Chapter Two

The Prime Minister's Ten Point Plan

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In June, 1992 the High Court created (or if you will, discovered) a remarkable new form of land title.[1] The discovery was a prelude to years of political, legal and economic disruption which even sequestered judges might have anticipated. The discovery soon became an icon of correct and progressive thought, although it is tied to a concept that is usually anathema these days: native title is explicitly a race-based right.

Effectively, *Mabo* spread Australia-wide the "land rights" which the Commonwealth bestowed on the Northern Territory in 1976. The Hawke Government flirted with the idea of doing it by legislation in the 1980s, but Western Australia's Labor government gave the scheme short shrift.[2] Little by little we may be led to the light. *Mabo* merely indicates that, whatever "native title" means, it *might* exist on the mainland as well as on Murray Island, and if so it resides in places, in forms and on terms yet to be revealed. In 1914-1918 war-weary troops in the trenches had a refrain which students of native title could echo now: "There *is* a Front, but damned if we know where."

The Court did make native title subject to the creation of freehold and certain other titles known before June, 1992, but this was a gesture rather than a concession. There must be compensation ("just terms") for any interference with the windfall, and there is no set-off for the billions spent on Aboriginal welfare since the 1970s, or for the Land Acquisition Fund, or for anything which Europeans brought to Australia.

The Court also relied for the permanence of its decree on the *Racial Discrimination Act* 1975 ("the *RDA*") and domestic politics based on perceived views of an international "community". The *RDA* and the "just terms" clause[3] are the twin pillars of native title. It is curious that people who sneer at "Eurocentricity" and "cultural cringing" play domestic politics by appealing to "international opinions" before which every knee must bow. Consistency and intellectual *chic* are not bosom companions.

Time for *Mabo* Mark II.

The extreme vagueness of *Mabo* Mark I soon forced Parliament's hand, as it was no doubt meant to do. After months of bitter debate and melodramatic lobbying by "players" and "stakeholders", the *Native Title Act* 1993 ("the *NTA*") emerged in the dying days of the year. At the eleventh hour the farmers and graziers, on being told that native title would be confined to vacant Crown land, broke ranks with the miners. That was not one of history's finest tactical withdrawals. This time the miners are leaving the front running to the farmers.

The *NTA* does not tell us what native title is; it leaves that to courts and tribunals to compose as they go along. It creates a zealous National Native Title Tribunal ("NNTT") whose life will not be prolonged by making native title difficult to claim. It also creates a "right to negotiate" remarkable in two respects. It is more extensive than any right held by members of other races facing a compulsory acquisition of property, and it is available not only to people with established rights but also to those who merely claim them. (This fundamental distinction is constantly blurred by media references to claimants as "native title holders" or "traditional owners".)

Three years of the *NTA* have done little to allay the fears and uncertainties raised by *Mabo* Mark I and Mark II.

Time for *Mabo* Mark III.

On the strength of some brief and passing remarks in *Mabo*[4] the Keating Government, many influential lawyers and the farmers who subsided at the last minute embraced the belief that pre-1994 leases were immune from native title. That article of faith was challenged in *Wik and Thayorre Peoples v. Queensland* ("*Wik*").[5]

In June, 1996 judgment in *Wik* was still reserved. I penned a paper for this Society's Adelaide conference in fear and trembling that at any moment *Wik* might deconstruct it when no time for revision remained. Now I return to the crystal ball for prospects of the Ten Point Plan and its elaboration in the *Native Title Amendment Bill* 1997 ("the Bill"). Overnight developments are less likely this time.

In Adelaide, somewhat against the tide, I advised caution. While I suspected that the majority in *Wik* would be smaller than in *Mabo* (and that came to pass), it seemed unlikely that the Court would "stunt the growth of its child by saying that all pre-1975 pastoral leases extinguish native title".[6]

Wik finally arrived on 23 December, 1996; it is not only elected politicians who know how to release bad news when the country is at the beach. By the narrowest margin, the Court held that native title is not necessarily extinguished by pastoral leases but may co-exist with them. Instantly the acreage open to claims rose from 35 per cent to 78 per cent.[7] It is noted in *Wik* itself that about 42 per cent of Australia is under pastoral leases, and that in some States the figure is as high as 80 per cent.[8]

Native title enthusiasts have ridiculed claims that *Wik* worsens the uncertainties of *Mabo*,[9] but Justice McHugh and his brother Kirby[10] do not agree. McHugh J. is convinced that "there will be serious uncertainty until this Court finally resolves the consequences [for] pastoral leases".[11] Even Kirby J. admits that *Wik* "introduces an element of uncertainty into land title in Australia". But his Honour consoles himself -- if not Australia's farmers and graziers -- with the thought that "... this is no more than the result of the working out of the rules adopted in *Mabo*".

By August, 1997 about 600 claims had been lodged, some over vast areas and many overlapping.[12] When the Bill appeared, more claimants rushed to register in the hope of avoiding the higher threshold test that it proposes.[13]

Wik gives no answer to these questions: (1) For the umpteenth time, what *is* native title? (2) How difficult or easy is it to prove? (3) How does one find an anthropologist to question a claim? (4) How does one distinguish an "exclusive" Crown lease (immune from native title) from a "non-exclusive" one? (5) On leases of the latter sort, where do the lessee's rights end and Aborigines' rights begin? (6) How are demarcation disputes to be settled, at what expense, and at whose expense? (There are many more questions, but those niggling little examples will do.)

Time for *Mabo* Mark IV.

Long before the *Wik* decision, the Keating Government knew that the *NTA* was in need of significant amendments. A Bill appeared in November, 1995 but lapsed when a general election was called. On 27 June, 1996 the new Government produced another Bill, but shelved it until the High Court produced the son of *Mabo*.

Wik put the 1996 Bill back in the melting pot. Mr Howard's "Ten Point Plan" was published on 4 June, 1997, and on 4 September, 1997 it emerged as a Bill and was immediately referred to a Joint Parliamentary Committee. Despite assertions by the Prime Minister that major amendments will not be accepted, it is doubtful whether the Senate will pass the Bill in any semblance of its

present form. But if the Bill does pass into law more or less intact it will then face the third house of the legislature, a High Court in the process of reconstruction.[14]

I shall concentrate on the Bill, which seeks to implement the Plan. In short form the Plan proposes:

1. Validation of some 1994-1996 Crown grants.

2. A declaration of "exclusive possession" tenures.

3. Protection of government services (roads, pipelines, etc).

4. Extension of "non-exclusive" leases to other forms of "primary production".

5. Interim access rights for registered native title claimants.

6. Improved access for miners to land under native title claim.

7. Protection of infrastructure developments.

8. Clearer Commonwealth and State[15] control of water resources and air space.

9. A stricter "threshold test" for registration of claims.

10. Improved facilities for settlements out of court.

As predicted in March this year,[16] the Government has rejected demands by the Queensland Premier and others[17] for a "one-point solution", namely the extinction of all native title, subject to compensation. The Government explains:[18]

> "[I]t is important to confirm that native title has only been extinguished on exclusive' tenures. To go further ... could undermine the very certainty and security sought ... [given] the likelihood of successful constitutional challenges. ... [Besides, native title] claims ... would simply be converted into claims for compensation, and would continue to involve the same expensive, time consuming ... litigation as claims now do.[19] It would greatly increase the potential exposure of governments ... It would be unlikely to be passed by the Senate [and] ... would jeopardise the passage of those amendments on which there might otherwise be a parliamentary consensus ...
>
> "It would risk permanent disaffection between indigenous and non-indigenous Australians [and] ... would ... be widely seen as unfair ...
>
> "[It] could provide a greater stimulus for calls for an Olympic boycott[20] ... It could be a breach of our international obligations ... ."

