Dispossession by the National Native Title Tribunal

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*The National Native Title Tribunal ('NNTT') was supposed to be a just and informal body that would facilitate the determination of native title and ensure that, whatever the sorry past, future grants would be made in a context that afforded equality to Aboriginal people. The administration by the NNTT of the future act process and the right to negotiate is critical to ensuring such equality. But to date the NNTT has failed dismally in its role. It is only judicial correction of the NNTT's errors by the Federal Court and the High Court that has prevented that body from becoming a mere facilitator of pre-*Mabo *style dispossession.*

THE National Native Title Tribunal ('NNTT') was originally envisaged both by the Commonwealth and by Aboriginal organisations as an informal and relatively non-adversarial body which would be empowered to determine claims to native title.[1] But the NNTT is not such a body. Its principal function is the administration of the 'future act regime'. It has no power to determine native title in the absence of agreement.

This paper seeks to explain the role of the NNTT. In order to do so it examines the perceived limits of protection of native title and the hostility of the States and industry which shaped the denial of native title by the Native Title Act 1993 (Cth). It examines the early decisions of the NNTT. They have further undermined the limited protection conferred by the Act on native title. It reviews the Coalition government's proposed amendments to the Act. They would further limit that protection. It is concluded that the NNTT operates more so as to dispossess Aboriginal people of native title than to provide for its settlement. In doing so both the Act and the NNTT are failing to meet the demands of equality before the law. A

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1. R Bartlett 'Post-Mabo: The Hard Road to Settlement in Australia' (1993) 4 Can Nat L Rep 1.

paradoxical conclusion of the paper is that the courts are proving to be much more prepared to protect and respect native title than the NNTT.

THE NATURE OF THE NATIVE TITLE ACT 1993 (CTH)

1. Perceived limits of protection of the Racial Discrimination Act 1975 (Cth)

The 1992 decision in *Mabo v Queensland (No 2)*[2] adopted much of the North American jurisprudence which originated in *Johnson v McIntosh*[3] in the US Supreme Court in 1823. 'Native title' is founded upon the traditional connection of an Aboriginal community to territory at the time of the acquisition of British sovereignty. But at common law it is subject to extinguishment without consent or compensation. Chief Justice Marshall explained that result as determined by pragmatic considerations. The High Court of Australia in its 4-3 decision in *Mabo (No 2)* adopted the result but without explanation. The result of the decision in Australia was to validate the dispossession without the consent of, or compensation for, Aboriginal people from 1788 until the passage of the Racial Discrimination Act (Cth) in 1975.

Recognition of the vulnerability of native title[4] and its unique character and significance to indigenous peoples led in the United States and Canada to the granting of special protection. The protection initially took the form of the conferment of exclusive jurisdiction on the Federal governments and denial of jurisdiction to the States and Provinces. The States and Provinces could not unilaterally extinguish Aboriginal title, although Federal governments could. In both countries the Federal governments implemented national policies requiring the settlement of native title by consent, in the form of treaty or agreement.[5] Latterly, Canada has constitutionally entrenched Aboriginal rights, including native title, in section 35 of the Constitution Act 1982. The requirement of consent to the extinguishment of Aboriginal title after 1982 is now constitutionally entrenched. The rationale of the protection focuses upon the uniqueness of the title. It recognises the history of dispossession and the limited rights remaining to the Aboriginal people.

In Australia, the Racial Discrimination Act 1975 (Cth) provides the fundamental protection conferred upon native title. The protection is that of a guarantee of genuine equality before the law, but only after 31 October

2. (1992) 175 CLR 1.
3. (1823) 21 US (8 Wheat) 543.
4. UKHC Select Committee *Report on Aborigines (British Settlements)* (1837) Brit Parl Papers, Vol 2, 77.
5. R Bartlett 'Native Title: The North American Experience' (1994) Aust Mining & Petroleum Law Yearbook 85.

1975. In *Mabo (No 1)*[6] in 1988 the High Court held that the effect of Queensland legislation enacted in 1985 was to deny equality before the law to the Miriam people with respect to the right to own property. Brennan, Toohey and Gaudron JJ explained:

> By extinguishing the traditional legal rights, characteristically vested in the Miriam people, the 1985 Act abrogated the immunity of the Miriam people from arbitrary deprivation of their legal rights in and over the Murray Islands. The Act thus impaired their human rights while leaving unimpaired the corresponding human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Miriam people.[7]

The Miriam people enjoyed their human rights of ownership and inheritance of property to a 'more limited' extent that others who enjoyed the same human rights.[8] The Court expressly recognised that the traditional interests asserted by the Miriam people were interests which could not be asserted by others but concluded that their abrogation constituted a denial of equality before the law.[9] It was thus clear that equality did not mean uniformity. 'True equality of treatment requires that artificial and irrelevant distinctions be put aside, but that distinctions which are genuine and relevant be brought into account'.[10]

It is suggested that the 'genuine and relevant' distinctions which need to be brought into account with respect to native title include the unique relationship of Aboriginal people to land, the history of arbitrary dispossession from that land, and the limited amount of land to which native title survives. Such recognition of the nature of native title would suggest that unique forms of protection for native title are necessary to provide equality before the law. The United States and Canada have, of course, proceeded on that understanding since European settlement. The High Court appeared to support such understanding in *Western Australia v The Commonwealth*[11] in upholding the right to negotiate provisions[12] of the Native Title Act.

The Commonwealth, at the time of the enactment of the Native Title Act, did not have a clear view of the demands of the Racial Discrimination Act 1975 (Cth). In the June 1993 Discussion Paper on *Mabo* the Government

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6. (1988) 166 CLR 186.
7. Id, 218.
8. Ibid.
9. Id, Deane J, 231-232.
10. M Gaudron *Equal Rights and Anti-Discrimination Law* (Canberra: ACT Law Soc, 1992).
11. (1995) CLR 373.
12. Even the WA State Premier has recently recognised the requirement. Richard Court has declared: 'The right to negotiate is a very important part of the Native Title Act and it ensures that Aboriginal people can protect their native title rights, and these cannot be taken away when the governments want to use land for another purpose without their involvement': see 'Title Act Puts Progress on Hold' *The Australian* 3 June 1996, 13.

was uncertain as to the requirements of equality with respect to rights of negotiation and consent.[13] In the preamble to the Native Title Act the right to negotiate is described as 'special' in the context of the need for the common law rights of native title holders 'to be significantly supplemented'. The Act itself is described as a 'special measure' within the meaning of the International Convention on the Elimination of All Forms of Racial Discrimination and the Racial Discrimination Act 1975.

The demands of equality before the law do not require 'special measures'. But the perception of the Commonwealth as to the limits of the demands of equality before the law limited the protection conferred upon native title by the Native Title Act and set the framework for the role of the NNTT as an instrument of dispossession.

2. Hostility of State governments and industry

The other constraining element in the legislative response by the Commonwealth was the intense hostility of State governments and industry. Both sought generally to deny native title and to subordinate it to all other titles and development.[14] They sought to stand the concept of equality upon its head and to assert that native title and the Native Title Act were racist and discriminatory. They followed the pattern of earlier political battles in Western Australia which the State and the mining industry had won.

In 1980, the then Premier of Western Australia, Sir Charles Court, declared:

> The land of Western Australia does not belong to the Aborigines. The idea that Aborigines, because of their having lived in this land before the days of white settlement, have some prior title to the land which gives them a perpetual right to demand tribute of all others who may inhabit it, is not consistent with any idea of fairness or common humanity. In fact, it is as crudely selfish and racist a notion as one can imagine. Nor is it an idea which has ever accorded with the law of this nation.[15]

Following *Mabo (No 2)* the mining industry and the State maintained such opposition.

In 1993 the mining industry campaigned against the Federal Native Title Act without any regard for the history and relationship to land of the Aboriginal people prior to European settlement. In the national campaign one of the industry's advertisements asked: 'Is this really one Australia for all Australians?' The advertisement declared:

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13. Cth Parliament *Mabo: The High Court Decision on Native Title* (Canberra: Govt Printer, 1993) ¶¶ 7.1, 7.6-7.10, 7.13-7.14
14. R Bartlett 'Political and Legislative Responses to Mabo' (1993) 23 UWAL Rev 352.
15. Letter to Mr DW McLeod (Perth, 3 Nov 1980) cited in R Bartlett 'Aboriginal Land Claims at Common Law' (1983) 15 UWAL Rev 293, following a dispute at Nookanbah in the North West in which a police escort was used to enable oil drilling at a sacred site.

