister for Lands for Western Australia* (1998) 85 FCR 303.

64 *Native Title Act* 1993 (Cth) s 42(2).

65 *Native Title Act* 1993 (Cth) ss 27 and 42(1).

66 *Native Title Act* 1993 (Cth) s 237.

67 *Native Title Act* 1993 (Cth) s 32(4).

consequences to determine whether it would have the effect referred to. The relevant section was not to be read as encompassing indirect effects of the proposed future act and requiring the Tribunal to make predictive assessments as to its likely consequence. In determining whether the proposed future act would involve a "major disturbance" it would be necessary to take into account the views of all members of the community without excluding any particular section of the general community. It was necessary to take into account the views and concerns of native title holders but the importance and weight to be attached to those matters would vary according to the circumstances.[68]

Some features of the right to negotiate process were:

1. Negotiated agreements could include provisions for payments to the native title parties worked out by reference to profits made or income derived or things produced by the grantee party.[69]
2. Subject to the operation of the expedited procedure, the right to negotiate could apply at both exploration and mining stages.
3. Issues concluded by agreement or determination at one stage could not be reopened in a subsequent negotiation or determination except by leave of the arbitral body.[70]
4. The right to negotiate could be exercised by individuals without any requirement for consultation with or consent of the relevant community of native title holders.

Authorisation of Future Acts — Section 21 and Non-Claimant Applications

The common law of native title contemplates that native title rights can be surrendered to the Crown. That principle was recognised in s 21 of the Act which provided that native title holders might, under an agreement with the Commonwealth, a State or Territory, surrender their native title rights and interests. It extended the principle by providing that native title holders could, under an agreement with the relevant government, authorise any future act that would affect their native title. Such agreements could be made for any lawful consideration and could be made on a regional or local basis.

A future act authorised by s 21 was a permissible future act and therefore valid unless it attracted the application of the right to negotiate process.[71]

The Act also provided for applications for determinations of native title made by persons other than persons claiming to hold native title.[72] Such claims could lead to a determination that native title did not exist in the particular area. If, within two months of the notification of a non-claimant application, no claimant application were lodged then the non-claimant application was taken to be unopposed and could be dealt with as an unopposed application by a

[68] *Dann* v *Western Australia* (1997) 74 FCR 391.
[69] *Native Title Act* 1993 (Cth) s 33.
[70] *Native Title Act* 1993 (Cth) s 40.
[71] *Native Title Act* 1993 (Cth) ss 23(1) and (2).
[72] *Native Title Act* 1993 (Cth) s 67.

Tribunal inquiry and determination. However in the light of the *Brandy* decision this process was of questionable validity. Nevertheless, a future act done while an unopposed non-claimant application was pending was valid subject to rights of compensation for any native title holders in the area.[73] Section 24 of the Act, which conferred such validity, was used to the benefit of both indigenous and non-indigenous interests to secure validity for future acts, such as pipeline developments, without resolving the native title questions that might arise under an application. In such cases, the non-claimant inquiry was adjourned with the consent of the relevant representative Aboriginal body to allow the proposed act to proceed on the basis that the application might eventually be dismissed.

If a non-claimant application were met with an accepted claimant application within two months, it was taken to be dismissed (if lodged by the Crown or a statutory authority) or not to apply to the area of the claimant application (if lodged by someone else).[74]

The Original Vision of the Native Title Act

The original vision of the *Native Title Act* was underpinned by, among other things, substantial preparation for the lodgment of each application, a screening process applied by the Tribunal, a conference to see whether agreement could be reached about the application, determinations of unopposed or agreed applications by the Tribunal and referral of contested applications to the Federal Court. The scheme of the Act was also consistent with the proposition that registration of a claim and the right to negotiate and arbitrate mining grants and acquisitions were tied to the acceptance of applications. As for intra-indigenous conflict, that was a matter to be resolved by Representative Bodies of Aboriginal people designated as such by the Minister.

Amendments to the Bill in the Senate and later decisions of the High Court and Federal Court led to different outcomes. The lodgment of applications gave rise immediately to the right to be placed on the Register of Native Title Claims and to invoke the compulsory negotiation and arbitration provisions of the Act in relation to the grant of mining tenements and certain compulsory acquisitions.[75] This right could be acquired and exercised by individuals without community consent or involvement. There was very little scope for substantive assessment of applications in deciding whether to accept them.[76] The Tribunal's power to make determinations in respect of unopposed or agreed applications was seriously undermined by the *Brandy* decision[77] and effectively removed by the consequential judgment of the Full Federal Court in *Fourmile* v *Selpam Pty Ltd*[78] that the provisions relating to registration, in the Federal Court, of Tribunal determinations were invalid.

[73] *Native Title Act* 1993 (Cth) s 24.
[74] *Native Title Act* 1993 (Cth) s 67(2).
[75] *Northern Territory* v *Lane* (1995) 59 FCR 332; *Kanak* v *National Native Title Tribunal* (1995) 132 ALR 329.
[76] *North Ganalanja Aboriginal Corporation* v *Queensland* (1996) 185 CLR 95 [Waanyi].
[77] *Brandy* v *Human Rights & Equal Opportunity Commission* (1994-95) 183 CLR 245.
[78] 78 (1998) 80 FCR 151.

AMENDMENTS TO THE ACT — BEFORE THE WIK PLAN

Following the decision of the High Court in the *Brandy* case, it became apparent that there was a serious question mark over the Tribunal's power to make determinations of native title. Independently of that question there was a tension between the Tribunal's role as a neutral mediator and its role as a decision maker in relation to the acceptance of applications and the determination of the standing of persons or organisations to be parties to an application.

In a Discussion Paper published by the Tribunal in March 1995, it was proposed that the Act be amended so that all applications would be commenced as proceedings in the Federal Court and then referred to the Tribunal as a mediation agency. Decisions about the viability of applications could be made in the context of strike out motions and the standing of persons to be parties would also be a matter for determination by the Court.

Amendments to give effect to these proposals were introduced by the former government in September 1995 but lapsed upon the proroguing of the Parliament prior to the last federal election.

The 1995 amendments would also have established a new registration test to be satisfied if the right to negotiate were to be invoked. It required the Registrar to accept the claim for registration unless she considered that prima facie it could not be made out. It was described in the Explanatory Memorandum as 'a low threshold test' which reflected the terms of the previous acceptance test. However, the Registrar was entitled to have regard to information other than that contained in the application and to consider submissions made by third parties. Where an application was refused registration by the Registrar, it would be considered for registration by the Federal Court.

In the light of the effects upon processes under the Act of the *Brandy*, *Lane* and *North Ganalanja* decisions, the present Government introduced a significant number of amendments to the Act in June 1996 and foreshadowed further amendments in October 1996. The amendments introduced in June 1996 and those foreshadowed in October were incorporated into a consolidated amending Bill which also brought in the Government's subsequent response to the decision of the High Court in *Wik Peoples* v *Queensland* — the so called 'Ten Point Plan'.[79]

THE WIK DECISION — ITS IMPACT ON THE OPERATION OF THE ACT

The High Court in *Wik Peoples* v *Queensland* held that pastoral leases granted under the Queensland *Land Acts* of 1910 and 1962 did not confer rights of exclusive possession on the grantees. Nor did they necessarily extinguish all incidents of native title on the land the subject of the leases. This raised the probability that native title would be found to co-exist with

[79] (1997) 187 CLR 1.

subsisting pastoral leases. Pastoralists who had been accustomed to regard their leases as conferring exclusive possession now faced the possibility of having to recognise, deal with and adapt to co-existence with indigenous owners.

The ferocity of the reaction to the *Mabo* decision paled in comparison with the response to the decision of the High Court in *Wik*. That should have come as no surprise. CD Rowley, writing in 1986 about the impact of land rights legislation on public attitudes, six years before *Mabo* and ten years before *Wik*, had said:

> Self interest is a firm basis for beliefs and mores in us all, and one can at least understand the shocked disbelief turning to wrath as miners and pastoralists now hear what they claim as their legal rights questioned, or see them restricted.[80]

The interaction of the *Wik* decision with the common law and future act provisions of the *Native Title Act* raised concerns which included:

1. Anything done by a pastoralist on the land not authorised by the lease which might impair the co-existing native title could be subject to legal restraint at the instance of native title holders. This was of particular importance in relation to the diversification of pastoral properties into more intensive activities such as horticulture and tourism which had been allowed in some instances, even though not authorised by the statutes creating the leases.
2. In the period between the passing of the *Native Title Act* in 1993 and the *Wik* decision in December 1996 some governments had made grants of interests, including mining interests, over land previously the subject of pastoral leases on the assumption that the pastoral leases had completely extinguished native title. On that assumption there seem to have been cases in which the process of the *Native Title Act* in relation to future acts had not been followed. Thus the validity of grants during that intermediate period was in question.
3. Some things able to be done lawfully under pastoral leases nevertheless required additional ministerial approvals or permits. These additional approvals or permits could be characterised as future acts because of their potential impact on the co-existing native title and thus have to comply with the requirements of the *Native Title Act.*
4. There were suggestions in some of the Wik judgments that things done lawfully within the terms of a pastoral lease could nevertheless have an additional impairing effect on native title — *Wik Peoples* v *Queensland* (supra) at 203 per Gummow J where his Honour spoke of the performance of improvement conditions under a lease as bringing about the relevant abrogation of native title rather than their imposition by the grant.

[80] C D Rowley *Recovery: The Politics of Aboriginal Reform* (Penguin Books)1986, 84

The decision also made clear what to lawyers was obvious, that the development of the common law and, in particular, the elucidation of the interaction between native title and particular interests would be worked out on a case by case basis.[81]

The issues which as a result of the *Wik* decision were pressed upon legislators thus included:

1. The validity of intermediate period acts.
2. The application of the right to negotiate in relation to grants of mining interests over land which were or had been the subject of pastoral leases.
3. The ability of pastoralists to undertake activities authorised by their leases without the requirement to comply with provisions of the *Native Title Act*.
4. The possibility of continuing uncertainty about the subsistence of native title in conjunction with a wide range of statutory interests in land.

The amendments to the *Native Title Act* 1993 can be understood and analysed against the background of these concerns and those which had preceded the Wik decision. But like the Act in its original form, the analysis of the Act as amended can be carried out under the three general objectives which remain in place:

1. Validation of past acts.
2. Recognition of native title.
3. Protection of native title in relation to future acts.

Validation — Intermediate Period Acts

The Act before it was amended validated, and authorised State or Territory Governments to legislatively validate, various categories of past acts being laws passed or grants made affecting native title which were invalid for that reason. The validation regime covered laws made, repealed or amended before 1 July 1993,[82] other dealings before 1 January 1994[83] and certain other acts done after those dates. The major concern behind the need for validation was the effect of the *Racial Discrimination Act* 1975 (Cth) which, on the reasoning of the High Court in *Mabo (No. 1)*,[84] would be inconsistent with, and thereby have invalidated to the extent of the inconsistency, discriminatory State laws or grants of interests.

