

**The National Native Title Tribunal in  
Australia**

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## Outline

	<b>Page No</b>
<b>1 INTRODUCTION</b>	1
<b>2 NATIVE TITLE AND INDIGENOUS LAND RIGHTS IN AUSTRALIA – A BRIEF HISTORY</b>	2
(a) Implications of British sovereignty	2
Progressive British assertions of sovereignty across Australia	2
– no legal recognition of Indigenous peoples’ rights	
No treaties	5
No common law recognition in 1971 <i>Gove land rights case</i>	5
(b) Various statutory land rights schemes	5
Legislative rather than judicial acts	5
Some key features	6
(c) Common law recognition of native title in 1992 – <i>Mabo v Queensland (No 2)</i>	7
<b>3 NATIVE TITLE LEGISLATION IN AUSTRALIA – AN OVERVIEW</b>	9
(a) The constitutional context	9
(b) Some legal principles	10
(c) The <i>Native Title Act 1993</i>	12
Objects and policy of the Act	12
Main features of the Act	13
National Native Title Tribunal	14
(d) Native title	17
Native title – the common law	17
Native title – the statute	19
Extinguishment of native title at law	21
The ‘tide of history’ and loss of native title	23
Difficulties in proving native title	24
<b>4 PROCEDURES FOR DETERMINING WHERE NATIVE TITLE EXISTS</b>	27
(a) The scheme of the <i>Native Title Act 1993</i>	28
Main steps in the process	28
The role of the National Native Title Tribunal	32
Mediation	33
(b) Context of native title mediation	35
Legal context	35
Indigenous cultural context	36
Historical context	39
Economic context	39
Social context	40
Political context	40

(c)	Purpose of native title mediation	40
	Substantive native title outcomes	40
	Related non-native title outcomes	41
	Indigenous land use agreements	44
	Other ‘stand alone’ outcomes	45
(d)	Some special features of native title mediation	45
	Differences from the circumstances of most mediation	45
	Multi-party	46
	Cross-cultural	46
	Interest-based	47
	Rights-based context	47
	Factors affecting the pace and progress of native title mediation	48
(e)	Phases of native title mediation	49
	Phase 1 – Information gathering and giving	49
	Phase 2 – Process design	50
	Phase 3 – Capacity-building and party development	50
	Phase 4 – Exploration and identification of issues, interests and options	50
	Phase 5 – Mediating the negotiation of agreements	50
	Phase 6 – Closure	51
	Relationship of phases to each other	51
	Some examples of mediation practice ‘in the field’	52
<b>5</b>	<b>MAKING AGREEMENTS THAT LAST</b>	<b>55</b>
(a)	Human rights principles	55
(b)	Evaluating critical components of agreements	57
(c)	Features of sustainable agreements	58
	Clarify the goals of an agreement	58
	Deal with as many issues as possible ‘up front’	59
	Take account of factors relevant to Indigenous communities	59
	Build relationships	60
	Ensure that the parties understand relevant legal procedures	60
	Provide for effective governance and capacity building	60
	Include employment and training as appropriate	60
	Specify how benefits will be distributed	61
	Have an implementation plan	61
	Attempt to deal with expectations and perceptions of others	62
	Adopt a holistic approach to agreement-making	62
	Implications for the Tribunal	63
<b>6</b>	<b>OUTCOMES AND OUTSTANDING ISSUES</b>	<b>63</b>
(a)	Outcomes	63
	Areas of land granted or where native title determinations have been made	63
	Social benefits	64

	A broader understanding of Australian history and society	65
(b)	Outstanding issues	65
	Finalising native title and land claims – the quest for certainty	66
	Overlapping and disputed claims	66
	Traditional and historic links to land	67
	Cost and delay of claim processes	67
	Cost and delay of exploration and mining	67
	Economic uses of land that is inalienable or native title areas	68
	Governance of land	68
	Uneven distribution of benefits for Indigenous Australians	68
	Reviews of legislation	69
<b>7</b>	<b>SOME RELATED ISSUES – AN OVERVIEW</b>	<b>70</b>
(a)	Sovereignty	70
(b)	Customary law	70
(c)	Cultural heritage	72
<b>8</b>	<b>ASSESSING AUSTRALIA FROM AN INTERNATIONAL PERSPECTIVE</b>	<b>72</b>
(a)	Local factors	72
(b)	International law and human rights standards	73
<b>9</b>	<b>FUTURE TRENDS</b>	<b>74</b>
<b>10</b>	<b>CONCLUSION</b>	<b>75</b>
	<b>Annexure A Land Rights Legislation – An overview</b>	<b>77</b>

# The National Native Title Tribunal in Australia

by Graeme Neate<sup>1</sup>

Paper delivered to the Attorney General's conference, Fiji  
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## 1. INTRODUCTION

Only in recent decades have the laws of Australia recognised Indigenous peoples' rights in relation to areas of their traditional lands and waters. Indeed it was nearly two centuries after British settlement before Australian parliaments passed laws and Australian courts delivered judgments that acknowledged the facts of history and granted some recognition of those rights.

This paper provides an overview of various key judgments and statutes in the past four decades, and particularly the development of the law on native title since the High Court of Australia's historic judgment in *Mabo v Queensland (No 2)*<sup>2</sup> and the enactment of the *Native Title Act 1993* (Cth),

It is prepared in light of the proposed establishment in Fiji of an Indigenous Claims Tribunal, and a request to learn from the Australian experience.

The paper does not attempt to compare the historical, legal and political circumstances in Fiji with those in Australia. Rather, it describes the various legislative schemes in Australia which provide for:

- the grant of estates or interests in land to Indigenous peoples; or
- the recognition of the native title rights of Indigenous peoples.

It is offered as a resource to those who are considering designing and implementing an appropriate scheme for Fiji in the hope that the Australian experience might provide some guidance in assessing what might, or might not, be appropriate in Fiji.

The paper has eight main parts.

The first part puts the development of Australian law in the context of British colonisation of Australia and the constitutional framework governing the enactment of laws by the Federal Parliament.

The second part deals with the main features of the Native Title Act which commenced to operate on 1 January 2004. The focus in that part is on the policy underpinning the Act, the concept of native title and the circumstances which result in native title not being recognised, in part or in whole, over much of Australia.

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<sup>2</sup> (1992) 175 CLR 1.

The third part outlines the procedures for determining where native title exists and focuses primarily on the mediation by the National Native Title Tribunal of native title claimant applications.

The fourth part outlines some recent analysis of what makes for lasting agreements in relation to native title matters.

The fifth part outlines what has been achieved after about one decade of native title law and practice, and some of the outstanding issues.

The sixth part deals briefly with three issues that are related to native title.

The paper concludes with parts dealing briefly with how Australia's performance might be assessed from an international perspective and what some future trends in native title practice might be.

The paper is confined to questions involving land, and does not deal with issues of native title to areas of sea and seabed, although those issues have also been dealt with by Australian courts.<sup>3</sup>

## **2. NATIVE TITLE AND INDIGENOUS LAND RIGHTS IN AUSTRALIA – A BRIEF HISTORY**

### **(a) Implications of British sovereignty**

*Progressive British assertions of sovereignty across Australia – no legal recognition of Indigenous peoples' rights:* The continent of Australia has been occupied by Aboriginal peoples for tens of thousands of years. Although various European and other groups visited Australia before the British came, they did not assert sovereignty over the land or its people. Lieutenant James Cook, who mapped the east coast of Australia in 1770, carried with him the Admiralty's instructions in the following terms:

You are... to observe the Genius, Temper, Disposition and Number of the Natives, if there be any and endeavour by all proper means to cultivate a Friendship and Alliance with them... Shewing them every kind of Civility and Regard; ...

You are also with the Consent of the Natives to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain: Or: if you find the Country uninhabited take Possession for His Majesty by setting up Property Marks and Inscriptions, as first discoverers & possessors.

It is clear that the country was not uninhabited – and Cook observed as much.<sup>4</sup> Accurate figures cannot be given but it is estimated that between 300,000 and 750,000 Aborigines were living in

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<sup>3</sup> See *Commonwealth v Yarmirr* (2001) 208 CLR 1, 184 ALR 113; *Lardil Peoples v Queensland* [2004] FCA 298.

<sup>4</sup> It is interesting to note that, in his reasons for decision in relation to a consent determination that native title exists over certain islands in the Torres Strait, Justice Drummond stated that on 22 August 1770, Captain Cook with a party of his men landed on Bedanug, which he called Possession Island and:

‘...hoisted English colours, and in the name of His Majesty King George III, took possession of the whole eastern coast from the above latitude of 38° south, down to this place by the name of New South Wales.’

As he sailed south and west from Possession Island past the islands of Zuna or Entrance, Mipa or Turtle, Yeta or Port Lihou and Dumaralag, he wrote in his log:

Australia when the first permanent European settlers arrived from Britain in 1788,<sup>5</sup> and approximately 250 languages were spoken by the Aboriginal population.<sup>6</sup>

It is now acknowledged that Aboriginal people and Torres Strait Islanders had their own local laws and customs which made them traditional owners of much, if not all, of the land mass. The nature of the land influenced the nature and intensity of land use, but variations in ecology and the poor capacity of some areas to support large numbers of people did not mean that those areas were unoccupied or unowned. Even the ‘dreadful Desert’ with sand ridges ‘in long fiery lines’ described by explorer Charles Sturt was the home for Aboriginal people, whose residential structures, physical artefacts and bones remain preserved in the landscape and whose descendants retain traditional links to the land.<sup>7</sup>

British claims to sovereignty over parts of Australia proceeded in 1788 and throughout much of the 1800s, concluding in the Torres Strait in 1879.<sup>8</sup> But the consent of the natives was neither sought nor given when possession of the land was taken for the Crown.<sup>9</sup> In the legal theory of the formative years, Australia was regarded as *terra nullius* – no one’s land. The claims of Australian Aborigines and Torres Strait Islanders were ‘utterly disregarded’ by the law.<sup>10</sup>

As European settlement extended inland from the coast, driven by a desire to expand agricultural and pastoral enterprises and mine gold and other minerals, Aboriginal people were progressively dislocated and dispossessed of many of their traditional lands. Title to much of the arable and grazing land was granted to the new settlers. In some areas, Aboriginal reserves and missions

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‘We saw upon all the adjacent lands and islands a great number of smokes – a certain sign that they are inhabited.’

And then, as he sailed closer to the point on Muralag Island itself, which he named Cape Cornwall, there were on a beach a number of people, men and women. ‘Some of the men’, Cook noted, ‘had on pretty large breast plates, which he supposed were made of pearl oyster shells; this was a thing, as well as the bows and arrows, we had not seen before’, i.e. that Cook had not seen on the entire voyage up the eastern coast of the continent. This is the first recorded European observation of the Kaurareg. It was only in 1872 that Captain Cook’s claim for British sovereignty of the east coast of Australia was extended to the islands in the Kaurareg Archipelago. *Kaurareg People v Queensland* [2001] FCA 657, 23 May 2001, paragraphs 3-5.

<sup>5</sup> JP White and DJ Mulvaney ‘How Many People?’ in DJ Mulvaney and JP White (eds) *Australians to 1788*, 1987, 115-117. One series of estimates shows 314,500 Aborigines at 1788 (when they comprised 99.7% of the total Australian population) declining in number to 73,800 in 1933 (when they comprised 1.1 % of the total Australian population) and rising in number since then: D Horton (ed), *The Encyclopaedia of Aboriginal Australia*, 1994, Vol 2, p 1299 using estimates derived from L Smith, *The Aboriginal Population of Australia*, ANU Press, Canberra, 1980. See also J Jupp (ed) *The Australian People: An Encyclopaedia of the Nation, Its People and their Origins*, 2001, pp 88, 93.