Within a week of its appearance the Ten Point Plan was publicly criticised by two federal judges, causing international embarrassment.[21] However, Father Frank Brennan SJ, a son of Chief Justice Sir Gerard Brennan and a leading proponent of "land rights", was more encouraging. Preferring the *patois* of American baseball to Australian sporting parlance, he ruled that the Plan was "within the ballpark".[22] But alas, a self-appointed referee is always at risk of dismemberment, and Aboriginal politicians quickly made it clear that Brennan was not their spokesman on this occasion.[23] Mr Noel Pearson depicted the Prime Minister trying to "wash the blood of extinguishment off his hands",[24] and regretted that he and other Aboriginal

"negotiators" were too kind to other parties when the original *NTA* was cobbled together.[25] The Bill, Pearson declared, contains "vile proposals" which "must at all costs be stopped".[26]

Initially there were signs that the federal Opposition, sensing an electorate tired of a diet of Aboriginal affairs, would let the Bill through. But in early October the Opposition spokesman on Aboriginal affairs told the parliamentary committee that "some things are not negotiable".[27] The proposed reduction of the right to negotiate is a major grievance.[28] There have been dark hints of a double dissolution if the Bill is rejected,[29] and one senior party administrator is confident that the Government would win the ensuing election "in a landslide".[30] But other counsellors are against a confrontation of that kind.

This paper does not canvass every aspect of the Bill. It comments on:

1. The validation of 1994-1996 grants.
2. The declaration of "exclusive" tenures.
3. Permission to extend "non-exclusive" leases to other forms of "primary production".
4. Interim access rights for registered native title claimants.
5. The new threshold test and its effect on the right to negotiate.
6. Changes of interest to the mining industry.
7. Facilitation of agreements.
8. A Compensation Cap and Time Limits.
9. The role of the Federal Court.
10. "The Hindmarsh Proposition".

1. The Validation of 1994-1996 Grants

The Bill would validate Crown grants, other than mining rights over vacant Crown land, made between the commencement of the *NTA* (1 January, 1994) and the *Wik* revelation on 23 December, 1996.[31] The States would be allowed to pass similar legislation.[32]

It is likely that this point will be won after some huffing and puffing to enhance opponents' bargaining power in other areas. The case for validation is strong, because in 1993 the former Government (in close consultation with influential Aborigines) concluded that native title was not claimable over pastoral leases. According to *Wik* that was a serious mistake, but the fact remains that those who made it were influenced by the federal government,[33] by the fulsome Preamble to the *NTA*[34] and by an implication in the Act itself.[35]

Wik was a windfall; it has been said repeatedly and without contradiction that in 1993-1995 leading Aboriginal "negotiators" accepted the conventional wisdom that all Crown leases extinguished native title.[36] Consistent with this claim, not one legal challenge was made to the grants in question. The guardians of native title certainly do not lack public funds or an appetite for litigation, but this time they did not go "to the haven of the courts to be saved from the wolves at Parliament House".[37]

Against this background, and considering that compensation is payable to anyone adversely affected, it seems unlikely that politicians will fight the validation provisions to the death.

2. The Declaration of "Exclusive" Tenures

In reliance upon statements of the majority in *Wik*, it is proposed to declare that certain past Crown grants[38] conferred exclusive possession and so extinguished any relevant native title.[39] The list includes freeholds, commercial leases, "exclusive" agricultural and pastoral leases, residential leases, community purpose leases and other grants (not including mining titles) to be specified in a Schedule to the Act. Also in reliance on *Wik*, it will be declared that native title over "non-exclusive" leases is extinguished "to the extent that the grant involves ... rights ... that are inconsistent with the native title".[40] *Wik* seems to accept[41] that a Crown lease which confers exclusive possession extinguishes native title.

However, the "exclusive" list is controversial. Rural interests complain that the proposed Schedule omits many tenements which *are* exclusive,[42] including a large number of leases in the Western Division of New South Wales.[43] On the other hand, native title advocates contend that the "exclusive" declarations would effect extinguishment on a scale greater than any envisaged by *Mabo*, *Wik* or the *NTA* and so violate the *RDA*. In Queensland, the list would rule out native title over about 25 per cent of the State, but 58 per cent would still be claimable.[44]

The professed purpose of the "exclusive" list is to "confirm" *past* extinguishment of native title in a manner "consistent with the *Wik* decision".[45] To the extent that the "exclusive" list accurately reflects that decision -- and it is recognised that perfection cannot be guaranteed[46] -- it merely underlines legal history. It would only operate retrospectively[47] to the extent (if any) that it treated as "exclusive possession acts"[48] some transactions which, on a judicial view, were not originally of that kind. In such a case the Government would fall back on a compensation clause[49] to counter claims of unlawful discrimination. If that were deemed insufficient, it is submitted that the legally good portions of the list could be "severed" from the bad.

3. Permission to extend "non-exclusive" Leases to other forms of "Primary Production"

These proposals are in aid of rural lessees who fear that any significant improvement to a non-exclusive holding, or a change from grazing to (say) cotton growing or "farmstay tourism", may be invalid unless they run the gauntlet of the right to negotiate.

It is proposed[50] to allow any form of "primary production" on a non-exclusive lease without the need to negotiate.[51] "Primary production" is widely defined[52] to include grazing, farming, fishing, forestry, horticulture and aquaculture. Limited rights may also be granted to third parties.[53] Any adverse effect upon a co-existing native title will attract compensation and the "non-extinguishment principle" will apply.[54] These proposals are essentially a modification of the right to negotiate, and the Government's view is that such a special right may be wound back without contravening the *RDA*.

4. Interim Access Rights for Registered Native Title Claimants

These rights would accrue to persons interested in a registered claim if, on 23 December, 1996[55] they "regularly had physical access to the whole or part of the area ... for the purpose of carrying on one or more traditional activities". Pending judgment or settlement they would have access to the subject land "in the same way and to the same extent" as in the past, subject to the rights of the lessee.[56] These rights would be additional to any access allowed by State land laws or the Aboriginal heritage legislation.[57]

"Traditional activity" means hunting, fishing, gathering, camping, performing ceremonies or visiting sites of significance.[58]

The proposed rights may make little difference in jurisdictions such as South Australia and Western Australia, where there are similar rights under State law.[59] Graziers in Queensland and New South Wales may find them harder to accommodate.

Interim rights of access would not necessarily be enjoyed by every Aborigine who is party to a registered claim. Some invidious distinctions may be involved. There could well be disputes about who is and who is not entitled to access, or as to whether persons who *are* entitled to it are exceeding their licence. Such disputes could be taken to the Federal Court, which might refer them to mediation.[60] There is a reasonable apprehension that, once people have interim access, a final decision in their favour could be a foregone conclusion. However, the difficulties are glossed over in a forlorn hope of reducing political opposition to the Bill.

5. The new Threshold Test and its effect on the Right to Negotiate

There is broad agreement that *some* tightening of the registration requirements is warranted. Decisions of federal judges[61] have made registration -- and hence the right to negotiate -- absurdly easy to obtain, particularly since *Wik* doubled the area open to claims. "Ambit" claims are an embarrassment to responsible Aborigines and a burden to leaseholders.

Under the new regime, persons seeking to register claims under the *NTA* would have to give details of the subject land and the customary basis of the claim. Further, the Registrar would have to be satisfied "that at least one member of the native title claimant group currently *has or previously had* a traditional physical connection with the area covered by the application".[62]

This would certainly be an improvement upon the vapid treatment of "sufficient connection" in *Mabo* Mark I, to which the existing *NTA* adds nothing. In *Mabo* it is a question of "presence amounting to occupancy" from a time "long prior" to the "point of inquiry". A "substantial" connection may exist where claimants have continued "(so far as practicable) to observe the customs ... of that clan or group".[63] The connection (physical, spiritual, contemporary or historical?) depends on native "laws and customs".[64] There can be native title where the clan continues to occupy or use the land, and other possibilities remain open.[65]

One judge speaks of a title "rooted in physical possession", but gives no indication of how far back in time the search for it may be taken.[66] According to the same judge, a customary connection may survive European influences, such as the "profound" effects of Christianity, the use of schools, other modern facilities and the adoption of a cash economy dependent on government allowances.

