THE SEARCH FOR CERTAINTY AND THE *NATIVE TITLE AMENDMENT ACT* 1998 (CTH)

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I. AN OVERVIEW OF THE EFFECT OF THE 1998 AMENDMENTS

The *Native Title Act* 1993 (Cth) (NTA) was 127 pages in length and not easy to comprehend. The 1993 Act, with the 1998 amendments, is 441 pages long. It is a highly complex piece of legislation.[1] The 1993 Act has been amended in a number of ways which are addressed in this article:

- Native title claimants have to satisfy a stringent – and retrospective – new registration test before they may have access to the 'right to negotiate' (RTN) in relation to government proposals for mining activity or some compulsory acquisitions. The test also represents a barrier to some other processes under the Act.
- States and territories may replace the RTN on such areas as pastoral leases and national parks with weaker processes of their own.
- Native title holders will also have reduced procedural rights concerning mineral exploration.
- Holders of pastoral leases may diversify into other primary production activities without the need to deal with any native title holders.

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1 The NTA itself had a tortuous evolution, traced by T Rowse, "How we got a Native Title Act" in M Goot and T Rowse, *Make a Better Offer. The Politics of Mabo*, Pluto (1994) 111; H McRae, G Nettheim and L Beacroft, *Indigenous Legal Issues. Commentary and Materials*, LBC (2nd ed, 1997) p 219-33; F Brennan, *One Land, One Nation. Mabo – Towards 2001*, UQP (1995). For a concise account of the political processes that led, finally, to the enactment of the NTAA, see F Brennan, *The Wik Debate: Its Impact on Aborigines, Pastoralists and Miners*, UNSW Press (1998). For a detailed account of the evolution of the 1998 amendments, see P Burke, "Evaluating the Native Title Amendment Act 1998" (1998) 3(3) *Australian Indigenous Law Reporter* 333.

- It will be easier for state governments to compulsorily acquire co-existing native title rights on pastoral leases and to upgrade a lease to freehold, so as to extinguish native title.
- Native title holders will have a reduced say in a range of government activities on their country, including management of national parks, forest and other reserves, public facilities and water resources.
- Native title holders will have no meaningful say in regard to offshore fishing or offshore mining activity which may affect native title rights.
- States and territories are permitted a further round of validation of "intermediate period acts" between 1994-96, notably government grants of interests, without going through required NTA processes.
- States and territories are authorised to "confirm" a lengthy list of "previous exclusive possession acts" as having extinguished native title, conceivably as far back as 1788. Many of these acts would not have extinguished native title under common law principles.
- Generally, states and territories have increased powers, and incentives, to establish their own tribunals and processes to deal with native title issues.
- Processes for determinations of native title will be more legalistic.
- There are welcome provisions for negotiation of Indigenous Land Use Agreements which can serve to avoid the more adversarial processes under the Act.
- There are also useful provisions to strengthen the role of "representative Aboriginal/Torres Strait Islander bodies". But such bodies are also required to undergo, within a year, a process of "re-recognition" by the Minister.

At a broader level, the challenge presented by the possible survival of native title is, generally, treated not as a matter of human rights in respect of property and culture, but as a matter of "land management" and states' rights.[2] A larger measure of control over native title issues is shifted to states and territories. And native title is further confined in the interest of causing minimal nuisance to industry and to government decision-making.

II. 'CERTAINTIES' ACHIEVED

In a number of areas the Act, as amended, resolves uncertainties, though other uncertainties remain.

2 G Nettheim, "Native Title, Fictions and Convenient Falsehoods" in C Perrin (ed), *In the Wake of Terra Nullius* (1998) 4.1 *Law. Text. Culture* 70.

A. Validations

In 1993, one of the problems perceived as having been created by the *Mabo* decision[3] was the possible invalidity of government grants of interests in land since the commencement, on 31 October 1975, of the *Racial Discrimination Act* 1993 (Cth) (RDA). This concern, expressed by the mining industry in particular, led to calls for the Commonwealth Parliament to provide for the validation of such interests. This proposal was explicable on the basis that, until 3 June 1992, native title had not been recognised.

Accordingly, Part 2, Division 2 of the NTA provided for the validation of "past acts" from 1975 to the end of 1993. For "future acts", the effect of the RDA was fortified by the general rule in s 23 and s 253 (the freehold rule) that native title, in on-shore places, was entitled to the same protections as would be available in respect of "ordinary title" (freehold, in most places). Division 2 also spelt out the consequences of any such validation, according to four categories of "past acts", in respect of extinguishment, partial extinguishment or non-extinguishment. It also provided for compensation.

From the date of the commencement of the NTA – 1 January 1994 – the "future act" regime should have prevailed, particularly in view of ss 10 and 11 of the NTA. Governments should only have granted interests in land and waters, or set aside land or waters for public uses, by going through the processes laid down by the NTA. Those processes included the issuing of s 29 "future act" notices, or the lodging of non-claimant applications (s 67), or the negotiation of s 21 agreements. To a surprising extent governments failed to use these processes.

Some governments chose to proceed on the "extraordinarily risky" assumption that pastoral leases had extinguished native title for all time. Some encouraged grantees to lodge non-claimant applications. Some simply sought to transfer the risk of non-compliance with the NTA to grantees.[4] Anything, it seems, rather than negotiate with Indigenous Australians. The example of Queensland is illustrative, though the problem was not confined to Queensland. The state's Minister for Mines and Energy reported that 4600 mining tenures had been issued between 1 January 1994 and 23 December 1996, the date of the *Wik* decision.[5] The disregard of the requirements of the NTA was not, apparently, confined to pastoral lease lands: the National Native Title Tribunal in its Annual Report for 1995/1996 reported that it received 5114 s 29 notices from Western Australia but only three from Queensland.[6]

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

4 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report: July 1994 – June 1995*, 1995 at 155-74, especially 158.

