# A Return to Dispossession and Discrimination: The Ten Point Plan

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*This article examines the Native Title Amendment Bill 1997 (the 'Ten Point Plan') and measures it against the standard of equality before the law. It concludes that the Plan perpetuates the policy of subordinating Aboriginal land rights and continues the historical pattern of discriminatory legislation upon which the colonisation of Australia was founded. The Plan is considered to entail a gross denial of equality before the law. It will face legal challenge both domestically and internationally.*

## CONTENTS



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## D. THE TEN POINT PLAN: A GROSS DENIAL OF EQUALITY

1. Abandoning the Principles of the Racial Discrimination Act 1975 (Cth)

2. **Point 1**: Extinguishment and Subordination of Native Title Between 1 January 1994 and 23 December 1996 — Intermediate Period Acts

3. **Points 2, 4**: Deemed Extinguishment and Subordination of Native Title by Past Acts
   (i) Freehold, leases and scheduled interests
   (ii) Extension of past leases
   (iii) **Point 7**: Variation of reservations

4. **Point 4**: Extinguishment of Native Title by Future Pastoral Acts — The Subordination of Native Title to Pastoral and Agricultural Interests

5. **Point 9**: Overriding Native Title Pursuant to Non-claimant Applications — Presumed Non-existence of Native Title

6. **Point 8**: Subordination of Native Title to Private Water Rights

7. **Points 3, 6, 7**: Diminishing the Procedural Rights of Native Title Holders

8. Abolishing the Right to Negotiate
   (i) Limiting the area subject to the right to negotiate
   (ii) Pastoral interests override native title
   (iii) **Point 6**: The exclusion of various forms of mining grants
   (iv) Exclusion of project acts
   (v) Exclusion of private infrastructure
   (vi) Exclusion of water
   (vii) Presumed non-existence
   (viii) Ministerial override of the right to negotiate
   (ix) Rendering the right illusory
   (x) **Points 6, 9**: Denying access to the right to negotiate

9. **Point 9**: The Six Year Sunset Clause

10. Limiting Compensation

11. **Point 5**: Substitution of Statutory Rights of Traditional Access for Native Title

## E. DISPOSSESSION

## A. THE EQUAL STATUS OF NATIVE TITLE AT COMMON LAW

Most of the common law world long ago accepted that traditional indigenous interests in land survived the acquisition of sovereignty by the Crown. This recognition of native title was merely the application of the general principle of international law which gives effect to existing interests at the time of acquisition of sovereignty. Only very recently did Australia accept this principle. In 1992, in *Mabo v Queensland (No 2),*[1] the High Court (Dawson J dissenting) cited long established common law propositions that the rights of property of the inhabitants upon conquest or cession are to be 'fully respected'.[2] Brennan J declared that '[t]he preferable rule *equates* the indigenous inhabitants of a settled colony ... in respect of their rights and interests in land'.[3] Native title was to be accorded 'full respect'.

In accordance with the notion of equality declared by the six member majority in *Mabo (No 2)*, the High Court in *Wik Peoples v Queensland*[4] rejected the subordination of native title to Crown grants in the absence of legislative authority. The majority of Toohey, Gaudron, Gummow and Kirby JJ required that an inconsistent Crown grant can only unilaterally terminate native title if legislation has manifested 'a clear and plain intention' that extinguishment should result from the grant.[5] The majority applied the general principle governing expropriation of *all* rights and interests. They rejected the application of a discriminatory jurisprudence involving a subordinate status for native title at common law.[6]

## B. A HISTORY OF DISCRIMINATORY LEGISLATION

The colonisation of Australia was founded upon a history of legislation that discriminated against and deprived the Aboriginal people of rights to their traditional land. A fundamental, though often ignored aspect of *Mabo (No 2)* was the validation of the dispossession of Aboriginal people prior to the Racial Discrimination Act

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1. (1992) 175 CLR 1.
2. Eg *Case of Tanistry* (1608) 80 ER 516; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399.
3. *Mabo (No 2)* supra n 1, 57 (emphasis added). See also Deane and Guadron JJ 82, Toohey J 183-184.
4. (1996) 187 CLR 1.
5. Ibid, Toohey J 126, 130, Gaudron J 155, 166, Gummow J 168, 171, 185-186, 203, Kirby J 242-243, 247.
6. The decision accords with the New Zealand and Canadian jurisprudence which has long maintained the equality of status of native title and other interests. The NZ Court of

1975 (Cth). Native title may not be subordinate to Crown grants at common law, but the High Court in *Mabo (No 2)* readily accepted that it was subordinate to legislation which clearly and plainly intended that Crown grants should extinguish and thereby expropriate native title. To that extent the Crown grants which issued under the public lands legislation of each State and Territory extinguished native title and did so without any consultation or compensation. The High Court in *Wik* affirmed this dispossession of native title holders. The majority very clearly declared that native title must 'yield' to the rights of pastoralists.[7]

