RECONCEPTUALISING CURRENT ISSUES IN THE LAW AND PRACTICE OF CONSENT DETERMINATIONS UNDER THE *NATIVE TITLE ACT 1993* (CTH)

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Although consent determinations play a key role in native title law, little scholarly attention has been given to their operation. This article synthesises judicial commentary in this area to argue that claimed differences between judges as to the circumstances in which it will be 'appropriate' to give effect to a consent determination reached between the parties are more apparent than real. Nevertheless, and for the avoidance of confusion, this article propounds a new model for the 'appropriateness' test in sections 87 and 87A of the Native Title Act 1993 (Cth), based upon key values drawn from the Federal Court's collective jurisprudence. Demonstrating the importance of this model, the article then considers the practical uncertainty arising from the use of 'generic extinguishment clauses' in response to the difficulties posed by tenure analysis. Cautioning that the use of such clauses may prove counterproductive, this article encourages negotiating parties to adopt current tenure analysis.

I INTRODUCTION

Consent determinations, those 'determinations of native title' made by agreement pursuant to sections 87 and/or 87A of the *Native Title Act 1993* (Cth) ('Act' or '*NTA*'), are the most common form of native title determination.

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I would like to thank all those individuals who have had a role in encouraging, inspiring and facilitating this article. I am greatly indebted to all of you on both a personal and a professional level. Particular thanks are also extended to the various anonymous reviewers, whose input significantly strengthened this contribution, and the editorial team of the *University of New South Wales Law Journal*.

Note: Judicial comments in consent determination reasons are often repeated across judgments (see *Dodd (Gudjala People Core Country Claim #1) v Queensland [No 3]* [2014] FCA 231, [1]). Where this has occurred, I have generally chosen to cite only a single authority. Additionally, for ease of identification, I have identified the claim group on whose behalf proceedings were brought following the applicant's surname in any case citations.

Despite this, their law and practice has been the subject of little examination. The purpose of this article is to identify two key areas of legal and practical concern evident in current and historical practice, and to provide a reconstructed 'model' of the law of consent determinations which is intended to directly address these issues. It is hoped that this article will form the foundation of further discourse surrounding these important instruments.

The article commences with a contextual discussion which considers the role of consent, and the concept of consent determinations within the comprehensive regime for the recognition of native title established by the Act. The article then proceeds to examine current practices surrounding consent determinations, and observes an apparent divergence in judicial approaches to the question of when it will be 'appropriate' for the Court to make a consent determination. Specifically, the article observes some degree of superficial divergence between judicial statements as to the appropriate evidentiary onus, the importance of agreement making, and the role of the government respondent in negotiating consent determinations. In exploring this apparent misalignment, this article identifies the key values and principles which should properly underpin the analysis of when a consent determination agreement is 'appropriate'. Viewed through the prism of these values, this article demonstrates that the observed differences in judicial approach are more apparent than real. Nevertheless, to avoid the possibility of these differences causing inconsistency in the law, this article sets out a reconstructed 'model' of the law of consent determinations which is intended to directly address these issues.

Demonstrating the need for such reformation, Part II of this article examines the practical difficulties for parties posed by the doctrine of extinguishment. This Part examines the varying approaches which have been taken to circumvent the rigours of a 'full' historical tenure analysis. It is argued that the increasing use of 'generic' extinguishment clauses (particularly in Queensland and South Australia) in recent years should not be encouraged, as such clauses are liable to render the resulting determinations impermissibly uncertain in both their geographic scope and legal operation. As an alternative to the use of these provisions, this article recommends the adoption of a process of 'current tenure analysis'. By utilising contemporary land use as the basis for the drawing of inferences as to extinguishment, the extensive delays and inordinate expense associated with native title claims may be reduced. This is likely to encourage earlier resolution of native title claims by streamlining negotiations and reducing the degree of duplication that occurs as a result of current approaches to tenure searching.

II THE CENTRALITY OF CONSENT IN THE ACT

Consent and consensual dispute resolution are core features of the legislative scheme established by the *NTA*. So much is explicitly recognised by the Act's preamble, which explicitly identifies the creation of a 'special procedure … for the just and proper ascertainment of native title rights and interests which … if

possible … is done by conciliation' as a key consideration in enacting the *NTA*.[1] Parties in native title matters are therefore required, arguably even more so than litigants in most ordinary civil litigation, to give primary consideration to agreed settlement of disputes. In this regard, the Act creates 'a very active relationship between the various aspects of the native title process'.[2] This relationship created by the legislation has not gone unnoticed by judges, who have variously described consent determination agreements as 'especially desirable',[3] 'preferable to a Court-imposed result',[4] 'the primary means of resolving native title applications',[5] and 'a core aim of the *NT Act*'.[6]

In short, the Act 'is designed to encourage parties to take responsibility for resolving proceedings without the need for litigation'.[7] Building upon this, the Federal Court's recently updated *Native Title Practice Note* separates applications into two classes: those in which consensual resolution appears possible, and those in which it does not.[8] Cases in the latter class remain subject to the more 'traditional' forms of case management employed elsewhere in the Court. Although the Court plays an active role in distinguishing between the matters, its recently updated *Native Title Practice Note* places the onus of classifying matters on parties, by requiring them to give 'careful consideration' to the possibility of resolving applications (or parts thereof) by consent.[9] Uniquely amongst most civil litigation, the *Native Title Practice Note* also recognises that the Court's Registrars can (and do) play a significant role in actively case-managing the proceedings, and in seeking to mediate and facilitate the consensual resolution of claims.[10] The Act supports this process by granting both the Court and the Registrar of the National Native Title Tribunal extensive case management powers in relation to native title claims.[11]

The importance of consent determinations to native title in Australia is thus far from accidental. This is important as the consensual resolution of native title claims obviates the need for lengthy judicial proceedings which are characteristic of contested native title litigation, reduces the financial, spiritual and emotional distress caused by that process, and assists in developing 'an amicable

1 *NTA* Preamble para 12.
2 Mary Edmunds and Diane Smith, 'Members' Guide to Mediation and Agreement Making under the Native Title Act 1993' (National Native Title Tribunal, October 2000) 23.
3 *Anderson (Spinifex People) v Western Australia* [2000] FCA 1717, [8] (Black CJ) ('*Spinifex*').
4 *Ngallametta (Wik and Wik Way Peoples) v Queensland* [2000] FCA 1443, [5] (Drummond J) ('*Ngallametta*').
5 *Lovett (Gunditjmara People) v Victoria* [2007] FCA 474, [36] (North J) ('*Lovett*'). See also *Ward (Miriuwung and Gajerrong People) v Western Australia* [2006] FCA 1848, [8] (North J); *Hunter (Nyangumarta People) v Western Australia* [2009] FCA 654, [16] (North J) ('*Hunter*').
6 *Brown (Antakirinja Matu-Yankunytjatjara Native Title Claim) v South Australia* (2010) 189 FCR 540, 548 [38] (Mansfield J) ('*Brown (Antakirinja)*').
7 *Lovett* [2007] FCA 474, [36] (North J).
8 Federal Court of Australia, *Practice Note NT-1 – Native Title Practice Note*, 25 October 2016, [8]–[9].
9 Ibid [6.2(e)]–[6.2(f)].
10 Ibid [8.1].
11 See *NTA* pt 4.

relationship between future neighbouring occupiers'[12] in a way which litigation cannot. Resolution of disputes also removes these matters from the Court's docket, and thus improves access to the courts (and therefore to justice) for other claim groups and litigants.[13]

A Predominance of Consent Determinations

Given their primacy in the native title regime, it is little wonder that consent determinations constitute the overwhelming majority of native title determinations. Since the first consent determinations in 1997 in New South Wales and Queensland,[14] as at 1 January 2018, the *National Native Title Register* recorded 316 separate consent determinations in claimant matters, compared to just 43 litigated determinations.[15] As revealed below, all except five determinations have recognised native title as existing in at least part of the determination area.

Although consent determinations have been made in all mainland Australian states, they are concentrated in Queensland (41 per cent of all consent determinations), the Northern Territory (28 per cent) and Western Australia (18 per cent). As Justice Michael Barker explains, this concentration reflects the fact that these jurisdictions are 'high-volume' jurisdictions for native title, necessitating a greater number of determinations.[16] The low number of Victorian determinations reflects the 'little NTA activity' following the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria*,[17] and the seemingly effective scheme established by the *Traditional Owner Settlement Act 2010* (Vic).[18]

12 *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, 617 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow JJ) ('*North Ganalanja*'); *Spinifex* [2000] FCA 1717, [8] (Black CJ).

13 *Prior (Juru (Cape Upstart) People) v Queensland [No 2]* [2011] FCA 819, [26] (Rares J) ('*Prior [No 2]*').

14 *Buck (Dunghutti People) v New South Wales* [1997] FCA 1624 and *Deeral (Gamaay Peoples) v Charlie* [1997] FCA 1408 respectively.

15 National Native Title Tribunal, *Search National Native Title Register* <http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-National-Native-Title-Register.aspx>.

16 Justice Michael Barker, 'Zen and the Art of Native Title Negotiation' (Speech delivered at the 2015 National Native Title Conference, Port Douglas, 16–18 June 2015) [15] ('Zen').

17 (2002) 214 CLR 422.

18 Barker, 'Zen', above n 16, [15]. In addition to the native title regime, each of the states and territories has established a state-based 'land rights' system, many of which predated the common law's recognition of native title. The *Traditional Owner Settlement Act 2010* (Vic) sets out an alternative regime for the State to enter into settlements with traditional owners, which may recognise certain traditional ownership rights and include various land or funding agreements: Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) 95 [3.30]–[3.31], 112 [3.107].

Table 1: Claimant Determinations as at 1 January 2018[19]

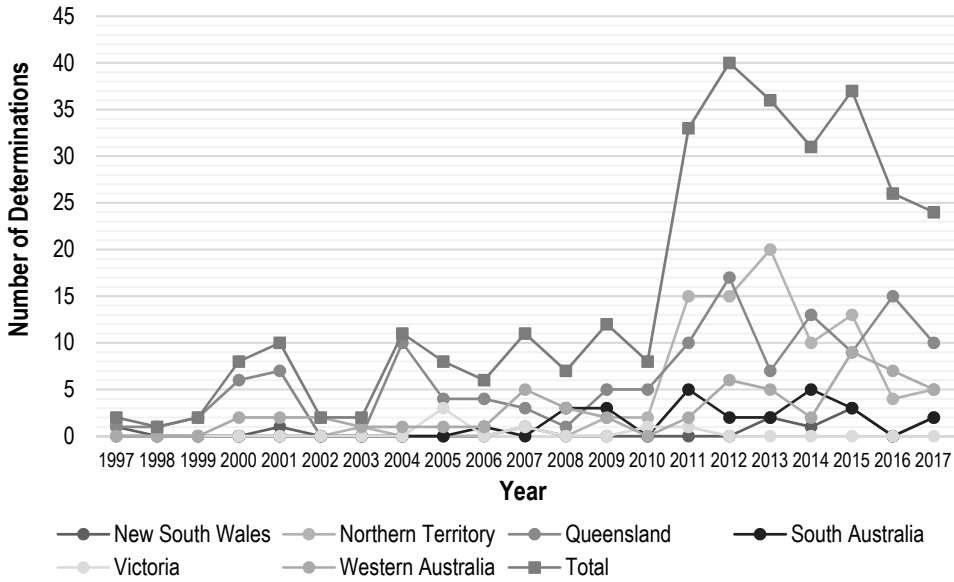
	Consent Determination Outcomes			Total Consent Determinations	Total Litigated Determinations	Total Determinations
	Native Title Exists (Whole)	Native Title Exists (Part)	Native Title Does Not Exist			
ACT	0	0	0	0	0	0
NSW	5	5	1	11	2	13
NT	1	86	1	88	10	98
Qld	100	29	1	130	12	142
SA	1	25	0	26	2	28
Tas	0	0	0	0	0	0
Vic	0	4	2	6	1	7
WA	22	34	0	56	17	73
Total	**129**	**183**	**5**	**317**	**44**	**361**

Interestingly, as demonstrated below, the making of these determinations has not been temporally constant. Instead, the number of determinations surged from 2010,[20] following the *Native Title Amendment Act 2009* (Cth). That Amendment Act expanded the role of the Federal Court in native title applications, established many of the case management powers referred to above, and broadened the Court's powers to make consent determinations by enabling them to include orders involving 'matters other than native title'. These amendments, and the Court's stronger and more active case management role, the development of jurisprudence surrounding consent determinations, and the common process of 'dividing' disputes which appeared intractable under the previous legislative regime into more manageable parts under the new scheme, are likely to explain the sharp increase in determinations since 2010. Despite a decrease in determinations made in 2016 and 2017 (for reasons which are not readily identifiable), the making of consent determinations shows no signs of returning to pre-2010 levels in the near future.