5 *The Wik Peoples and Thayorre People v Queensland* (1996) 187 CLR 1. The High Court held that pastoral leases under Queensland legislation did not necessarily extinguish native title but native title interests would have to yield to the rights of the pastoralist. For a similar decision in regard to pastoral leases in South Australia and Northern Territory, see *Hayes v Northern Territory* [1999] FCA 1248 (9 September 1999), per Olney J.

6 G Nettheim, "Wik: On Invasions, Legal Fictions, Myths and Rational Responses" (1997) 20 *UNSWLJ* 495-501; G Nettheim, "Responding to Wik: First, Define the Problem" (1997) 4(1) *Indigenous Law Bulletin* 14.

The *Wik* decision led to a fresh round of demands for validation of titles which may have been at risk of invalidity. Those who were likely to suffer from any such invalidity were, of course, not so much the governments that granted the titles but the miners and others who had received them. But it was the state and territory governments which led the clamour. For their disregard of the requirements of Commonwealth law those governments were "punished" by the enactment of new Division 2A (in Part 2 of the Act) which provides for the validation of "intermediate period acts" of Governments in the period from 1 January 1994 to 23 December 1996. As with the provisions for validation of "past acts", "intermediate period acts" are divided into four categories for the purposes of their effect on native title: extinguishment, partial extinguishment or non-extinguishment. Provision is also made for compensation. In addition, governments are required to notify details of such acts relating to mining within six months, but failure to comply with this requirement apparently has no effect on the validation. So a further instalment of certainty seems to have been achieved, for both non-Indigenous interests and native title holders: to the benefit of the former and to the detriment of the latter.

It seems to be conceded that both rounds of validation are contrary to racial discrimination principles. Section 7(2) of the 1993 Act, now s 7(3) of the amended Act, expressly provides that the section's general statement as to the applicability to the Act of the RDA does not affect the validation provisions.

B. Confirmations

It now appears certain that the immensely long and detailed list of past acts which governments are authorised to "confirm" as "previous exclusive possession acts" extinguish native title, as provided by ss 23C and 23E. "Previous non-exclusive possession acts" are also confirmed as *partially* extinguishing native title under ss 23G and 23I.

So, in respect of such confirmed previous acts, there should be no more unwelcome *Wik*-type surprises. The category of "previous non-exclusive possession acts" clearly derives from the *Wik* decision, as it consists of the grant of non-exclusive pastoral and agricultural leases (s 23F). Interestingly, s 23G expressly provides that the effect of such leases may be simply to suspend native title for the duration of the lease. No similar allowance is made in respect of "previous exclusive possession acts".

The category of "previous exclusive possession acts" in s 23B is more wide-ranging. It includes grant of:

- a freehold estate – not surprising, in view of judicial statements in *Mabo [No 2]* and recently confirmed by the High Court in the *Fejo* case;[7]
- a commercial lease that is not a pastoral or agricultural lease;
- an exclusive pastoral or agricultural lease;
- a community purposes lease;
- a portion of a mining lease, as defined;
- any lease other than a mining lease that confers a right of exclusive possession.

The definition also includes various "vestings" and construction of public works. It also includes grant of a "Scheduled Interest" defined in s 249C and listed in Schedule 1 to the Act. Schedule 1 sets out long lists of leases, state by state, granted under various Acts for various purposes. State and Commonwealth officials have decided that they confer a right of exclusive possession. Such grants extinguish native title. They do so for all time, even if the interest granted has long since ceased to exist: s 237A.

The following is a selection of the purposes for which some extinguishing leases may have been granted some time in the past in NSW:

- cultivation of eucalyptus
- night soil depot
- sheep and cattle yard
- wattle growing
- cricket
- dog racing course
- feedlot
- whaling station
- caravan park and camping ground.

Similar lists appear for other states. In Queensland, for example, certainty of immunity from native title claims is secured for any "clubhouse for the Grand Lodge of the Royal Antediluvian Order of Buffaloes". In Western Australia, similar certainty is achieved for any "brine evaporating plant" or any "lobster receival depot". It is far from clear that all of these leases are so inconsistent with the exercise and enjoyment of native title rights and interests as to extinguish them.

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7 *Fejo and Mills v Northern Territory of Australia and Oilnet (NT) Pty Ltd* (1998) 156 ALR 721. The decision seems contrary to North American jurisprudence. See K McNeil "Racial Discrimination and Unilateral Extinguishment of Native Title" (1996) 1 *Australian Indigenous Law Reporter* 181; "Co-Existence of Indigenous and Non-Indigenous Land Rights: Australia and Canada Compared in Light of The Wik Decision" (1997) 4(5) *Indigenous Law Bulletin* 4; "Extinguishment of Native Title: The High Court and American Law" (1997) 2 *Australian Indigenous Law Reporter* 365. And see *Delgamuukw v British Columbia* (1998) 3 *Australian Indigenous Law Reporter* 35.