Between 1 January 1994 and 23 December 1996 when judgment was delivered in the *Wik* case, grants had been made affecting certain lands on the assumption that current or past pastoral leases had extinguished native title. Given, as the High Court held, that the grant of a pastoral lease does not necessarily extinguish native title, some of the grants made may have affected native title adversely in a way that was inconsistent with the *Racial*

[81] See eg Gummow J, 184.
[82] *Native Title Act* 1993 (Cth) s 228(2)(a)(i).
[83] *Native Title Act* 1993 (Cth) s 228(2)(a)(i).
[84] *Mabo* v *Queensland* (1988) 166 CLR 186.

Discrimination Act 1975 and the future act provisions of the *Native Title Act* 1993. Commonwealth grants made on the same wrong assumption may have amounted to acquisition of property other than on just terms and thus be invalid for failure to comply with the requirements of the Commonwealth Constitution.

To overcome the uncertainties in relation to these grants, the amended Act provides for the validation of what are called 'intermediate period acts'.[85]

Intermediate period acts which are or can be validated pursuant to the amended *Native Title Act* include a range of executive acts. With certain narrow exceptions they will not include laws which were invalid because of their effect on native title. The classes of laws which are to be treated as intermediate period acts are those creating freehold or leasehold estates or licences over the land or waters in question and laws reserving, proclaiming or dedicating land or waters for a particular purpose.[86] The act to be validated must have taken place between 1 January 1994 and 23 December 1996 (inclusive), it must have been invalid to some extent because of its impact on native title and not be within the definition of a past act.[87]

An intermediate period act must affect land or waters which have been the subject of a valid prior freehold or leasehold grant (not including a mining lease) or the construction or establishment of a public work.[88] Some classes of acts may be excluded by regulation from the category of intermediate period act. Intermediate period acts are subdivided, as were past acts under the original validation provisions, into Categories A, B, C and D.

Category A covers freehold grants or vestings and the grant or vesting of various classes of leasehold interest being:

(a) an interest set out in Schedule 1 to the proposed amended Act or included in it by regulation;[89]
(b) a commercial lease that is neither an agricultural lease nor a pastoral lease;[90]
(c) an exclusive agricultural lease or an exclusive pastoral lease being an agricultural or pastoral lease that confers a right of exclusive possession or which is a scheduled interest;[91]
(d) a residential lease;
(e) community purposes lease;[92]
(f) elements of mining leases which authorise the construction of cities, towns or private residences where the lease was in force at 24 December 1996;[93]

[85] *Native Title Act* 1993 (Cth) Division 2A of Part 2.
[86] *Native Title Act* 1993 (Cth) new s 232A(2)(b).
[87] *Native Title Act* 1993 (Cth) new s 232A.
[88] *Native Title Act* 1993 (Cth) new s 232A(2)(e) and (f).
[89] *Native Title Act* 1993 (Cth) new s 232B(3)(a) and Native Title Act 1993 (Cth) new s 249C.
[90] *Native Title Act* 1993 (Cth) new s 232B(3)(b).
[91] *Native Title Act 1993* (Cth) new s 232B(3)(c) and *Native Title Act* 1993 (Cth) new s 247A; *Native Title Act* 1993 (Cth) new s 248A; *Native Title Act* 1993 (Cth) ss 247 and 248.
[92] *Native Title Act* 1993 (Cth) new s 249A.
[93] *Native Title Act* 1993 (Cth) new s 232B(3)(f).

(g) any lease (other than a mining lease) which confers a right of exclusive possession over land or waters;[94]

Also included is the construction or establishment of any public work.[95] Excluded from category A are grants or vestings under laws for the benefit of Aboriginal and Torres Strait Islander people.[96]

The amendments provide that category A acts attributable to the Commonwealth will extinguish 'all native title in relation to the land or waters concerned'.[97] If the act concerned is the construction or establishment of a public work it will extinguish native title in the land or waters on which it is situated and the extinguishment is taken to have happened when the construction or establishment of the work began.[98]

Category B intermediate period acts are leasehold grants which are not in Category A, are not mining leases and are not granted under laws granting leases only to or for the benefit of Aboriginal and Torres Strait Islander people.[99] Those acts attributable to the Commonwealth which are inconsistent with native title rights and interests will extinguish native title to the extent of the inconsistency.[100]

Category C intermediate period acts are the grants of mining leases.[101] The non-extinguishment principle applies to them.[102] Any other intermediate period acts are Category D.[103]

If the invalidity of an intermediate past act attributable to the Commonwealth was due to failure to comply with the 'just terms' requirement of the Constitution, then the person affected is entitled to compensation in accordance with Division 5 of the Act and such additional compensation as is necessary to meet the just terms requirement.[104]

The amendments also validate State and Territory intermediate period acts for which like provisions have been made relating to extinguishment and the preservation of beneficial reservations, conditions and rights.[105] Native title holders affected by the validation of those acts will be entitled to compensation as against the State or Territory concerned.[106]

Under the existing law, compensation is payable only once for acts that are essentially the same. This would also apply to compensation arising from the validation of intermediate period acts.[107]

94 *Native Title Act* 1993 (Cth) new s 232B(3)(g).
95 *Native Title Act* 1993 (Cth) new s 232B(7).
96 *Native Title Act* 1993 (Cth) new s 232B(8).
97 *Native Title Act* 1993 (Cth) new s 22B(a).
98 *Native Title Act* 1993 (Cth) new s 22B(b)(ii).
99 *Native Title Act* 1993 (Cth) new s 232C.
100 *Native Title Act* 1993 (Cth) new s 22B(c).
101 *Native Title Act* 1993 (Cth) new s 232D.
102 *Native Title Act* 1993 (Cth) new s 22B(d).
103 *Native Title Act* 1993 (Cth) new s 22B(d).
104 *Native Title Act* 1993 (Cth) new s 22E.
105 *Native Title Act* 1993 (Cth) new s 22F.
106 *Native Title Act* 1993 (Cth) new s 22G.
107 *Native Title Act* 1993 (Cth) new s 49.

EXTINGUISHMENT

Extinguishment of native title is a common law concept. It is propounded as an incident of the Crown's sovereignty over the land and waters established upon the creation of the various colonies. 'Sovereignty carries the power to create and extinguish private rights and interests in land within the sovereign's territory'.[108]

The concept of extinguishment is paradoxical. The essence of the *Mabo* decision is that the common law of Australia can recognise and protect rights and interests arising out of the traditional laws and customs of indigenous people. But the recognition of indigenous law and custom does not alter its content. Nor can the withdrawal of recognition alter that content. Extinguishment effected by legislative action or executive grant has reality only in the non-indigenous legal system. It can be characterised as a limitation on the capacity of the common law imposed by or under statute to recognise native title. Extinguishment in this sense is to be distinguished from the loss of native title rights and interests by abandonment of indigenous law and custom. There, the foundation of those rights disappears. That is not a consequence of the operation of non-indigenous law.

The proposition that once extinguished native title cannot be revived at common law may be debatable although it appears to have been settled by the High Court in *Fejo*. It is, however, at most a statement about non-indigenous law. Whether derived as a common law principle or imposed by statute, such a proposition is not entrenched. Where indigenous law and custom persist, then a rule of permanent extinguishment, whether derived from common law or imposed by statute, can arguably be reversed by statute law. Extinguishment is about the limits of non-indigenous law. As such, it is not necessarily forever. What is imposed by common law or statute can be reversed by statute. Examples of such reversal appears in the *Native Title Act* itself in ss 47, 47A and 47B which provide that under certain circumstances prior extinguishment of native title is to be disregarded for all purposes under the *Native Title Act*. They relate to pastoral leases held by native title claimants, reserves covered by claimant applications and vacant crown land covered by claimant applications. The conceptual basis for extinguishment which is outlined above is implicit in a statement of Toohey J in the *Wik* case that refers to native title rights affected by inconsistent grants as "unenforceable at law and, in that sense extinguished".[109]

The amended *Native Title Act* introduces a definition of the word 'extinguish'. No definition appeared in the original Act. The definition is in the following terms:

[108] *Mabo No. 2* (1995) 175 CLR 1 at 63 per Brennan J.
[109] *Wik Peoples* v *The State of Queensland* 1997 187 CLR 1, 184.

> The word 'extinguish' in relation to native title, means permanently extinguish the native title. To avoid any doubt, this means that after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect.[110]

The definition thus established applies to the extinguishment effected in conjunction with the validation of Category A past acts and Category A intermediate period acts as well as previous exclusive possession acts which will be discussed in the next section. The extinguishment effected by the application of this definition may be permanent in the light of *Fejo*, but could be reversed by statute.

Extinguishment of Native Title by Previous Valid or Validated Acts — Previous Exclusive Possession Acts

The amendments to the *Native Title Act* created a new Division 2B headed "Confirmation of past extinguishment of native title by certain valid or validated acts". It provides for the extinguishment or partial extinguishment of native title in respect of past grants of interests in land or waters done before 23 December 1996. The heading of the Division suggests a purely declaratory operation for the amendments. To the extent, however, that the common law would have continued to recognise native title subject to the interests covered by the Division, the amendments would effect or authorise substantive extinguishment or impairment of native title at common law.

The amendments operate directly to effect extinguishment or partial extinguishment in relation to Commonwealth grants. They authorise the States and Territories to legislate to similar effect in relation to such grants under State or Territory law. Such legislation, if effecting substantive extinguishment or impairment would then not be open to challenge as being inconsistent with the *Native Title Act* 1993 (Cth).

There is a right of compensation provided for 'any extinguishment under [Division 2B]' of native title rights and interests by virtue of the amendments or State or Territory laws authorised under them.[111]

There are two classes of acts in respect of which Division 2B operates. The first class, known as 'previous exclusive possession acts' extinguish native title by virtue of the amendments.[112] The second class, known as 'previous non-exclusive possession acts', extinguish native title to the extent that they involve the grant of rights and interests inconsistent with native title rights and interests.[113] The extinguishment and partial extinguishment for which the amendments provide is subject to the preservation of existing reservations, conditions, rights or interests of Aboriginal and Torres Strait Islander people other than native title rights and interests.[114]

[110] *Native Title Act* 1993 (Cth) new s 237A.
[111] *Native Title Act* 1993 (Cth) new s 23J.
[112] *Native Title Act* 1993 (Cth) new s 23C and 23E.
[113] *Native Title Act* 1993 (Cth) new s 23G and 23I.
[114] *Native Title Act* 1993 (Cth) new ss 23D, 23E, 23H and 23I.