> The Australian Mining Industry is not opposed to Aborigines being granted titles.... But we believe all Australians should have the same rights over these titles. The Australian Mining Industry supports the same land rights for all Australians.[16]

The advertisement essentially asserted that native title promoted inequality. It recognised only the legitimacy of title granted by the Crown after European settlement and not the rights of Aboriginal people to whatever residual traditional land was left to them arising from their relationship to the land prior to that time.[17] A state mining industry campaign against the Native Title Act and the Commonwealth legislation was to similar effect. Under the heading '*Mabo*: protect your children's future' it urged that 'all Australians must be equal', rejected 'special rights and privileges based on race' and called for the restoration of the 'principle of equality'.[18]

The State government campaigned in support of its legislation in a similarly deceptive manner proclaiming that it was 'a fair solution to *Mabo* for all Western Australians' in leaflets distributed to every household in the State. It advertised to the same effect, in newspapers.[19]

THE DENIAL OF NATIVE TITLE BY THE NATIVE TITLE ACT

1. Validation of dispossession by past grants

The hostility of State governments and industry and the perceived constraints of the protection conferred by the Racial Discrimination Act shaped the Native Title Act. State governments and industry demanded and got validation of all existing interests. The Act enables the validation of (ie, it gives 'full force and effect' to) Crown grants made before 1 January 1994, where the invalidity arose from the existence of native title. The validation affects grants made after the coming into effect of the Racial Discrimination Act 1975 and thereby completes the legitimation of the dispossession of Aboriginal people up until 1 January 1994. The back-dating of the Racial Discrimination Act so as to require equality before the law prior to 1975 was never considered by any government. A retroactive equality before the law for those who could prove a sufficient connection with the land up until extinguishment without consent or compensation was never contemplated.

16. *The West Australian* 14 Aug 1993, 7.
17. Other advertisements in the series stressed the economic woes the court's decision might give rise to and the national identity of Australians: 'If we get *Mabo* wrong, we'll all lose again' *The West Australian* 6 Aug 1993, 19; 'We've found the solution to *Mabo* Australians have been looking for' *The West Australian* 17 Aug 1993, 26.
18. Assoc of Mining and Exploration Companies *Mabo – Protect Your Children's Future* advertising pamphlet (Leederville, WA: GMA/AMEC, Oct 1993).
19. *The West Australian* 6 Nov 1993, 23.

Rather, freehold grants, all leases other than mining leases, and public works were taken to have extinguished native title[20] where they lacked 'full force and effect' on account of the existence of native title. Mining dispositions and other past grants were given 'full force and effect' but not so as to extinguish native title; rather native title was suspended to the extent of inconsistency.[21]

Compensation is payable where native title is overridden after 1975 and would have been payable if the native title holders instead held 'ordinary title' (ie, freehold title — 'the similar compensable interest test').[22] The compensation is payable by the Government to whom the act is attributable.[23] The 'similar compensable interest test' and the meaning of 'ordinary title' are the responses made to the protection conferred by the Racial Discrimination Act 1975. But, of course, the overriding of native title without any due process or consent and the priority thereby accorded all other interests can hardly be considered to constitute equality before the law. The Act accordingly expressly provides that the operation of the Racial Discrimination Act 1975 does not affect the validation of past acts.[24]

The process does not contemplate any negotiations or agreement with respect to the validation of past grants. It removes a significant element, that is, the giving effect to existing interests, from the negotiations that might otherwise occur with respect to the determination of native title and the management and governance of native title land. The *only* role of the NNTT in the validation of past grants is the mediation of compensation.

2. Consensual determination of native title by the NNTT

The NNTT has two primary roles: (i) the mediation of native title and compensation; and (ii) the administration of the future act regime. Aboriginal parties sought a body such as the NNTT to enable a more just and informal determination of native title. The preamble to the Act accordingly declares that 'A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character'. And indeed the Act requires determination of native title and compensation to be made in a 'fair, just, economical, informal and prompt way'.[25] Nor is the NNTT 'bound by technicalities, legal forms or rules of evidence'.[26] *But* the powers of the NNTT to determine

20. NTA s 15.
21. NTA ss 15(1)(d), 238, 242(2), 245(1).
22. NTA ss 17(2), 240.
23. NTA s 17(4).
24. NTA s 7(2).
25. NTA ss 61, 109.
26. NTA s 109. The Federal Court has upheld non-technical interpretations with respect to

native title are essentially grounded in consensual conduct or mediation. It cannot determine native title except by agreement. Since the negotiation positions of the parties depend upon the future act regime, it is the administrative role of the NNTT in that regime which is much more significant. Indeed it might be said that the significant role of the NNTT is not the part it plays in the determination of native title, but rather the overriding of native title under the future act regime.[27]

The NNTT can only determine native title where an application is unopposed and it is 'just and equitable in all the circumstances',[28] or where there is an agreement between the parties if 'appropriate in the circumstances'.[29] The NNTT must hold an inquiry before making such a determination.[30] If the application is opposed and no agreement is reached the application is referred to the Federal Court for determination.[31] The Federal Court is the body which is empowered to make a determination of native title where the parties cannot agree. In any event all determinations of the NNTT are subject to review by the Federal Court[32] as to 'all issues of fact and law'.

Applications for determination of native title may be made not only by a claimant, but also by a government or a person holding an interest in the whole of the area.[33] An application may accordingly be brought by a developer holding a mining tenement or other interest in the area. If such a non-claimant application is unopposed, any future act by any person, before a determination of native title, is valid and overrides native title.

3. Overriding native title in the future act regime

(i) Overriding native title

The future act regime reflects the Commonwealth's perception of the concept of equality before the law under the Racial Discrimination Act 1975.

Only 'permissible future acts' have full force and effect with respect to native title.[34] Future acts are 'permissible' if the legislation applies in the same way, or the act could be done in relation to the lands or waters if the

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the requirements for an application 'in harmony with these mandates': see *NT v Lane* (unreported) Fed Ct 24 Aug 1995 no DG6001; *WA v Lane* (unreported) Fed Ct 24 Aug 1995 no WAG112 O'Loughlin J, 7; *Kanak v NNTT* (1995) 132 ALR 329, 348-349.

27. It is proposed by the government that the power of the NNTT to determine native title be removed in a response to the High Court decision in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 which suggested the constitutional invalidity of the power.

28. NTA s 70.
29. NTA ss 71, 73.
30. NTA ss 139, 160.
31. NTA ss 74, 81.
32. NTA s 168.
33. NTA s 61(1).
34. NTA ss 22, 23.

native title holders held 'ordinary title'.[35] An example in the Act is 'a grant of a mining lease over land in relation to which there is native title when a mining lease would also be able to be granted over the land if the native title-holders instead held ordinary title to it'.[36] The thrust of the Act, onshore, is to confer the same protection from overriding Crown grants upon native title that is conferred upon freehold. The analogy gives rise to the non-extinguishment principle and the entitlement to compensation.[37] Compensation is payable under the 'similar compensable test'.