The Racial Discrimination Act 1975 sought to provide equality before the law. In *Mabo v Queensland (No 1)*[8] it was held to invalidate Queensland legislation which attempted to perpetuate the history of discriminatory legislation by extinguishing the native title of the Meriam people without compensation. The Queensland Coast Islands Declaratory Act 1985 (Qld) was struck down because it denied equality before the law to the Meriam people with respect to their right to own property.[9] After the enactment of the Racial Discrimination Act 1975 the States could no longer subordinate and override native title pursuant to discriminatory legislation unless the Commonwealth provided an amendment or exception to the Racial Discrimination Act. Western Australia, of course, sought to continue its history of discrimination by the enactment of the Land (Titles and Traditional Usages) Act 1993 (WA). This purported to extinguish all native title and to substitute 'rights of traditional usage' which were 'administratively defeasible' and subordinate to other rights granted by the Crown. The High Court declared that the Act denied equality before the law: 'The shortfall [was] substantial'.[10]

## C. NATIVE TITLE ACT 1993 (CTH): COMPROMISING EQUALITY

Following the 1992 decision of the High Court in *Mabo (No 2),* the dominant forces in Australian society never contemplated giving effect to equality before the

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Appeal explained the relationship of expropriation to native title in *Te Runanganui o Te Ika Whenua Inc Society v AG* [1994] 2 NZLR 20, 24; and see *R v Symonds* [1847] NZ PCC 387, 390. In Canada see *Calder v A-G* (1973) 34 DLR (3d) 145, 173-174, Hall J 208-210; *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470, Macfarlane JA 522-525, Taggart JA 480, Wallace JA 595, Hutcheon JA 753 in agreement; Lambert JA 663, 670 would also seem to be in agreement.

7. Supra n 4, Toohey J 132-133, writing a postscript on behalf of himself, Gaudron, Gummow and Kirby JJ.
8. (1988) 166 CLR 186.
9. Ibid, Brennan, Toohey, Gaudron JJ, 218, Deane J 231, 233.
10. *WA v Cth* (1995) 183 CLR 373, 449.

law with respect to acts which had taken place before *Mabo*, let alone before the enactment of the Racial Discrimination Act 1975. Rather it was determined to validate all Crown grants issued and legislation made prior thereto, thus subordinating native title irrespective of the requirement of equality before the law. An attempt to meet the standard of equality before the law would only be made for grants issued or legislation made *after* that time.

## 1. Validation of dispossession by past acts

The Native Title Act enables the validation of (ie, it gives 'full force and effect' to) legislation made before 1 July 1993 and Crown grants made before 1 January 1994, where the invalidity arose from the existence of native title. The validation affects acts done after the coming into effect of the Racial Discrimination Act 1975 and thereby completes the legitimation of the dispossession of Aboriginal people up till 1 January 1994. 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'.[11] But the overriding of native title without any due process or consent and the priority thereby accorded to all other interests can hardly be considered to constitute equality before the law. The Act accordingly provides *expressly* that the operation of the Racial Discrimination Act does not affect the validation of past acts.[12]

The process does not contemplate any negotiations or agreement with respect to the validation of past acts. It removes a significant element (ie, the giving effect to existing rights) from negotiations that might otherwise have occured with respect to the determination of native title and the management and governance of native title land.

## 2. The future act regime

The future act regime reflects the Commonwealth's perception of the concept of equality prior to the enactment of the Racial Discrimination Act 1975. Only 'permissible future acts' have full force and effect with respect to native title.[13] Future acts are 'permissible' provided that the legislation applies in the same way or the act could be done in relation to the lands or waters if the native title holders held 'ordinary title' (ie, freehold title[14]). The thrust of the Act, onshore, is to confer upon

11. S 17(2).
12. S 7(2).
13. Ss 22-23.
14. S 235(2).

native title the same protection from future overriding Crown grants that is conferred upon freehold. Generally only mining dispositions override freehold title; freehold grants in Australia are normally conditioned upon the right of the Crown to authorise entry to mine. Other dispositions can only issue over freehold following compulsory acquisition for public works.

However, the future act regime fails to take account of important differences between native title and freehold. Thus:

- Native title land must necessarily have been a homeland for many generations and must have a continuing cultural and spiritual significance;
- The land left to native title holders is only a remnant of that which they originally inhabited;
- The land is likely to be located in remote regions away from urban and farm lands;
- Such land is more likely to be the target of mining operations than urban or farm lands;
- Urban and farm lands have exceptional provisions to protect them from mining operations, including rights of veto and substantial compensation. The provisions reflect the high regard accorded to urban and farm land use;
- Native title at common law is not, like Australian freehold grants, conditioned upon access for mining.

In recognition of these points the Act provides 'a right to negotiate' to native title holders with respect to the grant of mining tenements and also with respect to compulsory acquisition for the purpose of making grants to private parties.

The right to negotiate is not a veto and may be overridden. If agreement is not reached a determination whether or not the grant may issue, and if so, under what conditions, may be sought from the National Native Title Tribunal (the 'NNTT').[15] But the NNTT 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 this is considered to be in the national, or a State or Territory interest.

## D. THE TEN POINT PLAN: A GROSS DENIAL OF EQUALITY

On 2 March 1996, the Federal Coalition of Liberal and National Parties was elected to government on a platform which included the amendment of the Native Title Act 1993 to 'ensure its workability' whilst respecting the provisions of the Racial Discrimination Act 1975. On 22 May 1996, the Department of Prime Minister

15. S 38.

and Cabinet released an Outline Paper.[16] This gave details of proposed amendments to which Cabinet had agreed.