The extinguishing acts known as 'previous exclusive possession acts' are grants of freehold and specified leasehold interests of various kinds including agricultural and pastoral leases which can be shown to confer exclusive possession or which are taken to do so by virtue of their inclusion in a Schedule to the Act.[115] All interests included in the Schedule are to be treated as previous exclusive possession acts as is 'any lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters'.[116] Vesting of land or waters conferring a right of exclusive possession on a person is taken to confer a freehold estate.[117] The amendments also extinguish native title on land or waters the subject of the construction or establishment of any public work commenced or established on or before 23 December 1996.[118]

Grants made for the benefit of Aboriginal and Torres Strait Islander people are excluded.[119] Also taken out of the category of prior exclusive possession acts are the establishment of areas such as National, State or Territory parks for the purpose of preserving the natural environment,[120] acts done under legislation that expressly provides that the act does not extinguish native title[121] and certain grants or vesting of interests in relation to land or waters to or in the Crown in any capacity or a statutory authority.[122] These acts are not previous exclusive possession acts unless apart from the Native Title Act the grant or vesting would extinguish native title. There is provision for exclusion of acts by regulation.[123] Extinguishment is taken to have happened when the act was done[124] or, in the case of a public work, when its establishment or construction was commenced.[125] It would appear to operate in respect of any past grant however remote in time and whether or not the land has subsequently reverted to vacant Crown land.

Previous non-exclusive possession acts effecting partial extinguishment comprise grants of non-exclusive agricultural and pastoral leases on or before 23 December 1996. Such leases granted after that date are also caught if granted pursuant to the exercise of a right or a good faith offer, commitment, arrangement or undertaking made before 23 December of which there is written evidence.[126]

[115] *Native Title Act* 1993 (Cth) new ss 23B and 247A, 248A.
[116] *Native Title Act* 1993 (Cth) new s 23B(2)(viii).
[117] *Native Title Act* 1993 (Cth) new s 23B(3).
[118] *Native Title Act* 1993 (Cth) new s 23B(7).
[119] *Native Title Act* 1993 (Cth) new ss 23B(9) and 23B(10).
[120] *Native Title Act* 1993 (Cth) new s 23B(9A).
[121] *Native Title Act* 1993 (Cth) new s 23B(9B).
[122] *Native Title Act* 1993 (Cth) new s 23B(9C).
[123] *Native Title Act* 1993 (Cth) new ss 23B(10).
[124] *Native Title Act* 1993 (Cth) new s 23C(1)(b).
[125] *Native Title Act* 1993 (Cth) new s 23C(2)(b).
[126] *Native Title Act* 1993 (Cth) new s 23F.

RECOGNITION OF NATIVE TITLE

Lodgment of Claims

A fundamental procedural change to the recognition process requires that in future native title determination applications under the *Native Title Act* be commenced as proceedings in the Federal Court.[127] Applications pending in the Tribunal at the time the amendments came into force also become proceedings in the Court.[128] This change was a response to the decision of the High Court in *Brandy* v *Human Rights and Equal Opportunity Commission*[129] and that of the Full Federal Court in *Fourmile* v *Selpam Pty Ltd.*[130] It is a consequence of those decisions that the provisions of the original *Native Title Act*, providing for registration of Tribunal determinations of native title in the Federal Court to take effect as an order of that Court, were invalid.

As a result of the amendments the system which applications had to go through — acceptance, registration and mediation processes — before they could be referred to the Court have changed. The Court and the Tribunal will be able to operate in parallel. These aspects of the amendments are best explained by tracking through the new procedural sequence.

There are three important provisions which in effect establish a threshold test for the lodgment of applications in the Federal Court. Section 61 requires the authority of all members of the native title claimant group before a claim can be lodged in their name. Section 61A imposes restrictions on the making of applications over any area where native title has been determined or which is covered by previous exclusive possession acts or previous non-exclusive possession acts. In the first two cases a claimant application cannot be made at all. In the latter case claimant applications cannot be made seeking native title rights conferring possession, occupation, use and enjoyment of the area to the exclusion of all others. Section 63 requires additional detailed information to be lodged with applications.

Applications for native title determinations, other than non-claimant applications, can only be made by a person or persons authorised by all persons who claim to hold the native title.[131] The claimant must be a member of that group. The requirement that the applicant be *authorised* by all the members of the native title claim group is explained in a new definition section.[133] It means that where there is in place a traditional decision-making process, that process must be complied with.[134] Absent a traditional process,

[127] *Native Title Act* 1993 (Cth) new s 13(1); new s 61.
[128] *Native Title Amendment Act* 1998 (Cth) Part 3 Item 6(1).
[129] *Brandy* v *Human Rights and Equal Opportunity Commission* (1994-95) 183 CLR 245.
[130] (1998) 80 FCR 151.
[131] *Native Title Act* 1993 (Cth) new s 61 and see generally *Strickland* v *Native Title Registrar* [1999] FCA 1530.
[132] *Native Title Act* 1993 (Cth) new s 61(1). This overcomes the problem of a non-member of the group purporting to make a claim on its behalf — *Kanak* v *National Native Title Tribunal* (1995) 132 ALR 329.
[133] *Native Title Act* 1993 (Cth) new s 251B.
[134] *Native Title Act* 1993 (Cth) new s 251B(a).

the claim must have been authorised according to a mechanism agreed to and adopted by the native title claim group.[135] Their authority must extend to 'dealing with matters arising in relation to [the application]'.[136] Only the person or persons authorised to make the claim are the applicants.[137] The applicant must name the members of the native title claim group or describe them with sufficient clarity that it can be ascertained whether any particular individual is one of them.[138]

Restrictions on the making of applications in the Federal Court are set out in the new s 61A.[139] No application can be made where there is an existing approved native title determination.[140] Nor can it be made over areas where native title has been extinguished by operation of the amending Act or State or Territory laws authorised by it or already extinguished previously. Extinguishment is effected, authorised or confirmed by the amending Act where prior dealings, known as previous exclusive possession acts, have been done.[141] No application can be made claiming exclusive native title rights over areas where native title has been partially extinguished by operation of the amending Act or State or Territory laws authorised by it. Partial extinguishment is effected or authorised by the amending Act where prior dealings known as previous non-exclusive possession acts have been done.[142]

In addition to information presently required under the Act, the applicant will be required to swear to the authority of the native title claimant group and the basis for that authority.[143] Specific information in relation to the boundaries of the application, details of searches relating to other rights and interests and a description of the native title rights and interests claimed are required.[144] The amendments also require a general description of the factual basis for the existence of the native title rights and interests claimed and for the claimed association with the area, the traditional laws and customs giving rise to the native title and for the continuance of native title in accordance with them.[145] Details of activities currently carried on in relation to the land or waters under claim will be required.[146] The application will also have to give details of other applications seeking a determination of native title[147] or compensation and details of any future act notices (under s 29 of the Act).[148]

[135] *Native Title Act* 1993 (Cth) new s 251B(b).
[136] *Native Title Act* 1993 (Cth) new s 251B.
[137] *Native Title Act* 1993 (Cth) s 61(2)(c).
[138] *Native Title Act* 1993 (Cth) new s 61(4).
[139] *Native Title Act* 1993 (Cth) new s 61A.
[140] *Native Title Act* 1993 (Cth) new s 61A(1).
[141] *Native Title Act* 1993 (Cth) new s 62A(2) and see *Native Title Act* 1993 (Cth) new s 23B and 23E.
[142] *Native Title Act* 1993 (Cth) new s 61A(3), ss 23G and 232I.
[143] *Native Title Act* 1993 (Cth) new s 62(1)(a)(iv) and (v).
[144] *Native Title Act* 1993 (Cth) new s 62(1)(b) and s 62(2)(a)(d) see also *Strickland* v *Native Title Registrar* (supra) and *Daniel* v *State of Western Australia* [1999] FCA 686.
[145] *Native Title Act* 1993 (Cth) new s 62(2)(e) and (f).
[146] *Native Title Act* 1993 (Cth) new s 62(2)(f).
[147] *Native Title Act* 1993 (Cth) new s 62(2)(g).
[148] *Native Title Act* 1993 (Cth) new s 62(2)(h).

The authorisation requirement is linked to s 62A which provides that the applicant may deal with all matters arising under the Act in relation to the application. The applicant's authority to deal in relation to the application derives from the authority under which the application was lodged.[149] Human nature being what it is, tensions within a native title claim group, may arise after the making of a claim and manifest in disputes as to the original authority of the applicant. There is here potential for collateral litigation by way of strike out motion for lack of authority. On the other hand, there is also a powerful incentive to continuing consultation and the ongoing management of conflict or divergent interests within the group.

There is provision in s 64 of the Act for the amendment of claims to reduce the areas of land or water covered by the application. An amendment of an application must not result in the inclusion of areas not covered by the original application. The qualification on that prohibition allowed by s 64(2) is that an application may be amended to combine it with another claimant application and in that event the inclusion of an area of land or water covered by one application in the area covered by a combined application is permitted.

The Native Title Registrar is required to give notice of any amended application to each party to the proceedings by s 66A(1). The Registrar in this case, as in the case of notification in the ordinary course can apply to the Federal Court for directions as to notice to be given to the parties.

Section 66B provides that members of the native title claim group in relation to a claimant application or a compensation claim can apply to the Federal Court for an order that member or the members jointly replace the current applicant on the grounds that the current applicant is no longer authorised to make the application and to deal with matters arising in relation to it, or has exceeded the authority given to him or her to make the application. The Court can make such an order if satisfied that the grounds are established.

There is provision in s 67 for overlapping native title determination applications. If two or more proceedings before the Court relate to native title determination applications and they cover in whole or in part the same area the Court must make such order as it considers appropriate to ensure that to the extent that the applications cover the same area they are dealt with in the same proceeding. The Court's order may nevertheless provide that different parts of the area covered by an application are dealt with in separate proceedings (s 67(2)).