19 See National Native Title Tribunal, above n 15.

20 Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 761 [27.9].

Figure 1: Consent Determinations by Year (at 1 January 2018)[21]



III PRECONDITIONS TO MAKING CONSENT DETERMINATIONS

Section 87 of the Act outlines the process by which the Court may make a determination of native title (amongst other orders)[22] giving effect to an agreement reached between the parties. Section 87 applies where the notification period applicable to the claim has elapsed, the parties have reached an agreement relating to the whole or part of the application, the agreement is in writing, signed, and has been filed with the Court, and the Court is satisfied that it has power to make orders consistent with the terms of the agreement.[23] Additionally, as a section 87 agreement proposes the making of a 'determination of native title' (eg, an order determining 'whether or not native title exists in relation to a particular area'),[24] for that agreement to be 'within the power of the Court', the order must also comply with the other requirements applicable to all determinations contained elsewhere within the Act.[25] Each of these are

21 See National Native Title Tribunal, above n 15.

22 See *NTA* ss 87(4)–(7), 87A(6)–(8).

23 *NTA* s 87(1).

24 *NTA* s 225.

25 *Nelson v Northern Territory* (2010) 190 FCR 344, 346 [4] (Reeves J) ('*Nelson*'). These include the requirements for all determinations to set out all of the matters listed in s 225: s 94A, be limited to rights 'recognised by the common law of Australia': s 223(1)(c), and be made only in areas where there is no unresolved overlapping application: s 67(1), or previously approved determination of native title: s 68.

'jurisdictional pre-conditions' to the operation of section 87, such that the Court may not make any order until all conditions are satisfied.[26]

Once an agreement is filed with the Court, the Act provides the parties and the Court with a significant degree of control over the procedures to be adopted in determining of the matter.[27] Ordinarily, the consent determination process involves the parties notifying the Court during case management that they are willing to enter into a consent determination. The Court then sets a timetable to progress towards a provisional future consent determination date. As this timetable progresses, the Court supervises the process through case management hearings. This process often involves a formal application, requesting the Court's making of orders in the form of the agreement, supported by (often joint) submissions and agreed statements of fact.[28] The Court may request an oral hearing if required.[29] Although orders may be made 'on the papers', the Court has generally made orders and delivered judgment in public hearings on or near the determination area.[30] Such hearings are a unique opportunity for the Court to engage with traditional owners in what are (rightly) regarded as deeply meaningful ceremonial celebrations.

Although the vast majority of agreements have resulted in the making of orders largely consistent with the terms of the agreement reached between the parties, the Court is neither bound to make orders in the form sought,[31] nor to make any orders at all.[32] As explained by Barker J in *Limmerick*, provided an agreement is validly made, 'the Court may proceed to make a determination in such form as it sees fit based on the evidence before it'.[33] The only limitation on the Court's discretion in relation to the making of agreements comes from sections 87(2)–(3), which require the Court's orders be 'consistent with' or 'give effect to' the agreement. Thus, as Reeves J explained in *Kynuna*, the Court may not make orders 'substantially different' from the terms of the agreement. In such cases, as his Honour explained, it would 'presumably refuse to make any orders at all'.[34] Notwithstanding this, there appears to be only a single (possible) instance where the Court has refused to make *any* order following the filing of an agreement (Drummond J in *Ngallametta (Wik Peoples) v Queensland*), although some difficulties surround this example.[35]

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26 *Munn (Gunggari People) v Queensland* (2001) 115 FCR 109, 110–11 [4]–[5] (Emmett J) ('*Munn*').

27 *NTA* s 87(1A). See also *Brooks (Mamu People) v Queensland [No 3]* [2013] FCA 741, [19] (Dowsett J) ('*Brooks [No 3]*').

28 *NTA* ss 87(8)–(11).

29 See, eg, *Nangkiriny (Karajarri People) v Western Australia* [2004] FCA 1156, [4] (North J) ('*Nangkiriny 2004*').

30 *Brooks [No 3]* [2013] FCA 741, [13], [20] (Dowsett J).

31 *Limmerick (Ngarlawangga People) v Western Australia* [2016] FCA 1442, [31] ('*Limmerick*').

32 *Kynuna (Bar Barrum People #5) v Queensland* [2016] FCA 1504, [29] ('*Kynuna*').

33 [2016] FCA 1442, [31].

34 [2016] FCA 1504, [29].

35 (Unreported QG6001/98, Federal Court of Australia, Drummond J, 17 April 2000). On 17 April 2000, Drummond J purportedly refused to make orders 'notwithstanding the consent of the state', as his Honour stated the claim group were 'trying to push the envelope of any native title rights [they] might be expected to be able to prove beyond the ambit of those rights'. Both Bartlett, above n 20, 754 [27.5] and

A Section 87A

Section 87A was inserted in the *NTA* by the *Native Title Amendment Act 2007* (Cth), and enables the Court to make determinations of native title over part of an application area.[36] Section 87A was inserted in response to Emmett J's decision in *Munn*, where his Honour held that section 87(1) required *all* parties to a proceeding (eg, every respondent party with an interest in the claim area) to sign the agreement.[37] As Mansfield J explained in *Coulthard (Adnyamathanha No 1 Native Title Claim Group) v South Australia*, section 87A was inserted to enable 'resolution of part of a claim by agreement, where those whose interests are directly affected by part of a claim have agreed upon a determination being made'.[38] In doing so, section 87A prohibits parties who only have an interest in one part of the claim area from 'blocking' resolution of other aspects of the claim in relation to areas in which they have no interest.[39]

Pursuant to section 87A, the Court may make orders in, or consistent with, the terms of an agreement filed by the parties where proceedings relating to an application for a determination of native title are on foot,[40] and the relevant notification period has ended.[41] To commence the section 87A process, all relevant persons with an interest in the part of the claim area to which the agreement relates must sign a proposed determination in relation to that part of the claim area.[42] The Chief Executive Officer of the Federal Court is then required to notify the remaining parties to the proceeding (who are not party to the agreement) that the agreement has been filed with the Court, thereby enabling them to object to the making of the determination.[43] Those objections are then incorporated into the Court's ultimate assessment as to whether the orders would be within power and appropriate (as with section 87).[44]

Section 87 also enables orders to be made relating to part of the proceedings.[45] Accordingly, the operation of sections 87 and 87A may overlap. For three months until its repeal in July 2007, the Act contained a provision, section 87(1)(d), prohibiting the Court from acting under section 87 where orders could be made pursuant to section 87A.[46] Presently, except where agreements seek 'non-native title' orders (which may only be made under section 87),[47] the Court generally proceeds under section 87A where both sections are enlivened,

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David Ritter, LexisNexis Butterworths, *Native Title*, vol 1 (at Service 108) [1728A] cite this example. However, I am unable to locate any judgment to this effect recorded on or around this date.

36 Explanatory Memorandum, Native Title Amendment Bill 2007 (Cth) [4.181].

37 (2001) 115 FCR 109, 111–12 [9].

38 [2009] FCA 358, [8] ('*Adnyamathanha [No 1]*').

39 Ibid.

40 *NTA* s 87A(1)(a).

41 *NTA* s 87A(1)(b).

42 *NTA* ss 87A(1)(b)–(d).

43 *NTA* ss 87A(2)–(3).

44 *NTA* s 87A(8).

45 *NTA* ss 87(1)(a)(ii), (3).

46 *Adnyamathanha [No 1]* [2009] FCA 358, [10] (Mansfield J).

47 Section 87A(4) only enables the Court to make a 'determination of native title'. Section 87A lacks a provision akin to section 87(5) which empowers the Court to make orders relating to 'matters other than native title'.

as the balance of the application is automatically amended to remove the consent determination area following the determination, without any need for the 'rump' claim to be reassessed for registration on the Register of Native Title Claims.[48] As the principles applicable to the sections are otherwise materially similar, the remainder of this article treats these sections as interchangeable.[49]

IV THE NATURE OF CONSENT DETERMINATIONS

Consent determination agreements are unique instruments in native title litigation. However, the consequences of this 'uniqueness' have not been the subject of sustained investigation. This is regrettable, as the distinctive nature of consent determinations is in large part responsible for their unique function.

The most significant judicial exploration of the inherent features of consent determinations to date is the decision of Dowsett J in *Brooks [No 3]*.[50] In that case, the State of Queensland had consented to the filing of an agreement pursuant to section 87A, but later became aware of information as to possible competing interests in the determination area which caused it to assert a right to 'revoke' its consent to the agreement. Ultimately, his Honour dismissed the State's protestations and proceeded to make orders in accordance with the agreement as filed.

In doing so, his Honour made a number of significant observations about the nature of section 87A agreements (which, presumably, apply equally to section 87). Beginning by observing that neither section of the Act prescribes the form which consent determination agreements must take, beyond requiring they be reduced to writing and signed by the parties,[51] his Honour essentially found that consent determination agreements are of dual character. Each of these matters suggested that the State's contentions should be rejected.

First, his Honour noted that as a document which involves the consensual resolution of proceedings, consent determination agreements will 'almost invariably' be a 'legally binding agreement' with independent status and enforceability.[52] Given the drafting of the agreement which the State of Queensland had entered into, cast in terms that '[e]ach party appearing below consents to orders being made in the following terms', his Honour found that the

48 *NTA* ss 64(1B), 190(3)(a)(iii), 190A(1A). See *Patch (Birriliburu People) v Western Australia* [2008] FCA 944, [7]–[8]; *Adnyamathanha [No 1]* [2009] FCA 358 [10]. But see *Yaegl People #2 v A-G (NSW)* [2017] FCA 993 where her Honour questioned the applicability of this conclusion in light of 'different practices … around Australia': at [18].

49 *Brown (Ngarla People) v Western Australia* [2007] FCA 1025, [22] (Bennett J) ('*Brown (Ngarla)*'); *Hunter* [2009] FCA 654, [11] (North J).

50 [2013] FCA 741, [27], [45].

51 *NTA* ss 87(1)(b), 87A(1)(d).

52 *Brooks [No 3]* [2013] FCA 741, [32]. Interestingly, his Honour did note in passing that section 87A may be of sufficient breadth such that a 'non-contractual arrangement or understanding is sufficient' to enliven the section.

agreement was properly understood as a contract.[53] Accordingly, ordinary contract law principles applied to the construction of the agreement. These principles required all parties to the agreement (including the State, which enjoys no special status in contract law merely due to its governmental role, beyond the doctrine of executive necessity) be bound by the agreement 'unless it has been rescinded, declared void or otherwise terminated in accordance with law' (eg, for fraudulent or negligent misrepresentation).[54] In circumstances where the State was seeking to withdraw from the agreement without any such basis, the claim group were entitled to insist on enforcement of the agreement as any other contracting party may have done.[55]

Secondly, and arguably more importantly, his Honour noted that consent determination agreements also have an independent existence and status as a 'document contemplated by the [Act] as a possible incident of Native Title litigation'.[56] As his Honour explained, filing the agreement constitutes 'effective[ly] admitt[ing]' the applicant's claim to the extent of the agreement, and enlivens the Court's jurisdiction to make orders consistent with it.[57] Nevertheless, as enforcement of the agreement would require invoking the Court's jurisdiction, not by bringing proceedings for breach of contract, but instead by seeking leave to withdraw the admission, the Court retains a discretion as to whether to give effect to the agreement, which may be exercised on grounds broader than those available to evade a validly formed contract.[58] Despite this, as section 87A 'does not contemplate departure from any relevant agreement', and the agreement represents a '[commitment] to the Court … setting in train the process pursuant to which the determination will be made', his Honour considered the integrity and feasibility of the consent determination process would be jeopardised by allowing parties to resile from agreements merely on the basis of the discovery of fresh information.[59]

Although *Brooks [No 3]* establishes that consent determination agreements maintain an independent legal existence either as contracts and/or a document 'contemplated' by the *NTA*, the source of any substantive effect upon proprietary rights and interests is not the agreement but the Court's exercise of judicial power in making orders consistent with its terms.[60] This distinction is important, as it means that the terms of the Court's determination must be the focus of any analysis.