Generally only mining dispositions override freehold and hence native title. Other dispositions can only issue over freehold land following compulsory acquisition. In such circumstances of grants of mining dispositions or compulsory acquisition in order to confer an interest on a third party there is no requirement of consent by native title holders. Rather the Act provides for a 'right to negotiate' for native title holders. The Government party must give all native title parties an opportunity to make submissions and must negotiate in good faith with the native title parties and grantee parties with a view to obtaining the agreement of native title parties to the doing of the act and any conditions to be attached thereto.[38]

The requirement to negotiate in good faith requires that the parties make a 'sincere effort ... to reach common ground.' As Professor Archibald Cox of Harvard University has explained:

> Initially it may only be the fear of the ... consequences of disagreement that turns the parties to facts, reason, a sense of responsibility, a responsiveness to government and public opinion, and moral principle; but in time these forces generate their own compulsions, and negotiating a contract approaches the ideal of informed persuasion.[39]

But excepted from the limited right to negotiate are all off-shore grants and those which do not:

- directly interfere with community life; or
- interfere with areas or sites of particular significance; or
- involve major disturbance to any land or waters.[40]

The NNTT must determine if the grant qualifies for such 'expedited procedure'.[41]

Six months, or four months in the case of exploration tenements, is allowed to reach an agreement.[42] If agreement is not reached a determination whether or not the grant may issue or act may be done, and under what conditions, may be sought from the NNTT.[43] The determination must be

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35. NTA s 235.
36. NTA s 235(6).
37. NTA s 23(3)(4).
38. NTA s 31.
39. A Cox 'Duty to Bargain in Good Faith' (1957) 71 Harv L Rev 1401, 1409.
40. NTA ss 32, 237.
41. NTA s 32(4).
42. NTA s 35.
43. NTA s 38.

made within six months (four months in the case of exploration tenements).[44] The NNTT is required to take into account: the effect on native title; the way of life and culture of the title holders; the development of social, cultural and economic structures; the preservation of sacred sites and the preservation of the natural environment; the interests and wishes of the titleholders; the economic and other significance to Australia and the State or Territory; the public interest; and any other matter the NNTT considers relevant.[45] But the Tribunal does not make the final decision. Even if it concludes that a grant should not issue and thereby override native title, the determination of the NNTT may be overruled by the Commonwealth Minister if considered to be in the national, State or Territory interest.[46]

(ii) The undermining of the negotiating position of native title holders

In the result the NNTT contemplates determinations of native title derived from agreement and mediation but finds itself in a framework that severely undermines the negotiating position of the Native title holders or claimants. This is shown by:

(a) The validation of the dispossession of Aboriginal people by past grants from European settlement until 1 January 1994 is excluded from negotiations.
(b) There is no requirement of consent by native title holders to future grants over their land. They possess merely a limited right to negotiate.
(c) The off-shore is excluded from the right to negotiate. All grants in the off-shore are 'permissible future acts'.
(d) The ambit of the 'expedited procedure' excludes many grants from the right to negotiate.
(e) The Minister has the power to override NNTT determinations as to whether or not a grant may issue.
(f) Compensation: The Act declares that the *same* 'principles or criteria' applied to freehold be applied to assess compensation for native title. Principles designed to measure freehold do not necessarily accommodate native title, and may only give effect to a notion of a 'limited' content and fail to recognise the unique *status* of native title and its significance for Aboriginal people.

Underlying the difficulties of the NNTT is the focus of the Act upon the piecemeal. The Act contemplates negotiations and/or compensation with respect to each grant. Within the framework of such limited negotiations it is much more difficult to compromise issues such as:

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44. NTA s 36. 45. NTA s 39. 46. NTA s 42.

- the area of land subject to a native title claim;
- the identity of native title holders; and
- the rights of native title holders as to (i) ownership of land and resources, (ii) management of land and resources and (iii) local and regional government.

The regime does not readily accommodate negotiations which allow for the kind of comprehensive settlements which can provide linkage between the traditional rights of holders of native title and Aboriginal ownership and participation in contemporary development.

In the result the undermining of the rights of native title holders and their negotiating position by the Act renders the task of the NNTT in securing consensual determination of native title truly formidable. It is likely that the Federal Court, rather than the NNTT, will become the body that determines whether native title exists or not. The principle task left to the NNTT will be the determination whether native title, if it exists, should be overridden by a grant. The NNTT, in such a framework, appears to be much more of an instrument of dispossession of native title rather than an instrument for its recognition or implementation.

A CONSERVATIVE TRIBUNAL WHICH FAVOURS CERTAINTY AND DEVELOPMENT

The foregoing account of the legal and political context in which the Native Title Act was enacted and the analysis of the Act itself has endeavoured to explain the likely limited significance of the NNNT in settling indigenous claims. To date that suggestion has been borne out. After $2^{1}/_{2}$ years of operation there has been not a single determination of native title in favour of claimants. The President of the Tribunal has observed, 'In every application, the relevant State or Territory government is a party and can effectively veto the making of any determination'.[47]

There have been several non-claimant applications which have succeeded in securing a determination of the *non*-existence of native title.[48]

But the problems of the NNTT have been compounded by its early decisions and determinations. Four notions seem to lie behind these decisions:

- certainty should be provided as quickly as possible;
- the right to negotiate is not significant;

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47. R French *Discussion Paper on Proposed Changes to Native Title Act* (14 March 1995) 3.
48. *DW and DJ Clarkson* (unreported) NNTT 4 Oct 1994 no QN 94/1, Flood (member); *Yass Shire Council* (unreported) NNTT 5 Oct 1994 no NN 94/2, Flood (member); *CSR Ltd* (unreported) NNTT 28 Oct 1994 QN 94/3, Chaney (member).

- non-Aboriginal development and settlement must proceed as quickly as possible; and
- native title is a radical change and accordingly 'conservative' interpretations of its principles should be adopted.

All have the effect of undermining possibilities for negotiation and mediation, and all suggest a much greater regard for the rights of the 'broader community' than those of native title holders.

1. The Waanyi cases

The case which best exemplifies these concerns is the *Waanyi Peoples Native Title Determination Application*.[49] The Waanyi Peoples made an application for a determination of native title over a Crown reserve which had previously been the subject of a pastoral lease. The land is the site of a proposed lead-zinc mining operation. The application was opposed by the State and the mining companies. The decision of the President of the NNTT afforded a surprising early victory to the miners. The President declared that the application should not even be accepted for negotiation and mediation. The President ruled that the applicants could not even make out the prima facie claim necessary to register a claim and accordingly rejected the application pursuant to section 63 of the Native Title Act.

In *Waanyi (No 1)*[50] the President ruled that a prima facie claim is made out when 'evidence exists or can be obtained which is capable of establishing each of the elements of native title'. This was then qualified by the view that on questions of law 'it *is not sufficient to conclude that the question is arguable* and that on that basis a prima facie claim exists. If there is an issue of law which in the view of the Presidential Member is fatal to the application that should be resolved at the threshold'.[51] Such an interpretation would appear inconsistent with the language of section 63 and authoritative interpretations of 'prima facie'. Further, this interpretation undermined the mediation function of the NNTT.

Native title claims involve a myriad of issues uncertain in law and fact. Final determinations at a stage prior to negotiation reduce possibilities for compromise, severely weight the process against the claimant and encourage litigious obstruction by third parties. The ruling turned the Tribunal into a court providing for determination of preliminary matters. Such was not the Tribunal's function. None of the authorities cited by the President or relied upon by the mining companies supported the Tribunal's interpretation. It was also at odds with the authority which seems most apposite: *Re Paulette*.[52]

49. *Waanyi Peoples* (unreported) NNTT 14 Feb 1995 no QC94/5, French J.
50. (1995) 129 ALR 100. 51. Id, 115 (emphasis added).
52. (1973) 6 WWR 97, subsequently cited in *North Ganalanja Aboriginal Corporation (on behalf of Waanyi People) v Qld* (1996) 135 ALR 225, Kirby J 264.

In that case the Dene people of the Canadian Northwest Territories sought to file a caveat for unextinguished native title over 400 000 square miles of land. The court upheld that right. The court found a prima facie case despite the existence of a treaty under which the Dene purported to surrender their title. The court considered that the Dene had a prima facie case (ie, an arguable case) and the result has been the negotiation of comprehensive regional agreements over the region.

Shortly after the decision in *Waanyi (No 1)* the President declared that an 'inflated importance' was attached to the right to negotiate[53] by both 'indigenous and non-indigenous sides'. The President went on to recommend an amendment to the Act that any party should be able to apply to the Federal Court at any time to have questions of law or fact, which could assist resolution of matters in mediation, resolved at that point in the process. The recommendation was accepted by the Labor and Coalition government and amounts to a legislative endorsement of *Waanyi (No 1)*. The decision in *Waanyi (No 1)* undercut what limited role was left to the NNTT under the Native Title Act, and the statutory amendment will affirm that limited role.[54]

The President adopted the same analysis in *Re Wadi Wadi Peoples Native Title Application*[55] in directing the rejection of a claim founded in part on the argument that grants which might be considered to have otherwise extinguished native title were issued in breach of the Crown's fiduciary obligation. After a lengthy analysis, which in itself revealed that the proposition was certainly arguable, the President formed a concluded view to the contrary and accordingly denied the existence of a prima facie claim.