C. Permanence of Extinguishment

The issue was presented in the *Waanyi*[8] case and, again, in the *Wik* Case, in relation to pastoral leases which had ended. In *Wik,* the majority judges, (in a "Postscript" to the judgment of Toohey J), found it unnecessary to decide the question whether native title was simply suspended during the currency of a pastoral lease, so that it might revive on the expiry of the lease. By contrast, Brennan CJ (in a judgment with which Dawson J and McHugh J agreed), developed the proposition which he had put forward in *Mabo [No 2]*, namely, that the effect of a Crown grant, even of a limited duration lease, is to remove the land in question permanently from the domain of native title into the domain of Crown-granted titles. Accordingly, when the lease comes to an end, the full beneficial title reverts to the Crown.[9] But the majority judges in *Wik* rejected that analysis.[10]

Is there a temporal dimension to the inconsistency which may arise between surviving native title and an overlaid lease? What might the common law position be?

Leasehold titles, as distinct from freehold titles, are traditionally granted for limited periods of time. Provisions for renewals do not alter this situation. Even perpetual leases will usually contain provision for forfeiture for breach of conditions, or for surrender. Generally, at law, when a lease comes to an end the underlying title comes back into full operation. If the owner of the freehold title to a farm leases it for 21 years, at the end of that period the full title reverts to the owner. Governments have the power to grant mining leases over much freehold or leasehold land. When such a lease is granted the rights of the owner or leaseholder are simply suspended for the duration of the overlaid mining lease.

Is the situation any different when the underlying title is native title? If it were, the situation would appear to offend the RDA.[11] But the general answer provided by the 1998 amendments appears in s 237A:

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

At points in the NTA, as amended, exceptions are made to this draconian general principle so that the matter may eventually be settled by the courts. As noted above, s 23G provides one such exception in relation to the confirmation of "previous non-exclusive possession acts". Other exceptions (likewise emanating from the Senate) relate to: Aboriginal land (s 23B(9)); national parks (s 23B(9A)); acts done under legislation that expressly provides that the act does not extinguish native title (s 23B(9B)); "Crown to Crown" grants or vestings

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8 *North Ganalanja Aboriginal Corporation v Queensland* (1995-96) 185 CLR 595.

9 Note 3 *supra* at 68 and 72-3; *Wik Peoples* case, note 5 *supra* at 88-94.

10 *Wik Peoples* case, note 5 *supra* at 127-9, per Toohey J; at 155-6, per Gaudron J; at 186-90, per Gummow J; at 233-5, per Kirby J.

11 ATSIC, *Native Title Amendment Bill 1997 – Issues for Indigenous Peoples*, October 1997 at 45-6.

(s 23B(9C)). Any extinguishment which would otherwise have been achieved as a result of historic tenures (for instance, 'ghost leases') on land which is now Aboriginal reserve or vacant Crown land can be disregarded if a claimant application for native title is made and the people are in occupation of the land (ss 47A, 47B).

D. Renewals and Upgrades

Under the 1993 Act any interest could be renewed under a pre-1994 legally enforceable right (s 25). Under the 1998 amendments, this is extended to apply to a legally enforceable right created before 23 December 1996 or to "an offer, commitment, arrangement or undertaking made or given in good faith" before that date of which there is written evidence (s 24IC).

The general principle in the 1993 Act was that the renewal of certain types of leases (commercial, agricultural, pastoral or residential – but not mining) would be valid as a "permissible future act", provided that the renewal did not create a proprietary interest in place of a non-proprietary interest or a larger proprietary interest than was previously created by the lease (s 235(7)). Under the 1998 amendments, a similar proviso applies to the renewal of non-exclusive pastoral and agricultural leases granted on or before 23 December 1996.

But upgrading to longer term or perpetual leases can be achieved by a process of compulsory acquisition following procedures laid down in new s 24MD which are less rigorous than those that previously would have applied under the RTN provisions. So, again, a larger degree of 'certainty' has been achieved for the holders of various sorts of leases that they may be renewed without the need to deal with any native title holders. And it is easier to upgrade leases. Compensation is payable to any native title holders.

E. Diversification

One of the identifiable problems presented by the *Wik* decision for pastoralists was the question whether they might diversify into other economic uses of the land, without having to go through the "future act" processes under the 1993 Act, notably, by obtaining the agreement of any native title holders. New Subdivision G (of Part 2, Division 3) authorises any "primary production activity" (or another activity associated with or incidental to a primary production activity) on a non-exclusive agricultural or pastoral lease granted before 23 December 1996, provided that such act could have been validly done or authorised prior to 31 March 1998.[12]

The term "primary production activity" is defined by s 24GA to include:

(a) cultivating land;

(b) maintaining, breeding or agisting animals;

(c) taking or catching fish or shellfish;

12 The latter date was selected to accommodate the expansion of permissible uses of such lands under the *Land Administration Act* 1998 (WA).

(d) forest operations;

(e) horticultural activities;

(f) aquacultural activities;

(g) leaving fallow or de-stocking any land in connection with the doing of any thing that is a primary production activity.

It does not include mining (s 24GA(2)). It does include farm tourism, though not involving observing "activities or cultural works of Aboriginal peoples or Torres Strait Islanders" (s 24GB(2) and (3)).

In the case of a pastoral lease exceeding 5000 hectares, no more than half may be used for non-pastoral purposes. However, diversification is more likely on smaller, well-watered leases. While the non-extinguishment principle is said to apply, some forms of diversification could well amount to de facto extinguishment. Compensation is payable by a government that authorises such activity, but not by the lessee conducting the activity. A government must also notify, and provide opportunity to comment on any proposal for forest operations or horticulture or aquaculture, or (on a pastoral lease) agriculture.