<sup>6</sup> See ‘Aboriginal languages since 1788’ in J Jupp (ed) *The Australian People: An Encyclopaedia of the Nation, Its People and their Origins*, 2001, p 93.

<sup>7</sup> See Land Tribunal, *Aboriginal Land Claim to Simpson Desert National Park*, 1994.

<sup>8</sup> See M H McLelland ‘Colonial and State Boundaries in Australia’ (1971) 45 *Australian Law Journal* 671; G Neate ‘Proof of Native Title’ in B Horrigan and S Young (eds) *Commercial Implications of Native Title*, 1997, Federation Press, 254-258.

<sup>9</sup> In their judgment in *Mabo v Queensland (No 2)*, Deane and Gaudron JJ noted that certain references in the two commissions and in the Instructions from King George III to Captain Arthur Phillip indicate a view that at least part of the new colony had automatically become British territory in 1770 by virtue of Cook’s ‘discovery’ and various pronouncements of taking ‘possession ... in the Name of His Majesty’: (1992) 175 CLR 1 at 77-78, 107 ALR 1 at 57.

<sup>10</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 40, 107 ALR 1 at 27 per Brennan J; *Western Australia v Commonwealth* (1995) 183 CLR 373 at 427 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Wacando v Commonwealth* (1981) 148 CLR 1 at 27 per Murphy J.

were established which provided some buffer between Aboriginal communities and the new settlers.<sup>11</sup>

In recent years, much has been written about the nature of the early relationships<sup>12</sup> and conflicts between the colonisers and Aboriginal peoples,<sup>13</sup> and much of that review of Australian history has been controversial.<sup>14</sup> What is not in dispute is that, for more than two centuries, the law that was introduced into Australia did not recognise that Aboriginal peoples had legal rights to their traditional lands.

**No treaties:** There were no treaties signed between Aboriginal peoples and the Crown, in contrast to the experience in other British colonies, such as Canada and New Zealand.

**No common law recognition in 1971 Gove land rights case:** Until the High Court's decision in *Mabo v Queensland (No 2)*,<sup>15</sup> the generally accepted legal position was that, at the moment when the Crown acquired sovereignty over land in Australia, all land became the property of the Crown.<sup>16</sup>

The first attempt to assert native title rights in Australian courts was the case brought by Aboriginal people of the Gove Peninsula in the top end of the Northern Territory to challenge a bauxite mine on their traditional lands. The plaintiffs claimed that their interests in the land had been 'unlawfully invaded' by the mining company and the Commonwealth, and that they had rights under native law or custom that persisted and must be respected by the Crown and its colonising subjects unless they were validly terminated.<sup>17</sup>

In the landmark *Gove Land Rights Case* of 1971, Mr Justice Blackburn recognised that groups of Aborigines in the Gove Peninsula area of the Northern Territory had a 'subtle and elaborate' system of law, highly adapted to their country.<sup>18</sup> But on the evidence before the court, the judge understood that 'the fundamental truth about aboriginals' relationship to the land is that whatever else it is, it is a religious relationship'.<sup>19</sup> He suggested that the people had 'a more cogent feeling of obligation to the land than of ownership of it'. The evidence indicated that 'the clan belongs to the land [rather] than that the land belongs to the clan'.<sup>20</sup> He also held that the doctrine of communal native title did not form and had never formed part of the law of any part of Australia.

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<sup>11</sup> There were more than 200 missions and reserves in different parts of Australia. The Wesleyan Missionary Society established the first mission in Victoria in 1836. Other missions and reserves followed in Victoria and elsewhere. For example, reserves were established at Cherbourg, Queensland (1904), Western Australia (1905), Arnhem Land, Northern Territory (1931), and there were missions at Yirrkala and Port Keats, Northern Territory (1935) and Ernabella, South Australia (1937). Demands for land for other purposes led to the selling off or reduction in area of some reserves.

<sup>12</sup> See e.g. I Clendinnen, *Dancing with Strangers*, Text Publishing Company, 2003.

<sup>13</sup> See e.g. H Reynolds *Frontier: Aborigines, Settlers and Land*, 1987, Allen & Unwin; H Reynolds, *The Law of the Land*, 1987, Penguin Books (2<sup>nd</sup> edn, 1992); H Reynolds, *The Other Side of the Frontier: Aboriginal resistance to the European Invasion of Australia*, Penguin Books, 1990; H Reynolds, *North of Capricorn: the untold story of Australia's north*, Allen & Unwin, 2003.

<sup>14</sup> See e.g. K Windschuttle, *The Fabrication of Aboriginal History: Volume One, Van Dieman's Land 1803-1947*, Sydney, Macleay Press, 2002; R Manne (ed) *Whitewash: On Keith Windschuttle's Fabrication of Aboriginal History*, Black Ink Agenda, 2003; S MacIntyre and A Clark, *The History Wars*, Melbourne University Press, 2003.

<sup>15</sup> (1992) 175 CLR 1.

<sup>16</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 245, citing *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404; *Randwick Corporation v Rutledge* (1959) 102 CLR 54. See also *Wik Peoples v Queensland* (1996) 141 ALR 129 at 249, and cases cited there.

<sup>17</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 146, 149.

<sup>18</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 267.

<sup>19</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167.

<sup>20</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 270-271.

## (b) Various statutory land rights schemes

**Legislative rather than judicial acts:** In the absence of common law recognition of native title rights before 1992, attention turned from the courts to the parliaments. Efforts by governments to legislate to ensure that Indigenous people could continue to use, occupy or own land were considered acts of policy rather than recognition that Aborigines were legally entitled to any land.<sup>21</sup> Governments did not act without considerable prompting, particularly from Aboriginal people. The enacting of federal land rights legislation for the Northern Territory, for example, resulted from a series of events including the Aboriginal strike at Wave Hill in 1966, the 1972 Aboriginal ‘tent embassy’ protests, and the commissioning of Justice Woodward to inquire and report on how (not whether) to recognise Aboriginal land rights in the Territory.<sup>22</sup>

The Federal Whitlam Labor Government introduced legislation in 1975 to give effect to the Woodward recommendations, but enactment was not complete when the Government was dismissed and the Parliament prorogued in November 1975. There was at that time, an essentially bi-partisan policy on Aboriginal land rights at a Federal level. Accordingly, in 1976 the Liberal-Country Party Government, led by Prime Minister Malcolm Fraser, enacted substantially similar legislation, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which commenced operation on 26 January 1977 – Australia Day, the 189th anniversary of the first European settlement.<sup>23</sup>

The range of land rights legislation across various states and territories of Australia enacted between 1966 and 1991 reflects, among other things the different circumstances of Indigenous communities, the federal system of government in Australia, and the different historical events that shaped each statute.

**Some key features:** Some broad observations can be made about the key features of those Acts.

The land rights schemes provide:

- for the direct grant of areas of land, usually to specific Aboriginal and Torres Strait Islander communities, or
- for groups to claim areas of land and go through a process of having their claims assessed and determined by government.

The basis on which land is granted varies. In some places people need to establish that they are the traditional owners of the land. In other places they may establish their historical links to the land, or that they need land for their economic or social viability. In some places, land is granted to local Aboriginal bodies without such criteria having to be established, by way of compensation for the past loss of land and recognition that land can provide an economic basis for those groups.

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<sup>21</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 254-261; but see also H Reynolds *The Law of the Land* (1987) and judicial observations on the history of relations between Aborigines and settlers in *Tasmanian Dam Case* (1983) 158 CLR 1, 180-1 (Murphy J), 272-5 (Deane J), *Gerhardy v Brown* (1985) 159 CLR 70, 149-51 (Deane J). See also *Pareroultja v Tickner* (1973) 42 FCR 32, 117 ALR 206 at 218-220.

<sup>22</sup> AE Woodward, *Aboriginal Land Rights Commission, First Report*, AGPS, Canberra 1973; AE Woodward, *Aboriginal Land Rights Commission, Second Report*, AGPS, Canberra, 1974.

<sup>23</sup> For a judicial discussion of the development and scheme of the Act and a list of judicial decisions about it see *Pareroultja v Tickner* (1993) 42 FCR 32, 117 ALR 206. See also *Risk v Northern Territory* (2002) 210 CLR 392, 188 ALR 376. Land rights legislation was enacted in other parts of Australia. See *Halsbury's Laws of Australia*, vol 1, Aborigines and Torres Strait Islanders.

The land which may be granted or claimed is usually vacant Crown land, some Crown reserves (such as Aboriginal reserves), specified national park land or land which Aboriginal people already hold (such as some Aboriginal owned pastoral leases). As noted earlier, the Crown granted title to much of the arable or grazing land of Australia early in Australia's history. The land that is included in land rights schemes is the land that remains. It is usually not land where anyone other than the Crown has proprietary rights.

Although these areas have been described as the 'remnant' lands, they are neither insignificant nor insubstantial. For those groups who have traditional rights to the land, this is their country and land rights schemes allow them the opportunity to obtain secure title over them.

Most Australians live at or near the coast. Some Aboriginal communities live in inland regions, far removed from cities. The relative isolation that these communities experience has enabled them to retain continuous associations with their traditional lands. Perhaps paradoxically, it is in the areas of least interest to most Australians where some groups can demonstrate the fullest extent of traditional ownership and hence gain the greatest legal protection of it.

Land rights legislation also brings various protections and benefits. The title that is granted is usually fee simple or freehold title, with limitations on dealings with the land. Often it cannot be sold or mortgaged and governments are restricted in their capacity to compulsorily acquire it. Public access is restricted or prohibited over many such areas, and access to the land for exploration or mining purposes is heavily regulated. Although, as a general rule, Indigenous groups do not own minerals or petroleum on or under their land, they do have substantial rights to negotiate with those who wish to explore or mine there.

An overview of land rights legislation is Annexure A to this paper.

### (c) **Common law recognition of native title in 1992 - *Mabo v Queensland (No 2)***

From the 1970s to the early 1990s it was widely understood that the law of Australia did not recognise that Indigenous Australians had any inherent rights to land. Legal rights and interests in land were granted by the Crown. Land rights laws regulated which areas would be granted. If Indigenous peoples wanted legally enforceable rights to land, and rights to regulate what happened on that land, they would have to obtain them from the relevant government. They could purchase land or obtain rights to land under special land rights laws.

It was in that context that, in the early 1970s, a man called Eddie Koiki Mabo from the Torres Strait island of Mer (or Murray Island to use its colonial name) discovered he did not have legal title to his traditional land on Mer. He was shocked to discover that the place of his birth and formative years, the outer Torres Strait islands between the mainland of Australia and Papua New Guinea, was Crown land. Mr Mabo discussed with sympathetic lawyers the idea of taking a claim for native title to the High Court of Australia.<sup>24</sup> He and his fellow plaintiffs wanted the Court to establish that the Meriam people had legally recognised rights and interests in their traditional land. Their legal struggle took 10 years to play out in various courts.<sup>25</sup>

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<sup>24</sup> For a detailed history of the litigation see BA Keon-Cohen, "The Mabo litigation: a personal and procedural account" (2000) 24 *Melbourne University Law Review* 893-951.

<sup>25</sup> See *Mabo v Queensland* (1986) 64 ALR 1; *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Mabo v Queensland* [1992] 1 Qld R 78; *Mabo v Queensland (No 2)* 1992) 175 CLR 1.