Notification of Claims

Following the lodgment of an application in the Federal Court, a copy is to be given as soon as practicable to the Native Title Registrar.[150] The Native Title Registrar is then to give a copy of the application and supporting documents to the relevant State or Territory Minister.[151] Notice of the application is also to be given by the Registrar to other persons or bodies including the relevant

[149] *Native Title Act* 1993 (Cth) new s 62A.
[150] *Native Title Act* 1993 (Cth) new s 63.
[151] *Native Title Act* 1993 (Cth) new s 66(2).

representative body, any registered native title claimant or native title body corporate, the Commonwealth Minister, local authorities in the area, persons whose interests may be affected by the determination and any person holding a proprietary interest in relation to the area which is registered in a public register of interests in relation to land or waters. In addition the Registrar must notify the public of the application.[152]

The obligation to notify persons other than the State or Territory Minister and relevant representative bodies does not arise until the Registrar has decided whether or not to accept the claim for registration.[153] Nor does the obligation arise if the Court strikes out the claim on application by the State or Territory Minister made within twenty eight days of his or her receipt of notice.[154] The requirement to give notice to proprietary interest holders does not arise if the Registrar considers it would be unreasonable to give notice.[155] This overcomes the effect of the decision of the Federal Court in *Western Mining Corporation* v *Lane* (supra) which held that under the present Act it is mandatory for the Tribunal to notify a claim to all persons holding registered proprietary interests. The Registrar has the facility of applying to the Federal Court for an order as to whether any particular person or class of person must be given notice and/or how such notice must be given.[156] This will allow for greater flexibility and economy in the notification process. A notification day must be specified by which it is reasonable to assume that all notices required to be given will have come to the attention of persons to whom they must be given.[157]

Parties

A person who wants to be a party to the application must notify the Federal Court in writing within three months after the notification day[158] unless they are a State or Territory Minister.[159] If a person is out of time he or she may nevertheless be joined as a party by order of the Court.[160] The Court can order that a person cease to be a party.[161] Issues of standing could no doubt be raised upon an application to the Court to challenge the continuance of a person as a party.[162]

[152] *Native Title Act* 1993 (Cth) new s 66.
[153] *Native Title Act* 1993 (Cth) new s 66(6); The application of the registration test does not affect the status of the claim as a proceeding in the Federal Court. Registration is a condition of the statutory right to negotiate.
[154] *Native Title Act* 1993 (Cth) new s 66(4).
[155] *Native Title Act* 1993 (Cth) new s 66(5).
[156] *Native Title Act* 1993 (Cth) new s 66(7).
[157] *Native Title Act* 1993 (Cth) new s 66(9).
[158] *Native Title Act* 1993 (Cth) new s 66(10)(c); *Native Title Act* 1993 (Cth) new s 84(3)(b).
[159] *Native Title Act* 1993 (Cth) new s 84(4).
[160] *Native Title Act* 1993 (Cth) new s 84(5).
[161] *Native Title Act* 1993 (Cth) new s 84(8).
[162] *Byron Environment Centre Inc* v *Arakwal People* (1997) 78 FCR 1 considered criteria for standing under the old Act which are applicable under the amended Act.

There is a provision for voluntary withdrawal of parties by notice to the Court.[163] This acknowledges that many of those who are respondents to native title determination applications are not concerned to oppose the application. Their objective is to ensure that their own interests are recognised and protected. One object of mediation practice in the Tribunal has been to explore agreements between applicants and other parties which will enable those parties to feel confident that they will not be prejudiced by a determination of native title and that they can safely withdraw from further involvement in the process.

If, for example, the holder of a mining tenement is given binding undertakings by the applicants that any native title determination will be expressed to be subject to the tenement, the tenement holder may be content to let the native title question be resolved by negotiation or litigation between the State or Territory Government and the applicants. Thus the number of parties to the proceedings in the Federal Court can be reduced and so too the cost and complexity of those proceedings. This approach may be applied at a more sophisticated level to resolve issues between local governments or other public authorities and native title applications in relation to future land use or infrastructure planning and public utility provisions.[164] A local or public authority which is prepared to recognise applicants as traditional owners of the land or waters concerned can make agreements about future development which can operate independently of a formal determination of native title. These may be indigenous land use agreements for which the amendments also provide. In such a case the authority concerned, just like the private interest holder, may decide it is no longer necessary for it to continue as a party.

Parties in proceedings in the Federal Court can, with the leave of the Court, be represented other than by lawyers.[165] They may be represented by a society, organisation or other body.[166] Thus, holders of commercial fishing licences in an area of offshore waters under claim may elect to be represented by their industry association such as a State or Territory based fishing industry council. This is an important facility because major industry players, at least in the marine based resource industries, are reluctant to embark on any negotiation which does not address industry wide issues. In the seas off the northwest coast of Western Australia there has been, for example, a series of contiguous claims which has led to exploration of regional resolutions of the interaction between indigenous and non-indigenous marine interests or at least regionally consistent resolutions from claim to claim. The relationship between s 84B and s 85 is not immediately clear although it may be that s 85 deals with appearances in Court whereas s 84B deals with the general conduct of the proceeding on behalf of a particular party.

[163] *Native Title Act* 1993 (Cth) new s 84(6).

[164] It should be noted however that under the amendments many vestings in local authorities will become previous exclusive possession acts. Public works constructed or established by local authorities may also fall into that category.

[165] *Native Title Act* 1993 (Cth) s 85.

[166] *Native Title Act* 1993 (Cth) new s 84B.

The Commonwealth Minister has a right to intervene in native title proceedings.[167] Presumably this intervention is not intervention which is required to be based on a party interest. It is notable that if the Commonwealth Minister intervenes in a proceeding before the Court, the Court may make an order as to costs against the Commonwealth.[168] Where such intervention occurs the Commonwealth Minister is taken to be a party to the proceeding. The special provision that the Court may make an order as to costs against the Commonwealth may be taken to exclude the Commonwealth from the general application of s 85A which provides that unless the Federal Court orders otherwise, each party to a proceeding must bear his or own costs. Based on current experience, such interventions can be expected where Commonwealth property is affected by the claims or where the claim applies to offshore areas.[169]

Commencement and Termination of Mediation

As soon as practicable after the notification period has expired, the Federal Court is required to refer every application for mediation by the Tribunal.[170] This is subject to the power of the Court to order, either of its own motion or on application of a party, that there be no mediation.[171] An order can be made that there be no referral if the Court considers it would be unnecessary because of agreements reached or for any other reason. The Court may consider there is no likelihood of the parties being able to reach agreement or that there has been insufficient detail provided about the claim on which mediation might take place.[172]

The Court is required to take into account various factors in deciding whether to order that there be no mediation. These include the number of parties, the number of those with common representation, the likely time taken to reach agreement, the area under claim and the nature and extent of non-native title interests as well as 'any other factor the Court considers relevant'.[173] The factors listed relate to the complexity and difficulty of the issues which will arise for consideration in both mediation and litigation. There is, however, no explicit legislative direction to indicate the way in which the Court should use those factors to inform the exercise of its discretion.

The amended Act does not require the Court to favour an order that there be no referral to mediation where the case is complex or difficult. The fact that there is a large number of parties, a substantial area of land and waters under claim, a complex array of non-native title tenures and a prognosis of lengthy negotiations may indicate that mediation should be tried if only to reduce the number of parties and narrow the issue before the Court. Section 86B(4) does

[167] *Native Title Act* 1993 (Cth) new s 84A(1).
[168] *Native Title Act* 1993 (Cth) new s 84A(2).
[169] *Native Title Act* 1993 (Cth) new s 84A.
[170] *Native Title Act* 1993 (Cth) new s 86B(1).
[171] *Native Title Act* 1993 (Cth) new s 86B(2).
[172] *Native Title Act* 1993 (Cth) new s 86B(3)(c).
[173] *Native Title Act* 1993 (Cth) new s 86B(4).

not explicitly mention as a factor relevant to the Court's discretion, the cost to the Court, the applicants, the government involved and therefore to the public purse of native title proceedings in the Court. And yet these must be matters of great weight which will no doubt be addressed under the 'other factor' category.

The purposes for which mediation can be undertaken are set out in s 86A. In relation to native title determination applications these are to assist parties to reach agreement about whether native title exists in the area under claim, if it exists, who holds it, what is its content, what other interests exist in the area and their relationship to it. The mediation process is also to address the question whether the native title propounded confers exclusive possession or occupation rights over an area which is subject to a non-exclusive agricultural or pastoral lease.[174] The purposes of mediation as set out in s 86A reflect the necessary elements of a native title determination which are set out in s 225 of the Act.

Ultimate supervision of the mediation process resides in the Federal Court. The Court has the power to order that a mediation be terminated. It will be able to do so at any time of its own motion or upon the application of a party if it considers further mediation unnecessary or unlikely to lead to agreement on the issues identified by reference to the purposes of mediation set out in s 86A. The test to be applied requires the Court to be satisfied positively that the mediation is unlikely to succeed or is unnecessary before it can be terminated. If, however, the applicant or the Commonwealth, State or Territory government apply for an order terminating the mediation more than three months after it has commenced the test changes. In such a case a major party in the proceedings would be indicating to the Court, in effect, that there would be no point in continuing. In such a case the Court must terminate the mediation unless satisfied that it is likely to be successful in enabling the parties to reach agreement on any of the matters set out in s 86A. If after three months a party other than the applicant or any of the relevant governments applies for termination then the Court may make such an order unless satisfied that the mediation is likely to be successful.[175] The test remains the same but the obligation to terminate is replaced by a discretion. This avoids the possibility that the Court's obligation to terminate mediation could be invoked by a minor party at a time when the applicants and the State or Territory government are happy to continue negotiation even though it is too early to predict the likelihood of a successful outcome.

The Court can request reports from the Tribunal about the progress of any mediation and may specify when the report is to be provided.[176] An issue for the Tribunal in responding to such requests is to provide a meaningful and useful report without compromising the confidentiality and "without prejudice" character of the mediation process. No doubt, such reports can safely include

[174] *Native Title Act* 1993 (Cth) new s 86A(1).
[175] *Native Title Act* 1993 (Cth) new s 86C(4).
[176] *Native Title Act* 1993 (Cth) new s 86E.

reference to any partial resolutions or interim agreements reached including negotiating protocols and agreed timetables and if there be a failure to meet a timetable the reasons for such a failure. Typically, mediation timetables involve commitments by the parties to provide information or proposals and responses to information and proposals by specified dates. Applicants might agree to furnish the State Government with an anthropological report and perhaps genealogies to satisfy it of their continuing connection to the land or waters in question. In some cases, the relevant State officials will already broadly accept that they are the traditional owners but have to demonstrate, for the purpose of briefing their Minister, that something has been forthcoming from the applicants. The State may require time to respond to the report on advice from its own experts and may seek clarification or elaboration of material provided by the applicants. This aspect of the process may take some months. The State itself may provide a commitment to furnish a comprehensive land tenure history of the area under claim. Draft determinations and ancillary agreements may be prepared by one party or another and provided for comment and response. Five or six versions of the draft may be developed.

Any of these and the many other steps involved in mediation are subject to interruption by such events as a death in the community, State, Territory or local government elections, bad weather in the area under claim, change in the governance of the representative body and so on.

The amendments empower the Tribunal to refer questions of law or fact to the Court if the presiding member considers that it would expedite the reaching of an agreement on any matter that is the subject of mediation. Mediation can continue while the question referred is considered by the Court.[177] This facility may prove useful in cases where a question arises about whether or not a particular form of dealing with land necessarily extinguishes native title. If the Court determines on referral that the nature of the dealing does not necessarily have that effect then negotiation could continue between parties on the basis that an agreement about co-existence is open. Issues giving rise to intra-indigenous conflict such as the proper limits of boundaries or whether a particular family is part of the native title claimant group might also be referred to determination as a last resort. Such questions frequently stand at the threshold of discussions between applicants and other parties.