Governments may also authorise a lessee, or third parties, to cut and remove timber or to "extract, obtain or remove sand, gravel, rocks, soil or other resources" from non-exclusive pastoral or agricultural leases (s 24GE). Certain off-farm activities associated with primary production are also permitted to freeholders and lessees, such as grazing cattle or taking water, even if there has been a determination that the land in question is subject to native title (s 24GD). In consequence, the uncertainties felt by pastoralists about their right to engage in activities on – and even adjacent to – their holdings are more than adequately settled in their favour.

F. Water and Airspace

The original NTA contemplated that native title rights and interests might apply not only to land but also to waters, on-shore and offshore. Section 212(1) authorises legislation to confirm (a) any existing ownership of natural resources by the Crown; or (b) any existing right of the Crown to use, control and regulate the flow of water; or (c) that any existing fishing access rights prevail over any other public or private fishing rights. Section 212(2) authorises legislation to confirm public rights of access to various places including waterways, beds and banks or foreshores of waterways, coastal waters and beaches. Any such confirmations do not extinguish any native title rights and interests. In addition, s 211 largely exempts native title holders from licence requirements in relation to fishing (and some other activities) conducted in exercise or enjoyment of their native title rights for the purpose of satisfying their personal, domestic or non-commercial communal needs.

Non-Indigenous interests in waters – and airspace – are given larger support by the 1998 amendments. New Subdivision H establishes another category of permissible future act which can be carried out without reference to native title holders, other than notification and an opportunity to comment. Governments may legislate or grant leases, licences, permits or authorities in relation to the

management or regulation of surface and subterranean water, living aquatic resources or airspace. This would permit the grant of irrigation licences and commercial fishing licences. The non-extinguishment principle applies and there is entitlement to compensation.

New Subdivision N also authorises the compulsory acquisition, without reference to the RTN procedures, of offshore native title rights and interests, provided that non-native title rights and interests in the area are also acquired, and provided that native title holders are given the same procedural rights as the holders of non-native title rights and interests.

So considerable certainty has been delivered to governments and to those who seek the grant of licences, etc, from governments in relation to water, fish and airspace.

G. Reservations, Leases etc

New Subdivision J also avoids any obligation on governments to negotiate with native title holders concerning the management of national parks, forest reserves and the like. It applies where pre-*Wik* legislation reserved land or waters for a particular purpose, or a pre-*Wik* lease was granted to a statutory authority for a particular purpose; in such cases, the land or waters may be used for that particular purpose. In the case of a reservation it may also be used for a different purpose, provided that the impact on native title is no greater. Native title will be extinguished if the act consists of the construction or establishment of a public work; otherwise, not. Compensation is payable. Limited right of notification and comment are required in the case of public works or national park management plans.

Again, enhanced certainty is provided to governments and non-native title interests.

H. Facilities for Services to the Public

Under the original NTA, the provision of new facilities for the public on native title land would probably have required resort to a non-claimant application, an agreement, or compulsory acquisition. These will not be necessary under new Subdivision K. Subdivision K relates to construction, operation, use, maintenance or repair of various listed facilities for the general public. The list includes roads, railways, bridges, jetties, wharves, water pipelines, wells and bores, communication cables or towers, street lighting, facilities for gas, electricity, irrigation, sewerage, drainage and the like.

Such future acts are conditioned on procedural rights equivalent to those provided to people who hold freehold title, notification, the non-extinguishment principle, compensation, reasonable access and provision for protection of significant sites. So greater certainty is provided to governments seeking to provide such facilities, again, at the cost of some erosion of the rights of any native title holders.

I. The Freehold Test

A general principle for an onshore future act to be "permissible" under the 1993 Act was that it apply to native title holders in the same way as it would if, instead, they held "ordinary title", defined as freehold title in most jurisdictions. This principle is replicated in new Subdivision M. But earlier Subdivisions already noted are not subject to this 'freehold test', notably the provisions relating to primary production; water and airspace; reservations, leases etc; facilities for services to the public.

Highly detailed provisions follow relating to extinguishment or non-extinguishment of native title, compensation and so forth. Under s 24MD, alternative procedures to the RTN are found in respect of compulsory acquisitions for the benefit of third parties, and these appear to cover the case of a government seeking to upgrade pastoral or agricultural leases to freehold.

J. The Right to Negotiate.

Under the 1993 Act, in relation to future acts onshore, native title holders had rights equivalent to those of freeholders. In addition, they had a time-limited RTN in respect of proposals for mining and proposals for compulsory acquisition of native title rights and interests for the benefit of third parties.

The scope for the RTN has been significantly reduced by the extinguishments achieved by the validation provisions (Divisions 2 and 2A) and by the provisions for confirmation of previous acts (Division 2B). It is also reduced by amended s 26. It no longer applies to:

- the extension of the term of a mining lease, etc, but only to its creation or variation;
- compulsory acquisition for a third party where the purpose is to provide an "infrastructure facility" (broadly defined), whether for public or private benefit;
- an approved exploration act as determined by the Commonwealth Minister (s 26A);
- an approved gold or tin mining act;
- opal or gem mining as excluded by s 26C;
- renewals of valid mining leases (s 26D);
- the creation of a right to mine where the RTN had applied to exploration (s 26D);
- compulsory acquisition of native title rights and interests within a town or city;
- the intertidal zone.

Some of these exclusions are subject to a number of conditions, some of which are dependent on the exercise of discretions vested in the Commonwealth Minister. The potential for greater certainty for non-native title interests is offset

by the possibility of applications for judicial review of the exercise of those discretions.