On 3 June 1992, ten years after the litigation commenced, the High Court of Australia delivered judgment in *Mabo v Queensland (No 2)*. By a majority of six to one, the members of the Court had agreed that:

the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.<sup>26</sup>

The law now recognised that, in some parts of Australia, Indigenous Australians had legally recognisable and enforceable rights of a type which their ancestors held when the Crown assumed sovereignty over the land and waters and the people. Those rights were found to have passed from generation to generation to the present. The Crown could not grant those rights. The people already had them.

Although the *Mabo* judgment specifically related to some of the land in the Murray Islands of the Torres Strait,<sup>27</sup> the implications of the judgment applied to the mainland.<sup>28</sup> The judgement raised numerous questions for governments, courts and communities throughout Australia. For example:

- Where does native title exist?
- Who has native title?
- What native title rights and interests are capable of legal recognition and protection?
- How can future activity (such as exploration and mining) take place in areas where native title has been recognised to exist or may exist?
- What are the best ways for resolving native title issues as they arise?

Leaving it to the courts to resolve these issues in a piecemeal fashion was not the preferable way to proceed. Comprehensive legislation was needed.

The desire for such legislation raised various constitutional and political issues. At its simplest, the issue was what level of government should deal with native title.

### **3. NATIVE TITLE LEGISLATION IN AUSTRALIA – AN OVERVIEW**

#### **(a) The constitutional context**

Australia has a federal system of government (created with the establishment of the Commonwealth of Australia on 1 January 1901) and a written constitution. The Australian Constitution sets out the legal framework within which the nation is governed. Among other things, the Constitution lists the subjects in relation to which the Federal Parliament may legislate. So, for example, section 51 provides:

The Parliament shall, subject to this Constitution, have power to make laws with respect to:-

...

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<sup>26</sup> (1992) 175 CLR 1 at 15.

<sup>27</sup> See the order of the High Court at (1992) 175 CLR 1 at 217.

<sup>28</sup> See, for example, *Western Australia v Commonwealth* (1995) 183 CLR 373, 128 ALR 1

(xxvi) The people of any race, for whom it is deemed necessary to make special laws:

...

(xxxii) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:

The legislatures of the states and self-governing territories may also make laws on many of the same matters as the Federal Parliament. They also make laws on matters with respect to which the Federal Parliament has no express legislative power. Most laws relating to dealings in land and exploration and mining are enacted by state and territory legislatures.

To deal with any possible inconsistencies between Federal and state laws, section 109 of the Constitution provides:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

The Constitution does not contain a comprehensive Bill of Rights or any express reference to the Indigenous peoples of Australia.<sup>29</sup>

The Federal Parliament passed native title legislation that is binding on the states and territories but expressly provides for them to have legislation that is consistent with, or meets standards set out in, the Federal law.<sup>30</sup> Consequently, state laws have had to be brought into line with the federal law to avoid inconsistency with that Act.<sup>31</sup>

The debate on the legislation was long and arduous – indeed, at 60 hours, it was one of the longest debates in the Senate to that point – and ran close to Christmas 1993.<sup>32</sup>

A challenge to the constitutional validity of the *Native Title Act* was rejected.<sup>33</sup>

## (b) Some legal principles

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<sup>29</sup> Aboriginal people were not involved in the drafting of the Constitution in the late 19<sup>th</sup> century. The two references to them in the original Constitution were negative. Section 51(xxvi) originally provided that the Parliament could make laws with respect to ‘The people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws’ (emphasis added) and section 127 stated ‘In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.’ Both of those references were removed following a national constitutional referendum in 1967.

<sup>30</sup> So, for example, the *Native Title Act* binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory and the Northern Territory: *Native Title Act 1993* s 5. It provides, however: ‘This Act is not intended to affect the operation of any law of a State or a Territory that is capable of operating concurrently with this Act.’: *Native Title Act 1993* s 8.

<sup>31</sup> See Australian Constitution s 109 which states: ‘When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid’.

<sup>32</sup> D Watson, *Recollections of a Bleeding Heart*, 2002, Random House, Australia, page 405. The longest debate was about the Communist Party Dissolution Bill 1950.

<sup>33</sup> In rejecting the challenge, the High Court clearly decided that the ‘race’ power in the Constitution can be relied on by the Federal Parliament to support native title legislation. It held that the *Native Title Act* is ‘special’ in that ‘it confers uniquely on the Aboriginal and Torres Strait Islander holders of native title (the ‘people of any race’) a benefit protective of their native title’. Whether it was ‘necessary’ to enact that law was a matter for the Parliament. The power supports a law which protects native title from extinguishment or impairment and which requires compensation to be paid where native title is extinguished: *Western Australia v Commonwealth* (1994-1995) 183 CLR 373; (1995) 128 ALR 1.

The Native Title Act as originally enacted was not the final statement. The courts were soon presented with more issues, such as:

- Do pastoral leases extinguish native title?
- Can native title revive once an extinguishing act (such as the grant of a freehold title) comes to an end?
- Can native title be characterised as a ‘bundle of rights’?
- Can native title be partially extinguished?
- Can native title holders lawfully carry out traditional hunting practices where conservation laws regulate hunting?
- Are there native title rights over areas of sea and sea bed?

The High Court has delivered answers to these and other questions,<sup>34</sup> although some issues remain to be resolved.

Some decisions of the High Court have prompted amendments to the Act. In 1998, the Act was extensively amended, introducing among other things:

- a registration test for claimant native title applications
- procedures for dealing with native title applications, which create a new relationship between the National Native Title Tribunal and the Federal Court of Australia
- a scheme for the validation of some interests in land that may have been invalidly granted before the decision in the *Wik* case<sup>35</sup>
- the types of land tenure that parliaments can declare have extinguished native title
- revision of the right to negotiate regime so that, depending on the type of development sought, native title applicants have different procedural rights
- a new scheme for indigenous land use agreements (ILUAs)
- an expanded scheme for alternative state regimes.

The debate on the 1998 amendments holds the record for the longest federal Parliamentary debate on legislation. Some of those amendments remain controversial.

The landmark decisions of the High Court of Australia in *Western Australia v Ward*,<sup>36</sup> *Wilson v Anderson*,<sup>37</sup> and *Members of the Yorta Yorta Aboriginal Community v Victoria*<sup>38</sup> (*the Yorta*

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<sup>34</sup> See *Wik Peoples v Queensland* (1996) 187 CLR 1; 141 ALR 129; *Yanner v Eaton* (1999) 201 CLR 351, 166 ALR 258; *Commonwealth v Yarmirr* (2001) 208 CLR 1, 184 ALR 113; *Wilson v Anderson* (2002) 213 CLR 401, 190 ALR 313; *Western Australia v Ward* (2002) 213 CLR 1, 191 ALR 1; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538.

<sup>35</sup> *Wik Peoples v Queensland* (1986) 187 CLR 1, 141 ALR 129. The High Court decided that pastoral leases (leases for grazing cattle) did not necessarily extinguish native title. Pastoral leases cover large areas of inland Australia. Before that judgment, many lawyers (and governments) had assumed that pastoral leases had extinguished native title. Indeed the preamble to the *Native Title Act 1993* recited that the High Court in *Mabo (No 2)* held that ‘native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights, such as the grant of freehold and leasehold estates’. The judgment showed that native title might survive over much more of Australia than had been thought. As a consequence of the *Wik* decision there were questions about the validity of mining interests granted over pastoral lease land after the Native Title Act commenced to operate (1 January 1994) and before the date of the *Wik* decision (23 December 1996). These ‘intermediate period acts’ were validated under amendments to the Native Title Act.

<sup>36</sup> *Western Australia v Ward* (2002) 191 ALR 1; (2002) 76 ALJR 1098.

<sup>37</sup> *Wilson v Anderson* (2002) 190 ALR 313; 76 ALJR 1306.

<sup>38</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538; 77 ALJR 356.

*Yorta case*) clarified important legal principles and compelled a reassessment of aspects of native title law and practice. From the many rulings made in those judgments, it is clear that:

- when an application for determination of native title is made under the Native Title Act, it is to the terms of the Act that primary regard must be had – in other words, the Act has the principal and determinative role
- native title is characterised by the general law of Australia as a bundle of rights
- to establish that they have native title, a group of Indigenous people must be able to demonstrate that their groups' observance of traditional laws and customs has continued substantially uninterrupted since the date when the Crown asserted sovereignty
- native title claimants do not necessarily need to prove that they have recently used or been present in an area to show connection to it
- native title may be extinguished partially, right by right, and with cumulative effect in the event of successive grants or appropriations
- native title is extinguished completely by the grant of certain interests in land and some vesting of land
- some native title rights and interests are extinguished by the grant of some pastoral leases and mining leases.

If determinations of native title are to be made, native title claim groups, governments and others need to:

- assess whether there is sufficient evidence to establish as a matter of fact that native title rights and interests exist in relation to some or all of that land, and
- research thoroughly the history of dealings with parcels of land that are the subject of native title applications in order to ascertain whether native title has been partly or wholly extinguished by those dealings.

The legislation and various court decisions have clarified both the areas where native title might survive in Australia and the content of native title rights and interests.

### (c) **The Native Title Act 1993**

**Objects and policy:** Most of the *Native Title Act 1993* commenced to operate on 1 January 1994.

The objects of the Act, as originally enacted, were:

- (a) to provide for the recognition and protection of native title; and
- (b) to establish ways in which future dealings affecting native title may proceed and set standards for those dealings; and
- (c) to establish a mechanism for determining claims to native title; and
- (d) to provide for, or permit, the validation of past acts invalidated because of the existence of native title.<sup>39</sup>

Those objects provide an indication of the balancing exercise that the Parliament went through in enacting the new scheme. The objects have remained virtually unchanged despite extensive amendment to the legislation, particularly in 1998.<sup>40</sup>

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<sup>39</sup> *Native Title Act 1993* s 3.

<sup>40</sup> One of the objects was amended to read: 'to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title' *Native Title Act 1993* s 3(d).

The preamble to the Native Title Act sets out in some detail ‘policy considerations taken into account by the Parliament of Australia in enacting’ the Act.<sup>41</sup> The preamble also shows the balancing exercise. It recites, for example:

- the intention ‘to rectify the consequences of past injustices’ by ‘special measures ... for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders’
- the intention ‘to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture fully entitle them to aspire’
- the importance of ensuring that ‘native title holders are now able to fully enjoy their rights and interests’ by supplementing their rights and interests under the common law with a scheme for future acts ‘to be validly done’, preferably by securing ‘the agreement of the native title holders through a special right to negotiate’, and
- the importance of providing ‘the broader Australian community ... with certainty that such acts may be validly done’.

The Act, along with other legislative and policy initiatives, was ‘intended to further advance the process of reconciliation among all Australians’.

Whether the right balance was struck was, and to some extent continues to be, a matter for debate. But more than a decade down the track, we are much more experienced in how the scheme operates and what outcomes can be achieved, often by agreement.