Under s 86F some or all of the parties to a proceeding in relation to an application may negotiate with a view to agreeing to action that will result in the withdrawal or amendment to the application or a variation in the parties or any other thing being done in relation to the application. They may request assistance from the Tribunal in negotiating the agreement. Where the proceedings are in Court, the Court may also grant an adjournment to allow time for such negotiations to take place. This is an important facility which was included as the result of persistent lobbying from the Tribunal to ensure that mediation or negotiation between the parties could address the full range of possible outcomes, including non-native title outcomes which might resolve the application entirely. Nevertheless the special position of s 86F and the fact that

[177] *Native Title Act* 1993 (Cth) new s 86D.

the Tribunal has no mandate to mediate in these cases but may do so upon request, reflects the political resistance there was to the Tribunal's mediation activities extending beyond outcomes related solely to the determination of native title.

The Mediation Conference

Under the proposed amendments the Tribunal, upon reference of a matter for mediation from the Court, may hold such conferences of the parties or their representatives as the Tribunal considers will help in resolving the matter.[178] Words spoken or acts done at such conferences may not be the subject of evidence in the Court unless by agreement of the parties.[179] The Tribunal member presiding may not take part in the proceeding 'in any other capacity' unless the parties agree.[180] This provision is directed, inter alia, at members of the Tribunal who are also judges or assessors of the Court. A mediation conference can be conducted by a member of the Tribunal assisted by another member or officer.[181] It may also be conducted by a mediation consultant engaged by the President of the Tribunal.[182]

The amendments authorise a more flexible approach to the conduct of mediation conferences than was explicitly authorised by the previous s 72. That section spoke simply, and some might say simplistically, of "a conference of the parties or their representatives to help in resolving the matter."[183] The amendments contemplate that a conference may involve only one or some of the parties. This allows for ex parte and bilateral or single issue meetings to be held within the mediation process.[184] Other persons not parties may participate in a conference if the presiding member considers it would assist in reaching agreement and the parties present at the conference consent.[185] For example, an industry association representative might participate where there are members of that industry who are parties to the application but who are not using the association as their agent. The amendments also permit the member, with the consent of the parties at the conference, to permit other persons to attend as observers.[186]

It is important to the native title process that persons involved in reporting on it either formally or informally should have a proper understanding of what native title mediation involves and of its complex and unique character. Members of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Social Justice Commissioner fall into that category. A journalist with a continuing responsibility for reporting on native title matters could, subject to suitable undertakings as to confidentiality, also be an appropriate person to be an observer.

[178] *Native Title Act* 1993 (Cth) new s 136A.
[179] *Native Title Act* 1993 (Cth) new s 136A(4).
[180] *Native Title Act* 1993 (Cth) new s 136A(5).
[181] *Native Title Act* 1993 (Cth) new s 136A(3).
[182] *Native Title Act* 1993 (Cth) new s 131A; *Native Title Act* 1993 (Cth) new s 136A(7).
[183] *Native Title Act* 1993 (Cth) s 72(1);
[184] *Native Title Act* 1993 (Cth) new s 136B(1).
[185] *Native Title Act* 1993 (Cth) new s 136C(b).
[186] *Native Title Act* 1998 (Cth) s 136C(a).

The Tribunal is given power to exclude disruptive parties or representatives from a conference. Indeed, a party may be excluded from a particular conference if the presiding member considers that it "would help to resolve matters".[187]

Conferences are to be held in private.[188] The presiding member may, in addition, prohibit disclosure of information given, statements made, or documents produced at the conference.[189] Members and officers of the Tribunal and mediation consultants cannot be compelled to give evidence in a Court contrary to a direction given by the presiding member nor to produce a document contrary to such a direction.[190]

Following the successful conclusion of a mediation, the member must provide a written report to the Federal Court setting out the results.[191] Progress reports must be provided if requested by the Court[192] but can be volunteered if they would assist the Court in progressing the proceedings.[193] Any report must, if the parties agree, include any agreement on facts between them that is reached during the mediation.

If parties reach agreement about the terms of an order in the Federal Court in relation to all or part of the proceedings, then the Court may make such order if it is within power and appropriate to do so.[194]

Proceedings in the Federal Court

The amendments make provision for the conduct of proceedings in the Federal Court in relation to native title and compensation applications. An important change to the Act relates to s 82, which previously required the Court to pursue the object of providing a mechanism of determination that is fair, just, economical, informal and prompt. It was also required to take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders and was not bound by technicalities, legal forms or rules of evidence.

Under the new s 82, the Federal Court is bound by the rules of evidence except to the extent that the Court otherwise orders. Moreover, in conducting its proceedings, the Court is empowered but not required to take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, 'but not so as to prejudice unduly any other party to the proceedings'.

The provisions as to assessors remain the same.[195]

[187] *Native Title Act* 1993 (Cth) new s 136B(2).
[188] *Native Title Act* 1993 (Cth) new s 136E.
[189] *Native Title Act* 1993 (Cth) new s 136F.
[190] *Native Title Act* 1993 (Cth) new s 181.
[191] *Native Title Act* 1993 (Cth) new s 136G.
[192] *Native Title Act* 1993 (Cth) new s 136G(2).
[193] *Native Title Act* 1993 (Cth) new s 136G(3).
[194] *Native Title Act* 1993 (Cth) new s 87.
[195] *Native Title Act* 1993 (Cth) new s 83A.

The Federal Court is empowered to request a State or Territory Minister to conduct searches of registers or other records of current or former interests in land or waters and to report the results to the Court. Absent the relevant Minister as a party to the proceeding or, in any event if the Court considers it appropriate, it may instead request the native title Registrar to conduct such searches and to report the results to the Court.[196]

It is important that primacy is given to the direction of such requests to Ministers of the State or Territory governments rather than to the Registrar of the Tribunal. The normal purpose of the conduct of tenure history searches is to determine the possibility of prior extinguishment of native title. If the Registrar is put in the position of conducting such searches it may be seen as compromising the neutrality of the Tribunal in the mediation process. The same difficulty of perception may arise where the Federal Court makes such orders.

Representation before the Federal Court may be by a barrister or solicitor or, with the leave of the Court, another person.[197] There is a special costs rule provided in s 85A. Unless the Court otherwise orders each party to a proceeding must bear his or her own costs. However, if the Court is satisfied that a party has by any unreasonable act or omission caused another party to incur costs, the Court may order that the party causing those costs to be incurred pay some or all of them. In the *Miriuwong Gajerong* case costs were awarded against the State of Western Australia and the Northern Territory. It was held that s 85A of the Act does not limit the discretion of the Court to order costs in the way that specific costs provisions in the *Family Law Act* and the *Workplace Relations Act* do. In one sense, it was said that s 84A does no more than state the obvious, namely, that in the absence of any order by the Court each party must bear its own costs. It did not confine the discretion of the Court to award costs.[198]

The form of determination of native title which may be made by the Court is specified in s 225 which replaces the former definition of the term. The new section would provide:

> A determination of native title is a determination whether or not native title exists in relation to a particular area (the **determination area**) of land or waters and, if it does exist, a determination of:
> (a) the persons, or each group of persons, holding the common or group rights comprising the native title area; and
> (b) the nature and extent of the native title rights and interests in relation to the determination area; and
> (c) the nature and extent of any other interests in relation to the determination area; and
> (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and

[196] *Native Title Act* 1993 (Cth) new s 83A.
[197] *Native Title Act* 1993 (Cth) new s 80.
[198] *Ward* v *State of Western Australia* (1999) 163 ALR 149 cf *Yarmirr* v *Northern Territory* (Unrep Olney J 4 September 1998 Judgment No 1185 of 1998).

(e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease — whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

PROTECTION OF NATIVE TITLE — FUTURE PERMISSIBLE ACTS

The Explanatory Memorandum for the Amendment Bill stated that the amendments provided 'a much more comprehensive regime' for validity of acts occurring in the future which affect native title. There is a wider range of future acts affecting native title which will be able validly to be done without the need to deal with the native title holders other than by the payment of compensation and subject to procedural rights which may arise under the provisions. The categories of these acts are broadly as follows:

1. Future acts on land or waters which are the subject of non-claimant applications and where no registered native title claim has been lodged within the notice period under s 66 of the Act.[199]
2. Future acts which permit primary production activities on non-exclusive agricultural or pastoral leases. Such activities include the cultivation of land, maintaining, breeding or agisting animals, fishing, forestry, horticulture, aquaculture, de-stocking or leaving land fallow. The primary production activities do not extend to mining. Acts requiring or permitting farm stay tourism activities are included.[200] This category of future acts generally includes State and Territory laws authorising the above activities to be carried out on leasehold land where they are not presently authorised by or under the leases.
3. Future acts permitting off farm activities directly connected to primary production activities which themselves take place on freehold or agricultural or pastoral leasehold land (exclusive or non-exclusive). An example given in the Act is the conferral of rights to graze cattle in an area adjoining that covered by an agricultural lease or pastoral lease if the cattle are also grazed in the area covered by the lease.[201]
4. Future acts granting rights to third parties and lessees on non-exclusive agricultural or pastoral leases to remove timber, gravel, rocks, sand soil or other resources (except so far as amounts to mining).[202]

[199] *Native Title Act* 1993 (Cth) ss 24FA to 24FE.
[200] *Native Title Act* 1993 (Cth) new ss 24GA and 24GB.
[201] *Native Title Act* 1993 (Cth) new s 24GD.
[202] *Native Title Act* 1993 (Cth) new s 24GE.