As an undergraduate exercise in Legal Drafting all this would leave something to be desired. On the crucial issue of "connection" the High Court has a great deal of room for manoeuvre.

Mabo's meanderings encouraged the Native Title Tribunal to doubt the necessity of a physical connection,[67] and when a company associated with Charles Perkins lodged a claim over the Ernest Henry mine site in Queensland he insisted that it was irrelevant that most of the claimants did not live in the area.[68] Anthropologists of the 1930s and 1940s, free from today's enticements of consultancy and expert-witness fees, were often unable to find consistent genealogies within a single century.[69] The locations of native groups in the late 19th and 20th Centuries were often determined by mission sites, the only traditional link being "the natural affinity which we all have for the place of our birth".[70] John Holmes, a Queensland Professor of geography and supporter of native title, considers that "on core pastoral lands ... or sub-coastal Queensland, ongoing Aboriginal connection is usually tenuous".[71]

Former Governor-General Bill Hayden represented the Queensland government in the Century Zinc mine negotiations. He reported that the Waanyi people were claiming land which they did not occupy until the 1890s.[72] A few days after the *Wik* decision, a community development

officer who worked in the relevant area from 1976 to 1984 said that he could not recall the name "Wik" being used then, and that when litigation began in 1993 "many of the claimants wondered what their lawyers and anthropologists meant by [it]". David Martin, an anthropologist who did post-graduate work in the same area, explains that 'Wik" is a modern term covering "diverse" peoples "who have forged links through ceremonies, marriage *and politics*".[73] It appears that some of the myriad clan names now appearing on native title application forms may be as recently settled as some "traditional lands".

"Sufficient connection" is one of the most elusive concepts in *Mabo,* and the effort to clarify it was one of the most difficult tasks for the framers of the Bill. Neither farmers nor Aborigines are content with the proposal "that at least one member of the ... group currently has *or previously had* a traditional physical connection" with the land. In the Aboriginal perspective it is too demanding; from the graziers' viewpoint, too loose.[74] The chairman of ATSIC complains that the word "physical" was added "at the last moment".[75] The President of the United Graziers' Association claims a promise by the Prime Minister that a *current* physical connection would be required, but "the word current' seems to have slipped out".[76]

Curiously, there is little public comment on the proposal that only one member of a claimant group need show the relevant connection. One wonders whether such people will become living treasures -- a species of Queen Bee -- to be rationed out to the many claimant groups. In June, 1997 a gold mine at Georgetown in north Queensland closed under pressure of a native title claim, throwing 40 per cent of the town's work force out of employment. The local mayor complained that only "two or three" of the claimant group lived in the area,[77] but that could be enough to secure registration and the right to negotiate if the Bill becomes law.

However, the proposed threshold tests and other changes would see fewer claimants with a right to negotiate.[78] The right would also be withdrawn from (a) acquisitions for public works and infrastructure facilities; (b) "primary production" developments on "non-exclusive" leases; (c) small-scale mining activities; (d) some renewals of mining titles; (e) the management of water resources and air space; and (f) developments within towns and cities.[79] But it would still apply to compulsory acquisitions for the benefit of third parties (excepting infrastructure developments) and to many grants of onshore mining titles.[80]

The proposed reduction of the right to negotiate is at the epicentre of the storm, which is not in the least surprising. The right is technically procedural, but in reality it may be much more valuable than the unproved native title which it purports to protect. Items which cannot be awarded at arbitration, such as private "royalties"[81] or profit shares,[82] may be obtained by "voluntary agreement" if a developer or a government wants peace and faster progress and believes it can absorb the cost or pass it on. (Governments can always pass it on, but this is not a luxury which many countrymen can afford.)

Few developments are so large as Queensland's Century Zinc mine, but in that case people who will never have to *prove* native title now will receive the equivalent of $90 million from the company and the State.[83] (There are already internecine disputes about the distribution of the bounty[84] but they need not detain us here.) Relatively small projects can yield handsome payments without proof; a gold mine at Tenterfield, NSW recently paid $1.3 million to get rid of a native title claim.[85] Developers disposed to buy claimants off may be encouraged by a Federal Court decision[86] that compensation in the form of private "royalties" and bursaries for Aboriginal students is a valid tax deduction.

The political and economic value of the right to negotiate ensures that any proposal to modify it will be fought tooth and nail in the Parliament, the media and the courts as an unconstitutional

interference with property and a sacrilege against the *RDA*. The native title lobby claims that the right to negotiate is an intrinsic part of native title,[87] but it is not part of the common law revelation in *Mabo*. It is a "special measure" not enjoyed by others. Indeed, people who acquire property by purchase rather than a novel judicial decree must *establish* their titles before they contest an acquisition.

The proposed changes to the right to negotiate are *not extinctions of native title*. People who now have a right to negotiate, but who will lose it if the Bill passes, may still pursue their claims at common law.[88] Provided that native title claimants are no worse off than established property owners facing compulsory acquisition, they are not victims of discrimination; they have merely had a procedural privilege modified or withdrawn. (Indeed, as mere *claimants* they are still better off than established owners.)

The Government's position is that the right to negotiate is a "special measure" (that is, reverse discrimination), which can be reduced or withdrawn at Parliament's discretion without affecting the *RDA* or the international agreement on which it is based.[89] (There is a compensation backstop in case the High Court rejects this argument.)[90]

The new threshold test would reach back to 27 June, 1996.[91] Retrospective legislation is not unconstitutional; it is common in the field of taxation. When the law in question is merely procedural, there is not even a common law presumption against it.[92]

6. Changes of Interest to the Mining Industry

Mining titles granted over Crown leaseholds between 1 January, 1994 and 23 December, 1996 would be validated. The "exclusive possession" list, if effective, would assist miners as well as farmers; if a farmer's lease is immune from native title, a miner who seeks secondary rights over that lease may also forget about the right to negotiate.

The right to negotiate would cease to apply to many mining developments.[93] In cases where it still applied it could be satisfied by approved State procedures, such as the objection and compensation provisions of State mining laws, suitably amended. Applications for the registration of dubious native title claims could be opposed by placing relevant information before the Registrar.[94]

The right to negotiate would apply once only to all acts constituting a single project.[95] This would be of considerable value; at present, if there is a native title claim, the miner must "negotiate" at the exploration stage, at any intermediate stage[96] and again when a lease is sought. It is also significant that the States could specify the stage of a development at which the once-only right to negotiate would arise.[97] Normally the cash value of that right is greatest when a commercial deposit has been proved, and the miner and the State government want production to begin quickly. If the right had to be exercised at the exploration stage, "traditional owners" would tend to make less ambitious demands and mining companies would consider less munificent settlements.