***Main features of the Act:*** The Native Title Act deals with:

- the recognition and protection of native title
- the validation of various ‘past acts’ on land where native title existed
- the validation of ‘intermediate period acts’ on land where native title existed
- the confirmation of the past extinguishment of native title by certain valid or validated acts
- how ‘future acts’ can take place on areas where native title exists or might exist, including the use of Indigenous land use agreements, and the ‘right to negotiate’ and ‘expedited procedure’ regimes
- the assessment and payment of compensation for acts affecting native title
- the making and processing of native title determination applications (both claimant applications and non-claimant applications), revised native title determination applications, and compensation applications
- the establishment, purpose, way of operating, membership and management of the National Native Title Tribunal
- the various roles of the Tribunal in providing assistance, mediating and holding inquiries
- the Register of Native Title Claims, the National Native Title Register, and the Register of Indigenous Land Use Agreements

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<sup>41</sup> As one Federal Court judge has observed: ‘Parliament has taken the unusual step of providing an extensive preamble to the Act so that the purposes of the Act may be clearly revealed. Consideration of the preamble is not a source of restriction of general provisions of the Act but is an aid to understanding the purpose and object of such a provision. The preamble is part of the context in which the provisions of the Act are construed.’ *Brownley v Western Australia (No 1)* (1999) 95 FCR 152 at 160 per Lee J citing *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 614 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, 637 per McHugh J; *Wacando v Commonwealth* (1981) 148 CLR 1 at 23 per Mason J.

- the recognition, functions and funding of representative Aboriginal/Torres Strait Islander bodies
- the role of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund
- possible recognised State/Territory bodies and equivalent State/Territory bodies
- the role of the Aboriginal and Torres Strait Islander Social Justice Commissioner in relation to the Act.

Although it is important to understand the legislative scheme, and the various judicial and tribunal decisions that explain it,<sup>42</sup> this paper will not dwell on the detail of that scheme. Rather, it looks primarily at functions of the National Native Title Tribunal and focuses principally on the Tribunal's work in relation to the mediation of native title claimant applications.

***National Native Title Tribunal:*** The National Native Title Tribunal was established on 1 January 1994 by the Native Title Act. The Act sets out the Tribunal's composition, functions and powers. The Tribunal's main role is to assist people to resolve native title issues. This is done through agreement-making. The Tribunal also arbitrates in relation to some types of proposed future dealings in land (future acts).

Members of the Tribunal are presidential members or non-presidential members. The Act sets out the categories of persons who may be appointed to each class of member.<sup>43</sup> Presidential members must be:

- a Judge of the Federal Court of Australia
- a former judge of any federal court or the Supreme Court of a state or territory, or
- a person who is and has been enrolled as a legal practitioner in an Australian court for at least 5 years.

A non-presidential member is a person (other than a judge or former judge) who:

- has, in the opinion of the Governor-General, special knowledge in relation to Aboriginal or Torres Strait Islander societies, land management, dispute resolution, or any other class of matters considered by the Governor-General to have substantial relevance to the duties of such a member
- is an assessor appointed under the *Federal Court of Australia Act 1976*, or
- is a member of a recognised State/Territory body.

Members are appointed by the Governor-General on a full-time or part-time basis.<sup>44</sup> A member is appointed for a period of not longer than 5 years, but is eligible for reappointment.<sup>45</sup> The Tribunal currently has:

- two full-time presidential members
- one part-time presidential member
- seven full-time non-presidential members
- four part-time non-presidential members.

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<sup>42</sup> See e.g. National Native Title Tribunal, *Guide to future act decisions made under the Commonwealth right to negotiate scheme*, updated and available on the National Native Title Tribunal's website [www.nmtt.gov.au](http://www.nmtt.gov.au)

<sup>43</sup> *Native Title Act 1993* s 110.

<sup>44</sup> *Native Title Act 1993* s 111.

<sup>45</sup> *Native Title Act 1993* s 115.

The remuneration and allowances paid to members (other than judges or assessors) are determined by the Remuneration Tribunal.<sup>46</sup>

The Governor-General:

- must terminate the appointment of a member (other than a judge or assessor) if the member becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors, or makes an assignment of his or her remuneration for the benefit of his or her creditors
- may terminate the appointment of a member (other than a judge or assessor) if an address praying for the termination of the member's appointment on the ground of proved misbehaviour or of physical or mental incapacity is presented to the Governor-General by each House of the Federal Parliament in the same session of the Parliament.<sup>47</sup>

As a general rule, a full-time member must not engage in paid employment outside the duties of his or her office.<sup>48</sup> Provision is made for appropriate disclosure where a member has any interest (pecuniary or otherwise) that could conflict with the proper performance of the member's functions in relation to an application or inquiry. A conflict of interest is deemed to arise if a member is employed by, or engaged as a consultant to, an organisation that has an interest in the subject matter of an application or inquiry assigned to the member, or the member was so employed or engaged in the previous 12 months.<sup>49</sup>

The Tribunal has statutory responsibility for:

- mediating native title determination applications (claimant and non-claimant applications) and compensation applications
- mediating in relation to the doing of proposed future acts and disputes about statutory access rights
- reporting to the Federal Court of Australia on the progress of mediation in relation to native title determination applications and compensation applications
- assisting people to negotiate Indigenous Land Use Agreements (ILUAs), and helping to resolve any objections to area and alternative procedure ILUAs
- assisting parties to court proceedings to negotiate agreements
- assisting persons wishing to make an agreement about statutory access rights
- assisting representative bodies in their dispute resolution functions
- arbitrating objections to the expedited procedure in the future act scheme
- arbitrating applications for a determination of whether a future act can be undertaken and, if so, whether any conditions apply
- arbitrating objections to the registration of an alternative procedure ILUA, and
- arbitrating in relation to special inquiries.

The President may engage consultants in relation to any assistance or mediation that the Tribunal provides under the Act.

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<sup>46</sup> *Native Title Act 1993* s 114.

<sup>47</sup> *Native Title Act 1993* s 119.

<sup>48</sup> *Native Title Act 1993* s 121.

<sup>49</sup> *Native Title Act 1993* s 122.

The President is responsible for managing the administrative affairs of the Tribunal, with the assistance of the Native Title Registrar. The Act gives the Registrar some specific responsibilities, including:

- assisting people at any stage of any proceedings under the Act, including assisting people to prepare applications
- assessing claimant applications for registration by reference to the conditions of the registration test
- giving notice of applications to individuals, organisations, governments and the public in accordance with the Act
- registering ILUAs that meet the registration requirements of the Act
- giving notice of ILUAs to individuals, organisations, governments and the public in accordance with the Act, and
- maintaining the Register of Native Title Claims, the National Native Title Register (the register of determinations of native title) and the Register of Indigenous Land Use Agreements.

The Registrar has the powers of the Secretary of a Department of the Australian Public Service in relation to financial matters and the management of employees. He or she may delegate all or any of his or her powers under the Act to Tribunal employees, and may also engage consultants.

Applications for a native title determination (claimant and non-claimant applications) and compensation applications are filed in and managed by the Federal Court. Although the Court oversees the progress of these applications, the Tribunal performs various statutory functions as each application proceeds to resolution (see 4. **Procedures for determining where native title exists**, below).

Future act applications (applications for a determination whether a future act can be done, objections to the expedited procedure and applications for mediation in relation to a proposed future act) are lodged with and managed by the Tribunal.

The way that the Tribunal carries out its range of functions is mandated by section 109(1) of the Act, which specifies that the Tribunal is to operate in a way that is ‘fair, just, informal, prompt and economical’. Section 109 further specifies that the Tribunal:

- may take into account the cultural and customary concerns of Aboriginal and Torres Strait Islanders, but not so as to prejudice unduly any party to any proceedings that may be involved; and
- is not bound by technicalities, legal forms or rules of evidence.

#### (d) Native title

**Native title – the common law:** Underpinning the detailed legislative scheme is the concept of native title. In the lead judgment in the *Mabo (No 2)* case, Justice Brennan<sup>50</sup> stated that:

The term ‘native title’ conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the *traditional laws* acknowledged by and the *traditional customs* observed by the indigenous inhabitants. ... Native title has its origin in and is given its content by the *traditional laws* acknowledged by and the *traditional customs* observed by the

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<sup>50</sup> With whom Chief Justice Mason and Justice McHugh agreed.

indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to *those laws and customs*.<sup>51</sup> (emphasis added)

The majority judges agreed that native title rights and interests of a group in respect of an area of land may bear little resemblance to property rights as recognised in Anglo-Australian property law. Indeed, the Court clearly stated in *Mabo (No. 2)* that the common law can recognise a native title right or interest even if there is no equivalent or analogous legal right or interest.<sup>52</sup> To establish that native title exists, it is not necessary to show that the interests in land are the same as, or of a kind familiar to, interests in land at common law. In the opinion of Justices Deane and Gaudron, the ‘preferable approach’ to determining the content of common law native title is ‘to recognise the inappropriateness of forcing the native title to conform to traditional common law concepts and to accept it as *sui generis* or unique’.<sup>53</sup>

In essence, because native title rights and interests come from traditional laws and customs, the content of those rights and interests will not necessarily equate to other forms of property under the general law. For the same reason, native title rights and interests may vary from place to place and group to group around Australia.<sup>54</sup>

The common law principles recognised in *Mabo (No 2)* have been considered and applied in subsequent High Court cases.<sup>55</sup> A majority of High Court judges stated in 1998:

Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law. There is, therefore, an intersection of traditional laws and customs with the common law.<sup>56</sup>

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<sup>51</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 57, 58.

<sup>52</sup> For example, see *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 58 and 70 per Brennan J. So, for example, Justice Brennan noted that the “general principle that the common law will recognise a customary title only if it be consistent with the common law is subject to an exception in favour of traditional native title.” (at 59). Justices Deane and Gaudron, acknowledged that “pre-existing native interests with respect to land ... were not confined to interests which were analogous to common law concepts of estates in land or proprietary rights.” (at 85). They accepted that it is correct to assume that “the traditional interests of the native inhabitants are to be so respected ‘even though those interests are of a kind unknown to English law’” (at 85).

<sup>53</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 89. Their Honours stated (at 89) that “prior occupation or use under the common law native title is explained by the common law’s recognition of prior entitlement under the earlier indigenous law or custom”. See also *Western Australia v Commonwealth* (1994-1995) 183 CLR 373 at 492, per Dawson J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 215, 141 ALR 129 at 257, see also 256; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 178-179, 187, 195 per Toohey J; *Fejo v Northern Territory* (1998) 195 CLR 96 at 130 [53], 152[108]; *Western Australia v Ward* (2002) 191 ALR 1 at 161 [578] per Kirby J. For further examples of judicial recognition of the *sui generis* nature of native title see *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 133 per Dawson J; *Ward v Western Australia* (1998) 159 ALR 483 at 498, 499, 505, 582 per Lee J; *Western Australia v Strickland* (2000) 99 FCR 33 at 53 per Beaumont, Wilcox and Lee JJ; *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 183 per Kirby J; *Western Australia v Ward* (2002) 191 ALR 1 at 161 per Kirby J, 280 per Callinan J; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at 589 per Callinan J.

<sup>54</sup> See *Mabo v Queensland (No 2)* 175 CLR 1 at 89 per Deane and Gaudron JJ; *Yanner v Eaton* (1999) 201 CLR 351, 166 ALR 258 at 278 [72] per Gummow J. See also *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 121-122 [11]-[16] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 183 [258] per Kirby J; *Western Australia v Strickland* (2000) 99 FCR 33 at 53 per Beaumont, Wilcox and Lee JJ; *Ward v Western Australia* (1998) 159 ALR 483 at 498-499, 582 per Lee J.

<sup>55</sup> See for example *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84; 141 ALR 129 at 151.