53 Ibid [32]–[33].
54 Ibid [33].
55 I note that the question of whether the State's attempt to 'revoke' its consent might give rise to an anticipatory breach, or a wrongful repudiation compensable by damages, may be left to another day.
56 *Brooks [No 3]* [2013] FCA 741, [34].
57 Ibid [34], [40].
58 Ibid [38]–[39].
59 Ibid [41].
60 *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 27 [59], 28 [61] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

Consent determinations share the same 'juridical character' as other determinations made under the Act.[61] They constitute 'approved determinations of native title' under the *NTA*,[62] representing 'determinations about the existence, or not, of a relationship with land'.[63] These determinations alter the 'status' of the land and waters to which they relate, by recognising the existence of rights enforceable against the world,[64] 'normalising' the existence of these rights within the common law, and providing for their enforcement.[65]

Furthermore, consent determinations bind all parties to a proceeding and finally dispose of the applicant's claim.[66] Despite this, as emphasised in *Western Australia v Ward (Miriuwung and Gajerrong People)*, determinations of native title retain 'an indefinite character' due to section 223(1) and 225's requirements for continuing connection with land and practice of traditional laws and customs, either of which, if interrupted, may trigger the 'expiry' of native title rights and interests.[67] Subject to this caveat, the in rem nature of determinations means that such determinations must provide certainty as to the nature, scope and holders of native title rights and interests recognised, as to do otherwise would undermine the preservation, maintenance and enforcement of those rights.[68]

Sections 87(4)–(7) of the Act also enable the Court to make orders 'about matters other than native title', whether or not a determination of native title is made. Although detailed consideration of these provisions exceeds this article's scope, such orders may relate to 'practical implementation' questions (eg, financial, logistical, and infrastructure issues), staging or 'partial agreements',[69] or resolution of multiple claims on a 'regional' basis.[70] Such orders may simplify native title negotiations by obviating the need for further Indigenous Land Use Agreements or other legal settlements over the same area.[71] Despite this, the Act does not contemplate, nor do ordinary case management principles permit, that

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61 See analogously, *CG (Badimia People) v Western Australia* (2016) 240 FCR 466, 477–8 [44] (North, Mansfield, Jagot and Mortimer JJ) ('*Badimia*').

62 *NTA* s 13(3)(a).

63 *NTA* s 225; *Badimia* (2016) 240 FCR 466, 477–8 [44] (North, Mansfield, Jagot and Mortimer JJ).

64 *Yanner v Eaton* (1999) 201 CLR 351, 372–3 [37] (Gleeson CJ, Gaudron, Kirby and Hayne JJ); *Mason v Tritton* (1994) 34 NSWLR 572, 592–3 (Kirby P).

65 *Lampton (Juru People) v Queensland* [2014] FCA 736, [4], [22] (Rares J) ('*Lampton*').

66 *Kovalev v Minister for Immigration and Multicultural Affairs* (1999) 100 FCR 323, 326 [7] (French J) ('*Kovalev*'); *Badimia* (2016) 240 FCR 466, 477–8 [44] (North, Mansfield, Jagot and Mortimer JJ).

67 (2002) 213 CLR 1, 71–2 [32] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) ('*Ward HCA*'). See also *Badimia* (2016) 240 FCR 466, 476 [40], 478 [45] (North, Mansfield, Jagot and Mortimer JJ). It is for this reason that it remains unclear whether determinations ordinarily give rise to a *res judicata*: *Western Australia v Fazeldean (Thalanyji People) [No 2]* (2013) 211 FCR 150, 156 [33] (The Court) ('*Fazeldean [No 2]*').

68 Justice J A Dowsett, 'Beyond *Mabo*: Understanding Native Title Litigation through the Decisions of the Federal Court' (Speech delivered at the LexisNexis National Native Title Law Summit, Brisbane, 15 July 2009).

69 Edmunds and Smith, above n 2, 23.

70 Robert S French, 'The National Native Title Tribunal and the Native Title Act, Agendas for Change' in Gary D Meyers (ed), *Implementing the Native Title Act – The Next Step: Facilitating Negotiated Agreements – Selected Discussion Papers of the National Native Title Tribunal 1996* (National Native Title Tribunal, 1997) 24, 35.

71 *Brown (Antakirinja)* (2010) 189 FCR 540, 546 [25] (Mansfield J).

the negotiation of these terms might distract from, obstruct, or impede the making of otherwise uncontroversial determinations of native title.[72]

V THE APPROPRIATENESS TEST

Once satisfied of all relevant jurisdictional preconditions, the Court must satisfy itself that the making of the consent determination is 'appropriate'.[73] Although taking the form of declarations, ordinary principles concerning the appropriateness of declaratory relief do not strictly apply to consent determinations.[74] The Court has nevertheless consistently recognised that the in rem, proprietary nature of consent determinations requires the Court to 'exercise caution' when assessing whether proposed determinations are appropriate.[75] Within those boundaries however, the scope of the Court's discretion is 'very wide'[76] and largely unfettered.[77] Accordingly, as explained by Chief Justice Robert French (as he then was), this means the appropriateness test 'has a somewhat elastic application'.[78]

Despite the breadth of the Court's power, some principles have emerged to guide the Court's task. Foundationally, it must be recalled that the making of a consent determination involves the exercise of judicial power by a Chapter III Court.[79] As a consequence, all of the ordinary constitutional and procedural requirements applicable to any exercise of judicial power apply equally to the making of consent determinations. These principles mandate that the exercise of discretion as to whether to approve a consent determination must 'be exercised judicially'[80] and not 'arbitrarily, capriciously or so as to frustrate the legislative intent' of the Act.[81]

Even within those boundaries, the inquiry is not entirely at large. Ordinary rules of statutory interpretation require that the question of appropriateness be construed by reference to the 'subject matter, scope and purpose of the Act'.[82] Factors which have emerged as particularly relevant to this inquiry include:

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72 Ibid 548 [38]–[39] (Mansfield J).
73 *NTA* ss 87(1A), 87A(4)(b).
74 *Lampton* [2014] FCA 736, [8] (Rares J).
75 *Anderson (Wulli Wulli People) v Queensland [No 3]* [2015] FCA 821, [153] (Collier J) ('*Wulli Wulli [No 3]*').
76 *Smith (Nharnuwangga, Wajarri and Ngarlawangga People) v Western Australia* (2000) 104 FCR 494, 499 [22] (Madgwick J) ('*Smith*').
77 *Munn* (2001) 115 FCR 109, 115 [26] (Emmett J).
78 Chief Justice Robert French, 'Native Title – A Constitutional Shift?' (Speech delivered at the JD Lecture Series, The University of Melbourne, 24 March 2009) 34.
79 Dowsett, above n 68.
80 *Munn* (2001) 115 FCR 109, 115 [26] (Emmett J).
81 *Smith* (2000) 104 FCR 494, 499 [22] (Madgwick J), quoting *Oshlack v Richmond River Council* (1998) 193 CLR 72, 81 (Gaudron and Gummow JJ).
82 *Brown (Ngarla)* [2007] FCA 1025, [22] (Bennett J); *Hunter* [2009] FCA 654, [16] (North J).

- whether the agreement was made on an 'informed basis';[83]
- whether the parties have had 'independent and competent legal representation';[84]
- whether an agreement was 'genuinely and freely made', without 'duress, fraud or misrepresentation';[85]
- whether the agreement arose from mediation;[86]
- whether the proposed orders 'are unambiguous and certain as to the rights declared';[87] and
- whether the determination would be inutile for example, by conferring functions on a prescribed body corporate unable to discharge those functions.[88]

These efforts at 'structuring' the discretion with which the Court is vested have not been entirely successful. In preparing this article, a review was undertaken of all the publicly available reasons for decision where orders were made under sections 87 or 87A of the Act. This review indicated that some divergence (and need for reform) appears evident in three distinct areas: first, the standard of proof which the Court will apply in satisfying itself that an agreement is appropriate; secondly, the importance to be placed upon the very fact that an agreement has been reached; and thirdly, the appropriate 'role' of the principal government respondent in native title proceedings. Each of these areas will be considered in turn.

A Standard of Proof

Proof of a native title claim is, self-evidently, a mammoth effort. It requires establishing that traditional Indigenous law and custom recognises that the claim group has rights and interests in or over the claim area which have been continuously observed since time immemorial.[89] Answering these questions, which essentially relate to the connection of the native title claim group to the claim area, requires large volumes of anthropological and historical evidence. Complicating the question of proof further are the difficulties inherent in taking evidence and obtaining information about matters of identity and culture from elders of the claim group, especially in circumstances where many of these matters are rarely the subject of written records and frequently contain matters of

83 *Lovett* [2007] FCA 474, [37] (North J).
84 *Munn* (2001) 115 FCR 109, 115 [29] (Emmett J).
85 *Nangkiriny (Karajarri People) v Western Australia* (2002) 117 FCR 6, 8 [14] (North J) ('*Nangkiriny 2002*'); *King (Eringa Native Title Claim Group) v South Australia* [2008] FCA 1370, [33] (Lander J) ('*King*'); *Hobson (Wuthathi, Kuuku Ya'u and Northern Kaanju People) v Queensland* [2015] FCA 381, [10] (Greenwood J) ('*Hobson 2015*').
86 *Close (Githabul People) v Minister for Lands* [2007] FCA 1847, [6] (Branson J).
87 *Wulli Wulli [No 3]* [2015] FCA 821, [153] (Collier J).
88 *Nangkiriny 2004* [2004] FCA 1156, [9], [11] (North J).
89 See generally Nick Duff, 'What's Needed to Prove Native Title? Finding Flexibility within the Law on Connection' (Research Discussion Paper No 35, Australian Institute of Aboriginal and Torres Strait Islander Studies, June 2014).

particular sensitivity. The difficulties and costs incurred in proving native title are therefore significant.

Understandably in light of this, all participants in the native title system have generally accepted that it is desirable to set the burden of proof required to establish a consent determination at the minimum appropriate level. Unfortunately, however, some divergence appears to be observable – both over time and between individual judges – as to what that level is. The Act contains no clear statement as to the appropriate standard of proof. Thus, the amount of evidence required to be filed, before the Court can be satisfied that the making of a consent determination is 'appropriate', can (and does) vary. In an attempt to fill that void, judicial consensus appears to have emerged around a need for the Court to be satisfied that a proposed consent determination rests upon an 'informed basis'.[90] This inquiry inevitably directs the Court's attention to the evidentiary foundation upon which the consent determination agreement rests.

Early decisions, exemplified by the decisions of *Munn*[91] and *Lovett*,[92] took a largely 'hands off' approach to the 'informed basis' test. In both of these cases, the Court largely accepted the government's signing of the agreement as sufficient to satisfy the Court that the agreement had an informed basis, in circumstances where the government has taken a 'real interest' in the proceedings and given the agreement 'appropriate consideration'.[93] In essence, these decisions (not unreasonably) assumed that the government would not enter into an agreement recognising native title, unless the claim group could show that native title existed. Accordingly, the Court 'inferred' that the standard of proof had been discharged, as a result of the fact that an agreement was put before it by consent. On this approach, it was therefore unnecessary, if not inappropriate, to proceed to examine the evidentiary basis on which the consent determination rested.