Section 43 of the 1993 Act provided for states and territories to establish their own "alternative provisions" to the RTN if they so chose, subject to fairly tight conditions. Section 43 remains with some modifications. New s 43A, as it emerged from the Howard-Harradine agreement, also provides for states and territories to make alternative provision when the proposal that would otherwise attract the RTN applies to land which was or is covered by a pastoral lease (or certain other interests) or was reserved for such public purposes as a national park, or is in a town or city. Such lands account for over 50 per cent of Australia.

The procedures which states and territories may provide are subject to conditions which now seem to be little different in essence, though not in detail, to the RTN itself. The Commonwealth Minister may endorse them as complying with the Act if the Minister is of opinion that they make provision for compensation to native title holders, and that Commonwealth or state or territory law provides for the preservation and protection of significant areas and sites. Under the full RTN, it would be open to native title holders to present a wider range of concerns such as social impact, environmental protection or social and economic matters. Other checks are that the Commonwealth Minister is required to notify representative Aboriginal/Torres Strait Islander bodies of a proposed determination and invite and consider submissions. The Minister's determination is also subject to possible disallowance by either House of the Commonwealth Parliament.

Some states moved rapidly to establish such alternative provisions, though it is still too early to provide an adequate account of what will emerge from the various political and legislative processes. Clearly, states hope to facilitate mining and other projects. Whether their processes will make much difference in the long run remains to be seen. In the meantime, some degree of certainty is lost to mining companies which may need to operate within different procedures in different jurisdictions.

Where the RTN remains there are also changes. A uniform period of six months is available for negotiation for both exploration and extraction (s 35). All parties – not just the government party – are required to negotiate in good faith (s 31). And there are other changes. One of the most critical factors is the new registration test which is now a precondition to access to the RTN (and other processes under the Act, mainly, the right to counter non-claimant applications and the right to interim statutory rights of access on pastoral leases).

K. The Registration Test

New ss 190A-D provide that a claimant application for a determination of native title will not be accepted for registration unless the Registrar is satisfied of various matters including that:

- the factual basis is sufficient to support the rights asserted;
- prima facie, some of the native title rights can be established;

- a traditional physical connection of at least one member of the claim group with the land (subject to a "stolen children/locked gates" exception);
- native title has not been extinguished.

The registration test is to have retrospective application to large numbers of applications previously placed on the Register (Table A, Schedule 5, Part 4). The registration test will make it almost certain that registered claimants are the appropriate people for governments and industry to deal with. Unfortunately, its application looks certain to deprive a number of genuine native title holders of the RTN to which they ought to be entitled.

L. Representative Aboriginal/Torres Strait Islander Bodies

Such bodies are crucial to the smooth operation of the NTA (see Part 11). The amendments provide a stronger basis for their work and provide additional mandates. In particular, these bodies have an important role in certifying that applications are lodged by and on behalf of the right people, in negotiating Indigenous Land Use Agreements, in attempting to resolve disputes among Indigenous peoples in their area and so on. They represent the logical first stop for industry representatives seeking to work on land which may be subject to native title. Strong "representative bodies", adequately resourced, are likely to advance the goal of certainty in the operation of the legislation.[13]

Existing representative bodies, however, face the prospect of a re-registration process by the Commonwealth Minister after a transition period of one year.[14] If this process is not handled carefully in accordance with proper considerations, the result could impair the goals of certainty and workability.

It has also been argued that additional accountability requirements are excessive and will divert energies and resources from the primary functions of the representative bodies.

M. The Federal Court

In brief, all applications for determinations of native title and compensation will now be lodged in the Federal Court and then referred to the National Native Title Tribunal (NNTT) for notifications, mediation etc. All determinations will be made by the Federal Court. (Other arrangements may apply in states and territories which set up their own processes.) This shift may make for more legalistic approaches in some areas.

N. State and Territory Processes

The 1993 Act and the 1998 amendments authorise state and territory legislatures to validate "past acts" and "intermediate period acts", and to

13 Aboriginal and Torres Strait Islander Commission, *Review of Native Title Representative Bodies*, 1995.

14 ATSIC Information Paper, *Implementation of New Legislative Provisions Relating to Native Title Representative Bodies*, November 1998; L Strelein, "Moving the Boundaries: Native Title Representative Bodies and the Recognition Process" (1999) 4(22) *Indigenous Law Bulletin* 12.

"confirm" the extinguishment of native title by "previous exclusive possession acts" (and partial extinguishment by "previous non-exclusive possession acts"). States and territories are also authorised to confirm the various matters mentioned in s 212.

As noted, they are also authorised to establish alternative provisions to the RTN: ss 43, 43A. Section 27 authorises states and territories to establish their own bodies to serve as the "arbitral body" for the purposes of the RTN. When a state or territory arbitral body makes a determination as to whether or not a mining proposal should be permitted, a power to override such determination may be exercised by the state or territory Minister: ss 27A, 42.

More generally, states and territories may establish a "recognised State/Territory body" (s 207A) to make determinations of native title, compensation and future acts. The Commonwealth Minister needs to be satisfied as to listed criteria for the body to be recognised. In addition, under s 207B an "equivalent body" may be accepted by the Commonwealth Minister to perform specified functions or exercise specified powers of the NNTT or the Native Title Registrar. Again, the Commonwealth Minister needs to be satisfied as to listed criteria.

Little use has been made of state powers to establish their own 'machinery' in the past, though this seems likely to change since the amendments. Whether this will be conducive to certainty probably depends on the differing points of view of state politicians and administrators, Commonwealth politicians and administrators, industry, and native title holders.

III. UNCERTAINTIES REMAINING

Various uncertainties have been resolved, at least for the time being, in relation to, among others, validations, confirmations, diversification on pastoral leases. However, uncertainties remain.