<sup>56</sup> *Fejo v Northern Territory* (1998) 195 CLR 96 at 128, [46]; 156 ALR 721 at 737 [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. See also *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 120-121 [9]-[12] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 149 [117] per McHugh J;

In *Western Australia v Ward*, four of those judges stated:

Identifying the nature and location of that intersection requires careful attention to the content of traditional law and custom and to the way in which rights and interests existing under that regime find reflection in the statutory and common law.<sup>57</sup>

According to Justice Gummow:

Native title is not treated by the common law as a unitary concept. The heterogeneous laws and customs of Australia's indigenous peoples, the Aboriginals and Torres Strait Islanders, provide its content. It is the relationship between a community of indigenous people and the land, defined by reference to that community's traditional laws and customs, which is the bridgehead to the common law. As a corollary, native title does not exhibit the uniformity of rights and interest of an estate in land at common law and 'ingrained habits of thought and understanding' must be adjusted to reflect the diverse rights and interest which arise under the rubric of 'native title'.<sup>58</sup>

More recently, a majority of High Court judges observed that the *Native Title Act*:

presupposes that, so far as concerns native title rights and interests, the two systems – the traditional law acknowledged and the traditional customs observed by the relevant peoples, and the common law – can and will operate together. Indeed, not only does it presuppose that this will happen, it requires that result.<sup>59</sup>

It is clear from these judgments that native title is not 'title' to land or a form of tenure. Rather, it is the recognition by the general law of existing rights and interests in relation to land under the relevant traditional laws and customs. These native title rights and interests have been described as a 'bundle of rights' which might, at their most extensive, be the right to 'possession, occupation, use and enjoyment of the lands'<sup>60</sup> and in other places comprise individual rights (such as the rights to hunt and gather, conduct ceremonies, camp and be buried on the land).

**Native title – the statute:** The Federal Parliament tried to capture the essence of Justice Brennan's description of native title<sup>61</sup> by enacting section 223 of the *Native Title Act 1993*, which states, in part:

## **223 Native Title**

### *Common law rights and interests*

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*Western Australia v Ward* (2000) 99 FCR 316 at 338, 349; 170 ALR 159 at 178, 189 per Beaumont and von Doussa JJ.

<sup>57</sup> *Western Australia v Ward* (2002) 191 ALR 1 at 37 [85] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; see also [17]-[18], [82].

<sup>58</sup> *Yanner v Eaton* (1999) 201 CLR 351 at 382-383 [72]; 166 ALR 258 at 278 [72].

<sup>59</sup> *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 128 [37] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. See also *Western Australia v Ward* (2002) 191 ALR 1 at 16-17 [17]-[18], [64].

<sup>60</sup> See *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>61</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 57-63, 70. The link between Justice Brennan's statements and the terms of s 223(1) is noted in *Western Australia v Ward* (2002) 191 ALR 1 at [16] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [568] per Kirby J.

- (1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
  - (a) the rights and interest are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
  - (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
  - (c) the rights and interests are recognised by the common law of Australia.

*Hunting, gathering and fishing covered*

- (2) Without limiting subsection (1), *rights and interests* in that subsection includes hunting, gathering, or fishing, rights and interests.

That definition has been adopted in various state and territory statutes.<sup>62</sup> It has been the subject of extensive judicial analysis.<sup>63</sup> The High Court has expressly recognised that the statutory definition is based on passages from the judgment of Justice Brennan in the *Mabo (No 2)* case, but the Court has stated that it is to the words of the statute that reference must now be made.

Native title is what is defined and described in s 223(1) of that Act. In order to establish an entitlement to a determination that native title exists, the applicants are required to establish that connection with the land has been substantially maintained through the acknowledgement and observance, so far as practicable, of traditional laws and customs.<sup>64</sup> Native title will be taken to have ceased to exist if those asserting that it exists cannot establish the present subsistence of the connection required by s 223(1)(b) of the Native Title Act.<sup>65</sup>

<sup>62</sup> See for example: *Native Title (New South Wales) Act 1994* (NSW) s 5; *Land Titles Validation Act 1994* (Vic) s 4; *Native Title (Queensland) Act 1993* (Qld) s 5 (but see separate definition of ‘native title’ in *Acts Interpretation Act 1954* (Qld) s 36); *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) s 4; *Native Title (Tasmania) Act 1994* (Tas) s 3, *Native Title Act 1994* (ACT) s 5, *Validation (Native Title) Act 1994* (NT) s 3. See also: *Native Title (South Australia) Act 1994* (SA) s 4, which adopts definition in substantially the same terms.

<sup>63</sup> See for example, *Western Australia v Ward* (2002) 191 ALR 1 at 19 [26], 131 [468] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; 179 [628]-[629], 181 [635], 182-183 [638], 187-188 [650], 211-212 [717]-718], 276-277 [964] per Callinan J; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at 543 [10], 548 [28], [548-549 [31], 559 [72], 560 [74]-[76] per Gleeson CJ, Gummow and Hayne JJ; 565 [100], 566 [102]-[103], 567-568 [109]-[110], 570 [120], 571 [123] per Gaudron and Kirby JJ; 571-572 [126]-[127], [129], 572-573 [133], per McHugh J; 586-587 [173], 589-590 [182], [185], 590-591 [186], per Callinan J; *Wilson v Anderson* (2002) 190 ALR 313 at 336 [191] per Callinan J; *Commonwealth v Yarmirr* (2001) 208 CLR 1; at 35-36 [8], 46-47 [37], 47-48 [40]; 184 ALR 113 at 119-120 [8], 128 [37], 129 [40] per Gleeson CJ, Gaudron, Gummow, and Hayne JJ; 73 [116]; 73-74 [118], 74-75 [122], 75-76 [126]-[127], 79-80 [141], 83-85 [154]-[158], 84-85 [159], 85-86 [162], 86-87 [164]-[165], 87-88 [167]; 184 ALR 113 at 149 [116], [118], 150 [122], 151 [126]-[127], 154 [141], 157-158 [154]-[159], 159 [162], 159-160 [164]-[165], 160-161 [167] per McHugh J.

<sup>64</sup> *Western Australia v Ward* (2000) 99 FCR 316 at 318 [12].

<sup>65</sup> *Western Australia v Ward* (2002) 191 ALR 1 at [26] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. Note the comment that ‘it may be doubted that circumstances of this kind are at the core of the meaning to be given to extinguishment’. While their Honours were referring to a failure to satisfy s. 223(1)(a), their comment also appears to be relevant to a failure to satisfy s. 223(1)(b).

The judgments in early native title cases are relevant only to the extent that they cast light on the words of the Act.<sup>66</sup>

***Extinguishment of native title at law:*** Although it has survived more than two centuries of introduced common law and statutes, and the effect of European colonisation, native title has been described as ‘fragile’.<sup>67</sup> The general law of Australia will not recognise native title rights and interests in areas where as a matter of law native title has been extinguished – irrespective of whether Indigenous Australians retain traditional links to and use of those areas. Although the underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title, their existence is not a *sufficient* basis for recognising native title<sup>68</sup> where that native title has been extinguished. Recognition may cease where, as a matter of law, native title rights have been extinguished ‘even though, but for that legal conclusion, on the facts native title would still subsist’. For example, Indigenous people may retain connections to the land because of the attitude adopted by the non-Indigenous owner of land in fee simple, yet, because of the grant of fee simple, their native title was extinguished.<sup>69</sup>

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<sup>66</sup> See *Western Australia v Ward* (2002) 191 ALR 1 at [16], [25] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Commonwealth v Yarmirr* (2000-2001) 208 CLR 1 at [7] per Gleeson CJ, Gummow and Hayne JJ; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2000) 194 ALR 538 at [37], [70], [75] per Gleeson CJ, Gummow and Hayne JJ.

<sup>67</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1 at 221, 235; 141 ALR 129 at 262, 273 per Kirby J; *Fejo v Northern Territory* (1998) 195 CLR 96 at 151 [105], 155 [112]; (1998) 156 ALR 721 at 756 [105], 759 [112] per Kirby J; *Ward v Western Australia* (1998) 159 ALR 483 at 552 per Lee J; *Commonwealth v Yarmirr* (2000) 101 FCR 171 at 186 [26]; (1999) 168 ALR 426 at 436 [26] per Beaumont and von Doussa JJ; *Yanner v Eaton* (1999) 201 CLR 351 at 408 [152]; (1999) 166 ALR 258 at 299 [152] per Callinan J; *Western Australia v Ward* (2000) 99 FCR 316 at 339 [65]; (2000) 170 ALR 159 at 180 [65] per Beaumont and von Doussa JJ; *Anderson v Wilson* (2000) 97 FCR 453 at 471 [84], (2000) 171 ALR 705 at 723 [84] per Black CJ and Sackville J; *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 131 [47] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; 183 per Kirby J.

<sup>68</sup> *Fejo v Northern Territory* (1998) 195 CLR 96 at 127, 156 ALR 721 at 737 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

<sup>69</sup> *Western Australia v Ward* (2002) 191 ALR 1 at 17-18 [21] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. For the same example see *Yanner v Eaton* (1999) 201 CLR 351 at 395 [107] per Gummow J.

Native title can be extinguished because the sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory. Consequently, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to 'extinction' by exercise of the new sovereign power.<sup>70</sup>

Native title may, therefore, be extinguished by various acts of the Crown, in particular by:

- statute<sup>71</sup>
- a valid Crown grant of an estate inconsistent with the continued right to enjoy native title,<sup>72</sup> or
- the Crown's appropriation and use of land inconsistently with the continued enjoyment of native title.<sup>73</sup>

The Native Title Act lists numerous examples of what tenures extinguish native title.<sup>74</sup>

Native title may be extinguished totally or partially. Whatever the extent of extinguishment, the High Court and the Federal Parliament have been clear in asserting that such extinguishment is permanent.<sup>75</sup>

There are, however, statutory exceptions to this rule. The Native Title Act also includes the 'non-extinguishment principle'<sup>76</sup> and provides that in certain circumstances any extinguishment of the native title rights and interests must be disregarded.<sup>77</sup>

Native title might survive in a limited form where there are other overlapping, non-exclusive legal interests which do not completely extinguish it. The High Court and the Parliaments have recognised that there are tenures which give title holders certain legal rights which extinguish native title rights where there is an inconsistency between the two. Native title can be treated as a bundle of rights and can be partially extinguished. Where there is no inconsistency, the native title rights and interests survive, but the other interests will prevail.<sup>78</sup>

***The 'tide of history' and loss of native title:*** The High Court has also decided that native title could disappear where a group has lost its links to the land in respect of which its forebears held native title.

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<sup>70</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 63, also at 110-11 per Deane and Gaudron JJ, 193 per Toohey J. See also *Wik Peoples v Queensland* (1996) 141 ALR 129 at 182 per Toohey J; *Fejo v Northern Territory of Australia* (1998) 156 ALR 721 at 756-7, 759 per Kirby J.

<sup>71</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 64, 67 per Brennan J, 110-11 per Deane and Gaudron JJ, 196 per Toohey J.

<sup>72</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 68, 69 per Brennan J, 110 per Deane and Gaudron JJ, 195-6 per Toohey J. See, also *Wik Peoples v Queensland* (1996) 141 ALR 129, at 152 Brennan CJ, 193, 209, 218 per Gaudron J.

<sup>73</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 69-70 per Brennan J. See also *Wik Peoples v Queensland* (1996) 141 ALR 129 at 152, *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 180 ALR 91.

<sup>74</sup> *Native Title Act 1993* ss 23B, 249C, Schedule 1.

<sup>75</sup> The *Native Title Act 1993*, for example, defines 'extinguish' in relation to native title to mean 'permanently extinguish native title'. In case that is not clear enough, the Act goes on to say 'this means that after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect.'