The proposals sought to reduce the impact of the Native Title Act on miners and pastoralists[17] by raising the threshold test for registration of claims, narrowing the scope for the operation of the right to negotiate, and validating the renewal of pre-1994 mining titles and the renewal and variation of pre-1994 pastoral leases irrespective of whether there was a right to such renewal or variation. The Native Title Amendment Bill 1996 was read for the first time on 27 June 1996.

On 8 October 1996, following consultation with industry groups and Aboriginal organisations, the Government released an 'Outline of Proposed Amendments to the Native Title Amendment Bill' together with an Exposure Draft of the proposed amendments. The amendments sought to further limit the scope of the right to negotiate. They also sought to create a greater role for the States and Territories to structure the rights of native title holders.

The decision in *Wik* was handed down on 23 December 1996. It held that the grant of a pastoral lease in Queensland did not necessarily extinguish all incidents of native title. But, because the decision sought only to respond to preliminary questions, without the benefit of any findings as to the incidents of native title, it did not indicate what (if any) incidents of native title did survive the grant and co-existed with those of the lessee. The decision did, as previously indicated, declare that to the extent that the rights of the pastoralist were inconsistent with those of the native title holders, the rights of the pastoralist would prevail. In response to this decision, the Government developed the 'Ten Point Plan'. In addition to its previous proposals, it proposed to diminish substantially any native title rights which might otherwise be maintained on current or former pastoral leases. At the same time it attempted to diminish any native title rights in reserves, towns and cities, and over water, and it introducd limits on how and when claims might be made and the level of compensation. In doing this the Government abandoned any commitment to the maintenance of equality before the law with respect to the future act regime. The Ten Point Plan provides for the subordination of native title to other interests in the future act regime, just as the Native Title Act 1993 already provides for past acts.

A working draft of the legislation was released on 25 June 1997: the Native Title Amendment Bill 1997. The working draft comprises a substantial reconsideration and redrafting of the 1996 amendments together with the 1997 additional amendments proposed in response to *Wik*. The Ten Point Plan is accordingly not merely a

16. Office of Indigenous Affairs, Cth Dept of Prime Minister and Cabinet *Towards a More Workable Native Title Act* (Canberra, May 1996).
17. Ibid, ¶ 18.

response to *Wik* but a major revision of the Native Title Act 1993 directed to the wholesale undermining of native title rights.

The Native Title Amendment Bill 1997 was read for the first time in the House of Representatives on 4 September 1997 and was read for the third time and passed by the House on 29 October 1997. Debate in the Senate was expected to commence on 24 November 1997.

## 1. Abandoning the principles of the Racial Discrimination Act 1975 (Cth)

In explanation of both proposals for amendments the Government asserted a commitment in 1996 to the principles of the Racial Discrimination Act 1975. Indeed in May 1996 the Outline Paper declared a 'respect' for those principles.[18] In October 1996 the Supplementary Explanatory Memorandum stated:

> The Government has been concerned to ensure that its amendments to the [Native Title Act] are consistent with the principles of the Racial Discrimination Act 1975. This is not a legal requirement, but flows from Government policy.[19]

The Government went on to explain that, in its view, the 1996 proposals, particularly with regard to the right to negotiate, met standards of both formal and substantive equality. It asserted that in applying the standard of substantive equality, the Government enjoyed 'a discretion in fashioning appropriate measures'. But it was 'mindful of the fact that ... the Government cannot, consistently with the RDA, provide for a system whereby native title holders *enjoy less protection* in relation to their property interests than other title holders'.[20] It is not considered that the 1996 measures did meet this standard, but the Government has in any event removed the latter assurance from the Explanatory Memorandum to the 1997 Bill. Moreover none of the documents[21] publicly released generally explaining the Ten Point Plan make any reference to or seek to explain the Plan in relation to principles of equality or the Racial Discrimination Act. Rather the Plan is said to be 'intended to achieve the following outcomes':[22]

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18. Ibid, ¶ 1.
19. Native Title Amendment Bill 1996; Supplementary Explanatory Memo, Exposure Draft 1996, 17.
20. Ibid (emphasis added).
21. N Minchin 'The Ten Point Plan: The Federal Government's Response to the *Wik* Decision' (Office of the Prime Minister, 1997); N Minchin '*Wik*: The Ten Point Plan Explained' (Office of the Prime Minister, 1997); N Minchin 'Some Questions and Answers on *Wik*' (Office of the Prime Minister, 1997); N Minchin 'Overview of the Native Title Amendment Bill 1997' (Office of the Prime Minister, 1997); 'A Fair, Just and Workable Plan to Fix the Native Title Act' (Office of the Prime Minister, 1997).
22. Minchin 'Wik: The Ten Point Plan Explained' ibid, 3.

- Validation of non-Aboriginal grants from 1994 to *Wik*;
- Certainty for pastoralists;
- 'Confirmation' of extinguishment by freehold and most leases;
- Removal of impediments to the development of municipal services;
- Assurance of government powers over water;
- 'Workability, through removing impediments to development';
- 'Devolution to the States and Territories'; and
- 'Speedy and sustainable resolution of concerns and uncertainty'.