A. Possible Revival of Native Title

As noted, some aspects of the question whether extinguishment is permanent remain to be determined by the courts, though the broad principle that extinguishment is permanent is strongly established in key aspects of the legislation. If the courts were eventually to rule that native title might revive on the expiration of a lease, or that it would not revive, this could have some bearing on the assessment of compensation for extinguishment of native title.

B. Sea Country

The Croker Island case[15] has provided a positive answer to the question whether native title rights and interests may extend offshore. The Federal Court

15 *Mary Yarmirr v Northern Territory* (1998) 156 ALR 370. See GD Meyers, M O'Dell, G Wright, SC Muller, *A Sea Change in Land Rights Law: The Extension of Native Title to Australia's Offshore Areas*, AIATSIS (1996).

also held that such rights would not affect non-Indigenous fishing and other rights in the area. More jurisprudence may be needed in this area, though the 1998 amendments to the NTA do supply some answers. The question of native title fishing rights has not yet been successfully argued in the context of criminal prosecutions.[16] Some answers are provided in the 1993 Act and the amendments.

C. Sub-Surface Rights

Such rights have been asserted in several cases, and there is some support for the proposition that native title is capable of including rights to sub-surface resources. It is possible that legislation of the several states and territories that declare Crown ownership of minerals may be interpreted as extinguishing any such rights, but that may depend on the actual language of the legislation. It is worth noting that there is some private ownership of minerals in several parts of Australia.[17]

D. Managing Co-Existence

One of the concerns expressed by some pastoralists in the aftermath of the *Wik* decision was about how to manage co-existence "on the ground". This ought not to be a novel idea in Australia. Pastoral leases in Western Australia, South Australia and the Northern Territory have long been subject to statute-based rights of continuing Aboriginal access. Some individual pastoralists have had long-standing arrangements with the native titleholders. Some have recently developed such arrangements, and there is an organisation devoted to the idea – Rural Land Holders for Co-Existence. The Cape York Peninsula Regional Heads of Agreement involved pastoralists, Aborigines and environmentalists and set out broad principles for co-existence. It has been proposed that the best way to proceed on this issue is via a regional agreement supplemented, at a more specific level, by "farm gate" agreements. One of the positive aspects of the 1998 amendments is the enhanced provision for negotiated agreements.

E. Common Law Native Title Rights

The 1998 amendments as enacted deleted the proposal for a "sunset clause" of six years on applications for native title and for compensation. It had been pointed out that native title is a common law right and that it would be open to native title holders to seek determinations of native title or compensation without any need to rely on the NTA, just as Eddie Mabo and his co-plaintiffs did.

As enacted in 1993, the NTA offered net benefits to native title holders, partially offsetting the possible losses caused by the validation provisions. The 1998 amendments substantially erode those benefits and there may arise cases

16 *Mason v Tritton* (1994) 34 NSWLR 572; *Derschaw v Sutton* (1997) 17 WAR 419, 2(1) AILR 53; *Dillon v Davies* (unreported, SC Tas, Underwood J, 20 May 1998).

17 GD Meyers, CM Piper, HM Rumley, "Asking the Minerals Question: Rights in Minerals as an Incident of Native Title" (1997) 2(2) AILR 203. And see *Ben Ward and Others on Behalf of the Miriuwung and Gajerrong Peoples v Western Australia* (unreported, FCA, Lee J, 24 November 1998).

where native title holders may see it as being more advantageous legally to proceed outside the confines of the Act. Another possibility for regaining 'country', quite outside the court system, is by open-market purchase through the Indigenous Land Fund.

F. Alternative Legal Arguments

There may, however, be situations where Aboriginal people or Torres Strait Islanders are unable to assert native title, either through the Act or at common law. It is worth remembering that the Mabo plaintiffs had alternative lines of argument which were not effectively determined by the High Court.

One line of argument was that the plaintiffs were entitled to be acknowledged as owners of their lands under common law principles of possessory title.[18] Only Justice Toohey gave the argument any extended consideration.[19] It could well be relevant in a situation, say, where Aboriginal people continue to occupy a portion of their traditional country which has never been alienated, but have lost too much of their traditional law to be able to establish native title.

Another possible line of argument is available in a defensive fashion to challenge the validity of actions of governments. This is the argument that governments owe a fiduciary duty to Indigenous peoples in certain circumstances. The argument has been accepted in some jurisdictions such as Canada.[20] Fiduciary duty has been argued in several Australian cases but mostly without a conclusive result. It did get a concluded answer in the *Wik* decision where the High Court rejected an argument that pre-1975 mining leases were invalid on this ground.[21]

IV. ASSESSING THE RISK OF LEGAL CHALLENGES IN COURT

A. Challenges to Constitutional Validity

There have been various suggestions that the provisions of the NTAA are constitutionally invalid.

One suggested ground for invalidity is that, insofar as it erodes the rights of Aborigines and Torres Strait Islanders, it goes beyond the legislative power conferred by Constitution s 51 (xxvi): the power to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws". The argument is that, at least since the deletion in 1967 of the words "other than

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18 K McNeil, *Common Law Aboriginal Title*, Oxford (1989).

19 Note 3 *supra* at 206-14. See G Nettheim, "Judicial Revolution or Cautious Correction?" (1993) 16 *UNSWLJ* 1 at 12–16.

20 *Guerin v The Queen* (1984) 13 DLR (4th) 321. And see C Hughes "The Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada" (1993) 16 *UNSWLJ* 70.