<sup>76</sup> *Native Title Act 1993* s 238, and ss 15, 22B, 22K, 24AA, 24DC, 24EB, 24EBA, 24GB, 24GD, 24GE, 24HA, 24ID, 24JB, 24KA, 24LA, 24MD, 24NA, 46, 47, 47A, 47B.

<sup>77</sup> *Native Title Act 1993* ss 47, 47A, 47B. See also *Passi v Queensland* [2001] FCA 697.

<sup>78</sup> See principally *Wik Peoples v Queensland* (1996) 187 CLR 1, 141 ALR 129, *Western Australia v Ward* (2002) 191 ALR 1. See also *Native Title Act 1993* ss 23G, 247B, 248B and 238.

In the *Mabo (No 2)* case, Justice Brennan<sup>79</sup> noted that, ‘since European settlement of Australia, many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it.’<sup>80</sup> He also said that ‘when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.’<sup>81</sup>

As noted earlier, the nature and incidents of native title must be ascertained as a matter of fact by reference to local traditional laws and customs,<sup>82</sup> in other words by evidence in the particular case.<sup>83</sup> Thus Justice Gummow has asked:

At what level of primary fact does one perceive the disappearance of the foundation for native title by reason of the washing away by ‘the tide of history’ of any real acknowledgment of traditional law and real observance of traditional customs?<sup>84</sup>

This issue was confronted most directly in the *Yorta Yorta* case where the trial judge decided that, as a result of the tide of history, native title had ceased to exist.<sup>85</sup> That decision was confirmed on appeal.<sup>86</sup>

The previous President of the National Native Title Tribunal, Justice French, has drawn a distinction between extinguishment in the sense of legal non-recognition of native title and the abandonment of the subject matter which the law might otherwise recognise.<sup>87</sup>

Australian courts have also held that a native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition. Once traditional native title expires, the Crown’s radical title expands to a full beneficial title, for then there is no other proprietor than the Crown.<sup>88</sup>

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<sup>79</sup> With whom Mason CJ and McHugh J agreed.

<sup>80</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 59 per Brennan J.

<sup>81</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 59-60 per Brennan J. In their joint judgment, Justices Deane and Gaudron also referred to native title rights being ‘lost by the abandonment of the connexion with the land or by the extinction of the relevant tribe or group’. Their Honours found it unnecessary for the purposes of *Mabo (No 2)* to consider the question whether those rights will be lost by the abandonment of traditional customs and ways. Their view was that, at least where the relevant tribe or group continues to occupy the land, they will not be lost: *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 110.

<sup>82</sup> See *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 57, 58 per Brennan J.; *Western Australia v Ward* (2002) 191 ALR 1 at 17 [18] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.; *Yanner v Eaton* (1999) 201 CLR 351 at 372-373 [37]-[38]; 166 ALR 258 at 269-270 [37]-[38] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 169 (see also Gaudron J at 166 and Kirby J at 238); *Western Australia v Commonwealth* (1995) 183 CLR 373; *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.; *Commonwealth v Yarmirr* (2000) 101 FCR 171 at 184 [16]; 168 ALR 426 at 435 [16] per Beaumont and von Doussa JJ (see also Merkel J at 247 [313], at 493 [313]).

<sup>83</sup> *Western Australia v Ward* (2000) 99 FCR 316 at 365 [177]; 170 ALR 159 at 205 [177].

<sup>84</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1 at 183; 141 ALR 129 at 231.

<sup>85</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606.

<sup>86</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244, 180 ALR 655; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538.

<sup>87</sup> *Lardil, Kajadilt, Yangkaal & Gangalidda Peoples v Queensland* (2001) 108 FCR 453 at 470 [45]; 185 ALR 513 at 528-529 [45].

<sup>88</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 60 per Brennan J. See also *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244 at 286-287 [163]-[165]; 180 ALR 655 at 695-696 [163]-[165] per Branson and Katz JJ; *Yanner v Eaton* (1999) 201 CLR 351 at 356; *Fejo v Northern Territory* (1998) CLR 96 at 98, 131, 153-154; *Wik Peoples v Queensland* (1996) 63 FCR at 500-501; *Ward v Western Australia* (1998) 159 ALR 483 at 510 per Lee J; *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 549 per Olney J.

***Difficulties in proving native title:*** It has been clear since the judgment in *Mabo (No 2)* that the onus of proving that native title exists in relation to an area of land or waters is borne by those who assert that they hold those native title rights and interests.<sup>89</sup> They need to establish, in effect, substantial continuity of traditional connection to the area from the date on which the British Crown first asserted sovereignty and a normative society held together by its traditional laws and customs under which the native title rights and interests arise.

The High Court has expressly recognised the ‘difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests’. Yet that is what the Native Title Act requires. As their Honours put it:

The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them. The difficulties are not reduced by the inevitable tendency to think of rights and interests in relation to the land only in terms familiar to the common lawyer.<sup>90</sup>

In *Mabo (No 2)*, for example, Justice Brennan observed that the ascertainment of the nature and incidents of native title ‘may present a problem of considerable difficulty.’<sup>91</sup>

In *Mason v Tritton*, Justice Priestley expressed the view that ‘it is likely to be difficult, particularly in the more settled parts of the country, for any Aboriginal group to fulfil the rather onerous requirements of proof’.<sup>92</sup> The then President of the New South Wales Court of Appeal, Justice Kirby, spoke of the ‘exacting nature of the evidential burden established by *Mabo*’<sup>93</sup> and of the ‘difficult evidentiary task’ facing a claimant in native title proceedings.<sup>94</sup> His Honour went on to state:

[The task] is not made easier by the former policies concerning Aboriginal Australians and the ignorance of their history and culture fostered by those policies. What is sufficient evidence to maintain a particular claim will vary according to the particular circumstances of the case. Courts are required to determine the admissibility and effect of evidence. I do not underestimate the difficulty of gathering and adducing such evidence. Proper proof is required out of respect for the rights of all those governed by our laws, including, on occasion, competing Aboriginal claimants. It is appropriate that claimants be put to proof of their claims. Doing so protects the wider community, both Aboriginal and non-Aboriginal, from those who would make illegitimate claims.<sup>95</sup>

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<sup>89</sup> See e.g. *Coe (on behalf of the Wiradjuri Tribe) v Commonwealth and New South Wales* (1993) 118 ALR 193, *Mason v Tritton* (1994) 34 NSWLR 592, *Western Australia v Ward* (2000) 99 FCR 316 at 350-352 [114]-[120], 170 ALR 159 at 190-192 [114]-[120] per Beaumont and von Doussa JJ, *De Rose v South Australia* [2002] FCA 1342 at [8], [265], [342], [914].

<sup>90</sup> *Western Australia v Ward* (2002) 191 ALR 1 at 15 [14] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; but compare Kirby J at 158-159 [569]-[570].

<sup>91</sup> *Mabo (No 2) v Queensland* (1992) 175 CLR 1 at 58.

<sup>92</sup> *Mason v Tritton* (1994) 34 NSWLR 572 at 600.

<sup>93</sup> *Mason v Tritton* (1994) 34 NSWLR 572 at 584.

<sup>94</sup> *Mason v Tritton* (1994) 34 NSWLR 572 at 590.

<sup>95</sup> *Mason v Tritton* (1994) 34 NSWLR 572 at 590.

More recently, in the *Yorta Yorta* case, Justices of the High Court identified challenges for the applicants and the courts when determining whether native title exists, and observed that these ‘may be very difficult questions to resolve. Identifying a society that can be said to continue to acknowledge and observe customs will, in many cases, be very difficult.’<sup>96</sup> Other conceptual challenges for a court were recognised. For example,

any analysis of the traditional laws and customs of societies having no well-developed written language by using analytical tools developed in connection with very differently organised societies is fraught with evident difficulty.<sup>97</sup>

The High Court has stated that the ‘proof of continuous acknowledgement and observance, over the many years that have elapsed since sovereignty, of traditions that are oral traditions is very difficult’<sup>98</sup> and ‘the difficulties inherent in proving facts in relation to a time when for the most part the only record of events is oral tradition passed down from one generation to another, cannot be overstated.’<sup>99</sup> The High Court has accepted that demonstrating the content of traditional law and custom ‘may very well present difficult problems of proof’<sup>100</sup> and that demonstrating the content of pre-sovereignty traditional laws and customs ‘may be especially difficult in cases ... where it is recognised that the laws and customs now said to be acknowledged and observed are laws and customs that have been adapted in response to the impact of European settlement.’<sup>101</sup>

In his judgment in *De Rose v South Australia*, delivered before the High Court’s *Yorta Yorta* judgment, Justice O’Loughlin stated:

The Court is well aware of the difficulties facing claimants who seek to gather the historical and anthropological material that would support their application for a determination of native title. It attempts to be as sympathetic as possible without causing undue prejudice to any other parties to the application.<sup>102</sup>

Later he referred to the ‘heavy burden’ on applicants attempting to prove substantial maintenance of connection from sovereignty to the present, ‘even if a Court is prepared to make reasonable assumptions’ in their favour.<sup>103</sup>

The substantive and procedural difficulties encountered in proving Indigenous peoples’ traditional rights to specific areas of land and waters have been documented in relation to hearings under land rights legislation in the Northern Territory and Queensland, and hearings of native title proceedings, primarily in the Federal Court. They include:

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<sup>96</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at 554 [52] per Gleeson CJ, Gummow and Hayne JJ.

<sup>97</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at 555 [55] per Gleeson CJ, Gummow and Hayne JJ.

<sup>98</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at 563 [89] per Gleeson CJ, Gummow and Hayne JJ.

<sup>99</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at 555-556 [59] per Gleeson CJ, Gummow and Hayne JJ quoting the primary judge, Olney J. See also Callinan J at 574 [143], 591 [187]-[188].

<sup>100</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at 561 [80] per Gleeson CJ, Gummow and Hayne JJ.

<sup>101</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at 561-562 [82] per Gleeson CJ, Gummow and Hayne JJ.

<sup>102</sup> *De Rose v South Australia* [2002] FCA 1342 at [370].

<sup>103</sup> *De Rose v South Australia* [2002] FCA 1342 at [570].

- determining which people have authority under traditional law to speak on behalf of each native title claim group
- determining which language is (or languages are) most appropriate to use when evidence is given
- determining the best way to adduce evidence (e.g. question and answer with cross-examination or a narrative approach)
- the availability and role of interpreters
- the application of the rules of evidence (e.g. to oral histories) and determining what is admissible and what weight is to be given to different types of evidence
- determining whether restrictions should apply to who can be present when certain evidence is given and who can read the transcript of such evidence (e.g. evidence of a secret-sacred nature or evidence that is gender restricted under traditional laws and custom)
- the role of views (e.g. visits to sites on or near the land or waters claimed)
- the role of ceremonies, gestures and the use of ritual objects as evidence
- the role of expert witnesses (e.g. anthropologists, historians, linguists, genealogists) and the weight to be given to their evidence compared with the primary evidence of claimants
- the relative weight to be given to written historical records compared with current oral histories.

Each matter raises complex issues and has been the subject of detailed consideration by judges and commentators.<sup>104</sup>

#### **4. PROCEDURES FOR DETERMINING WHERE NATIVE TITLE EXISTS**

The Native Title Act emphasises agreement-making as the preferred means of resolving native title issues, and established the National Native Title Tribunal to, among other things, mediate native title applications.