The time for negotiations would be 4 months in all cases;[98] presently it is 6 months when a production title is sought. The NNTT would have to complete an arbitration "as soon as practicable", and the Minister could intervene in cases of delay.[99]

The position regarding renewals and extensions of mining titles granted before 23 December, 1996 would be clarified and improved. The right to negotiate would not apply, provided that the area is not enlarged and new proprietary rights are not created.[100] An extension longer than the original term would not entail negotiations. There would be compensation for any consequent interference with native title, and the non-extinguishment principle would apply.[101]

The Bill would allow the States to confirm their ownership of mineral deposits. (However, in most if not all jurisdictions the Crown appropriated minerals long ago.)[102] In *Wik* the trial judge dismissed a claim to minerals, and that ruling was not questioned in the High Court.[103]

7. Facilitation of Agreements

The Government is endeavouring to "sell" the Bill by placing greater emphasis on mediation and extra-curial settlements.[104] *Prima facie* this is a "motherhood" issue, but in practice there is tension between an expedient desire to use already-powerful Aboriginal bodies -- much to their delight[105] -- as organisers and rationalisers of claims, and on the other hand, a policy of *not* granting monopolies to regional native title brokers. Monopoly is a prospect feared by some Aborigines[106] as well as respondents with limited resources. But bureaucratic convenience shows every sign of winning.[107] A formal assurance that people who do not trust the brokers may "go it alone" sits beside statements that "Commonwealth funding for claimants will be channelled mainly through the representative [bodies]"[108] and advertisements for their superior resources and experience.[109]

The over-arching authority of ATSIC would remain.[110] Claimants refused assistance by regional brokers would have a right of appeal to ATSIC.[111] ATSIC would be relied on to report unsatisfactory brokers to the Minister, who (if suitably informed) could demand information and appoint special auditors.[112] The efficacy of these provisions would depend greatly upon the politics and diligence of the incumbent Minister. ATSIC resents even this degree of supervision, and in blithe disregard of recent history[113] it claims that "accountability" is already "stringent and adequate".[114]

The Bill does little to guard against abuses of power by the brokers, or to ensure that benefits exacted by negotiation are fairly and efficiently distributed. Complaints of maladministration of the Century Zinc mine settlement[115] were followed by reports that Aborigines in Kakadu National Park have gained surprisingly little from $40 million in mining "royalties" paid to their representatives in the last 17 years.[116]

Mining companies which enjoy good relations with local Aborigines and prefer to deal with them direct may notice little improvement. Recently a Miss Hobbs gave evidence to the Joint Parliamentary Committee describing her experience with native title "consultants" and "negotiators" in Western Australia.[117] She complained that they allow no contact with the nominal claimants, and will only talk to company representatives in consideration of substantial fees charged on a daily basis -- hardly an incentive to expedite a settlement. (One's fancy strays to extra-curricular business practices in certain foreign climes.)

Hobbs added:

> "It is clear ... that some of the claims lodged in the last year or two are lodged for reasons other than protecting native title; it's openly admitted to us that they're lodged for reasons of obtaining access to funds from mining companies. I've had that stated to me personally. ... My opposition here is to us being forced to work in a corrupt environment and to contribute to corruption."

Not a word of her evidence appeared in Brisbane, Sydney or national newspapers. They concentrated on evidence yet to be given by Mr Sean Flood who, so they said, was bravely resigning from the Native Title Tribunal in order to fight the Bill publicly.[118] In an earlier paper I quoted a remarkable fulmination in one of Mr Flood's decisions.[119] In truth, his position became untenable several months before the recent gesture, when he embarrassed President French by a public denunciation of the Ten Point Plan.[120]

As Miss Hobbs indicates, mediation is often not a quick, cheap and efficient alternative to litigation. The Century Zinc saga dragged on for five years. A representative of the Queensland government was paid $180,000 and his staff cost a further $542,700, not to mention travelling expenses and their public service salaries. The Carpentaria Land Council received $900,000 to "participate in negotiations".[121] Readers who wonder whether mediation is quite so sharing and caring as its disciples claim may read the comments of Mr Justice Young quoted in an earlier paper.[122]

8. A Compensation Cap and Time Limits

Proposed s. 51A, which would apply to claims filed before or after[123] the Bill becomes law, would limit compensation to "the amount that would be payable [in the event of] a compulsory acquisition of a freehold estate in the land".[124] This is probably meant to put paid to imaginative claims based on "spiritual attachment" or "psychological trauma" suggested by some native title tribunalists.[125] However, the limit is open to an argument that in remote areas, where land values are low, a freehold valuation would not fully compensate native title holders for rights lost or diminished.

On the matter of time limits, it is proposed to limit native title applications to six years following the enactment of a new s. 13(1A). Claims for compensation would have to be filed within six years after the Bill becomes law, or within six years of the relevant "future act".[126]

Critics assert that this would be unconstitutional, racially discriminatory, or both. Their reasons are not obvious. Most legal actions are subject to time limits, some as short as three years. If and when the "sunset clause" becomes law, it will then be five or six years since *Mabo* Mark I, and the additional time in the Bill will result in a liberal 12 year limit for native title claims.

9. The Role of the Federal Court

The Bill does not question the eminently questionable assumption that native title claims are matters for the Federal Court.[127] While the Commonwealth may graciously accredit State courts and tribunals for *NTA* purposes,[128] claimants could still go forum-shopping for sympathetic federal adjudicators remote from the effects of fashionable rulings.

The proper tribunals for native title claims are the State Supreme Courts. The Federal Court was set up just twenty years ago to administer Commonwealth legislation, perhaps in the hope that it would construe it more generously than our traditional courts. Federal Court appointments quietly proliferate in Canberra, and attract less professional scrutiny than Supreme Court nominations. Surprise appointments are not rare.

Most members of the Federal Court were appointed by the monochrome federal governments of 1983-1996. The title of federal "Justice" is too often used to accredit special-purpose tribunals short on law and long on social engineering. Several federal judges consider themselves immune from the self-restraint which the judiciary normally observes in matters of politics. One who would no doubt relish a leading role in native title matters frequently and freely pontificates on highly political subjects.

The State courts comprise a broader selection of lawyers appointed by a wider variety of governments. The Supreme Courts are the only courts with all-round experience of major criminal and civil litigation. Such common law jurisdiction as the Federal Court possesses was annexed from State courts by self-serving interpretations of a quaintly named "pendant jurisdiction".

The Federal Court's patchwork of civil jurisdiction is based on broad-brush statutes such as the *Trade Practices Act*, well described by a distinguished State judge as more like the terms of reference for a roving Royal Commission than a definition of legal rights. Sweeping discretions

breed loose jurisprudence and judicial adventurism. The Federal Court took "judicial review", a strictly limited form of appeal, so close to second-guessing the Government that even the Mason Court felt bound to call a halt.[129] In an area like native title, where the law is vague and the chances of obtaining favourable evidence are so much on the claimants' side,[130] it is vital to have a broad spectrum of judicial opinion and a rigorous, apolitical examination of evidence.

While the Bill would wind back some of the free-wheeling procedures in native title cases,[131] which have already spawned some bizarre practices,[132] it would still allow the Federal Court to ignore the rules of evidence "to the extent that the court ... orders"[133] -- a "Clayton's rule" if ever there was one!

The Federal Court is not the appropriate forum for litigation of this kind[134] -- especially if it develops (as well it may) an informal cadre of "specialists" promoted from native title tribunals or kindred legal aid bureaux.

Native title is not a child of the federal Constitution or of any Commonwealth statute. Native title parades as common law, and the High Court has recently and expressly declared that the common law cannot be turned into a law of the Commonwealth.[135] (In a moment of delightful unconscious irony, the Court explained that this would improperly "confer legislative power on the courts"!) Native title affects a great deal of land vested in the States, and land titles and land management are quintessential State concerns.

10. "The Hindmarsh Proposition"

The spirit of Hindmarsh still walks abroad, and now offers the High Court a golden opportunity for judicial legislation. In a pending challenge to a federal law passed to save taxpayers yet another forensic meditation on "secret women's business", the Court is asked to decree that laws based on the Commonwealth's "race power"[136] are valid only when they bestow *benefits* on the race in question.

The secret women, it seems, have a bottomless legal aid fund. If the Court agrees with them, the logical consequence would be that federal laws with respect to Aborigines could only be amended so as to maintain or increase special benefits for that race. If that is good law, *any* federal government will have to think long and hard before it ever uses the "race power" again! The Hindmarsh Proposition would create a unique exception to the rule that a power to enact legislation includes power to repeal it, and would pave the way for a root and branch attack on the present Bill.

It will be interesting to see whether the Hindmarsh Proposition is a mite too adventurous for a High Court under reconstruction. Hints that the Court may be resigning itself to a more modest legislative role appear in *Thorpe v. Commonwealth* (No. 3)[137] (*pace* Justice Toohey, Australia has no "fiduciary duty to the original peoples of this land") and *Kruger*[138] (former Northern Territory laws affecting the "stolen children" were not invalid and are not now legally actionable).