More recently, the Court appears to have departed from this approach. In its place, a wide range of alternative verbal formulations as to when an 'informed basis' exists have begun to emerge, with the following terms being variously used to describe the standard as requiring:

- 'some foundation upon which the Court can exercise its jurisdiction';[94]
- sufficient evidence that 'the orders have a substantive and real foundation';[95]
- a 'facial appearance' or 'prima facie impression, that the proposed orders have a proper basis';[96]
- 'adequate evidence' to show a 'credible or arguable basis for the application';[97]

90 *Nelson* (2010) 190 FCR 344, 347–8 [11]–[14] (Reeves J).
91 (2001) 115 FCR 109, 115–116 [29]–[31] (Emmett J).
92 [2007] FCA 474, [37] (North J).
93 *Munn* (2001) 115 FCR 109, 115 [29] (Emmett J).
94 *King* [2008] FCA 1370, [33] (Lander J).
95 *Prior [No 2]* [2011] FCA 819, [14] (Rares J).
96 *Hobson (Kuuku Ya'u People) v Queensland* [2009] FCA 679, [12] (Greenwood J) ('*Hobson 2009*').

- satisfaction as to the 'cogency of the evidence upon which the applicant relies';[98]
- a 'credible', 'arguable' or 'proper' basis that the determination is 'justified in all of the circumstances';[99] and/or
- proof that the agreement is 'rooted in reality'.[100]

At first, the different verbal formulations which are scattered across recent cases appear to prescribe a wide range of evidentiary standards which differ from one another in subtle, but important respects. However, underlying all of these formulations appears to be a shared willingness to inquire into the amount and cogency of evidence which a claim group has provided in support of the consent determination.

Whichever verbal formulation is preferred, it is clear that an 'informed basis' necessarily requires a body of evidence *materially less than* that which would be required to persuade the Court at trial, on the balance of probabilities, that a determination of native title can be made.[101] The apparent tendency in more recent cases to prescribe a higher evidentiary standard on claim groups must be understood in light of an emerging tendency for practitioners seeking consent determinations to provide the Court with *more* material than may strictly be required to meet this standard.[102] Paradoxically, this practice appears to have emerged in reliance upon judicial statements regarding the role of the principal government respondent in 'enforcing' the standard of proof which, as discussed below, themselves appear to have departed from the standard prescribed by the Act.[103]

Much, therefore, can be said about the benefits of attempting to settle upon an acceptable verbal formulation of the relevant test. This article proposes that the appropriate threshold is best expressed as requiring the Court to be satisfied that the parties possess sufficient evidence to reasonably support a finding that the agreement rests on a proper factual foundation. In making good this proposition, it is appropriate to proceed from a position that as consent determinations are applications in a civil proceeding, the Court need only be satisfied that giving effect to the agreement would be both within power and

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97 *Lovett* [2007] FCA 474, [38]–[39] (North J); *Ampetyane (Ilkewartn and Ywel Anmatyerr People) v Northern Territory* [2009] FCA 834, [19] (Reeves J) (emphasis altered); *Sharpe (Gooniyandi People) v Western Australia* [2013] FCA 599, [25] (Gilmour J) ('*Sharpe*'); *Chubby (Puutu Kunti Kurrama and Pinikura People #1 and #2) v Western Australia* [2015] FCA 940, [39] (McKerracher J).

98 *Goonack (Wanjina-Wunggurr People) v Western Australia* [2011] FCA 516, [26] (Gilmour J) ('*Goonack*').

99 *Oil Basins Ltd v Watson (Nyikina Mangala People)* [2014] FCAFC 154, [136] (The Court).

100 *Kerindun (Wik and Wik Way Native Title Claim Group) v Queensland* (2009) 258 ALR 306, 310 [16] (Greenwood J) ('*Kerindun*'); *Hobson 2009* [2009] FCA 679, [15] (Greenwood J); *Hobson 2015* [2015] FCA 381, [10] (Greenwood J), each quoting French, above n 78, 35.

101 *Apetyarr v Northern Territory* [2014] FCA 1088, [25] (Mortimer J) ('*Apetyarr*'); *Lapthorne (Thudgari People) v Western Australia* [2009] FCA 1334, [24] (Barker J) ('*Lapthorne*').

102 See, eg, *McKellar (Buditji People) v Queensland* [2015] FCA 601, [12]–[14] (Mansfield J); *Wulli Wulli [No 3]* [2015] FCA 821, [32]–[150] (Collier J).

103 As to which, see Part V(C) below.

appropriate, on the balance of probabilities at the highest.[104] In reaching that state of satisfaction, sections 140(2)(a)–(c) of the *Evidence Act* require the Court to construe 'strength of the evidence necessary' to reach this standard in light of the 'nature of the cause of action', the 'subject-matter of the proceeding' and the 'gravity of the matters alleged'.[105]

One such key consideration is the status of consent determinations as an alternative method of dispute resolution.[106] Appropriate acknowledgement of this fact tends towards reducing the body of evidence required, as consent determinations are designed to 'minimise cost and delay' and are alternatives to a fully litigated dispute.[107] Gilmour J explained this difference in *Watson (Nyikina Mangala People) v Western Australia [No 6]* stating that:

> in the context of a consent determination, a party is not required to prove, or have proved to them, matters of fact as if the proceeding were contested. Although the available information may be limited, it should be considered in that context. It is not unreasonable to expect that where a party is not required to prove a particular matter, it will not lead evidence of a kind … that would be expected to be made in a litigated proceeding.[108]

Additionally, it should be recalled that nothing in the relevant sections 'necessarily require[s] the Court to receive evidence, make findings, embark on its own inquiry on the merits … or even to form a concluded view as to whether the legal requirements for proving native title have been met'.[109] As sections 87(2)–(3) and 87A(4) permit the Court to make orders without a hearing, the Court could even theoretically be satisfied of the appropriateness of the orders where no evidence has been tendered to the Court.[110] The consequence of these matters is that the evidentiary onus imposed by the Act should be understood as simply requiring the Court to have some material before it that is capable of supporting a judicial determination that the making of the orders is appropriate.[111]

In essence, this test is largely analogous to a requirement that the claim group have a 'reasonably arguable case', rather than any higher evidentiary threshold.[112] In practical terms, as Jagot J explained in *Blakeney (Yaegl People #1) v A-G (NSW)*, the evidence is merely required to disclose 'a foundation for the application which is believable and rational', but need not be in admissible

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104 *Evidence Act 1995* (Cth) s 140(1) ('*Evidence Act*'). Section 82(1) of the *NTA* requires the Court to follow the rules of evidence except as otherwise ordered.

105 *Qantas Airways Ltd v Gama* (2008) 167 FCR 537, 576–7 [139] (Branson J).

106 *Evidence Act* s 140(2)(a)*; Lovett* [2007] FCA 474, [37] (North J); *Hunter* [2009] FCA 654, [16] (North J); *Hobson 2009* [2009] FCA 679, [15] (Greenwood J); *Hughes (Eastern Guruma People) [No 2] v Western Australia* [2012] FCA 1267, [14] (Bennett J); *Bullen (Esperance Nyungar People) v Western Australia* [2014] FCA 197, [32] (McKerracher J).

107 *Hunter* [2009] FCA 654, [17] (North J).

108 [2014] FCA 545, [29].

109 *Limmerick* [2016] FCA 1442, [46] (Barker J). See also *Wurrunmurra (Bunuba People) v Western Australia* [2015] FCA 1480, [27] (Barker J); *Goonack* [2011] FCA 516, [25]–[26] (Gilmour J); *Lapthorne* [2009] FCA 1334, [25] (Barker J).

110 *Limmerick* [2016] FCA 1442, [46] (Barker J).

111 *Hobson 2015* [2015] FCA 381, [11] (Greenwood J); *Woosup (Ankamuthi People #1) Queensland* [2017] FCA 831, [17] (Greenwood J).

112 *Lovett* [2007] FCA 474, [39] (North J).

form.[113] More importantly, the evidence should clearly and precisely articulate the relationship between the evidence filed and the orders sought, by demonstrating the claim group's prima facie entitlement to native title. Such an approach encourages certainty, limits discontent amongst those who may be adversely affected by the determination, and minimises the likelihood of a destabilising future application for revocation of the determination.[114]

Differences in judicial comments as to the applicable standard of proof should thus not be understood as departing from the above standard, but merely as responding to the evidence with which the Court has been provided. Whether the standard of proof has been met is a question which must be resolved on a case by case basis, and is influenced by a wide range of factors, including local litigation practices, and the individual attributes of each matter. For example, where the amount of evidence before the Court increases (eg, because a claim is particularly complex), it becomes increasingly proper for the Court to have regard to that evidence in forming an independent view as to whether an agreement is appropriate, and vice versa.[115]

B The Importance of Agreement-Making

Given the importance of consent in the *NTA*, it is perhaps unsurprising that the Court's focus in applying the appropriateness test has centred around the consent of the parties.[116] Ordinarily, judges place substantial weight on the fact that an agreement has been presented to the Court, as this is seen to be a strong prima facie indicator that it would generally be appropriate to make the orders sought (and inappropriate to 'second-guess' them).[117] This reflects a restrained understanding of the Court's role, which, as French J articulated in *Kovalev*:

> is not … to impede settlement between parties [who are] legally represented and able to understand and evaluate the desirability of agreeing to a settlement nor to refuse to give effect to terms of settlement by refusing to make orders … where they are within the court's jurisdiction and are otherwise unobjectionable'.[118]

It is for this reason that the Court considers whether consent to the agreement was obtained freely, following a mediation process and with the benefit of independent legal advice.[119] To be satisfied that the agreement is 'genuine' and 'made freely', the Court is entitled to (and does) consider whether the parties had 'independent and competent legal representation' throughout negotiations.[120] This is important, as courts have generally found that the fact that an agreement results from mediation (especially when conducted by the Court's own experienced Registrars) generally supports the appropriateness of giving effect to

113 [2015] FCA 647, [9] ('*Blakeney*').
114 Dowsett, above n 68.
115 *Nangkiriny 2002* (2002) 117 FCR 6, 8 [14] (North J).
116 *Owens (Tagalaka People) v Queensland* [2012] FCA 1396, [14] (Logan J) ('*Owens*').
117 *Smith* (2000) 104 FCR 494, 500 [26] (Madgwick J); *Hobson 2009* [2009] FCA 679, [12] (Greenwood J).
118 (1999) 100 FCR 323, 327–8 [12].
119 *Nelson* (2010) 190 FCR 344, 348 [14] (Reeves J).
120 *Hunter* [2009] FCA 654, [16] (North J).

that agreement.[121] Consideration of these factors is necessary in circumstances where mediation is a dispute resolution mechanism mandated under the Act.[122] The integrity of those processes (and thus, of any consent determination agreement resulting from them) could readily be compromised in circumstances where these values are lacking.

A small number of judgments have gone further, suggesting the Court may refuse to make orders where a determination appears to be 'obviously unfair or unjust'.[123] It is not clear how frequently, if ever, courts have refused to make a consent determination on this basis. Nevertheless, taken at its highest, these statements appear to authorise an inquiry into the substantive merits (or otherwise) of the agreement as part of the appropriateness test. Such an approach is inconsistent with various decisions which establish the well-accepted position that 'it is not for the Court to exercise any paternalistic role as to the merits or demerits of the proposed settlement'.[124]

Given these consequences, judges and practitioners should treat these decisions with caution. Instead, this article suggests that these comments should be understood as merely authorising the Court to examine the agreement to discern whether the parties 'are acting in good faith and rationally',[125] both generally and with respect to any specific concerns in the agreement identified in submissions.[126] In circumstances where the Court is invited to uphold freedom of contract values and give effect to the bargain reached between the parties,[127] consideration of the fairness or justice of the agreement is entirely appropriate to ensure that that the Court's procedures are not being hijacked to give effect to coercive or exploitative agreements. This is especially important considering the presence of systemic Indigenous disadvantage, gross disparities in bargaining power, and the frequent need for legal and institutional assistance in realising native title rights identified in the preamble to the *NTA*. Properly understood, comments which seek to direct the Court's attention to the fairness or justice of the determination therefore appear to add little to the orthodox position discussed above.[128]

C The Principal Government Respondent

The previous sections clearly demonstrate that principal government respondents (eg, the relevant state, territory, or Commonwealth governments)

121 Ibid; *Lovett* [2007] FCA 474, [41]; *Lovett (Gunditjmara People) v Victoria [No 5]* [2011] FCA 932, [26] (North J).

122 See s 86B(1).

123 *James (Martu People) v Western Australia* [2002] FCA 1208, [4] (French J); *Brown (Ngarla)* [2007] FCA 1025, [24] (Bennett J); *Kogolo (Ngurrara People) v Western Australia* [2007] FCA 1703, [16] (Gilmour J); *King* [2008] FCA 1370, [34] (Lander J).