This list of outcomes is a list of means by which, and interests under which, native title will be subordinated. Included in the list is a reference to: 'respect for native title, preserving the principle of native title as established in the *Mabo* cases and allowing claims to proceed'.[23]

But, of course, the *Mabo* cases acknowledged that clear and plain discriminatory legislation could override native title. It is only in this context that the Ten Point Plan 'respects' native title.

The Bill runs to 293 pages of specific and complex provisions adding to the existing 127 pages of the Native Title Act. Part of the explanation for such extensive provision is the need for specificity if the intention of the Bill is to override the Racial Discrimination Act. The High Court stressed in *Western Australia v The Commonwealth* that any ambiguous provisions in the Native Title Act 'should be construed consistently with the Racial Discrimination Act if that construction would remove the ambiguity',[24] but specific unambiguous provisions of the Native Title Act would prevail over the Racial Discrimination Act.[25]

Examination of the substance of the Native Title Amendment Bill 1997 conducted in this article reveals that it is a substantial, complex and *specific* disapplication of the protection of the Racial Discrimination Act.

## 2. Point 1: Extinguishment and subordination of native title between 1 January 1994 and 23 December 1996 — intermediate period acts

The Bill will enable the validation of all grants made between 1 January 1994 and 23 December 1996 (when the *Wik* decision was handed down) over land which was formerly the subject of a freehold estate, or any lease, including pastoral leases,

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24. Supra n 10, 453 n 301.
25. Ibid, 484. See generally R Bartlett 'Racism and the Constitutional Protection of Native Title in Australia: The 1995 High Court Decision' (1995) 25 UWAL Rev 127.

but excluding mining leases.[26] The validation will in most cases extinguish, and in all cases override, native title. The validation is justified on the suggested pre-*Wik* assumption 'that native title had been extinguished on pastoral leases'.[27]

There was no such assumption in Western Australia. It was always evident that the courts would be unlikely to conclude that native title had been extinguished by the grant of pastoral leases in this State. What the validation will achieve in Western Australia is the endorsement of those grants and interests made under the regime of the Land (Titles and Traditional Usages) Act 1993 (the 'L(TTU) Act') of the State and made afterwards in blatant non-compliance with the Native Title Act. The L(TTU) Act was struck down in May 1995 as a substantial denial of equality before the law.

Moreover no such assumption could safely have been made elsewhere in the country. Following *Mabo (No 2)* 'the question of whether the interest' granted by a pastoral lease was 'so inconsistent as to extinguish' native title was 'highly debatable'.[28]

The 'validation' effects a wide-ranging extinguishment of native title far beyond any reasonable assumptions proferred to sustain what is, even on such assumptions, a denial of equality before the law in favour of the security of non-native title interests.

## 3. Points 2, 4: Deemed extinguishment and subordination of native title by past acts

### (i) Freehold, leases and scheduled interests

The common law demands a clear and plain legislative intention that a grant extinguish native title if a grant is to have that effect. This is a basic requirement of equality. It is generally considered that freehold grants to private parties reflect such intention. It is not clear that other grants will always have the same effect. In particular, freehold grants to Crown agencies[29] and short-term leases may not have

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26. New Div 2A.
27. Minchin '*Wik*: The Ten Point Plan Explained', supra n 21.
28. R Bartlett 'Aboriginal Land Rights at Common Law' [1992] AMPLA Yearbook 485, 504; P Van Hattem 'The Extinguishment of Native Title' in RH Bartlett (ed) *Resource Development and Aboriginal Land Rights in Australia* (Perth: UWA Centre for Commercial and Resources Law, 1993) 61, 74-75. Cf *North Ganalanja Aboriginal Corp v Qld* (1995) 132 ALR 565, Lee and Hill JJ.
29. *Wik* supra n 4, Brennan CJ 85-86; *Pareroultja v Tickner* (1993) 117 ALR 206, 218.

this effect — the latter because of the substantial possibility that they may be considered to have only suspended native title which will revive at the expiration of the term.[30]

Proposed new Division 2B of the Native Title Act will, however, deem there to have been permanent extinguishment in these circumstances, irrespective of the common law. New Division 2B is founded upon a distinction between 'exclusive possession' and 'non-exclusive possession acts'. The criterion of exclusive possession was, of course, criticised in *Wik* as 'obscuring' or 'distorting' the central question of extinguishment.[31] The new Division 2B provides a false statement of the criterion of extinguishment. The true criterion requires an impossibility of co-existence such as to manifest a clear and plain legislative intention to extinguish. The false criterion necessarily extinguishes native title where the true criterion would not. Pre-1994 grants of freehold; all commercial, residential and community purposes leases irrespective of whether they confer exclusive possession; agricultural or pastoral leases which confer exclusive possession; and the construction or establishment of all public works will be deemed to have permanently extinguished native title. Non-exclusive agricultural and pastoral leases (as in *Wik*) will be deemed to have permanently extinguished native title to the extent of inconsistency.[32]

The extinguishment of native title would terminate even those rights which do not require access, including those relating to spiritual affiliation. Even Brennan CJ, dissenting in *Wik,* did not consider that these rights would necessarily be extinguished by a lease conferring exclusive possession.[33]