The Hindmarsh Proposition ignores the history and intent of s. 51 (xxvi) of the Constitution. Unpalatable as it may be, that clause was not designed solely for the creation of special benefits. A prime object was to control immigration by Chinese, Pacific islanders and others.[139] It appears that Sir Samuel Griffith had the repatriation of Queensland's "Kanaka" labourers in mind.[140]

In 1967, amid the warm glow and inevitably limited foresight accompanying the race power referendum,[141] Percy Joske, a constitutional lawyer, observed:[142]

> "The assumption that legislation with respect to the people of a particular race would be to give them benefits may well be erroneous, since the historical reason for including a provision in the Constitution was to give the Commonwealth authority to deal with the

problem of Chinese and Kanaka labour, the restriction of which was one of the motivating causes of federation."

The question received some attention in High Court judgments in l982[143] and 1983,[144] several years after the *RDA* arrived.[145] In *Koowarta v. Bjelke-Petersen*, Gibbs CJ observed:[146]

> "It would be a mistake to suppose that [the race power] was included ... only for the purpose of enabling the Parliament to make laws for the special protection of people. ... Such laws might validly discriminate against, as well as in favour of, the people of a particular race."

And Stephen J. remarked:[147]

> "The content of the laws which may be made under [the race power] are left very much at large; they may be benevolent or repressive ..."

Wilson J. recognised[148] that there are now political limits to the use of the power, but he did not assert as a legal principle that it can only be a source of privilege:

> "In these days one would not readily contemplate the use of the power to the detriment of the people of a race; nevertheless ... even when it is used for wholly benevolent and laudable purposes it remains a power to discriminate."

It should be noted that these statements related to a purely negative policy to minimise grants of Crown leases to Aborigines. The judges in *Koowarta* may have been even less attracted to the Hindmarsh Proposition if they had been dealing with a complex of benefits and controls such as the present Bill. Even if the present Court were inclined to accept the Proposition, would it be a judicial function to chop the Bill into pieces, sort them into "benefit" and "detriment" piles, and conduct some sort of political weigh-in? The Government's position is that overall the Bill is beneficial, although the Constitution does not require it to be so.[149]

Most people would agree that "race" laws are a more delicate political exercise in 1997 than they were in 1901, but the Hindmarsh Proposition goes much further. It asks the High Court to say that something which several Justices accepted in the 1980s (namely, the possibility of a "detrimental" race law) is a breach of the Constitution in 1997.

It is not enough to say that an exception regarding the "Aboriginal race"[150] was removed from the race power in 1967. All that follows is that Aborigines are now no more exempt from its operation -- positive or negative -- than the people of any other race. It would be better if there were *no* "race power" at all; it is odd that we have a racial principle in the Constitution and a pious horror of any such thing in the *RDA*. Hence, one supposes, the temptation to avoid embarrassment by confining s. 51 (xxvi) to occasions when gifts are given. But ordinary statutes, whatever their moral or political appeal, cannot override the Constitution.

In a dissenting judgment in *Koowarta,* Murphy J. made the long leap from the view that non-beneficial uses of the race power are undesirable to the legal conclusion that they are unconstitutional,[151] characteristically proceeding by assertion rather than demonstration. But in the very next year Mason J. accepted that the power may be used not only to "protect" but also to "regulate and control".[152] Deane J, a vehement member of the majority in *Mabo,* said this in 1983:

> "The [race] power ... remains a general power to pass laws discriminating against or benefiting the people of any race. Since 1967, that power has *included* a power to make laws benefiting the people of the Aboriginal race."[153]

Clearly s. 51(xxvi) does include the power to confer special benefits upon Aborigines. But it does not follow -- and Deane J. did not suggest -- that the special benefits *exhaust* the ambit of the power.

In the same case Brennan J. said:[154]

> "No doubt [the race power] in its original form was thought to authorise the making of laws discriminating adversely against particular racial groups The [deletion of] ... the words other than the aboriginal race' was an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial. The passing of the *Racial Discrimination Act* manifested the Parliament's intention that the power will hereafter be used only for the purpose of ... conferring benefits ...".

There are two suggestions here: (1) That in voting for a transfer of Aboriginal affairs from the States to the Commonwealth, Australians intended (and somehow implicitly enacted) that never again could the Commonwealth "control and regulate" Aborigines as such; and (2) that the *RDA* is an enactment which cannot be amended because in its 1975 form it has some quasi-constitutional status. What tangled webs our oligarchs weave from the wool of international conventions! However, even Justice Brennan went no further than to speak of special benefits as the "*primary* object of the power".

The High Court was created as a court of law, and at law the *RDA* is a non-constitutional provision which cannot tie another Parliament's hands.[155] Indeed, s. 7(2) of the existing *NTA*[156] quietly amended the *RDA* by excluding its censorship from provisions validating Crown grants of 1975 - 1993.[157]

Some see magic in the fact that s. 51(xxvi) speaks of laws "for" a chosen race.[158] Let us hope that not too much of our money is spent on legalistic torture of that humble preposition. We have noted recent authorities which admit that the race power cuts each way. The very same preposition ("for") appears in s. 122 of the Constitution,[159] which has repeatedly been dubbed "as large and universal a power ... as can be granted".[160] Even Murphy J. could not imagine how s. 122 could be made any wider.[161]

In s. 122 "for" means "with respect to", and it is difficult to see a legal reason for interpreting s. 51(xxvi) any differently. After all, the Constitution does not say: "The Parliament shall have power to make laws for ... the people of any race". No: the race power is governed by the same all-embracing phrase which precedes all the other grants of federal power in s. 51 of the Constitution: "*with respect to*". Wisdom in the use of the race power is a matter of morality and politics, not law.

Supporters of the Hindmarsh Proposition contend that any departure from the *RDA* is a breach of the international agreement on which it is based.[162] But this overlooks the fact that neither the *RDA* nor its parent treaty obliges the Commonwealth to adopt "special measures" in favour of Aborigines or people of any other race. Still less does it require the indefinite retention of such measures, if adopted.[163]

It appears that the Hindmarsh case will be heard in May next year.[164] In that event the Chief Justice, soon to retire, is unlikely to be involved. But in any event, the principles of apprehended bias which he and his colleagues so rightly emphasise[165] counsel him not to sit; a near relative is one of the keenest supporters of native title and is now actively promoting the Hindmarsh Proposition.[166] I say nothing of the composition of the Court in *Mabo* Mark I.

If the Bill is recognisable when it leaves the Senate it will face unpredictable litigation[167] and political turbulence. The native title lobby is probably as well funded and well-organised as any

major political party; witness the almost daily stream of media items, most of them in grievance mode -- alleged wrongs of the fathers are now the currency of the sons. How much of the residue (if any) will the High Court leave intact? Will it forge ahead regardless of expense, uncertainty and social strain or discreetly withdraw, murmuring that *Mabo* did seem like a good idea at the time?

Endnotes:

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

2. *The Australian,* 7 June, 1993: *Mabo Sparks Battle Over States' Rights.*

3. Constitution, s. 51 (xxxi).

4. *Loc. cit.,* at 75-76.

5. (1996) 141 ALR 129.

6. *Revisiting Mabo: Time for the Streaker's Defence?* in *Upholding the Australian Consitution,* Proceedings of The Samuel Griffith Society, Volume 7 (1996) 111 at 120.

7. *Federal Government's Response to the Wik Decision: The Ten Point Plan,* Canberra, 4 June, 1997 at 7, quoting an estimate of the Bureau of Resource Sciences; *Native Title Amendment Bill* 1997 (Explanatory Memorandum), p. 86.

8. (1996) 141 ALR 129 at 260 (Kirby J.).

9. See e.g., Ron Castan, *The Australian,* 10 January, 1997: *Wik Hysteria all on basis of Nothing.*

10. (1996) 141 ALR 129 at 261, 285.