The suggestion that the NNTT regards native title as a radical change and believes that its principles should be given a 'conservative' interpretation is exemplified by *Waanyi (No 2)*.[56] The question of whether pastoral leases granted in the past extinguished native title is of critical significance to claims in Australia. In *Waanyi (No 2)* the President held that native title had been extinguished:

(a) By the grant of a pastoral lease where none issued, even though '*had* a lease issued ... it would have contained a reservation' of free access to the Aboriginal inhabitants for the purposes of sustenance. Such a reservation was part of the standard form used in leases at that time.

The President was prepared to uphold the validity of a lease where none in fact issued, but not to imply a term which was part of the standard form of leases at that time.

(b) By the issue of a new pastoral lease, in November 1907, backdated to

53. French supra n 47, 10.
54. Id, 13; Native Title Amendment Bill 1996 cl 49.
55. (1995) 129 ALR 167.
56. (1995) 129 ALR 118.

July 1904, albeit the claimed area had been proclaimed as a reserve and thereby excluded in June 1907.

Absent from the President's determination in *Waanyi (No 2)* was any reliance on the principle that the onus of showing that a 'clear and plain' intention to extinguish lies upon those asserting extinguishment. The weight of common law authority was clear prior to *Waanyi (No 2)* and it has since been affirmed in the High Court decision in *Western Australia v The Commonwealth.*[57] The history of land tenure surrounding the reserve would seem unlikely to discharge the onus of showing a 'clear and plain intention' to extinguish native title.

The decisions in *Waanyi (No 1)* and *(No 2)* resulted in a refusal to even register a claim which the common law under its processes might ultimately sustain. The requirement of showing a prima facie case was transmuted into a need to succeed upon all important questions of law before a claim was even registered. In *Waanyi,* the threshold of registration was raised even higher because of the failure to acknowledge and apply the onus with respect to the 'clear and plain intention' to extinguish. Yet in the conclusion of his judgment in *Waanyi (No 2)* the President sought to avoid responsibility for this conservative approach to native title by criticising the moral shortcomings of the principles of native title.

The President's ruling was reminiscent of the conservative and restrictive approach adopted in the early years of the Indian Claims Commission in the United States. A subsequent chairman of the Commission commented that it had focused on a 'narrow' interpretation of the law and failed to 'actively encourage the settlement of the claims'. He added: 'The Commission has chosen to sit as a court and as a result: the Congressional mandate has been utterly frustrated'.[58]

An appeal in *Waanyi (No 1)* and *(No 2)* was heard by the High Court in February 1996. From the Bench, without reserving its decision, the unanimous High Court overturned the determination and rejected the analysis of the President of the NNTT which had deprived the Waanyi of the right to negotiate.[59] The High Court rejected the NNTT's view of a prima facie claim, but did not comment on the issue of extinguishment by grant of a pastoral lease preferring to maintain the potential for negotiation. The High Court stressed the significance of the right to negotiate. It is not a 'windfall accretion' to the claimant's

57. Supra n 11.
58. J Vance 'The Congressional Mandate and the Indian Claims Commission' (1968) 45 North Dak L Rev 313, 335.
59. *North Ganalanja Aboriginal Corp* supra n 52.

rights:

> If the claim is well-founded, the claimant would be entitled to protection of the claimed native title against those powers and interests which are claimed or sought by persons with whom negotiations might take place under the Act.[60]

The High Court emphasised the advantages of a negotiated settlement as opposed to determination of a claim in the manner of a court:

> If it be practicable to resolve an application for determination of native title by negotiation and agreement rather than by the judicial determination of complex issues, the court and the likely parties to the litigation are saved a great deal in time and resources. Perhaps more importantly, if the persons interested in the determination of those issues negotiate and reach an agreement, they are enabled thereby to establish an amicable relationship between future neighbouring occupiers. *To submit a claim for determination of native title to judicial determination before the stage of negotiation is reached is to invert the statutory order of disposing of such claims'*.[61]

McHugh J declared the refusal of the Tribunal to accept the claim of the Waanyi to be a 'serious injustice' and to 'refuse to correct that breach because to do so would serve the social or economic interests of other persons would be a step calculated to undermine the rule of law in our community'.[62]

Earlier the Full Court of the Federal Court[63] had rejected much of the NNTT's analysis of extinguishment by grant of the pastoral leases, albeit it had not disturbed its ultimate conclusion. In the result the NNTT, a body designed to recognise the 'unique character' of native title and provide for its 'just and proper ascertainment' was adopting conservative interpretations restricting the rights of claimants, whilst the courts appeared much more prepared to recognise and give effect to the rights and interests conferred by such title.

2. An illusory right to negotiate

The same propositions are evident from the NNTT's approach to the mandatory nature of the right to negotiate, 'expedited procedures', and 'future act determination applications'. All are critical aspects of the interim or future act regime. In *Kanak v NNTT,*[64] the Full Court of the Federal Court had declared, after referring to recognition of the disadvantaged status of Aboriginal people in the preamble, that the Native Title Act 'is clearly remedial in character and thus should be construed beneficially so as to give

60. Id, 235 Brennan CJ, Dawson, Toohey, Gaudron, Gummow JJ.
61. Id, 236 (emphasis added).
62. Id, 259.
63. *North Ganalanja Aboriginal Corporation v Qld* (1995) 132 ALR 565.
64. Supra n 26, 348.

the most complete remedy'. The NNTT has discounted such approach in the construction of the future act regime.[65] The NNTT has adopted interpretations which undermine the negotiating process itself and the negotiating position of the native title holders and claimants.

The Act expressly provides that the government party *must* negotiate in good faith.[66] Despite such provision the NNTT concluded that such negotiation is not a pre-condition to securing an order from the Tribunal on a future act determination application that a Crown grant may issue overriding native title.[67] The Tribunal explained that it had to be 'careful about reading into' the Native Title Act 'powers which are not clearly spelled out'. It refused to enforce the duty to negotiate in good faith because 'there is no specific power in the Native Title Act to enable this application to be dismissed on the basis that the Government party has not negotiated in good faith'.[68] The Tribunal suggested that the native title party should seek judicial review 'if it wishes to pursue its argument that there has been no negotiation in good faith'.[69]

The Tribunal reached this conclusion despite the acceptance 'that in the majority of cases, there have either been no negotiations or they have just started' and that 'the overwhelming majority of grantee and native title parties have expressed a willingness to negotiate and have expressed the likelihood of settlement as moderate'. In its conclusion the Tribunal patronisingly suggested that 'more could be done', particularly by the Government, 'to facilitate effective negotiation'.[70] It is suggested rather that what needs 'to be done' is that the Tribunal refrain from 'conservative' and literal approaches where manifestly purposive interpretations are

65. *Nyungah People* (unreported) NNTT 30 Apr 1996 nos WO 95/29, 95/32, 95/36, 95/37, Deputy President Seaman 5-12.

66. NTA s 31.

67. *Minister for Mines (WA) v Njamal People* (unreported) NNTT 30 Mar 1996 no WF 96/4. Member Sumner purported to follow: *Assoc Goldfields and Alkane Exploration* (unreported) NNTT 6 Feb 1995 no NF94/1 (in the matter of a future act determination). In that case Olney J concluded that the notice of intention to grant a mining lease required by NTA s 29 was published in an insufficient manner which might have been misleading, but there was no suggestion that any person was misled or not notified. Olney J concluded that the NNTT had no 'role' in assessing the validity of a future act determination application and observed: 'Once an application has been made pursuant to NTA s 35 ... the Tribunal's duty is to take all reasonable steps to make a determination in relation to the proposed act....' In his view lack of strict compliance with the notice requirements could 'only be considered in the context of the exercise by the Tribunal of its function to make a determination and not by way of preliminary objection'. The decision is, of course, readily explicable as a circumstance where there was substantial albeit not strict compliance with notice requirements: see *Pancontinental Gold Mining v Minister for Mines* [1989] WAR 169; *Hunter Resources v Melville* (1988) 164 CLR 234. In *Njamal People* Mr Sumner acknowledged the absence of substantial compliance.

68. *Njamal People* id, 5.

69. Id, 9.

70. Id, 10-11.

required. The duty to negotiate in good faith is the only provision in the Act that pays any regard to the unique significance of surviving native title. If the NNTT is not prepared to enforce the duty then the process of negotiation and mediation is entirely illusory.