'Scheduled interests' will also be deemed to extinguish native title. 'Scheduled interests' may be declared in Schedule 1 of the Bill or subsequently designated by regulation. The designation of 'scheduled interests' will be 'based on information provided by the States and Territories,' so that 'it will be possible to identify extensive areas in a number of States where claims will no longer be able to affect pastoralists, miners and other non-government holders of land'.[34]

The justification for the deemed extinguishment provisions of the new Division 2B is the need for 'certainty for governments and those with interests in land'. The Division provides for the extinguishment of native title in the interests of security of tenure for non-native title holders. It is an abandonment of the principle

30. *Wik* ibid, Toohey J 108, 133, Gummow J 204; *North Ganalanja Aboriginal Corp* supra n 28, Hill J 617.
31. *Wik* ibid, Toohey J 131, Gummow J 204.
32. In *Wik* the majority required that inconsistency be such as to indicate an impossibility of co-existence. There is no such depiction of the requirements of inconsistency in new Div 2B: Toohey J 126, Gummow J 185, Kirby J 249.
33. Ibid, 87.
34. Minchin '*Wik*: The Ten Point Plan Explained' supra n 21, 4.

of the Native Title Act that extinguishment by past acts be confined to the extent of rights which already *exist*. In a pattern repeated elsewhere in the Ten Point Plan the proposed Division 2B gives effect to *aspirations* and *expectations* of non-native title holders in preference to the *rights* of native title holders. Compensation is made possible, as is required constitutionally, but this does not deny the subordination of native title brought about by the deemed extinguishment.

The Federal Court will be explicitly empowered to strike out applications made before or after the commencement of the provisions where native title is extinguished by the provisions.[35] The provisions will to that extent operate retrospectively and terminate proceedings already in progress.

## (ii) Extension of past leases

The Native Title Act treated the future renewal, re-grant or extension of interests granted before 1994 — even where there was no right to such additional interests — as a past act, and accordingly provided for the extinguishment or subordination of native title.[36] But the renewal, re-grant or extension could not create a 'larger proprietary interest'. Proposed new Division 3, subdivision I, expressly declares that the creation of a longer term or the upgrading of a lease to a perpetual lease is permitted as a 'permissible lease renewal'.

## (iii) Point 7: Variation of reservations

Native title can only be extinguished at common law upon reserved land in accordance with a clear and plain statutory mandate. The Native Title Act treated a future act 'done in good faith under or in accordance with the reservation' as a past act and thereby extinguished or subordinated native title. New Division 3, subdivision J, dispenses with this limitation 'so long as the [future] act's impact on native title is no greater than the impact that any act that could have been done under' the reservation would have had. The proposed amendment is a further departure from the principle that extinguishment by past acts must be confined to the extent of rights already established and entails even greater disregard for the common law principles governing extinguishment. It is not accurately described by the Government's explanation that the proposed amendment will merely make clear that the Native Title Act 'does not prevent any future action authorised (or required) by the grant or dedication'.[37]

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35. New Div 84C.
36. S 228(4)-(8).
37. Minchin '*Wik*: The Ten Point Plan Explained' supra n 21, 8.

## 4. Point 4: Extinguishment of native title by future pastoral acts — the subordination of native title to pastoral and agricultural interests

The principle of validation of past acts in order to ensure the necessity of *existing* rights is completely abandoned in the proposed amendments respecting pastoral and agricultural interests. Proposed new Division 3, subdivision G, declares that the *expansion* of rights to engage in, and the carrying on of, *any* primary production activity or *any* associated or incidental activity on non-exclusive agricultural or pastoral leases overrides native title, irrespective of the rights originally granted. Primary production activity is defined to include cultivation, fishing, and also pastoral, forestry and horticultural activities. The expansion of rights may also extend to tourism. Crown grants of licences to take timber and construction materials on such leases will also override native title.[38]

This provision is not made with respect to agricultural and pastoral leases which confer exclusive possession because the new Division 2B proposes the permanent extinguishment of native title on such lands. But Division 2B does not extend the extinguishment *outside* the area of the lease. The new Division 3, subdivision G, provides for this lack of paramountcy of the lease. It provides that native title is overridden by a *future* grant over lands *outside* a freehold estate, pastoral or agricultural lease 'related to the carrying on of any primary production activity on the area covered by the freehold estate or lease'. The Bill cites the example of the 'conferral of off-lease rights to graze cattle'. Any of the interests granted pursuant to the new Division 3, subdivision G, may be varied so as to permit another primary production activity.[39] The new subdivision G perpetuates the historic paramountcy of pastoral interests over Aboriginal people in Australia. It subordinates native title *rights* to pastoral *aspirations*.

## 5. Point 9: Overriding native title pursuant to non-claimant applications — presumed non-existence of native title

Under the proposed amendments any future act undertaken pursuant to a non-claimant application which has not been withdrawn or dismissed will be valid and will extinguish or otherwise override native title unless a native title claim is registered within three months.

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38. Point 7 of the Ten Point Plan.
39. New subdiv I.