21 *Wik Peoples* case, note 5 *supra* at 98-100, per Brennan CJ; at 100, per Dawson J; at 131, per Toohey J; at 135, per Gaudron J; at 167, per McHugh J; at 251-61, per Kirby J. For discussion and additional references, see H McRae, G Nettheim, L Beacroft, note 1 *supra*, pp 295-7.

the aboriginal race in any State", the power may only be used for the benefit of Indigenous Australians, not to their detriment.

There have been several dicta from High Court justices in the past which seemed to give some credibility to this proposition. But it failed on the first attempt to argue it in the Hindmarsh Island Bridge Case.[22] The argument as to the suggested limitation was accepted, in substance, in the separate judgments of Gaudron and Kirby JJ. Justices Gummow and Hayne saw only a limitation that a Commonwealth law could not represent a "manifest abuse" of Parliament's discretion to deem such a law to be necessary. Chief Justice Brennan and McHugh J did not consider the issue at all. Five of the Justices (Kirby J dissenting) held that the challenge to validity failed on the ground that the challenged 1997 Act was necessarily valid as a partial repeal or amendment of the valid principal 1984 Act, on the basis that the asserted rights of the Aboriginal plaintiffs were solely statutory rights.

It may still be open to argue that the effect of the NTAA on non-statutory rights of native title holders necessarily requires determination of the issue whether the race power is subject to some such limitation. If it is, there would be little difficulty in demonstrating that the extinguishments of native title rights and interests in the amendments are not to the benefit of Indigenous Australians.

Another possible Constitutional argument that has been put forward relates to the obligation in s 51(xxxi): the power to make laws with respect to "the acquisition of property *on just terms* from any State or person for any purpose in respect of which the Parliament has power to make laws". The NTA, both in its original version and as amended, shows a strong awareness of this obligation in its elaborate provisions for compensation. An attempt to impose a cap on compensation appears in new s 51A which purports to provide that the amount of compensation for the total extinguishment of native title must not exceed the amount that would be payable for the compulsory acquisition of freehold title. But sub-s (2) subjects this to s 53 which provides that any shortfall in the statutory provisions for compensation should, when necessary under s 51(xxxi), be topped up to what would constitute "just terms".

Any challenge on this ground may be directed to specific provisions for the assessment of compensation. It may also challenge the procedures of the Act as failing adequately to facilitate applications for compensation when payable. It was partly on the basis of submissions on these matters that the 1997 Bill was amended to make some provision for notifications to native title holders of possible effects on native title rights which might not otherwise have come to their knowledge.[23]

Again, one can only speculate on the likely success of a Constitutional challenge on this ground – or on other grounds that may be argued. The major point is that the substantial erosion of the rights of native title holders in the search for certainty may have created the impetus for challenges to the validity

22 *Kartinyeri v Commonwealth* (1998) 152 ALR 540; 72 ALJR 722.

23 *Tenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, October 1997.

of the NTAA which, until resolved, may partly offset the degree of certainty apparently achieved.

B. Challenges to Statutory Validity

One of the 'sticking points' between the Government and non-Government Senators concerned the relationship between the NTA and the RDA. The Government was determined to resist any amendment to s 7 of the NTA that might provide a basis for challenging the amendments for inconsistency with the earlier RDA. There was a concern that proposed wording might create a 'clause buster'. The Government's concerns on this score were apparently allayed by the language agreed in the Howard-Harradine agreement:

> 7(1) This Act is intended to be read and construed subject to the provisions of the [RDA].
>
> (2) Subsection (1) means only that:
>
> (a) the provisions of the [RDA] apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and
>
> (b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the [RDA] if that construction would remove the ambiguity.

The remaining s 7(3) exempts the validation provisions from the operation of the section.

The NTA as amended authorises legislation at state and territory level, and administrative action at both Commonwealth and state/territory levels. To the extent that such legislation, or such administrative action, discriminates among title holders on the basis of race, it may be invalid. State legislation relating to native title has already been held invalid for inconsistency with the RDA unless very clearly authorised by the NTA.[24] Section 7 authorises courts to construe the NTA consistently with the RDA where possible. And s 7(2) states generally that the RDA is to apply to the performance of functions and the exercise of powers under the Act.

Parliamentary draftspeople and administrators will need to be careful to craft legislation and to take administrative action that, so far as possible, reduces the racially discriminatory aspects of the powers being exercised, lest their actions be held invalid either for breach of the RDA or for ultra vires (ie, going beyond the power conferred by the NTA when that power is interpreted in accordance with the RDA).

C. Challenges on Administrative Law Grounds

A large number of discretions are vested in the Commonwealth Minister and others and the amendments have the potential to cause a strong sense of injustice. One can expect a quite considerable increase in applications for

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24 Note 3 *supra*; *Western Australia v Commonwealth* (1995) 183 CLR 373.

judicial review, and other administrative law challenges in respect of particular exercises of discretionary powers. This possibility, too, may militate against the sense of certainty and workability that were principal objectives of the exercise.

V. ASSESSING THE RISK OF INTERNATIONAL CHALLENGE

The prospect of international challenge is very strong. It does not have the potential to invalidate Australian legislation or action but it can present troubling issues for the nation.[25] The relevant international law standards by which Australian action may be assessed fall within four main groupings:

A. Property Rights

The Universal Declaration of Human Rights, Article 17, states:

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

Australia has ratified the International Convention on the Elimination of All Forms of Racial Discrimination. Article 5 requires equality before the law, without distinction as to race (etc) in the enjoyment of various rights including:

(d) (v) The right to own property alone as well as in association with others.

(vi) The right to inherit.