The notion that development and settlement should proceed as quickly as possible was adopted by the NNTT in refusing to allow a stay of the application pending judicial review of the decision. The Tribunal referred to the 'public interest considerations involved'[71] and observed that 'given the overall purposes of the legislation, for the Tribunal not to be able to make its determination within the period would be a grave circumstance indeed'.[72] In the result the native title party was directed to provide comprehensive detail of the impact of the proposed grant on that party in the absence of the provision of any information by the Government party or grantee party as to the nature of the grant pursuant to the negotiations otherwise mandated by section 31.[73]

As in the *Waanyi* cases it was left to the courts to give effect to native title and its protection under the Native Title Act. Upon judicial review the NNTT's decision to entertain future act determination applications in the face of objections that no negotiation in good faith had taken place was set aside by the Federal Court.[74] The State of Western Australia and the applicants for mining leases had argued that the requirement to negotiate in good faith was not a pre-condition to the making of an application under section 35. They emphasised:

(a) The importance of the time limits set down in the Act;
(b) The difficulty for the NNTT in endeavouring to ascertain whether the government party had negotiated in good faith;
(c) The availability of curial remedies to enforce the duty to negotiate in good faith;
(d) That negotiation involves other parties as well as the government — that resolution of a dispute is not entirely within the government's power and depends upon a submission by a native title party under section 31(1)(a).

Carr J rejected the arguments and remitted the matters back to the NNTT in order that the Tribunal might determine if the State had negotiated in good faith. 'If the government party has not so complied then the application is invalid and should be dismissed'.[75] The Tribunal had erred in law in deciding that it did not have power to dismiss such an application.

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71. Id, 8. 72. Id, 12.
73. *WA Minister for Mines v Njamal People* supra n 67; *Delores Cheinmora* (unreported) NNTT 7 Feb 1996 no WO95/27, Sumner (member) 10-12.
74. *Walley v WA and Western Mining Corp* (unreported) Fed Ct 20 Jun 1996 nos WAG 6004, 6005, 6006, 6007.
75. *Njamal People* supra n 67, 30.

The duty to negotiate in good faith was declared to be 'clearly important and central to the permissible act process'. Reliance was placed on the High Court decision in *Waanyi v Queensland*[76] and the 'clear mandatory language employed by parliament'.[77] The duty to negotiate in good faith was accordingly a condition precedent:

> If the government party has not complied with its obligation under section 31(1)(b) ... then none of the parties may move to the next stage of making an application under section 35 for a determination.[78]

Carr J explained that the condition precedent was expressed in section 31. Parliament 'made its will known on the matter some four sections earlier' than section 35. 'It would have been unnecessarily repetitious to have restated it in section 35. Furthermore it is almost unthinkable that the Government party might not obey such a mandatory command'.[79] On remission the NNTT concluded that the 'facts of this case clearly demonstrate that the government party has not fulfilled its obligations' to negotiate in good faith, and dismissed the application.[80] The NNTT, in response to the decision in *Walley*,[81] has amended its procedures to require applicants under section 35 to provide a statement of the steps taken by the government party to establish that the government party has negotiated in good faith.

3. The expedited procedure: exemption from the duty to negotiate

(i) The need for the native title claimant to put forward evidence

The negotiating position of native title holders and claimants has been further undercut by decisions of the NNTT to the effect that they must put forward evidence to demonstrate that a grant is *not* exempted from the duty to negotiate (that is, *not* subject to the expedited procedure) or why a grant should not issue in 'future act determinations applications'. The interim and future act regime has been interpreted as a procedure which *presumes* that native title will be overridden. There is no support in the Act for such interpretations. In *Irruntyju-Papulankutja Community*[82] the community objected to the exemption of the grant of exploration licences from the duty to negotiate and their inclusion in the expedited procedure.

76. Supra n 52.
77. *Njamal People* supra n 67, 14.
78. Id, 30.
79. Id, 29-30.
80. *WA v Njamal People* (unreported) NNTT 7 Aug 1996 no WF 96/4, Sumner (member).
81. Supra n 74.
82. *Irruntyju-Papulankutja Community* (unreported) NNTT 6 Oct 1995 no WO 95/7, Deputy President Seaman: 'Inquiry into an objection for inclusion in an expedited procedure'.

Deputy President Seaman of the NNTT ruled that because the objection of the Native title parties is treated as an application under the Act[83] they must 'satisfy the Tribunal by evidential material that section 237 does not apply to the act' by showing that the grants are not exempt because of the interference with the land, community life or sites of significance.[84] The Deputy President admitted that the language of the Act was of 'a very general nature' but considered it was 'designed to balance the competition between certain activities of governments and the interests of native title holders'.[85] The 'balance' he contemplated presumes ongoing settlement and development unless native title holders can demonstrate sufficient interference such that the grants should not be exempted.

The requirement that the native title parties must put forward evidence to demonstrate why the expedited procedure should not apply was followed and applied by the NNTT in a series of cases.[86] In his latest ruling Deputy President Seaman restated that the Act 'places on the native title party an obligation to *make out a case that [an act] does not*' attract the expedited procedure.[87]

But on appeal the Federal Court has ruled that 'no burden of proof, nor for that matter any evidential burden of a legal nature, lies on any party to proceedings before the Tribunal inquiring into the matters referred to in section 237'. Nor was there 'any implied imposition of any such onus, in particular by the fact that section 75 treats an objection as an application'.[88] But Carr J, somewhat charitably it is suggested, concluded that the Tribunal had not misapprehended the burden on the native title party despite the 'troubling'[89] and 'unhelpful'[90] usage of the Tribunal. The Court adopted a 'beneficial construction'[91] of the determination of the Tribunal and concluded that it had not improperly assessed the evidence.

(ii) Intentions of grantee parties irrelevant

The significance of the NNTT's presumption in favour of ongoing settlement and development is accentuated by a further presumption that the government party will ensure that grantee parties, in particular miners,

83. NTA s 75.
84. *Njamal People* supra n 67, 5.
85. Supra n 74, 5.
86. *Evans and Wheelbarrow* (unreported) NNTT 16 Oct 1995 nos WO95/4, WO95/5, Sumner (member); *Waljen People* (unreported) NNTT 24 Nov 1995 no WO95/17 Deputy President Seaman; *Smith* infra n 96; *Cheinmora* (unreported) NNTT 19 Jan 1996 WO 95/16, Sumner (member); *Cheinmora* supra n 73; *Ward* (unreported) NNTT 29 Feb 1996 no WO95/34, Sumner (member).
87. *Nyungah People* supra n 65, 14 (emphasis added).
88. *Ward v WA* (unreported) Fed Ct 9 May 1996 no DG600, 17.
89. *Njamal People* supra n 67, 21.
90. Id, 24. 91. Id, 21.

do not cause such interference. The Deputy President has declared:

> Absent exceptional circumstances the effect which the grant is likely to have is not to be judged by a consideration of the intentions and capacities of particular grantee parties but by the power of the government party to control the activities of a grantee party by existing legislation, conditions of grant and regulatory process and upon the basis that grantee parties will act lawfully.[92]

He held that the grants were exempt from the duty to negotiate because the Government had the power and was likely to prevent such interference by requiring a work clearance agreement with respect to sites of significance[93] or requiring consultation with respect to such sites.[94] The Tribunal maintained such conclusion even where the evidence demonstrated that entry permits for mining on the Aboriginal reserve had previously been granted by the Minister for Aboriginal Affairs contrary to the wishes of the Aboriginal community.[95]

Native title parties had suggested that for the purposes of an inquiry into objections to inclusion in an expedited procedure that the grantee party be required to provide full details of proposed disturbance by mining on the land, of steps to be taken to protect Aboriginal sites and areas of significance, and of proposed rehabilitation. In *Clarrie Smith*[96] directions to this effect were given *by consent.* Following the Tribunal's conclusion in *Irruntyju-Papulankutja Community* that 'the intentions and proposals of particular grantee parties are irrelevant in an Inquiry' the directions were struck down as irrelevant.[97] The NNTT determines whether or not an act constitutes interference exempt from the duty to negotiate in a context where no evidence of the intentions or capacities of the grantee party is considered or provided, yet the native title party is expected to bring forward evidence to show why the interference is exempt.

(iii) Direct interference with community life

The difficulty for native title parties in establishing that a grant is not exempted from the duty to negotiate was further increased by the broad construction given by the Tribunal to what constituted exempt interference.