In the 10 years since the Act commenced, the Tribunal has developed a practice for mediating native title matters (primarily claimant applications) in ways that take into account the many special circumstances in which parties try to negotiate agreements. This paper deals with Tribunal practice in light of:

- the statutory scheme for processing native title applications
- what the Native Title Act says about mediation
- the legal and other contexts in which native title mediation occurs
- the purpose of native title mediation, including the range of possible outcomes
- some of the special features of native title mediation and the factors that affect the pace at which mediation occurs, and
- the phases through which most native title applications move - from when each application is filed through to its resolution by agreement or following a trial.

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<sup>104</sup> See D Ritter, 'Native title claims before the Court: Proof and evidence', General Commentary in *Native Title Service*, LexisNexis Butterworths; G Neate, 'Determining native title claims – Learning from experience in Queensland and the Northern Territory', (1995) 69 *Australian Law Journal* 510-539; G Neate 'Proof of Native Title' in B Horrigan and S Young (eds) *Commercial Implications of Native Title*, Federation Press, 1997; G Neate 'Land, law and language: Some issues in the resolution of Indigenous land claims in Australia', Paper delivered to the conference of the International Association of Forensic Linguists, 11 July 2003, available on [www.nntt.gov.au](http://www.nntt.gov.au) and G Neate 'Speaking for country' and speaking about country: Some issues in the resolution of Indigenous land claims in Australia', paper delivered to the Joint Study Institute, 21 February 2004, available on [www.nntt.gov.au](http://www.nntt.gov.au) and the numerous judgments and articles cited in those papers.

(a) **The scheme of the *Native Title Act 1993***

**Main steps in the process:** The preamble to the Act states:

A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.

The procedure involves the Federal Court of Australia and the Tribunal dealing with each native title application from the time it is made (or even in its preparation) to its final determination. The main steps in the claimant application process are summarised in Table 1.

**Table 1: Main steps in the claimant application process**

Main steps in native title application process	Responsible agency		Relevant section(s) of the Native Title Act
	Federal Court	National Native Title Tribunal/Native Title Registrar	
Filing	Application filed		s.61 s.61A s.62
Referral #1	Copy of application given to Native Title Registrar		s.63 s.64(4)
Notification #1		State or territory government and native title representative bodies provided with a copy of application by the Registrar	s.66(2) s.66(2A)
Registration		Registration test applied to native title application by Registrar	ss.190A-190C
Notification #2		Native title application advertised and other potential parties notified by Registrar	s.66(3) (s.66A)
Parties	Applications for party status assessed and determined		s.84 (s.84A)

<b>Main steps in native title application process</b>	<b>Responsible agency</b>		<b>Relevant section(s) of the Native Title Act</b>
	<b>Federal Court</b>	<b>National Native Title Tribunal/Native Title Registrar</b>	
Referral #2	Native title application referred to Tribunal or equivalent body for mediation		s.86B
Mediation		Mediation conducted by Tribunal with reports to Federal Court on progress of mediation	ss.86A,136A-136G
Referral of question of fact or law to the Federal Court		Referral by Tribunal	s.136D
Determination of question of fact or law	Federal Court		s.86D
Agreement reached and mediation successfully concluded		Report setting out results of mediation provided to Federal Court by Tribunal	s.136G(1)
Agreed determination of native title	Federal Court considers if appropriate to make determination of native title		s.81 s.87 s.94A s.225
Other agreements in relation to proceeding	Federal Court		s.86F s.87
No agreement		Tribunal makes mediation report to Federal Court	s.86E s.136G(3)
Order that mediation cease	Federal Court		s.86C
Contested determination	Federal Court decides whether to make a determination of native title. (Court may refer matter back to Tribunal for further mediation at any time in the proceeding)		s.81 (s.86B(5))

Aboriginal people and Torres Strait Islanders who wish to seek formal recognition of their native title rights and interests may do so by making a native title application to the Federal Court.<sup>105</sup>

Each claimant application is registration tested and notified by the Native Title Registrar or his delegate, and people or bodies who wish to be parties notify the Court of their desire.

After the notification #2 process is complete and parties to the claim have been determined by the Federal Court, a claimant application will usually move into mediation. Indeed, except in limited circumstances when the Federal Court may order otherwise, all claimant applications are referred to the Tribunal for mediation.<sup>106</sup>

The central role of the Tribunal in the mediation of native title applications is apparent from the mandated terms of referral,<sup>107</sup> and the Federal Court's power to request the Tribunal to provide reports on the progress of any mediation.<sup>108</sup> Members of the Tribunal or consultants appointed by the President for this purpose preside at mediation conferences for claimant applications.<sup>109</sup>

When the Federal Court refers an application to the Tribunal for mediation, the Tribunal has the responsibility to undertake mediation of all aspects of the application relevant to the purposes defined in section 86A of the Act. This can include the development of a detailed negotiation protocol, the exchange of information between the parties (possibly including information about a claim group's traditional connection to the claim area), the identification of issues to be resolved and times and venues of conferences under the Act in furtherance of the mediation process.<sup>110</sup> The provisions of the Act relating to mediation conferences are ancillary to the referral of applications to the Tribunal for mediation. They do not define the limits of the Tribunal's role.<sup>111</sup>

Mediation protocols and timetables may provide for bilateral negotiations between parties, with them reporting back to the Tribunal. Timetables for such bilateral discussions are an element of the mediation process undertaken by the Tribunal in the exercise of its statutory function and in respect of which it may be required to report to the Federal Court.<sup>112</sup>

The purpose of mediating claimant applications is to assist parties to reach agreement on all or some issues specified in the Act, such as whether native title exists and, if it does exist, who holds native title; what constitutes the native title rights and interests; whether there are any other (non-native title) interests in the claimed area and, if so, the relationships they have with the native title rights and interests; and whether the native title rights and interests confer exclusive possession, occupation, use and enjoyment of any of the land or waters.<sup>113</sup>

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<sup>105</sup> *Native Title Act 1993* ss.13, 61.

<sup>106</sup> *Native Title Act 1993* s.86B. See *Bropho v Western Australia* (2000) 96 FCR 443 at 445, 456, 461-2; 169 ALR 365 at 368, 373 per French J.

<sup>107</sup> *Native Title Act 1993* s.86B(1).

<sup>108</sup> *Native Title Act 1993* ss.86E, 136G(2).

<sup>109</sup> *Native Title Act 1993* ss.136A (2), 123(1) (b).

<sup>110</sup> See *Frazer v Western Australia* (2003) 198 ALR 303 at [27], [28].

<sup>111</sup> See *ibid.*, at [26]. The approach taken by French J in *Frazer v Western Australia* has been followed by him subsequently (see e.g. *Anderson v Western Australia* [2003] FCA 1058) and by some other Federal Court judges (see e.g. Mansfield J in *Jones v South Australia* [2003] FCA 538 at [36]-[37] and Stone J in *Johnson on behalf of the Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2003] FCA 981 at [13] and [17]).

<sup>112</sup> See *Frazer v Western Australia* (2003) 198 ALR 303, at [28].

<sup>113</sup> *Native Title Act 1993* s 86A(1).

If the parties agree on some or all of those matters and an order is required, the parties will set out their agreement in the form of a proposed order of the Federal Court.<sup>114</sup> It is then for the Court to decide whether it can, or will, make an order consistent with the terms of the agreement reached between the parties.<sup>115</sup> Where agreements involve non-native title matters,<sup>116</sup> the Court may have no say in the form of the outcomes.

Table 1 suggests a simple, step-by-step process from the filing of a native title application to its finalisation by the Federal Court, either by agreement of the parties or following a trial. In fact, the pre-mediation and mediation processes are not simple, nor do they necessarily follow in a strict order from one discrete step to the next (although the progress of a matter might be regulated by a program endorsed in orders of the Federal Court).<sup>117</sup>

***The role of the National Native Title Tribunal:*** The Native Title Act provides the foundation of the work of the Tribunal. The Tribunal's main functions in relation to claimant applications are:

- providing information about native title processes
- providing various forms of assistance to parties including helping people to prepare applications and accompanying material, and helping people at any stage of a proceeding in matters related to the proceeding<sup>118</sup>
- mediating between parties to native title applications and assisting parties to reach agreement about relevant matters
- assisting parties to negotiate legally binding agreements (such as ILUAs) that resolve a variety of native title issues
- maintaining registers of native title applications, determinations and agreements.

As noted earlier, in carrying out its functions, the Tribunal seeks to:

- be fair, just, economical, informal and prompt
- take into account the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any party to any proceedings that may be involved.<sup>119</sup>

***Mediation:*** The mediation of claimant applications by the Tribunal is one of its more important functions. It is still the case that, as Justice French<sup>120</sup> observed, the 'heart of the Tribunal's work' is found in the provisions dealing with mediation.<sup>121</sup> Justice Kirby expressed a similar view when he wrote:

It is important to emphasise that the purpose of the Tribunal is to facilitate negotiation, discussion and agreement, if at all possible.<sup>122</sup>

Other judges have noted the importance of mediation as the means of achieving outcomes.<sup>123</sup>

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<sup>114</sup> *Native Title Act 1993* s.87 (1).

<sup>115</sup> *Native Title Act 1993* s.87 (1), (2).

<sup>116</sup> *Native Title Act 1993* s.86F.

<sup>117</sup> See e.g. *Frazer v Western Australia* (2003) 198 ALR 303.

<sup>118</sup> *Native Title Act 1993* s 78. Such assistance can include research or mapping services.

<sup>119</sup> *Native Title Act 1993* s 109.

<sup>120</sup> The first President of the National Native Title Tribunal, Justice Robert French of the Federal Court served in that role from 1994 to 1999.

<sup>121</sup> National Native Title Tribunal (1999) *Annual Report 1998-99*, AGPS, Canberra, p.11.

<sup>122</sup> *North Ganalanja Aboriginal Corporation v Queensland* (1966) 185 CLR 595 at 657, 135 ALR at 269.

Although formal determinations of native title are made by the Federal Court, the Act emphasises agreement-making as the preferred method of resolving a wide range of native title issues, including where native title exists and what acts can be done where native title exists or may exist. Justice Kirby has noted ‘the stated emphasis of the Act on the facilitation of agreement through negotiation rather than through instant recourse to judicial decision’.<sup>124</sup> Other judges have made similar observations.<sup>125</sup>

One clear example of the trend towards resolving native title applications by agreement was evident at a special sitting of the Federal Court on Dauar Island in the Torres Strait on 14 June 2001. Chief Justice Black made consent determinations that native title exists in relation to Dauar and Waier Islands, the two islands nearest to Mer.

Because the High Court had left undecided the question whether native title existed over those two islands in *Mabo (No 2)*, a native title application was lodged in 1998 and the matter was referred to the Tribunal for mediation in October 2000. The application was resolved in a matter of months. By contrast, the *Mabo* case had taken approximately 10 years to prepare and argue and for judgment to be given.

In his reasons for his decision on making the native title determination, Chief Justice Black noted the Court’s ‘great satisfaction when native title claims are settled by agreement rather than through litigation’ and noted that the result in that case was achieved because of the provisions of the *Native Title Act*. His Honour contrasted the determination process of the *Mabo* claim and the native title application process, and noted that the contrast ‘is a measure of the change that has taken place’. Having noted also the number of consent determinations elsewhere in Australia, he said: ‘These numbers suggest that governments and other parties are increasingly cognisant of the benefits of negotiated settlements, which otherwise have the potential to be lengthy, costly and divisive’.<sup>126</sup>

There are numerous references in the Act to mediation as the means by which various types of agreement might be reached.<sup>127</sup> The Act does not, however, define ‘mediation’.