124 *Smith* (2000) 104 FCR 494, 500 [26] (Madgwick J). But see *Owens* [2012] FCA 1396, [15]–[16] (Logan J).

125 *Munn* (2001) 115 FCR 109, 115 [26], [30] (Emmett J).

126 *Roberts (Najig and Guyanggan Nganawirdbird Groups) v Northern Territory* [2012] FCA 223, [6] (Finn J).

127 *Fazeldean [No 2]* (2013) 211 FCR 150, 156 [33] (The Court).

128 As to which, see *Apetyarr* [2014] FCA 1088, [26] (Mortimer J).

play a central role in all native title litigation, and, by extension, in the negotiation of consent determination agreements. This privileged position inevitably results from the fact that these bodies are the source of all 'non-indigenous title' to land within their respective jurisdictions, are substantial landholders in their own right, hold significant land use and tenure records, and are intimately connected with the land and law within their borders.[129] As a result, judges in recent years have consistently recognised that the government respondent's involvement in preparing the consent determination agreement assumes special significance in the Court's analysis.[130] This article does not seek to displace, nor necessarily endorse, this reliance. Instead, this article's focus is on the application of this 'special status' and its associated responsibilities and obligations in the context of consent determination negotiations.

It is well-established that the Court may infer that the making of orders is appropriate if it is satisfied that the principal government respondent has adopted a process of satisfying itself of the agreement's cogency that is appropriate in the circumstances.[131] The rationale for this process generally appears to be motivated by recognition of the particular resourcing advantage possessed by government litigants, and the fact that many other respondents who do not take an active role in proceedings often defer to the government's position on contested questions surrounding the determination.[132] Keane CJ (as his Honour then was) encapsulated these sentiments in *King (Eringa and Eringa No 2 Native Title Claim Group) v South Australia*, stating that the principal government respondent:

> acts in the public interest and as the public guardian in doing so. It has access to anthropological, and where appropriate, archaeological, historical and linguistic expertise. It has a legal team to manage and supervise the testing as to the existence of native title in the claimant group. Although the Court must, of course, preserve to itself the question whether it is satisfied that the proposed orders are appropriate in the circumstances of each particular application, generally the Court reaches the required satisfaction by reliance upon those processes.[133]

Courts have indicated an increased willingness to provide some degree of deference to the government respondent's processes where standardised 'guidelines' for the assessment of consent determination agreements (and the evidence in support of them) have been adopted in advance of the determination.[134] Notwithstanding the comments below, such guidelines, which

129 *Kerindun* (2009) 258 ALR 306, 310 [16] (Greenwood J); *Brooks [No 3]* [2013] FCA 741, [35] (Dowsett J); *Hobson 2015* [2015] FCA 381, [10] (Greenwood J).

130 See *Limmerick* [2016] FCA 1442, [41] and the authorities cited therein.

131 See, eg, *Munn* (2001) 115 FCR 109, 115 [29] (Emmett J); *Lovett* [2007] FCA 474, [37]–[39] (North J).

132 *Watson (Nykina Mangala People) v Western Australia [No 3]* [2014] FCA 127, [23] (Gilmour J) ('*Watson [No 3]*').

133 *King (Eringa and Eringa No 2 Native Title Claim Group) v South Australia* [2011] FCA 1387, [21] ('*King Overlap*').

134 See, eg, *Lovett* [2007] FCA 474, [37] (North J); Paul Sheiner, 'The Beginning of Certainty: Consent Determinations of Native Title' (2001) 2(12) *Land, Rights, Laws: Issues of Native Title* 1, 6.

appear to have been adopted in non-statutory form by South Australia,[135] Western Australia[136] and Queensland,[137] serve a valuable role in providing certainty to claim groups. Accordingly, their adoption and promulgation should be encouraged.

However, some judicial decisions have gone further and found that the appropriateness test had been satisfied on the basis that the government respondent had adopted procedures described as 'rigorous and detailed',[138] 'careful',[139] 'thorough',[140] or 'scrupulous and professional'.[141] Madgwick J's comments in *Smith* typify such an approach, where his Honour wrote that:

> State governments are necessarily obliged to subject claims for native title over lands and waters owned and occupied by the State and State agencies, to scrutiny just as careful as the community would expect in relation to claims by non-Aborigines to significant rights over such land. The State is faced with a good many such claims. A deal of proper caution is to be expected.[142]

It is submitted that these (and related) comments should not be understood as providing authority for the proposition that either the Court, or the Act, require the government respondent to subject a claim group to a strenuous, or 'court-like' process for the negotiation and verification of consent determinations before an agreement will be considered 'appropriate'. Such a conclusion is inconsistent both with the underlying objectives of the Act, and a proper interpretation of his Honour's comments. Madgwick J's comments in *Smith* were 'made with respect to an agreement that the representative body declared had "serious problems" as to its "fairness, certainty and workability"'.[143] Accordingly, and when understood in context, his Honour's comments related specifically to substantive questions as to the nature and operation of the agreement before him. These comments did not, and were not intended to, prescribe a standard of investigation for all decisions.

Jagot J's recent decision in *Western Bundjalung People v A-G (NSW)*,[144] provides a salutary reminder of the significant deleterious consequences that the proliferation of such misconstructions is liable to produce. In that decision, her Honour noted that the State of New South Wales' insistence upon its 'credible evidence threshold' resulted in the applicants being required to provide a vast amount of anthropological evidence, which may have even exceeded that

135 Crown Solicitor's Office (Native Title Section), 'Consent Determinations in South Australia: A Guide to Preparing Native Title Reports' (Government of South Australia, 2004).

136 Department of Premier and Cabinet (Native Title Unit), 'Guidelines for the Provision of Connection Material' (Government of Western Australia, February 2012).

137 Department of Natural Resources and Mines (Aboriginal and Torres Strait Islander Land Services), 'Guidelines for Preparing and Assessing Connection Material for Native Title Claims in Queensland' (State of Queensland, November 2016).

138 *May (Ngurrara People) v Western Australia* [2012] FCA 1333, [14] (Gilmour J).

139 *Ah Chee (Wangkangurru/Yarluyandi People) v South Australia* (2014) 319 ALR 59, 64 [22] (Mansfield J).

140 *Lapthorne* [2009] FCA 1334, [26] (Barker J).

141 *Turner (First Peoples of the River Murray) v South Australia* [2011] FCA 1312, [25] (Mansfield J); see also *Limmerick* [2016] FCA 1442, [42] (Barker J).

142 (2000) 104 FCR 494, 501–2 [38].

143 Bartlett, above n 20, 755 [27.6].

144 [2017] FCA 992 ('*Western Bundjalung*').

required to prove the claim at trial.[145] For her Honour, this was indicative of 'fundamental systemic issues' in the State's approach to connection evidence (and native title claims more generally).[146] In addition to significant difficulties in resourcing and management of the government response, her Honour observed that '[a]pplicants and the Court remain in the dark as to what the State in fact requires to satisfy it to enable a consent determination to commence to be negotiated, let alone accepted'.[147]

Taken together, these concerns led her Honour to condemn the system of resolving native title claims in New South Wales as one which 'mean[s] that orders of the Court are routinely breached and outcomes for prima facie cogent claims can only be achieved after substantial delay, at substantial cost and subject to an ever present risk of last minute derailment'.[148] As her Honour noted, such consequences are, unfortunately, not confined to New South Wales.[149] This is deeply undesirable, and appears to reflect an increasing burden which states are attempting to place on native title claim groups. These practices are productive of wasteful litigation and undermine all parties' willingness to negotiate consensual resolutions to native title claims.[150] More fundamentally, however, it undermines the moral foundation on which the Act rests, threatening the rule of law,[151] dashing the hopes of Indigenous Australians and perpetuating challenges to the legitimacy of Indigenous land ownership as a feature of modern Australian law.

In light of the seemingly entrenched weaknesses identified in *Western Bundjalung*, this article submits that an appropriate understanding of the role of the principal government respondent requires adequate regard be had to four key considerations. Taken together, these considerations recognise that the flexibilities and difficulties of native title law, modern litigation, and government administration, place a range of complex and competing demands on government parties. However, in circumstances where the Act requires no particular standard of scrutiny from government respondents,[152] this article submits that none of these factors require government respondents to adopt a 'quasi-judicial' posture in native title litigation. This article submits that the various government respondents' processes of verification (and any guidelines adopted pursuant to them) should be (re)designed with appropriate recognition of these key values at their heart. Such a process is likely to contribute markedly to alleviating many of the difficulties, and the delays, which have characterised native title litigation in recent years.

145 Ibid [44]–[45].
146 Ibid [61], [64]–[65].
147 Ibid [65].
148 Ibid [61].
149 Ibid [63].
150 *Ward HCA* (2002) 213 CLR 1, 397–8 [969] (Callinan J).
151 *Western Bundjalung* [2017] FCA 992, [7]–[9] (Jagot J); *Ngallametta* [2000] FCA 1443, [4], [6]–[7] (Drummond J).
152 *Limmerick* [2016] FCA 1442, [43] (Barker J).

First, the fact that the Act is beneficial legislation which privileges negotiated outcomes, and is to be construed so as to 'advance the process of reconciliation',[153] tends strongly against adopting an approach which would align the degree of verification required for consent determinations, with that required by a Court in litigation. Authority for this proposition may be found in *Smith* itself, where Madgwick J commended the State's 'welcome degree of openness to change' and 'constructive attitude for the future' in renegotiating the agreement.[154] The alternative position, countenancing a practice whereby government respondents may fastidiously and uncompromisingly insist on unduly onerous or burdensome procedures, risks undermining the Act by substituting 'a trial before the Court with a trial conducted by the State party respondent'.[155] Such a consequence is contrary to the very purpose of consent determinations.

The second key consideration is a proper understanding of the facilitative, but not determinative, role of the government respondent in native title proceedings. In negotiating consent determinations, government 'appears in the capacity of parens patriae to look after the interests of the community generally'.[156] It thus plays a 'leadership role',[157] and occupies an 'advantageous position' in resolving native title claims.[158] This role is not 'at large'. Instead, the underlying object of the Act requires that the government's role be guided by a range of 'public interest' considerations.

Chief amongst these considerations is government's duty to 'seek to protect the interests of the whole community that it represents'.[159] It must not be forgotten that Indigenous peoples form part of this 'whole community'. This inclusion does not cease merely because the claim group are also applicants in judicial proceedings. Unlike many other forms of litigation, lodgement of a native title application does not readily lend itself to characterisation as a 'hostile' act. Properly understood, a claim of native title is not an assertion of an interest against which government must guard. Instead, it is an assertion of an interest in land and sea that, if established, demonstrates that the government respondent's rights over the claim area are not, and have never truly been, unencumbered. In this respect, and as Dowsett J explained in *Brooks [No 3]*:

> the State has duties to both indigenous and non-indigenous citizens. It may not always be easy to take into account and protect the rights and expectations of both

153 *NTA* Preamble para 17; *Northern Territory v Alyawarr Native Title Claim Group* (2005) 145 FCR 442, 461–2 [63]–[64] (The Court).

154 (2000) 104 FCR 494, 502 [38].

155 See, eg, *Lovett* [2007] FCA 474, [37]–[38] (North J); *Hobson 2009* [2009] FCA 679, [12] (Greenwood J); *Nelson* (2010) 190 FCR 344, 348 [13] (Reeves J); *Apetyarr* [2014] FCA 1088, [27] (Mortimer J); *Limmerick* [2016] FCA 1442, [49] (Barker J).