92. Concerning Aboriginal reserve lands: see *Irruntyju-Papulankutja Community* supra n 82, 6.
93. Id, 10-11.
94. *Waljen People* supra n 86 ('Inquiry into an objection to inclusion is an expedited procedure'). Cf *Ngalura and Injibandi People* (unreported) NNTT 17 Jun 1996 nos WO96/16, 96/19, Wilson (member) 7 where the NNTT was 'not satisfied that it is likely that the guarantee parties will comply with the relevant guidelines issued by the Department of Minerals and Energy'.
95 *Cheinmora* supra n 86, 28-29; *Cheinmora* supra n 73, 15.
96. (Unreported) NNTT 11 Dec 1995 no WO95/21.
97. *Evans and Wheelbarrow* supra n 86, 16-18.

In *Irruntyju-Papulankutja Community,* the Deputy President considered that direct interference with community life had to be 'physical' in nature, or else it would attract the expedited procedure.[98] The decision was followed repeatedly thereafter by the NNTT.[99]

The Tribunal refused to consider evidence of spiritual affiliation and the impact mining activity could have on community life because of disregard of that affiliation.[100] It was again left to the courts to correct the Tribunal. On appeal the Federal Court concluded that the NNTT had erred:

> Community life might include all sorts of spiritual and the like activities which might be directly interfered with without any physical interference.... Members of that community might well be very distressed by the thought of such [intensive exploration] activities.[101]

The Federal Court decision has resulted in a dramatic change in the trend of the decisions by the Tribunal. A series of decisions has now concluded that the grant of exploration licences is 'likely to directly interfere with the community life of the native title party' and accordingly is not exempt from the duty to negotiate'.[102]

(iv) The Aboriginal Heritage Act provides effective protection

A future act may only be exempt from the duty to negotiate if it 'does not interfere with areas or sites of particular significance.'[103] The Deputy President has determined that such interference is unlikely where guidelines explaining the requirement of the Aboriginal Heritage Act 1972 (WA) are provided and consultation with Aboriginal people is urged.[104] Under the

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98. *Irruntyju-Papulankutja Community* supra n 82, 6.
99. See cases in supra n 86.
100. NTA s 237(a).
101. *Ward v WA* supra n 88, 27, overturning on that point *Smith* supra n 96, 13; *Ward* supra n 86, 8.
102. *Re James* (unreported) NNTT 5 Jun 1966 no WO96/21, P O'Neil 7; *Re Goolburthunoo (Waljen) People* (unreported) NNTT 13 Jun 1996 no WO96/12, Wilson 8; *Re Burringurrah Wadjuri People* (unreported) NNTT 13 Jun 1996 no WO96/13, Wilson 5; *Re Dann and Goonock* (unreported) NNTT 21 Jun 1996 no WO96/7, 11; *Re Ngaluma and Injibandi People* (unreported) NNTT 26 July 1996 no WO96/17, 13 Aug 1996 no WO96/44, Wilson (member); *Re Tjupan People* (unreported) NNTT 3 Sept 1996 no WO96/20, O'Neil (member); *Re Waljen People* (unreported) NNTT 20 Aug 1996 nos WO96/37, 96/38, Wilson (member). And on remission by the Federal Court of the applications in *Ward*, the grants were held either not to be exempt from the duty to negotiate or to require the submission of further evidence: *Ward v WA* (unreported) NNTT 26 July 1996 nos WO95/11, 95/21-23, 95/34, Sumner (member).
103. S 237(b).
104. *Waljen People* supra n 86, 942.

Aboriginal Heritage Act the Minister is expressly empowered to consent to interference with sites of significance.[105] Ninety per cent of applications for such consent are granted, and 20-30 per cent or more of the applications relate to mining activities. The evidence would raise doubts as to the efficacy of the protection conferred by the Aboriginal Heritage Act. But the Deputy President's ruling has been construed in subsequent decisions as holding that the 'Act will generally be effective in ensuring that there is not likely to be interference with areas or sites of particular significance'.[106]

The Federal Court has refused to conclude that the ruling is so unreasonable as to constitute an error of law. Carr J observed that 'the real complaint is about the Tribunal's ultimate factual conclusion' and the 'deficiencies in the Aboriginal Heritage Act do not, in my view, raise questions of law' which were properly the subject of an appeal.[107] Carr J did comment that it was proper for the Tribunal to take 'into account the effectiveness of the Aboriginal Heritage Act' and 'how it was administered in practice'.[108]

The decisions of the Tribunal have effectively substituted the regime declared by the Aboriginal Heritage Act providing for the discretion of the Minister to consent to interference in place of a regard for whether the miner's *proposed activities* are likely to interfere with sites of significance. As was explained in *Ward*:[109] 'The Tribunal acts on the basis that actual proposals and intentions of grantee parties in relation to their exploration activities are not relevant in these matters' and 'on a grantee party acting lawfully' under the Aboriginal Heritage Act.[110] If the Minister consents to interference the grantee party will not, of course, be acting unlawfully.[111]

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105. NTA s 18.
106. *Smith* supra n 96, 6; *Cheinmora* supra nn 73, 82; *Ward* supra n 88; *Nyungah People* supra n 65.
107. *Ward* supra n 88, 40.
108. *Njamal People* supra n 67, 41.
109. *Ward* supra n 88, 13.
110. But see *Raymond Wallaby* (unreported) NNTT 29 Apr 1996 no WO95/35, Wilson. The expedited procedure was not considered to be applicable where the objectors had difficulties in securing access to the land and sought an agreement with the grantee party as to how the exploration was to be carried out. Mr K Wilson did not refer to the other decisions of the NNTT and observed that 'the Tribunal does not accept that this [the Aboriginal Heritage Act and the guidelines issued to explorers] is the level of protection or the result that should be available in *every* matter where the expedited procedure is sought'. Cf *Ngarinyin Community* (unreported) NNTT 21 Dec 1995 no WO 95/8, Wilson.
111. It is suggested that the NNTT could reconsider its position if a grantee party refused to provide an undertaking *not* to apply for Ministerial consent to interference. In such circumstance the grantee party will clearly not be excluding the possibility of interference within the meaning of NTA s 237(b).

(v) Lower standards in remote regions and the inefficacy of the Environmental Protection Act in the South West

Acts that 'involve major disturbance to any land or waters'[112] do not attract the expedited procedure. The Deputy President in *Irruntyju-Papulankutja Community*[113] ruled that the standard applied should not be that of the affected Aboriginal community but of the 'broader community'.[114] He concluded:

> These are very large open areas in very remote country. It is not likely in my view that the ground disturbing activities authorized by the proposed exploration licences would be regarded by members of the broader community as a major disturbance to the lands concerned.

The determination was made having regard to the rights of the grantee party, including the power to remove up to one thousand tonnes of material, or more with the Minister's consent, not having regard to the proposed exploration activities. The NNTT has thereafter consistently followed this approach in relation to the granting of exploration licences under the Mining Act.[115] In *Cheinmora*[116] the NNTT observed that 'in general, where there are large relatively open areas, the Tribunal has found that the activity permitted, with the controls imposed by legislation[117] and conditions, do not constitute major disturbance'. The Tribunal referred in particular to the standard conditions imposed on exploration licences relating to rehabilitation, and use of mechanised equipment only with permission of the District Mining Engineer.

A contrary result was arrived at with respect to the grant of exploration permits under the Petroleum Act. Under the Act the work programme of seismic exploration and drilling of wells is set out as a condition of a permit. The area applied for was along the South-west coast of Western Australia, with large areas of freehold land, nature reserves and State forest. The Deputy President rejected Government suggestions that the Environmental Protection Act and the Environmental Protection Authority could be relied upon to ensure that major disturbance was unlikely.[118] He concluded that clearing of

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112. NTA s 237(c).
113. *Irruntyju-Papulankutja Community* supra n 82, 10-11.
114. The standard applied was not considered to be erroneous by the Federal Court in the appeal of *Ward* supra n 88.
115. *Waljen People* supra n 86; *Smith* supra n 96.
116. *Cheinmora* supra n 86, followed in *Cheinmora* supra n 73; *Ward* supra n 86; *Re Mingarwee* (unreported) NNTT 26 Aug 1996 no WO96/36, O'Neil (member); *Re Gwini* (unreported) NNTT 28 Aug 1996 no WO96/41, O'Neil (member). Cf *Tjupan People* supra n 102.
117. Mining Act 1978 (WA) s 66.
118. *Nyungah People* supra n 65, 24-25.

seismic lines in State forests would constitute a major disturbance.[119] The decision suggests that a very different approach will be adopted in the South-west of the State where the interests of the 'broader community' are affected than in the 'remote' interior where the interests principally affected will be those of the Aboriginal communities.