The Committee on the Elimination of Racial Discrimination has made it clear that these standards cover native title rights and interests. So did the High Court in *Mabo* on the basis of the RDA which directly invokes the standards of the Convention. There is no question but that the NTA amendments impair the property rights of native title holders while leaving intact and, indeed, enhancing the property rights of others.

On 11 August 1998 the Committee took the highly unusual step of requesting the Australian Government to provide it with information, by 15 January 1999, "on the changes recently projected or introduced to the 1993 Native Title Act, on any changes of policy in the State party as to Aboriginal land rights...".[26]

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25 G Nettheim, "The International Implications of the Native Title Act Amendments" (1998) 4(9) *Indigenous Law Bulletin* 12.

26 CERD/C/53/Misc.17/Rev 2. See *Australian Government Response to the United Nations Committee on Racial Discrimination Request for Information Under Article 9 Paragraph 1 of the Convention on the Elimination of All Forms of Racial Discrimination* (January 1999); *Aboriginal and Torres Strait Islander Peoples and Australia's Obligations under the United Nations Convention on the Elimination of All Forms of Racial Discrimination*, ATSIC (February 1999); Committee on the Elimination of Racial Discrimination, Decision on Australia CERD/C/54/ Misc40/Rev (18 March 1999); (1999) 4(2) Australian Indigenous Law Reporter 134; D Dick and M Donaldson, Issues Paper No 29, *The Compatibility of the Amended Native Title Act 1993 (Cth) with the United Nations Convention on the Elimination of All Forms of Racial Discrimination*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies (August 1999).

In its decision on 18 March 1999, the Committee noted that "the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title". It continued:

> 7. The Committee notes, in particular, four specific provisions that discriminate against indigenous title-holders under the newly amended Act. These include: the Act's 'validation' provisions; the 'confirmation of extinguishment' provisions; the primary production upgrade provisions; and restrictions concerning the right of indigenous titleholders to negotiate non-indigenous land uses.

B. Cultural Rights

Australia has also ratified the International Covenant on Civil and Political Rights, Article 27 of which provides that members of minority groups "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". The Human Rights Committee established by the Covenant has, in a number of contexts, made it clear that Article 27 applies to the use of land and resources by Indigenous peoples. Some of the NTA amendments appear to cut across this international standard.

C. Participation Rights

A number of international standards support the need for the effective participation of members of minority groups, and Indigenous peoples, in decisions which affect them. The RTN provisions in the NTA are consistent with these standards; their dismantling is not.

D. Equality Rights

The principle of equality and non-discrimination on the grounds of race (etc) is fundamental to human rights standards and is to be found in the United Nations Charter itself, the Universal Declaration of Human Rights, the Covenants and in the Racial Discrimination Convention. The Government has argued strongly that these standards preclude native title holders having a RTN which the holders of other forms of title – particularly pastoral lessees – may not have.

But equality law recognises that there is a distinction between formal equality of treatment and substantive equality of outcome: unequal treatment may be necessary in order to achieve substantive equality of result. This is recognised, in part, by allowances made for 'special measures' which may be necessary to allow particular groups to achieve adequate enjoyment of their human rights. The relationship of native title holders to their land is qualitatively different from the relationship to land of non-Indigenous Australians, and requires some degree of differential treatment to allow for this. The RTN about mining on native title land represents a bare minimum, in this context.

E. Processes

Australia, having ratified the key human rights treaties, has committed itself to providing periodic reports to the relevant treaty committees. In three instances it has also agreed to allow individuals in Australia to communicate directly to the relevant committees. A treaty committee can form a view and report that Australia is in breach of its treaty obligations. Such a ruling has no formal operation in Australian law but it has the potential to be intensely embarrassing in our political relationships with other nations and peoples.

VI. WAYS FORWARD

Native Title is a property right, deserving of the same respect in Australian law as other property rights. The situation is complicated, however, by the fact that native title has been so recently acknowledged in Australian law. It will inevitably take some time to incorporate it into the legal landscape and to complete the mapping of its extent. It will also take some time to incorporate native title into the mind-sets of industry groups and government decision-makers, though important sections of some industry groups have made much further progress in this direction than many of our land administration bureaucrats.

But progress will remain elusive on all fronts while some politicians and others choose to inspire fear and loathing in the community.

The NTA required amendment in several areas and some of the 1998 amendments represent positive improvements. But others represent what appears to be a strong desire to push Indigenous people and their rights back into a corner where they cause minimum inconvenience and disturbance to the way we have grown accustomed to doing things. In the process, I suspect that the amendments might prove to be self-defeating in their complexity and in the levels of uncertainty which they have created in the pursuit of certainty.

The most positive aspects of the amendments are, in my view, the provisions for negotiated Indigenous Land Use Agreements. The proposals for these amendments were, in fact, developed by Indigenous Australians in co-operation with representatives of industry groups and with the strong support of Justice French, former President of the NNTT. It is to the credit of the Government that it picked up these proposals and adopted them in place of other procedures which were proposed in the 1996 amendments.

Negotiated agreements represent the most constructive way forward. The NNTT in its 1997-98 Annual Report, noted that some 1100 agreements have been struck since the NTA commenced in 1993 between different Indigenous groups, miners, industry bodies and governments.[27] Negotiated agreements can take a variety of forms to meet a variety of purposes. What they have in common is that all the parties 'own' them in a way that all cannot 'own' an imposed legislative package or the outcome of adversarial procedures.

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27 National Native Title Tribunal, *1997/98 Annual Report*, 1998 at 41.

They also have the inestimable advantage that, if properly constructed, they can deliver that elusive commodity – certainty.