11. During argument in the *Waanyi Case*, quoted in *Courier Mail,* 22 March, 1996: *Judge Criticises Court's Inaction*. *Waanyi* was a monumental waste of money which bogged down in points of procedure.

12. Second Reading speech of the Attorney-General (Williams, QC), 4 September, 1997.

13. *Courier Mail,* 20 September, 1997: *Wik Panic Swamps State with Land Claims.* ("Forty per cent of Queensland is now subject to native title claims.")

14. *The Australian,* 25 June, 1997: *High Court to Lose Liberal Judge*; *Sydney Morning Herald,* 25 June, 1997: *PM Gets Chance to Fashion New High Court*.

15. For the sake of brevity "State" includes "Territory" unless otherwise indicated.

16. *Amending the Native Title Act* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 8 (1997) 210 at 229:

"It seems unlikely that the government would brave the political passions and the righteousness, real or contrived, which [outright extinction] would provoke. A less radical step would be to define some of the essential concepts which *Mabo* and the *NTA* now leave up in the air .... an attempt might be made to define connection with the land."

17. See e.g., *Courier Mail,* 23 April, 1997: *Angry Borbidge Warns PM of Lawyers' Banquet*; *Sydney Morning Herald*, 25 April, 1997: *PM Isolated: Wik Talks End in Chaos*; *Courier Mail,* 29 April, 1997: *Talking Tough Gets Nowhere*; *Courier Mail,* 5 May, 1997: *Howard Risks Back Bench Revolt*; *Courier Mail,* 7 May, 1997: *Nationals Give Howard's Plan Nought Out of Ten*.

18. *The Ten Point Plan,* 4 June, 1997, pp. 11-12.

19. But as all compensation claims would be against federal or State governments, there would not be the same opportunities for extracting "over-award" payments which now exist in private dealings with would-be developers; consider the Century Zinc mine affair and s. 33 of the present Act, under which a settlement may include a share of profits, income or product. This cannot occur if the matter is taken to arbitration (s. 38), but a private developer may not be able to wait so long.

20. Evidently even the national Government is now in thrall to the major sports-entertainment industries. For examples of boycott threats, see *Weekend Australian,* 6-7 January, 1996: *Black Australia's Game Plan*; *The Australian,* 15 May, 1996: *Perkins warns of Sydney 2000 Turmoil*; *Sydney Morning Herald,* 19 August, 1996: *Aborigines Call for Games Boycott*; *Sydney Morning Herald*, 12 December, 1996: *Olympics Chaos Warning*; *Courier Mail,* 8 February, 1997: *Games Boycott Warning*; *The Australian,* 10 June, 1997: *Blacks No to Olympic Peace Claim*.

21. *Courier Mail,* 10 June, 1997: *Judges Must Stay Out of Politics*.

22. *The Australian,* 11 July, 1997: *How the Wik Plan Can Work*.

23. *Weekend Australian,* 25-26 July, 1997: *Don't Fence Us Out*. (Gatil Djerrkura, ATSIC chairman.)

24. *Courier Mail,* 17 May, 1997: *Howard Blasts "Wild" Wik Claims.*

25. *Weekend Australian,* 31 May - 1 June, 1997: *Pearson Admits Strategic Blunder*.

26. *Courier Mail,* 9 September, 1997: *Law Rewrite Sweeps Away Rights.*

27. *Courier Mail,* 9 October, 1997: *Native Title Forum Ends in Row Over Bias Claims.*

28. *Courier Mail,* 12 September, 1997: *ALP Push to Block Wik Plan*.

29. *The Australian,* 17 July, 1997: *Coalition Flags Referendum in Wik Impasse*; *Courier Mail,* 28 June, 1997: *Coalition Stands Firm on Native Title Law*.

30. *The Australian,* 28 April, 1997: *An Irate State Wants the Wik Word from Howard*.

31. Proposed ss. 22A-22G.

32. The Commonwealth cannot unilaterally validate acts of the States: *University of Wollongong v. Metwally* (1985) 158 CLR 447; *Western Australia v. Commonwealth* (1995) 183 CLR 373.

33. On the Second Reading of the original Bill, Prime Minister Keating stated:

"I draw attention ... to the Government's view that under the common law past valid freehold and leasehold grants extinguish native title": *CPD* (Representatives), 16 November, 1993, p. 2880.

34. "The High Court has ... held that native title is extinguished by valid government acts ... such as the grant of freehold or leasehold estates."

35. *Native Title Act* 1993, s. 47, which makes special arrangements for native title claims over pastoral leases held by the claimants. According to s. 47(2), "any extinguishment" by the granting of the lease is to be disregarded for this particular purpose.

36. *The Australian,* 4 April, 1997 (letter from Ian Donges, NSW Farmers Association, Sydney): "Noel Pearson told the Rural Press Club in November, 1993 ... I rule that out categorically because there is a facility now available for us to purchase land under the Land Fund, and to convert into native title, pastoral leases' "; *The Australian,* 15 April, 1997: *Howard Toughens Stance on Wik* (claim by Deputy PM Fischer); *The Australian,* 22 April, 1997: *Pastoralists the Biggest Losers in Wik,* quoting Mr D McDonald, National Party federal president: "Pearson's tune has changed dramatically since 1993, when he saw no purpose in litigating for native title on pastoral leases."; *Courier Mail,* 30 April, 1997: *No Room to Go It Alone in Search for Wik Solution*.

37. *Courier Mail,* 28 December, 1996: *Land Battle* (David Solomon, quoting Noel Pearson).

38. I.e., before the *Wik* decision on 23 December, 1996.

39. Proposed ss. 23A-23E, 23J, 249C.

40. Proposed ss. 23A, 23F, 23G-23J.

41. (1996) 141 ALR 129 at 141, 207-208, 218, 276.

42. *Courier Mail,* 27 September, 1997: *Native Title Claims to be Slashed by Schedule,* quoting Mr Larry Acton of the United Graziers' Association. See also *Courier Mail,* 1 October, 1997: *Farmers to Walk Away if Wik Law Altered*.

43. *The Australian,* 27 August, 1997: *National MPs Lose Wik Race to Protect Leases*. Conceivably a test case could be brought for a declaration that the leases in question are, after all, "exclusive".

44. *Courier Mail,* 27 September, 1997: *Native Title Claims to be Slashed by Schedule*.

45. Explanatory Memorandum, p. 39.

46. Supplementary Explanatory Memorandum, *Native Title Amendment Bill* 1997 at 5.

47. Proposed s. 23C(1) (b)

48. As defined in proposed s. 23B.

49. Proposed s. 23J.

50. Proposed ss. 24GA -- 24GE ("Future Acts and Primary Production"). These provisions do not enable a lease to be upgraded to freehold or to exclusive possession. Concurrence of the relevant State will usually be required.

51. Proposed s. 24GB.

52. Proposed s. 24GA.

53. E.g., to cut timber, or to remove sand, gravel or rock: Bill, s. 24GE.

54. See *Native Title Act* 1993, s. 238. (Total or partial revival of native title rights affected if and when the overriding "act" is removed.)

55. Proposed s. 44A(3).

56. Proposed ss. 44B(1), (2), (3).

57. Proposed s. 44D.

58. Proposed s. 44A(4).

59. *Weekend Australian,* 26-27 April, 1997: *Leases Already Restrict Graziers' Use of the Land*.

60. *Native Title Act* 1993, s. 213(2); proposed s. 44F.

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

62. Proposed ss. 62, 190A, 190B; and see especially s. 190B(7). Emphasis added.

63. *Mabo* (No. 2) (1992) 175 CLR 1 at 59 per Brennan J.

64. *Ibid,* at 70.

65. *Ibid,* at 110; note the qualification, "at least".

66. *Ibid,* at 188 (Toohey J.).