156 *Munn* (2001) 115 FCR 109, 115 [29] (Emmett J), cited in *Watson [No 3]* [2014] FCA 127, [6] (Gilmour J).

157 *Hoolihan (Gugu Badhun People #2) v Queensland* [2012] FCA 800, [6] (Logan J).

158 *Mosby (Kulkagal People) v Queensland* [2014] FCA 628, [10] (Greenwood J), citing *Kerindun* (2009) 258 ALR 306, 310 [16] (Greenwood J). See also *Coconut (Northern Cape York #2) v Queensland* [2014] FCA 629, [17] (Greenwood J).

159 *Lampton* [2014] FCA 736, [6] (Rares J), citing *Munn* (2001) 115 FCR 109, 115 [29] (Emmett J).

> groups, or all members of either group. In the end, it is the Court, and not the State, which is responsible for doing justice to all.[160]

The importance of this conclusion was underlined in *Hayes (Thalanyji People) v Western Australia*, where it was affirmed that the degree of verification required by the government respondent must be 'moderate[d]' by the knowledge that successful native title claims have not had the catastrophic effect on private interests which was initially feared.[161]

The third consideration of relevance arises from sections 37M and 37N of the *Federal Court of Australia Act 1976* (Cth), which require both the Court and parties to act so as to promote the 'just resolution of disputes: according to law; and as quickly, inexpensively and efficiently as possible'. In *Bates (Barkandji Traditional Owners #8) v A-G (NSW)*, Jagot J invoked the overarching purpose provision in the native title context in support of her Honour's criticism of the fact that the claim in that case took 18 years to be resolved, in large part due to the State's tenure analysis policies.[162] Although it largely passed without notice, this was significant, as it represented the first clear steps towards countering the largely passive acceptance of the idea that the 'exceptionalism' of native title litigation somehow justifies the extensive delays which characterise this area of practice.[163]

Jagot J has demonstrated a continued willingness to ensure that parties discharge the obligations imposed on them by the overarching purpose provisions. In *Phyball (Gumbaynggirr People) v A-G (NSW)*, her Honour gave colour to these statements in the context of consent determinations, emphasising that compliance with the overarching purpose required parties to approach consent determination negotiations with 'common sense, practicality, proportionality, and flexible, constructive and creative thinking'.[164] Such a proposition, which her Honour affirmed even more forcefully in *Blakeney*[165] and, later, *Western Bundjalung*[166] sends a clear message that 'business as usual' or 'litigation-esque' approaches to the negotiation of consent determinations are not acceptable, and are contrary to the overarching purpose of litigation.

Finally, the government's model litigant obligations are a key consideration in determining whether the Court considers a government's processes are appropriate. As articulated at the Commonwealth level (and equally applicable to states/territories via local instruments and the common law), government parties must 'act with complete propriety, fairly and in accordance with the highest professional standards'.[167] More specifically, government parties must handle litigation consistently, minimise litigation costs, avoid taking purely 'technical' defences, refrain from causing unnecessary delay, and avoid exploiting

160 [2013] FCA 741, [36].
161 [2008] FCA 1487, [22]–[23] (North J) ('*Hayes*').
162 [2015] FCA 604, [12] ('*Bates*').
163 See, eg, Dowsett, above n 68.
164 [2014] FCA 851, [1], [9].
165 [2015] FCA 647, [9]–[10].
166 [2017] FCA 992, [3]–[7].
167 *Legal Services Directions 2017* (Cth) app B cl 2.

impecunious applicants with legitimate claims.[168] These obligations are justified on the basis that such parties lack the same 'legitimate private interest' in the outcome of litigation as that held by applicants.[169] Additionally, governments enjoy significant advantages in litigation, not least due to their significant resourcing, which dwarves that of other litigants.[170] As a result, government litigants must uphold a spirit of 'fair play', which is essential to maintain the rule of law.[171]

In the native title context, these inequalities are particularly acute. As set out above, the principal government respondent occupies a position of particular power and influence in native title claims, as it is through them that all successful claims (and consent determinations) must 'pass'. Accordingly, and as Wilcox J implicitly recognised in *Bennell v Western Australia*, courts should be slow to countenance any departures from these standards, and should be willing to identify and publicise such breaches.[172] The Court's authority to do so may be traced directly to the remedial purpose of the *NTA*, which has the recognition of the 'common humanity'[173] of all citizens at its heart. As the above paragraphs demonstrate, the aims of the Act will only be realised when sustained efforts are directed to bringing about cultural change as to the way in which native title is viewed and consent determinations are negotiated.

VI DEALING WITH EXTINGUISHMENT

In light of the previous section, it may appear that native title practice has largely stood stagnant, resulting in extraordinarily long delays in resolving native title claims despite an increasing judicial call for the adoption of new solutions. Thankfully, that has not been the case. To their credit, government respondents (and claim groups) are demonstrating a willingness to pursue alternative solutions to many of the issues which plague these claims. Unfortunately, as demonstrated below, one of the most popular recent innovations – the adoption of 'generic' exclusion and extinguishment clauses – should not be encouraged.

Once the content of native title rights and interests capable of recognition have been ascertained, the Court must consider whether those rights have been extinguished by an assertion or exercise of rights by the Crown in a manner which is inconsistent with the continued existence of native title rights and interests.[174] Although the principles surrounding extinguishment are technical

168 *Legal Services Directions 2017* (Cth) app B cl 2.

169 *Hughes Aircraft Systems International v Airservices Australia* [No 3] (1997) 76 FCR 151, 196 (Finn J).

170 *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345, 434–5 [239] (Heydon J).

171 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342 (Griffith CJ).

172 (2006) 153 FCR 120, 349 [932] (not disturbed on appeal).

173 Borrowing the language of Heydon J's comments regarding 'model litigant' obligations in *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330, 416 [298].

174 *Western Australia v Commonwealth* (1995) 183 CLR 373, 433–4, 439 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ) ('*NTA Case*'); *Ward HCA* (2002) 213 CLR 1, 95 [94], 114 [149], 115 [151] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

(and largely outside the scope of this article), it is generally accepted that at common law, native title rights and interests may be extinguished 'by a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title',[175] such as a grant of an estate in fee simple over the claim area.[176] The Act confirms that 'previous exclusive possession acts' ('PEPAs') completely extinguish native title, whilst 'previous non-exclusive possession acts' ('PNPAs') extinguish native title to the extent they are inconsistent with native title.[177] Except for areas where the effect of extinguishment may be disregarded pursuant to sections 47–47B of the Act,[178] section 61A prohibits applications for a determination of native title over areas where native title has been extinguished.[179]

Generally, to determine the extent of extinguishment in respect of the claim area, the government respondent prepares a tenure history of that land, which records all current and historical Crown grants, licences and uses.[180] Each of those uses are then 'characterised' as to their potential effects on native title, to determine whether extinguishment has occurred. Accordingly, 'complete' tenure analysis requires examination of every dealing with each parcel in the land comprising the claim area, dating back to the original Crown grant, to determine whether a PEPA or PNPA exists, and thus whether native title has been extinguished. Governments, rather than claim groups, generally undertake this process as they have direct interests in the land and are best placed to do so, given they draw significantly on the state's own land titles offices and internal records.[181] Nevertheless, a complete tenure analysis is clearly a significant exercise. Such a process can (and does) take decades, even for well-resourced government departments. Frequently occurring after the question of connection has been determined, tenure analysis is therefore resource intensive, expensive, and one of the key barriers to the prompt resolution of proceedings.[182]

In this respect, questions of extinguishment are intrinsically connected to the negotiation and making of consent determination agreements. Extinguishment and tenure analysis have proven to be a notorious 'sticking point' in the negotiation of many (if not, most) consent determination agreements, leading to extensive delays. By way of example, in 2015, the State of New South Wales estimated that on current practices, it would take 19 years of full-time work

175 *NTA Case* (1995) 183 CLR 373, 439.

176 *Fejo (Larrakia People) v Northern Territory* (1998) 195 CLR 96, 126 [43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

177 *NTA* s 4(6), pt 2 div 2B. For the definitions of 'previous exclusive possession act' and 'previous non-exclusive possession act', see *NTA* ss 23B and 24F respectively.

178 Broadly, indigenous-held pastoral leases, indigenous land and reserves, and vacant crown land.

179 *NTA* ss 61A(2)–(4).

180 *North Ganalanja* (1996) 185 CLR 595, 616–7 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow JJ); Barker, 'Zen', above n 16.

181 *McLennan (Jangga People) v Queensland* [2013] FCA 795, [1] (Rares J); *Kynuna* [2016] FCA 1504, [32] (Reeves J), quoting *Brooks [No 3]* [2013] FCA 741, [35] (Dowsett J).

182 Justice Michael Barker, 'Innovation and Management of Native Title Claims: What Have the Last 20 Years Taught Us' (Speech delivered at the Australian Institute of Aboriginal and Torres Strait Islander Studies 2013 National Native Title Conference, Alice Springs, 3–5 June 2013) [14] ('Innovation').

exclusively on this matter to complete the tenure analysis for the Gomeroi Peoples' (admittedly large) claim.[183]

Although one may hope that these delays will begin to be alleviated following the adoption of Jagot J's comments in *Western Bundjalung*, and given the expected decline in the number of new claims in the future, questions of extinguishment will continue to have significant practical consequences. Valiant case management, mediation and dispute resolution efforts have gone some way to confining the impact of these disputes. Nevertheless, further steps are required. The identification and implementation of those steps should properly occur in accordance with the principles of proportionality and appropriateness, and their underlying rationales, considered above.

A Are Generic Exclusion and Extinguishment Clauses the Solution?

In an effort to mitigate the effects of full tenure searching, governments have begun to insist that determination agreements include clauses which obviate the need to prepare a full tenure analysis before the making of a determination. This has primarily occurred through the use of 'generic exclusion' and 'generic extinguishment' clauses. In *Kynuna*, Reeves J described the Government's use of these clauses as 'commendable' and 'proportionate, efficient, conserving of public resources and yet appropriately responsive to their role as public guardians acting in the public interest'.[184] Respectfully, this article considers that these clauses do not appropriately or effectively overcome the issues posed by extensive tenure analysis, but are instead themselves productive of further uncertainty and expense.

'Generic exclusion clauses', in a broad sense, are provisions inserted in a consent determination, which exclude certain categories of acts from the area subject to the Court's determination, by reference to a class or category of actions under the Act (eg, PEPAs). Although the drafting of these provisions takes a number of forms, their essence is a statement that areas which were the subject of one or more previous exclusive possession acts are excluded from the determination area. Functionally, these clauses 'carve out' areas subject to particular types of act from the determination area, such that no determination of native title is made over the excluded areas. Put another way, their 'status' is unaffected by the determination. However, the excluded parcels remain liable to future claimant (or, indeed, non-claimant) applications. To date, five determinations, all in Queensland, have adopted such exclusion clauses (without more) in their orders.[185] As set out below, South Australia and Queensland have employed variations on these provisions, and their use continues to be contemplated by other state governments.

These clauses, and thus the Court's orders, may record agreements reached between the parties, reflecting an agreement that the native title rights and

183 Barker, 'Zen', above n 16, [170].

184 [2016] FCA 1504, [35]–[36].

185 *Owens* [2012] FCA 1396, sch 2(i)–(ii); *Daphney (Kowanyama People) v Queensland* [2014] FCA 1149, sch 2 pt 3; *Congoo (Bar Barrum People #2) v Queensland* [2016] FCA 693, sch 2; *Kynuna* [2016] FCA 1504, sch 2; *Congoo (Bar Barrum People #10) v Queensland* [2017] FCA 1511, sch 2A.

interests claimed are likely to be extinguished over these excluded areas. Arguably, and in the authors' opinion, the inclusion of these clauses in a determination is liable to render that determination sufficiently uncertain, so as to undermine both its utility and effectiveness.