The proposed requirements for application and registration by a native title claimant are extremely onerous.[40] Three months is inadequate for the preparation of a claim. There are no similar onerous requirements imposed with respect to a non-claimant application (eg, details of how native title has been extinguished). Non-claimant applications are made by governments or persons seeking a determination that native title does not exist. The provision amounts to a presumption or deeming of the non-existence of native title in the area subject to the application. The presumption with respect to government applications will not be overturned by the subsequent registration of a claim. Acts will continue to extinguish or otherwise override native title until a native title determination is made or the application is withdrawn or dismissed.

## 6. Point 8: Subordination of native title to private water rights

The proposed Division 3, new subdivision H, provides for the subordination and overriding of native title by the making of future legislation relating to the management or regulation of water *and* future grants of any water lease, licence, permit or authority. The draft legislation expressly declares that any rights and obligations created under such legislation or grant 'prevail over any native title rights and interests'. The Government has offered no justification as to why all non-Aboriginal interests should necessarily prevail over native title rights beyond asserting the need for governments to 'regulate and manage'[41] water in, presumably, a racially discriminatory manner. Moreover, the suggestion that 'substantial compensation liability' can be avoided is fanciful. Compensation for rights to water could be, and in other jurisdictions has been, substantial.

## 7. Points 3, 6, 7: Diminishing the procedural rights of native title holders

The Native Title Act, for the purposes of the future act regime, equates the status of native title with that of freehold and accordingly requires that certain procedural rights be accorded to native title holders.[42] The proposed amendments contemplate a drastic reduction of the procedural rights and status of native title. In many cases native title will, in the words of the High Court in *Western Australia v*

40. Infra pp 59-60.
41. Minchin '*Wik*: The Ten Point Plan Explained' supra n 21, 9.
42. S 23(6).

*The Commonwealth*, become 'administratively defeasible'.[43]

On non-exclusive pastoral or agricultural lease land, instead of being protected by the requirements appropriate to the compulsory acquisition of freehold, the protection will be limited to that accorded to a lessee. But these leases have always been a junior form of tenure, inferior to freehold. They have always been subject to substantial reservations and conditions including a right of resumption without compensation. They are deemed 'Crown land', not 'private land', for the purposes of the Mining Act 1978 (WA) and the Petroleum Act 1967 (WA). The pastoralist has almost no rights to resist other development of the land. These leases *are* subordinate interests and always have been. Native title rights are determined by the nature of the traditional connection to the land. But they are not circumscribed and limited by the multitude of conditions which are inherent in and have always been attached to pastoral leases. Native title holders, to the extent of their rights, are entitled to their full, unconditional enjoyment. The lowly status of a pastoral lease will be accorded to native title in the context of the construction and operation of infrastructure,[44] and may be accorded such status by a State or Territory in the grant of mining tenements and the compulsory acquisition of native title for the benefit of third parties.[45] The High Court in *Western Australia v The Commonwealth* rejected the suggestion that the status of a native title holder could be equated with that of a pastoral lessee.[46]

On reserved land, including Aboriginal reserves, the rights of the native title holders will be limited to notice, an 'opportunity' to negotiate and a right of objection.[47]

## 8. Abolishing the right to negotiate

The Native Title Act recognised a right to negotiate vested in native title holders with respect to the grant of mining tenements and compulsory acquisition for the purpose of grants to private parties.[48] The right sought to accord 'full respect' to the concept of native title in accordance with the demands of equality before the law.[49]

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43. Supra n 10, 463.
44. Div 3, subdiv K (point 3).
45. New s 43A (points 6, 7).
46. Supra n 10, 440-449.
47. New s 43A (points 6, 7).
48. S 26(2).
49. Supra pp 46-47.

The proposed amendments will deny the applicant the right to negotiate over much of that part of Australia where native title might be established, will remove many forms of grant from its ambit, will substantially reduce its significance, and will greatly limit access by native title holders. The amendments amount to the practical abolition of the right to negotiate.

## (i) Limiting the area subject to the right to negotiate

The following changes should be noted:

- The removal of the right to negotiate on non-exclusive pastoral and agricultural lease land upon the provision of substantially diminished rights by a State or Territory.[50] The exclusion extends to vast areas of Australia, up to one half of the mainland.
- The removal of the right to negotiate on reserved land, including Aboriginal reserves, upon the provision of substantially diminished rights by a State or Territory.[51]
- The exclusion of towns or cities (Points 3 and 7). The right to negotiate is excluded with respect to any grant or other act relating to land or waters within a town or city.[52]
- The 'deeming' of extinguishment by past acts.[53]

## (ii) Pastoral interests override native title

The subordination of native title to pastoral and agricultural interests is achieved.[54]

## (iii) Point 6: The exclusion of various forms of mining grants

### (a) Exploration tenements

The Commonwealth Minister may exclude 'approved exploration etc acts' which are considered generally 'unlikely to have a significant impact on land or waters'.[55] Provision must be made for notification of native title holders and

50. New s 43A, supra p 55.
51. Ibid.
52. New s 26(2)(e).
53. Div 2B, Div 3 and subdivs I, J supra pp 51-53.
54. Div 3, new subdiv G supra p 53-54.
55. New s 26A.

for a right to be heard unless 'no other person would have such a right'. The person doing the act must 'consult' for the purpose of minimising the impact. An 'approved exploration etc act' cannot create a right to produce minerals.