5. Future acts which make, amend or repeal laws relating to the management or regulation of surface and sub-terranean water, living aquatic resources or airspace. This category extends to the grant of leases, licences, permits or authorities under such laws.[203]
6. Acts involving the renewals or extensions of valid or validated leases, licences, permits or authorities. This only applies to future acts which meet one or more of four positive conditions. They are:

(i) the original grant was made on or before 23 December 1996; or
(ii) the original grant was validated by the permissible future act provisions; or
(iii) the original grant was a pre-existing right based grant; or
(iv) the original grant was previously the subject of a renewal, regrant, remaking or extension that itself was permissible under the amended future act provisions.[204]

7. Future acts flowing from pre-23 December 1996 reservations, proclamations, dedications etc of land or waters for a particular purpose. Thus the creation of a national park management plan is covered if the land had been reserved for that purpose. This category extends to the construction or establishment of public works under reservations, dedications or proclamations made on or before 23 December 1996.[205]
8. Future acts involving provision of facilities for services to the public. These include roads, railways, bridges, jetties, wharves, power lines, street lighting, pipelines, drainage facilities, irrigation channels, sewerage facilities, cables, antennas, towers or other communication facilities and anything that is similar to any of the above.[206]
9. Low impact future act. This category is negatively defined as excluding freehold or leasehold grants, grants of exclusive possession, excavation or clearing, mining, construction, disposal or storage of garbage or toxic substances. It applies only to acts that take place before and do not continue after an approved determination of native title is made in relation to the land or waters. Excavation or clearing reasonably necessary for the protection of public health or public safety are not within the exclusions nor are tree lopping and the clearing of noxious or introduced animal or plant species etc. The definition is rather similar to that of a low impact future act under the existing s 234.[207]
10. Future acts that pass the freehold test. This category covers legislation which applies in the same way to native title holders as it would if they held freehold to the land or to land adjoining or surrounding waters affected by the act. It is also a condition of inclusion in this category that the effect of the future act is not such as to cause the native title

[203] *Native Title Act* 1993 (Cth) s 24HA.
[204] *Native Title Act* 1993 (Cth) new s 24IA-24ID.
[205] *Native Title Act* 1993 (Cth) new s 24JA-24JB.
[206] *Native Title Act* 1993 (Cth) new s 24KA.
[207] *Native Title Act* 1993 (Cth) new s 24LA.

holders to be in a more disadvantageous position at law than they would be if they instead held freehold. An example of an act in this category is a law that permits mining on land in respect of which there is either native title or ordinary title.[208] The category also extends to the non-legislative future acts if it could be done on freehold land. An example is the grant of a mining lease over land in relation to which there is native title when such a lease could also be granted over freehold land. These provisions also apply to future acts of a non-legislative character consisting of the creation or variation of a right to mine for opals or gems. It only applies to onshore future acts.[209]

11. Acts affecting offshore places. An offshore place includes waters (known as the coastal sea) off the coast of a State or Territory and reefs or waters beyond their territorial limits over which Australia asserts sovereign rights.[210]

The various classes of future act specified are rendered valid by operation of the amended Act. In the case of land the subject of a non-claimant application, any future act by any person in relation to the area that is done at the time that the protection afforded by the non-claimant operation is effective is a valid future act. There is an entitlement to compensation if the act extinguishes native title to any extent. This is payable by the Commonwealth, the State or the Territory depending whose act it is or by other persons where the law so provides.[211] Acts permitting primary production activities are rendered valid and the non-extinguishment principle applies to them. There is a right of compensation for native title holders.[212] The same is true for future acts permitting off farm activities and the grant of rights to third parties and lessees on non-exclusive agricultural or pastoral leases.[213] The non-extinguishment principle also applies to legislative acts relating to the management of regulation of water and air space.[214]

Future acts which are renewals or extensions (as of right) extinguish native title if they consist of the grant of a freehold estate or a right of exclusive possession. In any other case the non-extinguishment principle applies.[215] In respect of future acts pursuant to reservations and proclamations, the Act extinguishes native title if it consists of the construction or establishment of a public work, otherwise the non-extinguishment principle applies.[216]

In relation to the provision of public facilities and low impact future acts, the non-extinguishment principle applies.[217] Acts passing the freehold test may

[208] *Native Title Act* 1993 (Cth) s 24MA.
[209] *Native Title Act* 1993 (Cth) new s 24MB and s 24MC.
[210] *Native Title Act* 1993 (Cth) new s 24NA.
[211] *Native Title Act* 1993 (Cth) new ss 24KA(6), 24MD(4) and 24NA(7).
[212] *Native Title Act* 1993 (Cth) new s 24GB.
[213] *Native Title Act* 1993 (Cth) new ss 24GD-GE.
[214] *Native Title Act* 1993 (Cth) new s 24HA.
[215] *Native Title Act* 1993 (Cth) new s 24IC.
[216] *Native Title Act* 1993 (Cth) new s 24JB.
[217] *Native Title Act* 1993 (Cth) new ss 24KA and 24LA.

extinguish the whole or part of native title rights and interests if the act is the compulsory acquisition of those native title rights and interests. Otherwise the non-extinguishment principle applies.[218]

THE NEW RIGHT TO NEGOTIATE

The right to negotiate regime in the new subdivision P applies to the grant of certain mining rights which may affect native title and to compulsory acquisitions of native title rights and interests as well as such other acts as may be included with the approval of the Commonwealth Minister. In the overview section, which introduces that part of the amendments dealing with the right to negotiate, the process is summarised. Thus, before the future act is done the relevant government, the beneficiary of the proposed future act and any registered native title bodies corporate and registered claimants must negotiate with a view to reaching an agreement about it. If they do not reach agreement an arbitral body, which will be the National Native Title Tribunal or a State or Territory equivalent body, will make a determination about the act instead. Alternatively, the Commonwealth or relevant State Minister can intervene and make a determination.

Compliance with the right to negotiate procedures is a condition of validity of any future act to which the right to negotiate applies. The States and Territories can establish their own statutory regimes for this process.[219] The right to negotiate applies to the creation of a right to mine, whether by grant of a mining lease or otherwise, compulsory acquisition of native title rights and interests if the purpose of the acquisition is to confer rights or interests on persons other than the government making the acquisition and is not for the purpose of providing an infrastructure facility.

There are various categories of future act within those classes which are excluded. All of those classes of future acts which are valid by reason of the permissive amendments already referred to are excluded. Also excluded are future acts done under indigenous land use agreements where such an agreement contains a statement that the right to negotiate process is not to apply.[220]

Additional exclusions relate to approved exploration acts. The Commonwealth Minister can determine, in writing, that a future act is an approved exploration act. The Explanatory Memorandum indicates that broadly these cover mining exploration, prospecting, fossicking or quarrying unlikely to have a significant impact on an area and which meet requirements relating to consultation with native title holders or claimants.

There are five conditions which have to be met before a future act can be determined to be an approved exploration act. The relevant act must involve a right to explore, prospect, fossick or quarry and must be unlikely to have a

[218] *Native Title Act* 1993 (Cth) new s 24MD.
[219] *Native Title Act* 1993 (Cth) new s 25(5) and s 43.
[220] *Native Title Act* 1993 (Cth) new s 26(2).

significant impact on the particular land or waters concerned. The relevant representative Aboriginal or Torres Strait Islander body and the public must have been notified and submissions invited. The Minister must be satisfied that the relevant native title bodies corporate, the claimants and representative bodies in relation to the affected land or waters will have a right to be notified and heard by an independent person or body about whether the act is to be done and any matter relating to the doing of the act unless no other person would have had such a right. Further, there is a requirement that the grantee of the act either will have a legal obligation to consult with indigenous interests or procedures will be in place under which such consultation will be required to minimise the impact of the act on the exercise of native title rights and interests.[221]

Also excluded by Ministerial determination are approved gold or tin mining acts. As outlined in the Explanatory Memorandum this class of acts relates broadly to future acts allowing alluvial mining for gold or tin where the land affected has to be rehabilitated and requirements relating to consultation with native title holders or claimants are met. The rationale for this exclusion, as set out in the Memorandum, is the nature of alluvial mining which involves short time spans for operations and frequent moves. There are six conditions to be met for this exclusion to be approved including notification of the relevant representative body and the public and provision for consultation to minimise the impact of the act on native title rights and interests.[222]

Opal or gem mining rights would be excluded within areas approved for that purpose by the Minister where the rights concerned allow mining only for opals or gems limited to an area no greater than five hectares and for a period of no more than five years. There is again a process of ministerial approval with three conditions to be satisfied.[223] Also excluded from the right to negotiate are the renewal, re-grant or extension of the term of earlier rights to mine which were created on or before 23 December 1996 by valid or validated acts.[224]

The amendments require the government party to give notice of the proposed future act.[225] The expedited procedure process is retained and the notice may include a statement that the act is an act attracting the expedited procedure.[226]

Notification of two or more future acts attracting the right to negotiate process may be given in the same notice. Where there is a project to be carried on in a specified area involving two or more future acts and the notice states they are project acts, then they will be called 'project acts' for the purposes of the right to negotiate. Such acts do not attract the expedited procedure.[227]

[221] *Native Title Act* 1993 (Cth) new s 26A.
[222] *Native Title Act* 1993 (Cth) new s 26B.
[223] *Native Title Act* 1993 (Cth) new s 26C.
[224] *Native Title Act* 1993 (Cth) new s 26D.
[225] *Native Title Act* 1993 (Cth) new s 29.
[226] *Native Title Act* 1993 (Cth) new s 32
[227] *Native Title Act* 1993 (Cth) new s 29(9).

Native title parties include those who within four months after the notification day are or become a registered native title claimant in relation to any of the land or waters to be affected.[228] Bodies corporate becoming registered native title bodies corporate within three months or after three months, if as a result of a claim lodged before that three month period expired, are also native title parties.[229] The negotiation parties are the government party, any native title party and any grantee party.[230] Except in cases attracting the expedited procedure, there is a requirement on government to give all native title parties an opportunity to make submissions to it in writing or orally regarding the Act.[231] The negotiation parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to the doing of the act or the doing of the act subject to conditions.[232] This is a departure from the previous provision which required only the government party to negotiate in good faith. The good faith negotiation requirement is further explained in s 31(2) by a provision that if any of the parties refuses or fails to negotiate about matters unrelated to the effect of the future act on the relevant native title rights and interests, this does not mean that there has been a failure to negotiate in good faith. The role of the arbitral body remains the same. It is obliged to mediate among the parties if requested to do so.[233]

The negotiations may include the possibility of a condition that native title parties are entitled to payments by reference to profits, income or things produced by any grantee party. Existing non-native title rights and interests and the existing uses of land or waters by persons other than native title parties may be taken into account as may the practical effect of the exercise of those existing non-native title rights and interests.[234]

If at least six months have passed since the notification day and no agreement has been reached then any one of the negotiation parties may apply to the arbitral body for a determination.[235] The arbitral body is the National Native Title Tribunal unless an alternative arbitral body has been set up in the relevant State or Territory. The arbitral body is required to take all reasonable steps to make a determination in relation to the act as soon as practicable.[236] The arbitral body is not to make the determination if a negotiation party other than the native title party did not negotiate in good faith.[237]

There is provision for a ministerial intervention after the commencement of the arbitral process if the Minister considers that a determination is unlikely to be made within a period which is reasonable having regard to all the circumstances.[238] There is a consultation process which the Minister must follow

[228] *Native Title Act* 1993 (Cth) new s 30(1)(a).
[229] *Native Title Act* 1993 (Cth) new s 30(1)(b) and (c).
[230] *Native Title Act* 1993 (Cth) new s 30A.
[231] *Native Title Act* 1993 (Cth) new s 31(a).
[232] *Native Title Act* 1993 (Cth) new s 31(b).
[233] *Native Title Act* 1993 (Cth) new s 31(3).
[234] *Native Title Act* 1993 (Cth) new s 33.
[235] *Native Title Act* 1993 (Cth) new s 35(1).
[236] *Native Title Act* 1993 (Cth) new ss 35 and 36.
[237] *Native Title Act* 1993 (Cth) new s 36(2).
[238] *Native Title Act* 1993 (Cth) new s 36A.

before making a determination pursuant to an intervention.[239] It is a requirement of the Act that a ministerial determination must be made by the Minister personally.[240] The Minister may decide that the act must not be done or may be done or done subject to conditions which will have contractual effect. A ministerial determination is to be tabled in the relevant parliament.[241]