Certainty of geographical operation is a key value through the native title process, and one which is subject to significant statutory protection. At the commencement of the native title process, section 62(2)(a) of the Act requires any application for a determination of native title to contain sufficient information so as to enable the boundaries of the claim area to be clearly 'identified'. The 'topographic focus' of this inquiry has been interpreted as requiring such a degree of specificity such that 'those who might be affected' by a claim are able to identify the boundaries of any determination area with 'reasonable precision'.[186] Concomitantly, at the end of the claim process, section 225(b) of the Act requires any determination of native title identify the 'nature and extent' of native title rights recognised. As explained by the High Court in *Ward HCA*, this requires undetermined questions of extinguishment be resolved prior to the determination.[187] This is critical, as the terms of any determination of native title themselves 'become the equivalent of the muniment of title'.[188]

Generic clauses which exclude categories of acts (most commonly, PEPAs) from the determination area, without identifying the specific lots so excluded, fail to provide the requisite degree of certainty as to the geographic scope of the determination area. As explained above, characterisation of a previous act as a PEPA or PNPA requires decisions to be made as to the validity and effect of the particular act. Instead of identifying all of those areas subject to particular types of act, the extinguishing effect of which is then to be resolved by the Court, generic exclusion clauses seek to circumvent these issues entirely, by excising areas subject to such acts from the determination area.

In effect, this means that at any given point in time, it is not possible to identify from the face of the determination what areas of land are clearly 'inside' or 'outside' the determination area. By excluding 'classes' of acts or grants from the determination area, the precise effect of the determination cannot be conclusively ascertained unless and until a complete tenure analysis is completed, and the legal position of any previous actions with respect to the land has been resolved. Such processes are likely to occur unilaterally, long after proceedings are finalised and, therefore, with limited Court supervision. In circumstances where tenure analysis is conducted virtually exclusively by government respondents, the final resolution of any such claim becomes subject to the vagaries of policy and resourcing which may govern such a response. This

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186 *Bodney v Bennell* (2008) 167 FCR 84, 130 [175] (The Court); *Utemorrah v Commonwealth* (Unreported, Supreme Court of Western Australia, Owen J, 19 May 1993) 5.

187 (2002) 213 CLR 1, 82 [51], 83 [53] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also *Western Australia v Ward (Miriuwung and Gajerrong People)* (2000) 170 ALR 159, 371–2 [202] (Beaumont and von Doussa JJ) (not disturbed on appeal).

188 Bret Walker, 'The Legal Shortcomings of Native Title' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 14, 21.

may therefore give the (misleading) impression that governments, and not the Court, would have final control over where native title is recognised.

The use of generic exclusion clauses may also give rise to various perverse outcomes, both in theory and in practice. It is conceptually possible that a positive determination of native title containing a generic exclusion clause could be made over an area which is, in fact, entirely subject to undiscovered extinguishment. When later discovered, the operation of the generic exclusion clause might have the practical effect that despite the positive grant of native title over the land, no native title rights and interests could be exercised within the determination area. Furthermore, and procedurally, the use of generic exclusion clauses may themselves further contribute to the delay which is endemic in native title proceedings. Such consequences are observable in the *Gibson Desert Nature Reserve* litigation, where Western Australia sought (and was granted) leave to withdraw admissions made where historical tenure searches voluntarily conducted late in proceedings uncovered potentially extinguishing historical acts.[189]

The above concerns may also undermine the consent determination to such a degree that raises questions as to the Court's exercise of judicial power. The 'determination of pre-existing rights and obligations'[190] with a 'feature of conclusiveness' is a 'special characteristic of the exercise of judicial power' under Chapter III of the *Constitution*.[191] One aspect of this doctrine of finality is that the Court's orders must be 'self-explanatory', and not 'of uncertain content' or content 'which is to be derived from materials which are not on the public record'.[192] Although formally 'certain' in their content and conclusive in their effect, the substantive effect of a determination containing a generic exclusion clause cannot be understood by an independent observer unless they are wholly appraised of both the tenure history of the claim area, and the current state of jurisprudence as to the characterisation of particular acts under the *NTA*. Although each of these matters may formally be considered to be matters on the public record, any person who seeks to understand the effect of the Court's orders would encounter the very same resourcing difficulties which leads government respondents to seek to adopt these clauses in the first instance. Such a circumstance poses serious questions as to the degree to which third parties are able to appropriately regulate their behaviour in response to the determination of native title.[193] It also renders the prospect of enforcing a determination significantly more difficult.[194] In those circumstances, whether the determination practically 'determines' a 'right' may be open to question.

189 *Ward (Traditional Owners of the Gibson Desert Nature Reserve) v Western Australia [No 2]* [2014] FCA 825 ('*Ward (Gibson Desert) [No 2]*'); *Ward (Traditional Owners of the Gibson Desert Nature Reserve) v Western Australia [No 4]* [2016] FCA 358 ('*Ward (Gibson Desert) [No 4]*').

190 *Luton v Lessels* (2002) 210 CLR 333, 345–6 [22] (Gleeson CJ).

191 Ibid 374–5 [127] (Kirby J).

192 *Kovalev* (1999) 100 FCR 323, 326 [8], 328 [15]–[16] (French J).

193 Dowsett, above n 68.

194 Ibid.

Further comment should be made in respect of three particular uses of 'generic clauses'. First, a particular subset of seven determinations has been identified (also confined to Queensland) where a generic exclusion clause has been employed, accompanied by a list of the particular lots excluded by its operation.[195] The use of generic exclusion clauses with lot specification is a generally satisfactory approach to achieve negotiated outcomes as it permits some level of certainty in respect of what areas are subject to the determination, and adequately accounts for the limitations on the Court's jurisdiction imposed by section 61A of the Act. Such determinations do not encounter the difficulties identified above as, in these cases, one may readily (albeit, tediously) ascertain the effect of the determination on a particular parcel of land within the claim area by identifying the lot number of a site, and then consulting the itemised list contained in the Court's orders. However, these benefits are sharply reduced in circumstances where, as appears to be the case, the lot specification is merely indicative and not an exhaustive statement of the impact of the exclusion clause.

Secondly, generic exclusion clauses have historically been used to overcome the effect of extinguishment by 'public works'. Although the use of *any* generic 'class-based' clause is undesirable for the reasons set out above, this article does not seek to cavil with the continued use of these clauses in this way. Public works occupy a different position to other potentially extinguishing acts as they are subject to unique legislative and executive procedures relating to dedication, proclamation, appropriation and procurement.[196] In that respect, the existence and extinguishing effect of such works is usually capable of being certainly and clearly obtained (eg, through Hansard). Additionally, unlike other actions, the extinguishing effect of public works cannot be disregarded pursuant to sections 47–47B of the Act.[197] These processes mean that the existence and extinguishing effect of such works is usually capable of being obtained more easily than through historical tenure searches.

Thirdly, a second type of 'generic' clause has also been similarly employed in a small number of determinations, all in South Australia. 'Generic extinguishment clauses' have been employed in three determinations to date. Unlike generic exclusion clauses, which 'carve out' certain classes of act and/or grant from the determination area, generic *extinguishment* clauses take the further step of making a negative determination – namely, they determine that native title rights and interests *do not exist* in relation to areas where the identified class of grant and/or act have occurred.

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195 *Lampton* [2014] FCA 736, sch 2 pt A; *Wulli Wulli [No 3]* [2015] FCA 821, sch 2; *Miller (Birriah People) v Queensland* [2016] FCA 271, sch 2; *Doyle (Iman People #2) v Queensland* (2016) 335 ALR 201, 297–309 sch 2; *Doctor (Bigambul People) v Queensland* [2016] FCA 1447, sch 2; *Dodd (Gudjala People Core Country Claim #1) v Queensland* [2016] FCA 1505, sch 2; *Dodd (Gudjala People Core Country Claim #2) v Queensland* [2016] FCA 1506, sch 2; *Doctor (Bigambul People) v Queensland* [2017] FCA 716, sch 2.

196 *Daniel (Ngarluma People) v Western Australia* [2003] FCA 666, [641] (Nicholson J); *Ngalakan People v Northern Territory* (2001) 112 FCR 148, 162 [44]–[45] (O'Loughlin J).

197 *Erubam Le (Darnley Islanders) [No 1] v Queensland* (2003) 134 FCR 155, 175–6 [86]–[90] (The Court).

The operation of these clauses is best demonstrated by way of example. In *Adnyamathanha No 1 Native Title Claim Group v South Australia [No 2]*[198] the determination contained a generic clause determining that native title 'does not exist' in areas subject to most types of freehold grants, a perpetual or non-perpetual lease, or a crown grant before 23 December 1996. Similarly, both the *King Overlap* and *Lennon (Antakirinja Matu-Yankunytjatjara Native Title Claim Group) v South Australia* determinations included generic clauses which determined that native title did not exist in area where there was any past or intermediate period act attributable to South Australia or the Commonwealth, in any delineated road, or in '[a]ny area in which native title rights and interests have otherwise been wholly extinguished'.[199]

It may be accepted that many of these determinations do not provide for extinguishment of any native title rights and interests which the claimants might have reasonably established if the claim proceeded to hearing. However, the determinations fail to provide any practical determination of the extent of extinguishment in the claim area – at least until such time as a complete tenure history is completed. Generic extinguishment and exclusion clauses in fact dissuade government respondents from completing such analyses, as the 'fruits' of that process are not reflected in the terms of the agreement. Although generic exclusion clauses accompanied by some level of lot description (eg, the Queensland approach) are preferable to clauses lacking lot description (eg, the South Australian approach), as they may allow agreements to be reached earlier than would otherwise be the case, alternative approaches which are more consistent with the principles of proportionality and reasonableness exist, and should be preferred.

The three determinations containing generic extinguishment clauses referred to above suffer from an additional difficulty. Each of the three South Australian determinations referred to above included a clause which identified various classes of acts which caused particular plots to be 'excluded from the Determination Area because native title has been extinguished in those areas'.[200] Although prefaced as areas *excluded* by agreement, the orders and reasons described these areas as 'areas … where native title has been wholly *extinguished*'.[201] Insofar as these provisions purport to exclude land from the determination area, and simultaneously determine that native title does not exist by reason of extinguishment, these provisions appear internally inconsistent as they appear to determine the status of land (thus, including them in the determination area), whilst simultaneously purporting to 'exclude' them (and thus make no determination as to their status).

198 [2009] FCA 359, sch 2 ('*Adnyamathanha [No 2]*').

199 [2011] FCA 1387, sch 3; [2011] FCA 474, sch 3 ('*Lennon*').

200 *Lennon* [2011] FCA 474, [53], sch 3 (Mansfield J). In *Adnyamathanha [No 2]* and *King Overlap*, the clause is worded slightly differently (eg, 'excluded from the Determination Area *by reason of the fact that* native title has been extinguished in those areas' (emphasis added)). However, the substantive effect of these provisions is identical.

201 *Lennon* [2011] FCA 474, [53], sch 3 (Mansfield J); *King Overlap* [2011] FCA 1387, [65], sch 3 (Keane CJ) (emphasis added). See also *Adnyamathanha [No 2]* [2009] FCA 359, [2]–[6], sch 2 pt 1.

B Current Tenure Analysis as an Alternative Option

This article suggests that the use of 'current tenure analysis' prior to assessment of connection by government respondents as the default model for resolving questions of extinguishment would overcome many of the issues caused by existing tenure practices, without introducing the additional concerns which plague generic clauses. Supported in extra-judicial comments by Justices Mansfield and Barker, current tenure analysis refers to a process of tenure searching which considers the extent to which present-day land use would extinguish native title rights and interests, from which an inference can be drawn that native title would have been wholly or partially extinguished in those areas before 1975 (predating the commencement of the *Racial Discrimination Act 1975* (Cth)).[202] The basis of this inference arises from the fact that there has been limited extinguishment of native title since that time.[203] Inversely, it may be inferred that if present land use would not, of itself, suggest that any native title rights and interest have been extinguished, the likelihood of the subsistence of native title in those particular plots increases. The operation of sections 47–47B must then be considered to identify what extinguishment may be disregarded, enabling those plots to be placed back into the claimable 'pool'.[204] These sites should then be the focus of further, more detailed, historical tenure analysis.