The Federal Court consistently overturned the NNTT's rulings regarding when an act attracted the expedited procedure and thereby avoided the right to negotiate. The proposed amendments seek to reinstate the NNTT's interpretations.[56] The amendments will remove exploration tenements from the right to negotiate.

### (b) Renewals

Any renewal, re-grant or extension of a right to mine or explore, irrespective of whether there is a right to an additional tenement, is excluded from the right to negotiate where the *original* tenement was granted after complying with the requirements of the right to negotiate.[57]

### (c) Small-scale mining area

The Commonwealth Minister may approve 'opal or gem mining areas' and alluvial 'gold or tin mining acts' and thereby exclude grants of all mining rights in the Crown from the right to negotiate. Such areas contemplate short-term, small area tenements. The Government has explained this exclusion as being necessary because application of the right to negotiate would be 'impractical'.[58]

## (iv) Exclusion of project acts

If two or more grants or other acts constitute part of a single project identified by a government party the right to negotiate will apply as if the project was a single act.[59]

## (v) Exclusion of private infrastructure

As originally proposed in October 1996, compulsory acquisition of native title rights in order to confer rights on private parties was only to be excluded from the

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56. See the Federal Court decisions in *Ward v WA* (unreported) Fed Ct 9 May 1996, Carr J; *Ward v WA* (unreported) Fed Ct 18 Nov 1996, Lee J; *Dann v WA* (unreported) Fed Ct 8 May 1997, 332. And see R Bartlett 'Dispossession by the National Native Title Tribunal' (1996) 26 UWAL Rev 108.
57. New s 26D(1) and see (2).
58. Minchin '*Wik*: The Ten Point Plan Explained' supra n 21, 7.
59. New ss 29(9), 42A.

right to negotiate for the purpose of the provision of a '*public* infrastructure facility'. The requirement that the facility be for the 'general public' has been deleted in the Ten Point Plan. The draft legislation affirms the abandonment of any limitation on the subordination of native title to public interests. No right to negotiate will attach where native title rights are compulsorily acquired in the course of developing infrastructure for the benefit of a private enterprise.

## (vi) Exclusion of water

The subordination of native title to private water rights is achieved.

## (vii) Presumed non-existence

The presumed non-existence of native title pursuant to non-claimant applications is achieved.

## (viii) Ministerial override of the right to negotiate

Under the Native Title Act the right to negotiate is not a veto and an arbitral body may determine that an act may be undertaken. Moreover, if the arbitral body determines that an act may *not* be undertaken the determination may be overridden by the Minister. The draft legislation will further reduce the significance of this right.

The Commonwealth will be empowered to intervene to exclude projects of 'substantial economic benefit to Australia' from negotiation *or* consideration by the arbitral body (the NNTT if there is no local tribunal).[60] The Minister will also be empowered to make a determination that an act may be done whenever the Minister considers that the arbitral body is unlikely to make a determination within what the Minister considers a 'reasonable period'.[61]

## (ix) Rendering the right illusory

In *Walley v Western Australia*[62] the Federal Court declared that the right to negotiate procedure must be complied with before a determination can be obtained from the arbitral body that the act can be done. The government party must negotiate in good faith.[63] The proposed amendments will relieve the government party from

60. New s 34A.
61. New s 36A.
62. *Walley v WA* (unreported) Fed Ct 20 Jun 1996 no WAG 6004.
63. S 31.

the duty to negotiate in good faith. A proposed amendment will require the arbitral body to make a determination that an act may be done 'even if the negotiation parties (other than the party who applied for the determination) did not negotiate in good faith'.[64] As long as the grantee negotiates in good faith and applies for the determination the government party need not do so.

## (x) Points 6, 9: Denying access to the right to negotiate

The Native Title Act has been interpreted as requiring registration of a native title claim upon lodgement.[65] The right to negotiate accrues upon registration. Both the previous Labor and the present Coalition Governments determined that a threshold test for registration needed to be put in place. But the proposed test in the draft legislation is not merely one requiring the establishment of a prima facie case. A claim will not be registered if, inter alia:

- a previous exclusive possession act has taken place;[66]
- a previous non-exclusive possession act has taken place if *any* claim to exclusive enjoyment is made;[67] or
- the Registrar considers prima facie that *any* of the native title rights and interests claimed in the application cannot be established.[68]

The new registration test will apply to claims made *before* as well as after 27 June 1996 (when the new proposals with respect to registration were introduced in Parliament). Registered claims which do not meet the new test will be removed.[69]

## 9. Point 9: The six-year sunset clause

The proposed amendments greatly increase the burden on applicants in the making of claims. Much more detail is demanded with respect to the nature of interests affected and the basis of the claims. The process of making a claim will entail the research and consideration of the pre-Colonial relationship of the Aboriginal people to the land and the impact of the entire history of subsequent development and regulation of the land following the acquisition of British sovereignty. The proposed amendments will impose a sunset clause of six years on all claims under the Act.[70] The clause totally fails to take account of the unique nature of native title

64. New s 36(2).
65. *Northern Territory v Lane* (1996) 39 ALD 527.
66. New s 190B(3).
67. New s 190B(4).
68. New s 190B(2).
69. Sched 2, Pt 4, Transitional.
70. New ss 13(1A), 50(2A).

and the special burdens attached to making a native title claim. The clause supposes that the entire question of the Aboriginal relationship to all land in Australia can be disposed of by applications made within a six year period. The Government called that part of its explanation of the amendments dealing with the sunset clause, 'the management of claims'.[71]

The six year period would seem to be a compromise between the one year period of Western Australia's invalidated Land (Titles and Traditional Usage) Act 1993 and Victoria's 15 year period in the repealed Land Titles Validation Act 1993.