The arbitral body's powers are also to make a determination that the act must not be done or that it may be done or may be done subject to conditions.[242] There is a list of criteria to be taken into account in making a determination which includes the effect of the proposed future act on the enjoyment by the native title parties of their rights and interests, its effect on their way of life, culture and traditions, the development of their social, cultural and economic structures, the freedom of their access to the land or waters and areas or sites of particular significance. Regard must also be had to the wishes of native title parties in relation to management, use or control of the land, the economic or other significance of the act to Australia and to the State or Territory concerned, any economic or other detriment to any person other than a native title party if the act is not done, the public interest and any other matter that the arbitral body considers relevant.[243]

The conditions upon which the act may be done if determined by an arbitral body take effect as a contract. The arbitral determination is subject to ministerial override within two months after the making of the determination.[244] Project acts are able to be treated as a single future act for the purpose of this process.[245]

State legislation which contains the essential elements of the Commonwealth system under the amended Bill can be approved by the Commonwealth Minister as alternative provisions to have effect instead of the *Native Title Act* requirements.[246] An alternative State or Territory regime may also be authorised for future acts affecting native title on land or waters that are or were covered by non-exclusive leases or are or have previously been reserved for a particular purpose.[247]

[239] *Native Title Act* 1993 (Cth) new s 36B.
[240] *Native Title Act* 1993 (Cth) new s 36C(3).
[241] *Native Title Act* 1993 (Cth) new s 36C.
[242] *Native Title Act* 1993 (Cth) new s 38.
[243] *Native Title Act* 1993 (Cth) new s 39.
[244] *Native Title Act* 1993 (Cth) new s 42.
[245] *Native Title Act* 1993 (Cth) new s 42A.
[246] *Native Title Act* 1993 (Cth) new s 43.
[247] *Native Title Act* 1993 (Cth) new s 43A.

PHYSICAL ACCESS RIGHTS

The new subdivision Q provides for conferral of access rights on native title claimants in respect of non-exclusive agricultural and pastoral leases. These rights are properly described as 'statutory access rights' and do not amount to recognition of native title over the traditional access area.[248] Section 44A sets out the conditions which must be met in order for the subdivision to apply. Those conditions require that a person must be within the native title claim group[249] for which there is an entry on the Register of Native Title Claims, which claim relates to an area that is to any extent covered by a non-exclusive possession agricultural or pastoral lease.[250] That person must also, as at 23 December 1996, have had regular physical access to the whole or part of the area covered by both the claim and the lease for the purpose of carrying on one or more traditional activities.[251] A 'traditional activity' is defined in section 44A(4) as hunting, fishing, gathering, camping, performing rites or other ceremonies or visiting sites of significance. Each of these activities must be or have been carried on for the traditional purposes of the relevant Aboriginal or Torres Strait Islander people.

Subsection 44B(1) provides for conferral of access rights in the above circumstances to allow persons who meet the criteria in section 44A to continue to have access to non-exclusive possession leasehold land for traditional purposes. This right is, however, not absolute but subject to the rights of the lessee or other non-native title interest holder, whose rights will prevail over any traditional access rights conferred by subsection 44B(1).[252] In exercising the statutory access rights persons are still subject to valid laws of the Commonwealth, States or Territories of general application.[253] There is scope under subsection 44B(3) for agreements between lessees and native title access rights holders to define the manner of exercise of the access rights or to vary the substance of such rights. For example, an agreement may be made requiring notification of intended exercise of the rights to be communicated to the lessee. The National Native Title Tribunal or a State or Territory equivalent body may assist upon request in the negotiation of an access agreement.[254] Such bodies may also, pursuant to a request by the parties, mediate in any disputes about the statutory access rights.[255]

[248] *Native Title Act* 1993 (Cth) new s 44B(5).
[249] 'Native title claim group' is defined in s 253 to mean a) the native title claim group mentioned in relation to the application in the table in sub-s 61(1) (in relation to an application for determination made to the Federal Court) or; b) the person or persons making the claim or on whose behalf the claim is made (in relation to an application for an approved determination of native title made by a recognised State/Territory body).
[250] *Native Title Act 1993* (Cth) new s44A(2).
[251] *Native Title Act 1993* (Cth) new s44A(3) — descendants of that person are also included.
[252] *Native Title Act 1993* (Cth) new s 44B(2).
[253] *Native Title Act 1993* (Cth) new s 44D(2).
[254] *Native Title Act 1993* (Cth) new s 44B(4).
[255] *Native Title Act 1993* (Cth) new s 44F.

For so long as a person has statutory access rights conferred under subdivision Q, native title rights and interests are suspended such that they can no longer be enforced over the land or waters covered by the lease except in proceedings before the Federal Court or a recognised State/Territory body that are related to the making of an approved determination of native title.[256] This is not, however, intended to affect any other provision of the Act. For instance, those provisions found in subdivision P which deal with the right to negotiate remain unaffected. Certain laws benefiting Aboriginal peoples or Torres Strait Islanders are also unaffected, such as those pertaining to the establishment of reservations and protected traditional areas or allowing for the granting of access rights by some other statutory means.[257] Further, individual or regional agreements which deal with access to an area covered by a non-exclusive possession agricultural or pastoral lease may still be entered into or enforced without employing the statutory regime established by subdivision Q.[258]

The Federal Court has general jurisdiction in relation to matters arising under the Act conferred by s 213(2). But by s 44E it may in its discretion refuse to exercise that jurisdiction in relation to a matter involving a right conferred by subsection 44B(1) for the reason that an adequate, alternative means of resolving the matter is available.

REGISTRATION OF CLAIMS

As can be seen from the general provisions relating to the right to negotiate, registration of a native title claim is, inter alia, a condition of the standing of the claimant to participate in negotiations and/or arbitration about proposed future acts. The registration process is entrusted to the Registrar. In considering whether a claim is to be registered, the Registrar must have regard to information contained in the application and in any accompanying documents, and information obtained by the Registrar as a result of searches conducted by the Registrar of interests in relation to the land or waters. To the extent that it is reasonably practicable to do so in the circumstances, the Registrar must also consider any information supplied by the Commonwealth a State or a Territory that, in the Registrar's opinion, is relevant to whether any one or more of the conditions set out in ss 190B or 190C are satisfied in relation to the claim.[259] The Registrar may also have regard to any other information that he or she considers relevant.[260] This represents a change from the position under the old Act as enunciated by the High Court in the *North Ganalanja* decision which precluded the Registrar from resort to information other than that provided on the application and supporting materials.

[256] *Native Title Act 1993* (Cth) new s 44C(1).
[257] *Native Title Act 1993* (Cth) new s 44D(1).
[258] *Native Title Act 1993* (Cth) new s 44G(b).
[259] *Native Title Act 1993* (Cth) new s 190A(3).
[260] *Native Title Act 1993* (Cth) new s 190A(3).

The merits of the claim have to be considered as a condition of registration and the matters of which the Registrar must be satisfied in that respect are set out in the proposed s 190B. Thus the Registrar must be satisfied that the information and map contained in the application are sufficient for it to be said with certainty whether native title rights and interests are claimed in relation to particular land or waters.[261] There is a requirement for the Registrar to be satisfied that persons in the native title claim group are named in the application or are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.[262] The description contained in the application must be sufficient to allow native title rights and interests to be readily identified[263] and the factual basis for the claim set out in the application must be sufficient to support the asserted existence of native title rights and interests.[264] The Registrar must also consider that prima facie each of the native title rights and interests claimed in the application can be established.[265] Presumably that means that, provided the native title rights and interests are factually and legally supportable or arguable, this aspect of the registration test would be satisfied.

There is also a requirement that the Registrar be satisfied that at least one member of the native title claim group currently has or previously had a traditional, physical connection with the area covered by the application.[266]

If the application and accompanying documents disclose, or the Registrar is otherwise aware, that the application should not have been made (in terms of the conditions of lodgment of an application under s 61A) then registration will not be granted.[267]

For the purpose of satisfying the registration test, the application must not involve claims for ownership of minerals, petroleum or gas where the Crown owns the minerals, petroleum or gas in question.[268] Nor can a claim be registered where the offshore elements of the claim purport to exclude other rights and interests.[269] Registration will also be defeated if the Registrar is aware, either from the documents lodged or otherwise, that the native title rights and interests claimed have been extinguished.[270]

Additional conditions on registration include a requirement that the Registrar be satisfied that no person included in the native title claim group for the application was a member of a native title claim group for any previous application in relation to the whole or part of the relevant area where the previous claim was registered under the new test, at the time of lodgment of the application under consideration.[271]

[261] *Native Title Act 1993* (Cth) new s 190B(2).
[262] *Native Title Act 1993* (Cth) new s 190B(3).
[263] *Native Title Act 1993* (Cth) new s 190B(4).
[264] *Native Title Act 1993* (Cth) new s 190B(5).
[265] *Native Title Act 1993* (Cth) new s 190B(6).
[266] *Native Title Act 1993* (Cth) new s 190B(7).
[267] *Native Title Act 1993* (Cth) new s 190B(8).
[268] *Native Title Act 1993* (Cth) new s 190B(9)(a).
[269] *Native Title Act 1993* (Cth) new s 190B(9)(b).
[270] *Native Title Act 1993* (Cth) new s 190B(9)(c).
[271] *Native Title Act* 1993 (Cth) new s 190C(3).

The Act requires that the application be lodged with the authority of the native title holders evidenced either by certification by the relevant representative Aboriginal and Torres Strait Islander body or to the satisfaction of the Registrar.[272] This requirement imports the notion of 'authorise' as defined in s 251B of the Act which attracts a requirement for authority to have been given according to traditional decision-making methods or otherwise as agreed by the claim group.

Where the Registrar does not accept a claim for registration, notice must be given to the applicant and the Federal Court, including a statement of reasons for rejection. In such a case the applicant may apply to the Federal Court for a review of the Registrar's decision and the Court has jurisdiction to hear and determine it.[273] The nature of the review is not specified in the Act.[274] It has been held that the relevant State or Territory government is entitled to be joined as a respondent in a review application.[275]

INDIGENOUS LAND USE AGREEMENTS

As the Explanatory Memorandum pointed out, s 21 of the *Native Title Act* 1993 (Cth) provided for agreements but did so in very general terms. The object of the provisions relating to indigenous land use agreements is said to be to give security for agreements with native title holders whether there has been an approved determination of native title or not, provided certain requirements are met. Thus future acts done with the consent of parties to such agreements will be valid.[276] In addition parties may agree under indigenous land use agreements that future acts (other than intermediate period acts) that have already been done invalidly may also be validated as a result of such agreements.[277]

Such agreements can also provide for changing the effects of the validation of intermediate period acts under Common wealth, State or Territory law. Thus it seems an intermediate period act or a prior exclusive possession act which would otherwise have the effect of extinguishing or partially extinguishing native title might under the agreement have the effect of merely suspending native title rights and interests by application of the non-extinguishment principle.