67. *Re Northern Territory of Australia* (1995) 119 FLR 239. See also the Federal Court in *Pareroultja v. Tickner* (1993) 42 FCR 32 at 39.

68. *Sydney Morning Herald,* 22 October, 1996: *Mine Negotiations are Dead, Says Perkins*.

69. Geoffrey Partington, *Determining Sacred Sites* (1995), *Current Affairs Bulletin,*Vol. 71, No. 5, 4.

70. *Courier Mail,* 15 January, 1997: *Missions Too Remote Says MP*.

71. *Courier Mail,* 24 April, 1997: *Time for Realism in the Wik Debate.*

72. *The Australian,* 27 March, 1997: *Wik Will Damage Nation*; *Sydney Morning Herald,* 29 March, 1997: *Strong Language in Wik Debate.*

73. *The Weekend Australian,* 28-29 December, 1996: *Title Fight* (emphasis added).

74 *Courier Mail,* 27 August, 1997: *Nats Support PM's Wik Plan.* "We don't want to have the absurd situation ..... of people who have never been on the land in 2 generations lobbing in from Inala [a Brisbane suburb] ....."

75. *Courier Mail,* 13 September, 1997: *No Easy Answers* (Gatil Djerrkura).

76. *Courier Mail,* 1 October, 1997: *Farmers to Walk Away if Wik Law Altered* (Larry Acton); see also *Courier Mail,* 13 September, 1997: *No Easy Answers* (Don McGauchie, National Farmers' Federation).

77. *Courier Mail,* 23 June, 1997: *A Mining Town in Its Death Throes*.

78. For cases in which the right to negotiate would not apply, see proposed sections 24FA (no claim lodged), 24GB (primary production extensions), 24GD (off-farm acts), 24GE (rights for third parties over leases), 24HA (management of air and water), 24IA (lease renewals, etc) , 24JA (government reservations of land or water), 24KA (public facilities), 24LA (low impact acts) , 26A (approved mining exploration) , 26B (gold and tin dredging), 26C (opals and gems), 26D (renewals of mining leases), 251C (acts within a town or city area).

79. Explanatory Memorandum, pp. 145-146, 153, 154, 158. *Native Title Amendment Bill* 1997, ss. 24EB, FA, GB, GD, GE, HA, IA, JA, KA, LA and 26A, 26B, 26C.

80. Unless "approved" (exempted) by the federal Minister.

81. An anomalous contradiction in terms -- hence the quotation marks.

82. *Native Title Act* 1993, s. 38.

83. *The Australian,* 2 May, 1997: *Rebels Support Century*; *Courier Mail,* 3 May, 1997: *New Call for Mine Package*; *Courier Mail,* 6 May, 1997: *Borbidge Set to Rule on Deal for Century Mine*; *Courier Mail,* 7 May, 1997: *Go Ahead for Mine of the Century*; *Courier Mail,* 21 July, 1997: *The Road to Respect*. The deal included substantial shares in two large grazing properties, a "positive discrimination" employment policy, the exclusion from the site of white workers who have not passed through a "cultural awareness programme", "culturally appropriate birthing facilities" and expenditure of $30 million by the State government.

84. *Courier Mail,* 17 May, 1997: *Gulf Aborigines Divided Over Century Zinc Mine Spoils*. "In the process of obtaining NT approval for the Century mine, Gulf communities have been left divided and bitter ... Much of [the initial cash payment of $2.5 million] will be absorbed in administration costs." A controversial and lucrative "consultancy agreement" was allegedly backdated for the benefit of the "consultants". On ill-controlled "consultancy" fees in this area, see e.g., *Courier Mail,* 15 April, 1995: *Police Inquiry into Blacks' Committee*; 21 October, 1996: *Perkins' Mine Deal Branded Gold Digging'*; 25 May, 1996: *Aboriginal*

Leader in Row Over $10 Million Gift'; 3 April, 1996: *Opening Pandora's Box*; 12 April, 1996: *Rort Row Puts Legal Service at Risk*.

85. *Sydney Morning Herald*, 26 July, 1997: *First Native Title Agreement Gives Go-Ahead for Gold Mine*.

86. *Cape Flattery Silica Mines Pty Ltd v. Commissioner of Taxation*, unreported, 28 July, 1997, Federal Court, Spender J. The payout was agreed under the compensation provisions of the *Mineral Resources Act* 1989 (Qld), but the court's ruling would seem to be applicable to compensation agreements made under the native title legislation as well. On this occasion the Hopevale Aboriginal Council received almost $400,000 and lawyers who arranged the deal (no litigation involved) received almost $50,000.

87. See e.g., ATSIC Social Justice Commissioner: *Native Title Report, July 1995 - June 1996*, AGPS, Canberra, 1996, pp. 18-20.

88. Bills Digest No. 51, *Native Title Amendment Bill*, Parliamentary Library, Canberra (1997) 53.

89. Explanatory Memorandum, p. 151; *Racial Discrimination Act* 1975, s. 8(1); Schedule, Article 1, para. 4 (special measures).

90. Explanatory Memorandum, pp. 151-2; Bill, s. 53.

91. Second Reading speech, 4 September, 1997; Explanatory Memorandum, p. 360. This date is the date of introduction of the 1996 Bill, which was intended to operate from that time.

92. *Maxwell v. Murphy* (1957) 96 CLR 261 at 267; *Cardile v. Nominal Defendant (Qld)* (1978) Qd R 132.

93. Proposed ss. 26A, 26(2)(b), 26(2) (d), 26(2) (e), 26B and 26C.

94. Proposed s. 190A(3). This would get over one difficulty created by the *Waanyi* decision, *loc. cit.*.

95. Explanatory Memorandum, pp. 148, 153, 154.

96. E.g., when seeking a "retention lease" for a deposit not yet commercially viable.

97. Explanatory Memorandum, p. 149.

98. Proposed ss. 35, 36.

99. Proposed s. 36A.

100. *Native Title Amendment Bill* 1997, ss. 26(2) (e) , 26D. Query the position if authority were given to mine different or additional kinds of minerals.

101. Explanatory Memorandum, p. 101.

102. J R Forbes, *Mabo and the Miners* in Stephenson & Ratnapala (eds), *Mabo: A Judicial Revolution,* University of Queensland Press (1993) 206 at 211.

103. P Keane, *The Ramifications of the Wik Decision* in *Refresher* (Journal of the Queensland Bar Association), June, 1997, No. 53 at 15. (Mr Keane appeared as counsel on the *Wik* appeal as Solicitor-General for Queensland.)

104. Indigenous land use agreements, area agreements and alternative procedure agreements.

105. See e.g., *Courier Mail,* 23 March, 1994: *Aboriginal Leader Calls for Mine Joint Ventures*; *The Australian Financial Review,* 18 September, 1995: *How to Make Native Title Work* (Noel Pearson).

106. *The Australian,* 11 February, 1993: *How to Kill the Golden Goose*; *Sunday Mail* (Brisbane), 7 March, 1993; ABC Television, 9 October, 1995 (Gordon versus Pearson); *Sunday Mail* (Brisbane), 7 April, 1996: *Aboriginal Bureaucrat Under Fire*; *Sydney Morning Herald,* 12 April, 1996: *Splinter Group Seeks Native Title*; *Courier Mail,* 27 August, 1996: *Native Title Claim over Hinchinbrook* ("Aboriginal groups around Queensland highlighted their concerns about the operation of native title representative bodies at the federal parliamentary joint committee."); *Majar v. Northern Land Council* (1991) 37 FCR 117.

107. Cf. J R Forbes, *Mabo and the Miners -- Ad Infinitum?* in M A Stephenson (ed.), *Mabo: The Native Title Legislation,* University of Queensland Press (1995), 49 at 53: "Bureaucratic nature being what it is, it will not be surprising if an oligopoly of native title brokers commends itself to the central government."