## 10. Limiting compensation

Native title and freehold are not the same. Native title may have a more limited panoply of rights but it may also have a greater significance, especially in the circumstances of a forced taking. Accordingly, compensation for native title in the event of a forced taking may be less or may be greater than that payable with respect to freehold, depending on all the circumstances. The Ten Point Plan rather than attempting to provide certainty by establishing a principle that compensation should always be paid as if freehold had been taken, attempts to impose a maximum limit 'as if the act were the compulsory acquisition of a freehold estate'. The proposals seek to deprive native title holders of rights rather than providing clarification.

## 11. Point 5: Substitution of statutory rights of traditional access for native title

The proposed amendments will confer rights of access for traditional activities (hunting, fishing, camping, gathering and ceremonies) to the same extent that a person 'regularly had physical access' as at 23 December 1996, where that person is a member of a native title claim group with a registered claim over a non-exclusive agricultural or pastoral lease. But the right is in substitution for all native title rights over the land and is subject to the rights of the lessee, or any person with non-native title rights, *no matter when* the lease or those non-native title rights were granted.[72] The new subdivision is a further explicit statement of the subordination of native title to pastoral interests.

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71. Minchin '*Wik*: The Ten Point Plan Explained' supra n 21, 9.
72. Div 3, new subdiv Q.

## E. DISPOSSESSION

The Howard Government's 'Ten Point Plan' is not unlike the invalidated Land (Titles and Traditional Usage) Act 1993 of Western Australia. It subordinates native title to all other interests, in particular those of the mining and pastoral industries, and strips native title of substantial protection. Native title is accorded an essentially inferior status, entailing a denial of equality before the law. However the Native Title Act started out, if the proposed amendments are enacted the amended Act will merely validate the dispossession of the past, validate the denial of native title in the future, and offer minimal rights to compensation and burdensome procedures to Aboriginal people. It will provide a stark and clear manifestation of Australia's inability to extend equality before the law to Aboriginal people. The Native Title Act will merely serve as an ongoing instrument of dispossession. It will provide title and resource security to everybody *except* native title holders. A more apt title would be the Native Title Extinguishment Act.

It is as though economic development and equality before the law are incompatible. They are not. In Canada, the United States and New Zealand the compatibility of resource security and equality before the law has been achieved by a process of regional agreement.[73] None of those jurisdictions has enacted any legislation comparable to the Native Title Act. They have preferred to rely on the parties to take responsibility for the exercise of their rights and the courts to adjudicate if a dispute arises. No legislation has been passed which would deny equality before the law. Investment and development have proceeded and in view of this the claims of the damage wrought by native title uncertainty in Australia are absurd. In late April 1997, BHP committed the first $680 million to the development of a diamond mine in the Northwest Territories, Canada. The mine is located on land subject to native title claims by at least two Aboriginal groups. Negotiations for a settlement of native title in the region are ongoing. The supposed uncertainty has not discouraged BHP because it is minimal, if not non-existent. All parties accept that native title will be settled by an agreement which respects existing rights *and* native title.

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73. See generally R Bartlett 'Resource Development and the Extinguishment of Aboriginal Title in Canada and Australia' (1990) 20 UWAL Rev 453, 487; R Bartlett 'Only an Interim Regime: The Need for a Long Term Settlement Process' in Centre for Commercial Resources Law *Native Title Legislation in Australia* (Perth, 1994); R Bartlett 'Native Title: The North American Experience' (1994) Aust Mining and Petroleum Yearbook 85; R Bartlett 'The Wik Decision and Implications for Resource Development' (1997) 16 Aust Mining and Petroleum L Journ 28, 43; R Bartlett *Native Title: The Way Ahead?* (Perth: WA Law Society, 1997).

One point in the Ten Point Plan has not been addressed in this article. It is the tenth point which provides for 'Indigenous Land Use Agreements'[74] as 'an alternative to more formal native title machinery'. In the context of the remaining provisions furthering the subordination and dispossession of native title the tenth point has little significance. The Ten Point Plan so greatly reduces the negotiating power of native title holders as to call into question the fairness of agreements reached and to undermine native title holder commitment to them.

The Ten Point Plan will attract international attention because of how far it falls short of the requirements of equality. It will breach the International Convention on the Elimination of Racial Discrimination and lead to the disparagement of Australia abroad. It will unquestionably face legal challenge within Australia. The more obvious success of international rather than domestic challenges arises from the lack of any constitutional protection from denials of equality before the law within Australia.[75]

The Ten Point Plan perpetuates the historic policy of subordinating the rights of native title holders. It is a return to dispossession and discrimination.

74. Div 3, new subdivs B, C, D, E.
75. See *Kruger v Commonwealth* (1997) 146 ALR 126.