If undertaken at a preliminary stage of the negotiations (before extensive connection evidence is filed), the application could thus be reformulated to remove those parcels where native title has most likely been extinguished.[205] This would have the effect of streamlining negotiations and reducing the amount of connection evidence claimants must adduce. Additionally, early consideration of historical extinguishment questions (including the degree to which extinguishment may be disregarded pursuant to sections 47–47B), would avoid 'double-handling' of particular parcels where extinguishment would otherwise be first 'identified' as part of the tenure analysis process and then later 'disregarded'.

Such a process is entirely conceptually consistent with the 'orthodox' approach to extinguishment set out above. The focus of the inquiry remains the identification of those areas where native title rights and interests are capable of being recognised under the Act. However, the key difference is that under a 'current tenure' model, that process is commenced by examining the degree of

202 The *Racial Discrimination Act 1975* (Cth) renders unlawful any acts which discriminate on the basis of race. As held in *Mabo v Queensland [No 1]* (1988) 166 CLR 186, 218–219 (Brennan, Toohey and Gaudron JJ), this protection applies equally in the context of native title, and limits the degree to which native title may be validly affected by government action. As the common law of Australia only recognised native title in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 17 years after the commencement of the *Racial Discrimination Act 1975* (Cth), the validity of acts occurring in this period (and thus, any entitlement to compensation) was called into question. See further discussion in French, above n 78, 10–19.

203 Justice John Mansfield, 'Re-thinking the Procedural Framework' (Speech delivered to the Native Title User Group, Adelaide, 9 July 2008); Barker, 'Zen', above n 16, [81]–[82], [136].

204 Barker, 'Zen', above n 16, [83].

205 Ibid [82]–[84]; Barker, 'Innovation', above n 182, [13]–[14].

extinguishment which can be inferred from contemporary land use and, in effect, 'working backwards' from there, rather than by 'working forwards' from colonial settlement to identify the precise event which 'first' extinguished native title. In that respect, 'current tenure analysis' is merely an administrative and intellectual tool, rather than a substantive reformation of the law. In the circumstances of a consent determination, where the fact of extinguishment is of greater significance than the date and act which occasioned it, it is submitted that such a model is entirely appropriate for adoption.

Current tenure analysis is not intended to wholly replace historical tenure searching, but merely to supplement it. This article's recommendation is premised upon recognition that the *NTA*'s requirements are best discharged by governments adopting a flexible, tailored policy to the investigation of each claim, based on 'what they know about the particular claim in front of them, having regard to their experience'.[206] In this respect, a current tenure analysis provides a useful 'first review' by which the majority of major issues can be addressed. Where more specific detail is required, either a complete historical tenure analysis could be conducted, or the tenure analysis could be conducted 'as at' a particular time, to identify the extent of extinguishment in the intervening period.[207]

Current tenure analysis is not a panacea to all of the problems plaguing tenure searching, and may not be appropriate in some cases (especially compensation claims – where the precise time of extinguishment is important – and large 'township' claims which encompass many different types of tenure).[208] Additionally, the Australian Law Reform Commission considered whether to recommend the adoption of current tenure searching in their 2015 review of the Act, but refrained from doing so, suggesting that the Court's own case management powers were sufficient to manage to manage timelines effectively on a case by case basis,[209] and any legislated or mandated acceleration of tenure analysis risks 'deleterious consequences'.[210] Nevertheless, the Commission described earlier tenure analysis as 'best practice',[211] and judges have indicated that the Northern Territory's experiments in adopting a current tenure approach have proven generally successful.[212]

Opposition to current tenure analysis generally proceeds on two main bases. First, insufficient human resources are often cited to justify postponing tenure analysis.[213] It is undeniable that any tenure analysis process is resource-intensive, time-consuming, and should not be undertaken unless claims show some prospect of success. However, as government respondents are obliged to act expeditiously in resolving disputes, and must act as model litigants in doing so, it

206 Barker, 'Zen', above n 16, [55]. See also Barker, 'Innovation', above n 182, [17].
207 Mansfield, above n 203.
208 Ibid.
209 Australian Law Reform Commission, above n 18, 364–5 [12.29], 366 [12.35].
210 Ibid 366 [12.36].
211 Ibid 367 [12.40].
212 Barker, 'Zen', above n 16, [81], [134]–[136].
213 Ibid [85].

may be (especially in light of *Western Bundjalung*) that current levels of investment in native title litigation are insufficient to discharge these obligations, and increased financing is required.[214] Additionally, investment in alternative methods of searching (akin to, eg, automating or outsourcing discovery in other civil litigation) should be encouraged. The cost of these options is likely to pale in comparison to the costs incurred in conducting a full historical tenure analysis, and the economic, social, political and emotional costs of the lengthy consequential delays.

Secondly, current tenure analysis is often suggested to be insufficient to provide an adequate evidential foundation for a determination as it may be inaccurate or incomplete. Although it may readily be accepted that the Court should ordinarily determine disputes based on the 'true factual state of affairs' (tending in favour of a complete tenure analysis),[215] neither the Act, nor the government's obligations require complete historical tenure searches to be presented to the Court. In *Ward (Gibson Desert) [No 2]*, Barker J confirmed that the historical tenure search conducted in that case had 'not been required by the Court and is not a necessary feature of a compensation application under the *NTA*'.[216] Given any compensation application must rest upon a determination of native title, Barker J's comments provide clear support for the proposition that a complete tenure analysis is not mandated by the Act.

Additionally, the very nature of a section 87 or 87A agreement points against requiring exhaustive historical tenure searching. As explained by Dowsett J in *Brooks [No 3]*,[217] the filing of a consent determination agreement functions akin to an admission in proceedings. Admissions in pleadings and joinder of issue are tactical forensic decisions which are respected by the Court, which will generally proceed upon the basis of the facts as agreed to by the parties. It is for this reason that his Honour stated that '[t]he State may choose to consent even if it is not satisfied as to matters strictly essential to a proposed determination'.[218] In this regard, it should be noted that historical tenure analysis is generally an exercise with diminishing returns. In the Northern Territory, for example, when compared against a current tenure analysis, a historical tenure analysis only resulted in a changed tenure position for 10–12 per cent of plots.[219] The risk of any adverse impact on material interests in these plots is limited by the 'extensive notification process' conducted by the National Native Title Tribunal, and the ability for interested persons to join themselves as respondents to the proceedings.[220]

Nevertheless, where serious concerns as to the tenure history of the land remain, various procedural mechanisms may be employed to circumvent these issues. First, section 83A of the Act enables the Court to request ministers to

214 Ibid.

215 *Ward (Gibson Desert) [No 2]* [2014] FCA 825, [115] (Barker J); *Ward (Gibson Desert) [No 4]* [2016] FCA 358, [138] (Barker J).

216 [2014] FCA 825, [114].

217 [2013] FCA 741, [40]–[41].

218 Ibid [37].

219 Barker, 'Zen', above n 16, [136].

220 *NTA* ss 66(10)(c), 84; Mansfield, above n 203.

conduct searches of current or former interests in land and report the results to the Court. This rarely-considered power may allay concerns that current tenure analysis would overlook some specific aspect of a claim. Additionally, it may be possible to adopt an approach whereby certain plots of land are explicitly excluded from the determination area, where tenure analysis has been complicated by legal uncertainty as to the potential extinguishing effect of an act,[221] or is otherwise incomplete.[222] Although the proliferation of 'part determinations' of this sort is not necessarily desirable, resolution of the balance of the application should not be impeded by delays in preparing a full tenure history. Such a process may be resolved by the use of the powers in rule 30.01 of the *Federal Court Rules 2011* (Cth) to determine 'a question arising in the proceeding' (eg, whether native title has been extinguished), separately from all other legal questions.[223]

As echoed throughout this article, sections 87 and 87A are designed to encourage negotiated solutions between the parties. This purpose would be undermined if the provisions required the determination of disputed questions of extinguishment 'precisely as a court would' at a fully-litigated hearing.[224] Consent determination negotiations are conducted on the basis of the 'respective and real perceptions and undertakings about [the parties'] strengths and weaknesses', and often canvass a range of native title and non-native title outcomes.[225] To insist on complete historical tenure analysis disregards this complexity, and undermines the principles of case management (which, indeed, are so strong they may require the Court to depart from the 'true factual state of affairs' in some circumstances).[226] It would also be inconsistent with the Court's willingness to accept flexible solutions, compromises and 'short-form' agreements in satisfaction of connection questions.[227] As Jagot J stated in *Bates*, '[t]here is no reason that such compromises cannot extend to the determination of issues of tenure. Indeed … it is essential they do so because, presently, that is the only way in which timely [resolution] of native [title] claims becomes possible'.[228]

In this regard, although the State appears in a parens patriae capacity and a respondent in native title matters, it is nevertheless the State's own residents who form members of the claim group.[229] Any 'risk' in a current tenure analysis is largely borne by the government respondent, who is faced with an agreement which would burden the Crown's otherwise theoretically 'radical' title to dispose

221 See, eg, *Munn* (2001) 115 FCR 109, 116 [33] (Emmett J); *Wilson* (*Bandjalang People No 1 and No 2) v A-G (NSW)* [2013] FCA 1278, notes B–D (Jagot J).

222 See, eg, *Adnyamathanha [No 2]* [2009] FCA 359, sch 2, pt 2.

223 *Federal Court Rules 2011* (Cth) r 30.01(1); Federal Court of Australia, above n 8, [6.2].

224 Duff, above n 89, 14.

225 *Brown (Antakirinja)* (2010) 189 FCR 540, 549 [40] (Mansfield J). See also Barker, 'Innovation', above n 182, [12].

226 *Ward (Gibson Desert) [No 4]* [2016] FCA 358, [138] (Barker J).

227 See, eg, *Tilmouth (Ilkewarn Landholding Groups) v Northern Territory* [2014] FCA 422, [18] (White J); *Nicholls v South Australia* [2015] FCA 1407, [16] (Mansfield J).

228 [2015] FCA 604, [12].

229 *Fazeldean [No 2]* (2011) 211 FCR 150, 156–7 [35] (The Court).

of or deal with the land as it wishes, more so than may exhaustively be proven to be the case.[230] However, it should be recalled that the fiction of 'radical title', and the doctrine of tenure which underpins its existence, is merely a mechanism for resolving competing claims and interests in land.[231] When reduced to its fundamental features, tenure history amounts to little more than a record of how the competing interests of the state (as 'beneficial owner') and private parties have been reconciled from time to time, in light of changing claims of entitlement to use of land, and state policies about its exploitation or appropriation.[232] Nothing about this, the nature of the *NTA*, or any other matter otherwise prohibits the government from surrendering claims of right, which it may otherwise have made to land subject to the claim. Relevantly, the vast majority of cases recognise native title on a non-exclusive basis, with the effect being that the state would not lose its status as beneficial title holder, and pre-existing rights to land (including those held by the state) continue to exist.[233]

VII CONCLUSION

The law and practice surrounding the making of agreements pursuant to sections 87 and 87A of the Act are rarely the subject of controversy, and thus have occasioned little sustained academic or judicial attention. In addition to drawing attention to a significant but under-examined area of native title jurisprudence, this article has consolidated the jurisprudence and commentary surrounding the making of consent determinations. By focusing particularly on the operation of the 'appropriateness' test, and the practical difficulties in dealing with extinguishment, this article has sought to provide a principled explanation of factors affecting the Court's willingness to give effect to a consent determination agreement. In doing so, the article has demonstrated that differences in respect of the standard of proof, the role of government respondents and the importance of agreement-making are more apparent than real. Additionally, the article has indicated that further attention should be given to the use of 'generic clauses' relating to extinguishment, as the uncertainty surrounding their operation may produce future conflict. The role of current tenure analysis might also be considered further in overcoming the difficulties created by complete historical tenure analysis. Adoption of such procedures is necessary to help address many of the systemic issues, practical difficulties, and lengthy delays which appear to be endemic in native title litigation.

230 *NTA Case* (1995) 183 CLR 373, 480–1 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ).
231 Thomson Reuters, *Property Law and Practice in Queensland* (at 20 October 2016) [LC2P1.20A].
232 Ibid.
233 *Ward HCA* (2002) 213 CLR 1, 95 [95] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 250–1 [590] (Kirby J).