108. Second Reading speech, 4 September, 1997.

109. Explanatory Memorandum, p. 324.

110. Explanatory Memorandum, pp. 314-315; proposed s. 203FE.

111. Explanatory Memorandum, p. 313.

112. Explanatory Memorandum, p. 314.

113. J R Forbes, *Revisiting Mabo: Time for the Streaker's Defence?* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 7 (1996), 111 at 133, note 55.

114. ATSIC, *Proposed Changes to the Native Title Act 1993: Issues for Indigenous Peoples*, November, 1996, p. 28.

115. *Courier Mail*, 17 May, 1997: *Gulf Aborigines Divided Over Century Zinc Mine Spoils.*

116. *The Australian,* 11 August, 1997: *Uranium Millions fail to Help Aborigines.*

117. ABC Radio, *PM*, 3 October, 1997. Transcribed from audiotape.

118. *Weekend Australian*, 4-5 October, 1997: *Mediator Quits to Fight Wik Plan*; *Sydney Morning Herald*, 4 October, 1997: *Tribunal Member Quits in Wik Protest*.

119. J R Forbes, *Revisiting Mabo: Time for the Streaker's Defence?* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 7 (1996), 111 at 118.

120. *The Australian Financial Review*, 13 June, 1997: *Flood Stands Down After Attacking PM's Wik Plan.*

121. *Courier Mail*, 4 April, 1997: *$180,000 Fee for Failed Mine Mission*.

122. J R Forbes, *Revisiting Mabo: Time for the Streaker's Defence?* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 7 (1996), 111 at 116-117.

123. Proposed Schedule 5, clause 18.

124. This does not mean that every native title will be treated as equivalent to freehold: Explanatory Memorandum, p. 226.

125. See e.g., *Re Minister for Mining and Energy of WA: Future Act Appln WF 96/11-11*, Native Title Service [100,046] at p. 52,074: "It is possible to envisage that the assumed freehold value of a small area of vacant Crown land in a remote location could be much less than [proper] compensation."; *Re Minister for Mining and Energy of WA: Future Act Appln WF 96/3 and WF 96/12*, Native Title Service [100,048] NNTT, Perth, 17 July, 1996 (Sumner, O'Neil and Neate, Members): "... Aboriginal people can be compensated for such things as being unable to complete initiation rites, inability to gain and enjoy full tribal rights ... inability to partake in matters of spiritual and tribal significance."

126. Proposed s. 50 (2A)

127. *Native Title Act* 1993, s. 81.

128. *Native Title Act* 1993, s. 13 (3); proposed s. 207B.

129. See *Australian Broadcasting Tribunal v. Bond* (1990) 170 CLR 1.

130. J R Forbes, *Proving Native Title* in *Upholding the Australian Consitution*, Proceedings of The Samuel Griffith Society, Volume 4 (1994) 31 at 42 ff; *Revisiting Mabo: Time for the Streaker's Defence?* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 7 (1996) 111 at 112 ff; *Amending the Native Title Act* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 8 (1997) 210 at 224 ff.

131. *Native Title Act* 1993, ss. 82, 83, 86.

132. Such as special-gender courts and "restricted" evidence: *State of Western Australia v. Ben Ward and Ors*, unreported, 8 July, 1997, Fed Ct (Full Ct).

133. Proposed s. 82(1).

134. At any rate where onshore areas are concerned.

135. *Western Australia v. The Commonwealth* (1995) 183 CLR 373 at 487, declaring s. 12 of the present *NTA* invalid.

136. Constitution, s. 51 (xxvi), upon which the current amendments are largely based: *Western Australia v. The Commonwealth* (1995) 183 CLR 373: "The Parliament shall have power to make laws ... with respect to the people of any race for whom it is deemed necessary to make special laws".

137. (1997) 71 ALJR 767, a single-judge decision of Kirby J.

138. *Kruger v. The Commonwealth*, High Court, 31 July, 1997.

139. Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 622; Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd edn, 1910) 462; R R Garran, *Prosper the Commonwealth*, Angus & Robertson, Sydney (1958) 54-55, 149-150; G Sawer, *The Australian Constitution and the Australian Aboriginal* (1966-67) 2 *Federal Law Review* 17, 18-25; Michael Coper, *Encounters with the Australian Constitution*, CCH Australia (1988) at 28 (albeit reluctantly); P H Lane, *Commentary on the Australian Constitution*, Law Book Company (1986) 188-189.

140. *National Australasian Convention Debates*, Adelaide (1897) 832. See also Griffith's views on undesirable immigration in *National Australasian Convention Debates*, Sydney (1891) at 703. "The [first federal] election in Queensland had been fought as a referendum on the coloured labour question ...": C M H Clark, *A History of Australia*, Volume V, p. 194. Section 51 (xxvi) was mentioned as one basis for the deportations under the *Pacific Islands Labourers Act* 1901 (Cth) in *Robtelmes v. Brenan* (1906) 4 CLR 395 at 415.

141. Enabling it to be used in relation to Aborigines as well as other races.

142. *Australian Federal Government* (1967) 225.

143. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168.

144. *Commonwealth v. Tasmania* (1983) 158 CLR 1.

145. Interestingly enough, the *Racial Discrimination Act* offers no definition of race. The opponents of the present legislation rely upon section 10 of that Act:

"If by reason of ... a law of Australia or of a State persons of a particular race ... do not enjoy a right that is enjoyed by persons of another race .... or enjoy a right to a more limited extent ... then, notwithstanding anything in that law, [they] ... shall, by force of this section, enjoy that right to the same extent .....".

There is no doubt that Aborigines are a "race" for the purposes of s. 51 (xxvi): *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 at 186; *Commonwealth v. Tasmania* (1983) 158 CLR 1 at 180, 243, 273, 318.

146. (1982) 153 CLR 168 at 186.

147. *Ibid*, at 209.

148. *Ibid*, at 244.

149. *Courier Mail*, 18 October, 1997: *Government Admits Wik Laws Will Go Before Court*.

150. In s. 51 (xxvi) of the Commonwealth Constitution.

151. (1982) 153 CLR 168 at 242.

152. *Commonwealth v. Tasmania* (1983) 158 CLR 1 at 158.

153. (1983) 158 CLR 1 at 273, emphasis added.

154. *Tasmanian Dam Case* (1983) 158 CLR 1 at 242.

155. *South East Drainage Board v. Savings Bank of South Australia* (1939) 62 CLR 603.

156. "7(1) Nothing in this Act affects ... the *Racial Discrimination Act* [but] ... (2) Subsection (1) does not affect the validation of past acts by or in accordance with this Act."

157. *Native Title Act* 1993, ss. 14-20.

158. Cf. *Koowarta* (1982) 153 CLR 168 at 242 per Murphy J.

159. "The Parliament may make laws *for* the government of any territory ..." (emphasis added).

160. *Spratt v. Hermes* (1965) 114 CLR 226 at 242 per Barwick CJ. See also *Attorney-General for WA; ex rel Ansett Transport Industries (Operations) Pty Ltd v. Australian National Airlines Commission* (1976) 138 CLR 492 at 504 and 512.

161. (1976) 138 CLR 492 at 531.

162. *International Convention on the Elimination of All Forms of Racial Discrimination*. And see (Cth) Parliamentary Joint Committee on Native Title, Hansard record, 24 September, 1997, p. 248.

163. *RDA*, s. 8(l); Schedule, Article 1, paragraph 4.

164. *Courier Mail*, 2 October, 1997: *Law Experts Tear Down 10 Point Plan on Wik*.

165. *Stollery v. Greyhound Racing Control Board* (1972) 128 CLR 509; *R v. Watson; ex parte Armstrong* (1976) 136 CLR 258; *Livesey v. NSW Bar Association* (1983) 151 CLR 288.

166. *Weekend Australian*, 6-7 September, 1997: *Power of Race* (Bernard Lane).

167. *Courier Mail*, 18 October, 1997: *Government Admits Wik Laws Will Go Before Court*.