4. Ordering the overriding of Native title

If the duty to negotiate applies but negotiations are unsuccessful the NNTT is empowered to order that a grant shall issue. In making a determination as to whether a grant may issue the NNTT must consider the criteria set out in section 39. The NNTT has made directions which require the native title parties to *first* produce evidence as to the impact of a grant.[120] The evidence sought relates to the effect of the proposed grant on the matters referred to in section 39(1)(a), in a context where the Government has neither engaged in negotiations nor provided information in the course of such negotiations. Neither the grantee party nor the Government has been required to provide details of the proposed activities under the grant. The directions are structured so as to suggest that a failure to produce evidence will result in the issue of the grant. There is no such presumption in the Act.[121]

The NNTT confirmed its inclination to override Native title in the first determinations handed down under section 39. In *Re Koara People,*[122] the State of Western Australia sought a determination that mining leases might be granted. Mining leases under the Mining Act 1978 (WA) confer the right to mine but do not require mining for up to 42 years. Exploration work will suffice to maintain such leases in good standing. The grantee parties provided little information about proposed exploration and almost none about proposed production mining operations The length of the leases is 21 years, renewable for a further 21 years. The Tribunal recognised, in the absence of information as to the 'impact of actual mining operations', that there were 'obvious difficulties' in: (i) negotiations; (ii) the Tribunal applying the criteria in section 39; (iii) assessment of future compensation; and (iv) 'providing appropriate protection for native title'. The NNTT commented: '[T]he result is that the Tribunal is placed in the position of weighing the criteria set out in section 39 at the least logical stage'.[123]

119. *Nyungah People*, supra n 65, 27.
120 *Njamal People* supra n 67.
121. *Gascoyne Gold Mines* (unreported) NNTT 15 Dec 1995, Sumner (member). The transcript makes instructive reading as to how the Tribunal will 'ensure that native title holders are now able to enjoy fully their rights and interests': Preamble NTA. It is apparent that the directions were proposed by the Government and adopted in hearings where the native title party was unrepresented for much of the hearing.
122. (Unreported) NNTT 23 Jul 1996 nos WF96/1, 96/5, 96/11, Deputy President Seaman.
123. Id, 17-18.

The Tribunal determined however that each of the mining leases might issue. It characterised the protection conferred by the Act as merely 'a right to be asked about actions affecting their land'.[124] Conditions were imposed providing:

- Access to the land by native title claimants (subject to mining operations);
- No exploration or mining on sites of particular significance;
- Good faith negotiations towards an agreement prior to the commencement of mining operations.

Compensation was to be determined under a separate application at a later stage,[125] presumably when the impact of the mining operations was evident.

The decision manifests the NNTT's inclination to ensure that non-Aboriginal development and settlement proceeds. The grant of mining leases was approved despite the recognised absence of information as to their impact on native title rights. The condition requiring good faith negotiations has no substance when the bargaining position of the native title party has been denied by a determination that the leases may issue irrespective of the outcome. The determination is tantamount to a ruling that native title may be overridden upon payment of compensation.[126]

The other determination to date concerned mining leases the Western Australian government sought to grant over land claimed by the *Waljen People*.[127] A differently comprised panel of the NNTT expressed its 'broad agreement with the approach taken'[128] in *Re Koara People*. It recited the importance of 'achieving certainty for the mining industry'[129] and determined that the grants might issue without the imposition of any conditions by the NNTT. The NNTT considered that in the absence of evidence of the effect of the grants and mining under the leases it was 'not an appropriate case to impose conditions'.[130] There was no evidence from the miner or the government as to the nature of the proposed exploration or producing mining activity. The conclusion confirms the approach of the NNTT that a failure to produce evidence by the native title party will lead to the issuance of the

124. Id, 9, 18, 39, 41.
125. Id, 29, 36, 39.
126. The ruling also postpones entitlement of compensation until a determination of native title has been made. S 23 confines entitlement to native title *holders*. The right to negotiate procedures contemplates that compensation might be held in trust for *claimants*: NTA s 52.
127. *WA v Robert Thomas on behalf of Waljen People* (unreported) NNTT 17 Jul 1996 nos WF96/3, 96/12, Sumner (member).
128. Id, 3.
129. Id, 31, 125.
130. Id, 112, 119, 127.

grant even in circumstances where the lack of information from the miner or the government renders it impossible to do so.

It was submitted to both panels of the NNTT that the 'difficulties' presented by the lack of information could be provided for by a condition allowing the Tribunal to impose further conditions at the mining stage. The submission was rejected on the basis that the Act contemplates 'one only determination which is complete in itself.... There is no power to resume the inquiry or impose a further set of conditions after the determination has been made'.[131] A submission that a condition might be imposed providing for an arbitrator to set the conditions upon which actual mining might proceed was considered to be 'outside the scope and purpose of the Act'.[132] The rejection of both submissions entails a narrow reading of the language of the Act with little understanding of the *purpose* of the provisions. It results in a determination that undermines the entire negotiating process. The Act could readily have been construed so as to permit the imposition of conditions in a single determination which entitled the Tribunal or an arbitrator to set additional conditions when the impact of mining operations was known.

The 'difficulties' presented to the Tribunal in these cases arose from: (i) the refusal of the State to negotiate in good faith; (ii) the nature of the grant contemplated, which empowers the substantial overriding of native title for a period of 42 years; and (iii) the lack of provision of any information by the miners as to proposed mining activities.

Nevertheless the Tribunal determined that the grants might issue. The determination encourages a failure to negotiate or to provide information. The Tribunal had alternatives which could have provided for the problem of a lack of information, but it rejected these alternatives on a narrow non-purposive construction. Given the 'difficulties' the Tribunal was presented with it should surely have determined that the act must not be done thus ensuring appropriate protection for the native title. Instead it favoured the 'public interest in the grant of mining leases and the ongoing development of the mining industry in the State'.

The NNTT has authorised the carte blanche overriding of native title without any information as to the nature of proposed mining activities. A narrow reading of the Act has been adopted which defeats the main purpose of the 'right to negotiate'. The Tribunal never even seemed to consider that rather than native title being comprehensively overridden, the miners should change their methods of operating or the State should change its methods of disposition. The proposed exploration activity of the miners did not require such overriding of native title. Native title should not be required

131. *Re Koara* supra n 122, 26.

132. Id, 27. In *Re Waljen People* supra n 127, 144 it was observed that 'there is no express power to impose such conditions'.

to give way to a 'strange' system of disposition,[133] when a grant of an exploration or retention tenement would have sufficed.[134]

GOVERNMENT PROPOSALS: FURTHER DISCOUNTING THE NEGOTIATING POSITION OF NATIVE TITLE PARTIES

On 2 March 1996, the Coalition Government was elected in Australia on a platform which included the amendment of the Native Title Act to 'ensure its workability' whilst respecting the provisions of the Racial Discrimination Act 1975. On 22 May the Department of Prime Minister and Cabinet released an a paper entitled 'Towards a More Workable Native Title Act',[135] which outlined proposed amendments to which Cabinet had agreed. Workability is considered to involve reducing the impact on miners and pastoralists. To the end of 'workability' the negotiating position of native title holders is further undermined.

1. Exclusions from the right to negotiate

(i) Pastoralists override native title

Pastoral leases severely circumscribe the rights of pastoralists to use the land. They are a limited form of tenure. Security of title for pastoralists and co-existence with native title holders can be readily assured without any legislative amendment. The proposed amendment, however, contemplates the declaration of the paramountcy of the pastoralists by allowing them to 'engage in different activities under the lease (such as agricultural, commercial or tourism activities)' without any requirement of negotiation.[136] The Crown will be able to significantly enhance the rights of pastoralists, provided compensation is paid 'if any native title were in fact affected'. This amendment is justified on the dubious basis that pastoral leases have extinguished native title 'and these amendments should therefore be unnecessary' but 'they will provide increased flexibility and certainty while the pastoral lease issue remains unresolved'.[137] It is also explained, in contradictory fashion, that the legislative extinguishment of native title on

133. *Re Koara* supra n 122, 17.
134. See Goldfields Land Council 'Making Native Title Work: The Goldfields Response' — Submission to Federal Government on Proposed Changes to the Native Title Act 1993 (Jun 1996) 4-6.
135. Cth Office of Indigenous Affairs *Towards a More Workable Native Title Act* (Canberra, 22 May 1996) ¶ 18.
136. Id, ¶ 62.
137. Id, ¶¶ 21-33, 62.

pastoral leases would fall foul of the Racial Discrimination Act 1975. It must be observed that the proposed amendments amount to extinguishment by 'stealth',[138] which may in any event fall foul of the Act.