There are three kinds of indigenous land use agreements. These are described as:

[272] *Native Title Act* 1993 (Cth) new s 190C(4).
[273] *Native Title Act* 1993 (Cth) new s 190D.
[274] In *Powder* v *Registrar National Native Title Tribunal* [1999] FCA 913 Kiefel J held that the review was in the nature of judicial review and not simply a reconsideration of the materials before the Registrar. See also *Strickland* v *Native Title Registrar* [1999] FCA 1530.
[275] *Bullen* v *State of Western Australia* [1999] FCA 1490.
[276] *Native Title Act* 1993 (Cth) new s 24EB.
[277] *Native Title Act* 1993 (Cth) new s 24EBA.

1. Body Corporate Agreements
2. Area Agreements
3. Alternative Procedure Agreements

The primary distinction between each type of agreement is the identity of the parties to it. In any case in which the agreement is to result in the extinguishment of native title by surrender, the relevant government must be a party.

Body Corporate Agreements cannot be made unless there is a registered native title body corporate holding native title over the whole of the area so that all relevant registered native title bodies corporate must be parties.[278]

Area Agreements can be made in any situation other than that in which a registered native title body corporate holds native title over the whole of the area. Thus, native title claimants and any registered native title body corporate holding native title over part of the area and any native title representative body for the area must be parties.[279]

Alternative Procedure Agreements may not provide for extinguishment of native title and must be made between the relevant government and any registered native title body corporate and the native title representative body. Registered native title claimants may also be parties.[280]

An agreement, once registered, is taken to have contractual effect between the parties and will also bind all native title holders for the area whether they are parties to it or not. Such agreements can also be supported by legislation. Generally, registration of an agreement will ensure the validity of future acts which it covers or authorises. The non-extinguishment principle will apply to such acts unless the agreement expressly provides for extinguishment through surrender.

There is a process for registration of Indigenous Land Use Agreements which requires, inter alia, that the Registrar be satisfied that the agreement has been authorised by the relevant native title group. There is also a provision for objection to be made and for the Tribunal or its State equivalent to mediate in resolving such objections. The decision about registration of an Indigenous Land Use Agreement is to be made by the Registrar. There is a role for the Tribunal or its State or Territory equivalent in deciding whether it would be fair and reasonable to register the agreement which is a condition for registration by the Registrar.[281]

Broadly speaking, these agreements offer increased flexibility in dealing with land use issues over areas where there may be native title claims pending but unresolved in such a way as to provide certainty and benefits for all concerned.

[278] *Native Title Act* 1993 (Cth) new s 24BB-24BI.
[279] *Native Title Act* 1993 (Cth) new s 24CA- s 24CL.
[280] *Native Title Act* 1993 (Cth) new s 24DA- s 24DM.
[281] *Native Title Act* 1993 (Cth) new s 24DL(2)(c).

REPRESENTATIVE ABORIGINAL/ TORRES STRAIT ISLANDER BODIES

Part 11 of the amended Act introduces a new scheme for the registration and operation of representative bodies. The amendments came into effect in two stages, the first with an initial commencement date on 30 October 1998 and the second stage to commence at least twelve months after stage one unless a Proclamation before the end of the period fixes a later date. The time between these two stages has been labelled the 'transition period'.[282]

There are two main areas of significant reform in respect of the provisions relating to representative bodies. The first is found in the revised scheme of recognition.[283] The initial amendments institute a new system of statutory recognition. Under this system, to achieve representative body status the Minister must be satisfied that:

(a) the body will satisfactorily represent persons who hold or may hold native title in the area; and
(b) the body will be able to consult effectively with Aboriginal peoples and Torres Strait Islanders living in the area; and
(c) if the body is already a representative body — the body satisfactorily performs its existing functions; and
(d) the body would be able to perform satisfactorily the functions of a representative body.[284]

Notably, in contrast to the existing legislation, only one body may be recognised as the representative body for a particular area.[285] This measure will prevent the unnecessary duplication of facilities and services and ensure that available resources for an area are put to more effective use.

During the transition period, applications for recognition will be invited from existing representative bodies in each defined area.[286] After the existing bodies have been given an opportunity to apply and if no existing body has been granted recognition status, applications will be invited from other eligible bodies in the area.[287] 'Eligible bodies' is defined in Division 1 as a body incorporated under Part IV of the *Aboriginal Councils and Associations Act* 1976 or any other such law of a State, Territory or the Commonwealth, which body is enabled by its objects to perform the functions of a representative body as designated by the Act.[288] The Act expressly excludes a registered native title body corporate from the definition of 'eligible body'.[289]

The later amendments which herald the end of the transition period allow for the Minister to withdraw recognition if satisfied that the body is not satisfactorily representing the native title holders or potential native title holders in

[282] *Native Title Act* 1993 (Cth) new s 201A.
[283] *Native Title Act* 1993 (Cth) new Part 11 Division 2.
[284] *Native Title Act* 1993 (Cth) new s 203AD(1). Matters to be taken into account in assessing an eligible body are set out in *Native Title Act* 1993 (Cth) new s 203AI.
[285] *Native Title Act* 1993 (Cth) new s 203AD(4).
[286] *Native Title Act* 1993 (Cth) new s 203AA.
[287] *Native Title Act* 1993 (Cth) new s 203A.
[288] *Native Title Act* 1993 (Cth) new s 201B(1).
[289] *Native Title Act* 1993 (Cth) new s 201B(1)

the area, not consulting effectively with the Aboriginal peoples or Torres Strait Islanders resident in the area or is otherwise failing to satisfactorily perform its functions.[290] The Minister may also, under the stage two amendments, extend,[291] vary[292] or reduce[293] the area covered by the representative body.

Another significant area of reform as a consequence of the amendments concerns the functions of newly recognised representative bodies. These are outlined in Division 3 and are part of the stage two amendments which come into effect after the transition period.[294]

Unlike the original Act, the new functions assigned to representative bodies are expressed as having mandatory application. Failure to satisfactorily perform those functions may have the consequence of withdrawal of recognition.[295] Functions include facilitation and assistance in researching and preparing native title applications,[296] certification of native title applications for the representation area,[297] provision of dispute resolution and mediation facilities for intra-indigenous conflict,[298] ensuring that all notices received about the area are properly relayed to constituents[299] and that the body is recognised as party to any indigenous land use agreements in respect of the particular area.[300]

To facilitate performance of these functions certain powers are bestowed upon representative bodies.[301] There is provision also for the internal review of decisions made and actions taken by the representative body.[302] This mechanism should ease the burden of initial review hitherto undertaken by ATSIC although a further avenue of review by ATSIC remains in certain circumstances.[303]

The remaining Divisions of Part 11 deal comprehensively with matters of finance,[304] accountability[305] and conduct of directors and executive officers of representative bodies.[306] The accountability provisions impose stringent requirements on representative bodies in respect of strategic planning,[307]

[290] *Native Title Act* 1993 (Cth) new s 203AH(2).
[291] *Native Title Act* 1993 (Cth) new s 203AE.
[292] *Native Title Act* 1993 (Cth) new s 203AF.
[293] *Native Title Act* 1993 (Cth) new s 203AG.
[294] During the transition period the functions of a representative body are outlined in *Native Title Act* 1993 (Cth) new s 202(4) which comes into force with the stage one amendments. These functions have been extended from the existing provision to include facilitation of negotiation and certification functions. However the provision remains one of discretionary as opposed to mandatory application.
[295] *Native Title Act* 1993 (Cth) new s 203AH(2)(a)(iii).
[296] *Native Title Act* 1993 (Cth) new s 203BB. Section 203BC provides for the mode of performance of these functions.
[297] *Native Title Act* 1993 (Cth) new s 203BE.
[298] *Native Title Act* 1993 (Cth) new s 203BF.
[299] *Native Title Act* 1993 (Cth) new s 203BG.
[300] *Native Title Act* 1993 (Cth) new s 203BH.
[301] *Native Title Act* 1993 (Cth) new s 203BK.
[302] *Native Title Act* 1993 (Cth) new s 203BI.
[303] *Native Title Act* 1993 (Cth) new s 203FB.
[304] *Native Title Act* 1993 (Cth) new Part 11 Division 4.
[305] *Native Title Act* 1993 (Cth) new Part 11 Division 5.
[306] *Native Title Act* 1993 (Cth) new Part 11 Division 6.
[307] *Native Title Act* 1993 (Cth) new s 203D.

accounting[308] and reporting.[309] The amendments further allow for the Minister to appoint an auditor to investigate the financial affairs of a representative body where irregularities are apparent.[310] ATSIC will assume the role of informant to the Minister[311] in these circumstances and consequently will play an important part in the review of recognised representative bodies.

EQUIVALENT STATE OR TERRITORY BODIES

The new Part 12A provides for the Commonwealth Minister to determine that a State or Territory body can exercise specified powers of the Tribunal or Registrar in specified circumstances and under specified equivalent body provisions. In determining that a State or Territory body can exercise such functions, the Minister must ensure that there is a nationally consistent approach to the recognition and protection of native title. There is therefore a number of conditions before a ministerial determination of an equivalent State or Territory body can be made.

The original Act allowed the States or Territories to set up their own equivalent bodies, but they would only have exclusive jurisdiction in respect of the mediation and arbitral processes under the right to negotiate regime. The amendments would allow a State tribunal to be set up exercising exclusive jurisdiction across the whole range of the national body's functions. That, in effect, would displace the operation of the national tribunal in the State or Territory concerned.[312]

CONCLUSION

At the time of publication of this paper there has been a number of first instance decisions on substantive native title determination applications and some of these are subject to appeal to the Full Court of the Federal Court.[313] There is also an increasing number of decisions on review from the Registrar which concern the construction of the various conditions of the registration test and the requirements for notification procedures under the amended Act.[314] It can be expected that within the next two years there will be significant developments in the common law of native title and the detailed construction of the Act which should, it is to be hoped, facilitate the advancement of this great national enterprise.

[308] *Native Title Act* 1993 (Cth) new s 203DA.
[309] *Native Title Act* 1993 (Cth) new s 203DC.
[310] *Native Title Act* 1993 (Cth) new s 203DF.
[311] *Native Title Act* 1993 (Cth) new s 203F.
[312] *Native Title Act* 1993 (Cth) new s 207B.
[313] *Ward* v *State of Western Australia* (1998) 159 ALR 483, *Yarmirr* v *Northern Territory of Australia* (1998) 156 ALR 370, *Yorta Yorta Peoples* v *State of Victoria* (Unrep. Olney J, 18 December 1998 Judgment No 1606 of 1998), *Hayes* v *Northern Territory* [1999] FCA 1248
[314] See also judgement on ancillary orders re correction of register after review — *Strickland* v *Native Title Registrar* (supra) is also under appeal to the Full Court.