(ii) Excluding exploration

It is proposed to remove the right to negotiate for mineral exploration activities and, perhaps, the expedited procedure thereby 'substantially decreasing the potential cost to all interested parties of the future act process'.[139] Impacts from exploration would be protected under relevant environmental and heritage legislation. It is explained that exploration offers 'little scope for profit-sharing arrangements, employment opportunities or other social or infrastructure benefits'. The amendment might be said to codify the approach to exploration initially adopted by the NNTT.

(iii) Renewal of all pre-1994 mining titles

The right to negotiate attaches to renewal of pre-1994 mining titles where there is no right to renewal. Native title does not interfere with security of title in such cases, but it is proposed that the right to negotiate be excluded.[140]

(iv) 'Once-only negotiation'

The process will be 'streamlined' to provide for 'once-only' negotiation with respect to projects that involve 'more than one act attracting the right to negotiate'.[141]

(v) Ministerial exclusion for major projects

A significant dilution of any negotiating position for native title holders is contemplated by the proposal that the Commonwealth Minister be empowered to intervene to exclude major projects from negotiation or consideration by the NNTT. The Minister would be empowered to determine that an act may be done if of the opinion that it would be in the national interest.[142] The Government has indicated that it has in mind projects such as the Tenneco gas pipeline in Southern Queensland and the Century Mine (*Waanyi*).[143]

138. 'Coming to Grips on Reconciliation' *The Australian* 28 May 1996, 12.
139. Goldfields Land Council supra n 134, ¶¶ 29, 32.
140. Id, ¶ 31.
141. Id, ¶ 33.
142. Id, ¶ 39.
143. 'Minchin Chooses Sites for Title Test' *The Australian* 16 May 1996, 3.

2. Limiting the arbitral criteria

The NNTT is required to consider criteria specified under section 39 in the determination of whether an act may or may not be done. The criteria include, of course, the impact on native title rights and interests, and refer inter alia to the 'natural environment of the land or waters'.[144] A suggested amendment under consideration would repeal the reference to the environment and restrict the criteria 'to those directly related to native title rights and interests'.[145] The suggestion seeks to distinguish between the impact upon native title and the environment itself. The distinction is false and absurd. Any assessment of impact must obviously consider the nature of the land or water. It is merely an attempt to eliminate any regard for environmental impact from consideration in assessing the impact on native title holders.

3. Narrowing the non-extinguishment principle

Another suggested amendment is the narrowing of the non-extinguishment principle so as not to apply to compulsory acquisition. The amendment would deny the revival of native title even if the acts undertaken or grants made, if any, for the purpose for which the compulsory acquisition was effected do not extinguish native title.[146] State legislation providing for compulsory acquisition provides for the revival of other rights previously acquired where no longer required.[147]

4. The proposed role of the NNTT

The proposed amendments also address the constitutional problems presented by the purported responsibility under the Native Title Act of the NNTT for judicial determinations.[148] Under the amendments claims will be lodged with, and determinations as to the existence of native title will be made by, the Federal Court.[149] Upon meeting the requirements of a prima facie case a claim may be registered with the NNTT whereupon the right to negotiate may attach in the restricted circumstances contemplated by the amendments. The NNTT would continue its function in mediation but 'would retain its role as an arbitral body for the right to negotiate process'.[150]

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144. NTA s 39(1)(a)(vi).
145. Goldfields Land Council supra n 134, ¶ 107.
146. Id, ¶ 114.
147. Land Acquisition and Public Works Act 1902 (WA) ss 29A, B.
148. *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.
149. Goldfields Land Council supra n 134, ¶¶ 83, 89.
150. Id, ¶ 95.

5. Contrary to the principles of the Racial Discrimination Act

The proposals are said to 'have been developed taking into account ... the principles of non-discrimination embodied in the Racial Discrimination Act 1975'.[151] And it is argued in the Outline Paper that the removal and exclusion of the right to negotiate will not be held contrary to the Racial Discrimination Act 1975 or the International Convention on the Elimination of All Forms of Racial Discrimination. The argument asserts that the right to negotiate, together with other benefits in the Act is a 'special measure' within the Act and the Convention.[152] Such of course is the declaration found in the preamble to the Native Title Act. But a 'special measure' can only be so considered if it provides benefits not otherwise demanded by equality before the law.[153] Moreover the High Court's perception of equality before the law may well differ from that of the Commonwealth and invalidate exclusions from the ambit of the right to negotiate, particularly with regard to pastoral leases and Ministerial exclusions.

AN INSTRUMENT OF DISPOSSESSION

The NNTT was given inadequate power to effect settlement of native title claims by the Native Title Act. Its powers to determine native title are mediative only. Moreover it administers a future act regime under the Act that severely undercuts the negotiating position of native title claimants. The proposed amendments to the Act will further weaken that position.

The NNTT itself has undermined that position by 'conservative' interpretations of the Act that favour certainty and development and limit the possibility of establishing native title by agreement. The interpretations of the Act with respect to the future act regime have the potential to establish the NNTT as fundamentally an instrument of dispossession of Aboriginal people. It has been left to the courts in *Waanyi, Walley* and *Ward*[154] to try to maintain the protections available to native title.

The President of the NNTT has sought to justify the record of the NNTT to date by declaring that critics have 'a cargo cult mentality' with respect to native title. He became an apologist for the Act when he observed that, 'if native title goes away for some legal reason it does not mean that [traditional] country has gone away'.[155] If native title is not recognised, traditional country

151. Id, ¶ 19.
152. Id, ¶ 42.
153. G Nettheim 'Native Title, Statutory Title and Special Measures' (1993) 63 Aboriginal Law Bulletin 4.
154. *Waanyi Peoples* supra n 49; *Walley* supra n 74; *Ward* supra n 86.
155. 'Mabo Process Opens Gate to Negotiaton' *The Australian* 2 Jan 1996, 11. The President

is, of course, unprotected from grants and development. Aboriginal leaders reacted with extreme hostility. Mr Noel Pearson, Executive Director of the Cape York Land Council, declared:

> French's [French J, President of the NNTT] despicable implication is that the indigenous people of Australia are a bunch of ignorant natives who are waiting for something to materialise from out of the clouds. We are supposed to be natives who have the unrealistic and naive idea that we are entitled to concrete results from the native title process, instead of being content with platitudes from patronising, bleeding-heart judges.[156]

The amendments to the Native Title Act contemplate removing some of the powers of the NNTT to make determinations but not its administration of the future act regime. It accordingly will not be true that the NNTT will be merely a 'mediation service', as the President would have it.[157] Rather it will be the principal body that provides for the overriding of native title.

Prospects for a constructive future for the NNTT are not strong. If it is to be a mediation service it must be stripped of its power to order the overriding of native title in its administration of the future act regime. And if its mediation function is to have any success the future act regime must be balanced so as to give full recognition to the unique significance of native title. The proposed amendments deny any such possibility. It may be left to the courts or international forums to declare that the underlying concept of equality before the law requires the conferment of unique rights proportionate to the unique relationship to that limited land left to the Aboriginal people, the dispossession of which was not validated by *Mabo (No 2)*.

It was hoped that the NNNT would provide an informal tribunal uniquely suited to the recognition and protection of native title. Those slight hopes are foundering on the future act regime and a philosophy of decision making which favours certainty and development and discounts native title and the right to negotiate.

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repeated such observations in 'The Wentworth Lecture' (Canberra, 12 Apr 1996) 21: 'Even if native title is swept aside by the law, country and its concerns remain'.

156. 'Judge Singled Out Aborigines' *The Australian* 3 Jan 1996, 2; and see response of the Aboriginal and Torres Strait Islander Social Justice Commissioner (M Dodson) 'Mabo Judge Hits Cargo Cult View' *The Australian* 2 Jan 1996, 1.

157. R French 'Native Title – Gateway to Country' (1996) 2(2) Native Title News 24.