The literature on conflict or dispute resolution shows that various definitions of mediation are influenced, in part at least, by the context in which mediation takes place.<sup>128</sup> The mediation of

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<sup>123</sup> For example *Munn v Queensland* (2001) 115 FCR 109 at [28] per Emmett J; *Birri Gubba v Queensland* [2003] FCA 276 per Drummond J; *North Ganalanja Aboriginal Corporation v Queensland* (1995) 61 FCR 1 at 17, 132 ALR 565 at 580 per Lee J.

<sup>124</sup> See *Fejo v Northern Territory* (1998) 195 CLR 96 at 139 [78]; 156 ALR 721 at 746-747 [78].

<sup>125</sup> Madgwick J has described the objects of the Act as including ‘arriving at agreement if possible as to who are the appropriate native title claimants, or at least minimising the scope for such disputes’: *Eora People – Brown v NSW Minister for Land & Water Conservation* [2000] FCA 1238 [27]. Emmett J has stated ‘One important object and purpose to be found in the Act is resolution of issues and disputes concerning native title by mediation and agreement, rather than Court determination. Detailed procedures are set out in the Act to achieve those objects’: *Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 119 at [28]. Branson J has noted that the Act ‘discloses an intention of encouraging and facilitating the resolution of native title claims by agreement.’: *Kelly on behalf of the Byron Bay Bundjalung People v NSW Aboriginal Land Council* [2001] FCA 1479 at [23].

<sup>126</sup> *Passi v Queensland* [2001] FCA 697 at paragraphs 9–11.

<sup>127</sup> *Native Title Act 1993* ss. 4, 43A, 44F, 44G, 79A, 86A, 86B, 86C, 86D, 86E, 108, 123, 131A, 131B, 136A, 136D, 136G, 136H, 183.

<sup>128</sup> H Astor & C Chinkin, for example, note that debates about definitions are important because they convey crucial information about what the definer believes to be most significant about the process. In their view, any attempt to suggest a rigid, prescriptive definition of mediation is undesirable. It may stultify the development and diversification of mediation and may, in any case, be ineffective in the face of diverse

native title issues by the Tribunal<sup>129</sup> is the management of a negotiation or a conflict by one or more impartial persons who have limited or no authoritative decision-making power but who assist the involved parties in voluntarily reaching a mutually acceptable settlement of those issues.<sup>130</sup>

## (b) Context of native title mediation

Native title mediation takes place within the broader context of social and legal recognition of the entitlement of Aboriginal peoples and Torres Strait Islanders to areas of their traditional lands and waters in accordance with their laws and customs. As the preamble to the Act recites, this context includes:

- recognition that Aboriginal peoples and Torres Strait Islanders have been progressively dispossessed of their lands, largely without compensation and that native title has been extinguished by valid government acts that are inconsistent with the existence of native title rights and interests
- acknowledgement that successive governments have failed to reach a lasting and equitable agreement with those peoples concerning the use of their lands
- acknowledgement that Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society
- the need to ensure that native title holders are able to enjoy fully their rights and interests (and, in certain circumstances, that their rights and interests under the common law of Australia be significantly supplemented)
- the need for a special procedure for the just and proper ascertainment of native title rights and interests
- the intended effect of the Act, as a special measure for the advancement and protection of Aboriginal people and Torres Strait Islanders, to advance further the process of reconciliation among all Australians.

The preamble to the Act provides some indication of the policy context in which the Act was prepared. Mediation takes place under the Act and hence in a legal context. But the mediation of any particular native title application will also take place in an indigenous cultural, historical, economic, social and political context.

**Legal context:** Native title mediation is conducted in a rights-based context, the rights being set out in the Act and other statutes as understood in light of an increasing number of court judgments. For example, a determination that native title exists in relation to an area of land or

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practices which reflect both the creativity and flexibility of a developing field, as well as a response to the needs of different disputes and disputants. However, precision in describing what is meant by mediation in any particular application is important: Astor, H and Chinkin, C (2002) *Dispute resolution in Australia*, 2<sup>nd</sup> edition, Butterworths, Sydney pp. 135-6. NADRAC, for example, defines mediation as ‘a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement’: NADRAC (2002) *ADR Terminology: A Discussion Paper*, Commonwealth of Australia, Canberra, p. 34.

<sup>129</sup> Depending on the mediation context, the mediator may be a Tribunal member or a presidential consultant or, in certain future act matters, a staff member.

<sup>130</sup> This definition is adapted from that provided by Christopher Moore in Moore, C (1996) *The mediation process: Practical strategies for resolving conflict*, Jossey-Bass Inc., San Francisco, p.10. This definition is preferred to other definitions of mediation because of its focus on negotiation and because it is not necessarily premised on the existence of a dispute.

waters, is, among other things, a determination of the nature and extent of those native title rights and interests, the nature and extent of other interests in relation to the determination area, and the relationship between the various rights and interests.<sup>131</sup> It is a determination of rights in *rem*, not just the rights of the parties to the proceedings, and it has an indefinite character that distinguishes it from a declaration of legal rights as ordinarily understood.<sup>132</sup>

Although key terms such as ‘native title’ and ‘native title rights and interests’ are defined in the Act,<sup>133</sup> the law about native title (including the meaning of those terms) continues to develop. Decisions of the Federal Court and the High Court provide increasing certainty on such subjects as the nature and content of those native title rights and interests that are recognised at law,<sup>134</sup> what dealings in relation to land extinguish (in part or in whole) native title rights and interests,<sup>135</sup> the types of groups that can make registrable native title applications,<sup>136</sup> and what claim groups must prove to demonstrate that they have the native title rights and interests that they assert.<sup>137</sup>

Changes to the law may significantly influence the prospect of a determination of native title being obtained over the claim area, and the attitude of some or all of the parties to the mediation. Such changes may shift the potential focus of the mediation from native title outcomes (e.g. a determination of native title with accompanying indigenous land use agreements) to non-native title outcomes (e.g. the grant of title to land, or the negotiation of joint management arrangements). Some applications may be amended, withdrawn, dismissed or struck out in response to judicial decisions.

Although the Tribunal generally adopts an interest-based approach to mediation, the design of the mediation must take into account the current state of the law as it affects the rights and interests of the applicant and other parties. The mediation design may need to be revised (and timeframes adjusted) as the law changes or is clarified and parties reconsider and adjust their positions.

***Indigenous cultural context:*** The parties and the Tribunal need to recognise the centrality of land to the native title claim group and any other neighbouring Indigenous parties.

For many Indigenous people, their traditional land has spiritual as well as economic and other significance. Songs, stories and ceremonies record the mythological history of the land. By singing the songs, telling the stories and performing the ceremonies, the inheritors of that cultural knowledge keep alive the spirit of the land – they ‘look after’ their country. One Aboriginal leader, Patrick Dodson, has written:

Land gives you the essence of who you are. It relates you to the country, to the other people who were born and bred there. It is like a great mosaic or jigsaw puzzle, various parts contributing to an intelligible whole. Dreaming tracks and

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<sup>131</sup> *Native Title Act 1993* s.225.

<sup>132</sup> See *Western Australia v Ward* (2002) 191 ALR 1 at 21 [32] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

<sup>133</sup> *Native Title Act 1993* s.223.

<sup>134</sup> See e.g. *Western Australia v Ward* (2002) 191 ALR 1.

<sup>135</sup> See e.g. *Western Australia v Ward* (2002) 191 ALR 1, *Wilson v Anderson* (2002) 190 ALR 313.

<sup>136</sup> See e.g. *Risk v National Native Title Tribunal* [2002] FCA 1589, *Quall v Risk* [2001] FCA 378, *Tilmouth v Northern Territory of Australia* (2001) 109 FCR 240, *Dieri People v South Australia* [2003] FCA 187; *Northern Territory v Doepel* (2003) 203 ALR 385.

<sup>137</sup> See e.g. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 194 ALR 538.

sacred sites are part of the law and part of day-to-day living. The spirit you have is related to that and relates back to the land.<sup>138</sup>

The challenge for a Western mind (and particularly for lawyers)<sup>139</sup> is to try to comprehend and describe the nature of that relationship or connection to traditional land under traditional laws and customs in order to negotiate and potentially agree about any native title rights and interests.

An anthropologist, Deborah Bird Rose, has written about the notion of ‘country’ in Aboriginal thinking.

Country in Aboriginal English is not only a common noun but also a proper noun. People talk about country in the same way as they would talk about a person: they speak to country, sing to country, visit country, worry about country, feel sorry for country, and long for country. People say that country knows, hears, smells, takes notice, takes care, is sorry or unhappy. Country is not a generalised or undifferentiated type of place, such as one might indicate with terms like ‘spending a day in the country’ or ‘going up the country’. Rather, country is a living entity with a yesterday, today and tomorrow, with a consciousness, and a will toward life. Because of this richness, country is home, and peace; nourishment for body, mind, and spirit; heart’s ease.<sup>140</sup>

The difficulty of understanding and describing the relationship between Aboriginal people and their traditional land was well expressed by another anthropologist, the late Professor WEH Stanner when he wrote:

No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word ‘home’, warm and suggestive though it be, does not match the Aboriginal word that may mean ‘camp’, ‘hearth’, ‘country’, ‘everlasting home’, ‘totem place’, ‘life source’, ‘spirit centre’ and much else all in one. Our word ‘land’ is too spare and meagre. We can now scarcely use it except with economic overtones unless we happen to be poets. The Aboriginal would speak of ‘earth’ and use the word in a richly symbolic way to mean his ‘shoulder’ or his ‘side’. I have seen an Aboriginal embrace the earth he walked on. To put our words ‘home’ and ‘land’ together into ‘homeland’ is a little better but not much. A different tradition leaves us tongueless and earless towards this other world of meaning and significance. When we took what we call ‘land’ we took what to them meant hearth, home, the source and locus of life, and everlastingness of spirit. At the same time it left each local band bereft of an essential constant that made their plan and code of living intelligible. Particular pieces of territory, each a homeland, formed part of a set of constants without which no affiliation of any person to any other person, no link in the whole network of relationships, no part of the complex structure of social groups any longer had all its co-ordinates. What I describe as ‘homelessness’, then, means that the Aborigines faced a kind of vertigo in living. They had no stable base of

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<sup>138</sup> P Dodson, *The Age*, 3 November 1987, reprinted in S Torre (ed), *The Macquarie Dictionary of Australian Quotations*, The Macquarie Library Pty Ltd, 1990, p 5.

<sup>139</sup> See e.g. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 per Blackburn J; *The Queen v Toohey; ex parte Meneling Station* (1982) 158 CLR 327 per Brennan J.

<sup>140</sup> D B Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness*, Australian Heritage Commission, 1996, p 7.

life; every personal affiliation was lamed; every group structure was put out of kilter; no social network had a point of fixture left.<sup>141</sup>

The passage from Professor Stanner is significant not only in its own terms but because it was subsequently quoted<sup>142</sup> and cited<sup>143</sup> in judgments dealing with a statutory scheme for the grant of land to traditional Aboriginal owners, and native title and other proceedings.

Various judges have acknowledged the religious or spiritual aspect of Aboriginal people's links to their land and have explored the conceptual gap between those concepts and legal concepts of property in land.<sup>144</sup> Much of the knowledge about the land and the peoples is recorded in reports of land claims in the Northern Territory<sup>145</sup> and Queensland.<sup>146</sup>

The Indigenous cultural context will also include the decision-making processes of each native title claim group that are relevant to resolving native title matters.

The Native Title Act expressly provides that, in carrying out its mediation functions, the Tribunal may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.<sup>147</sup>

**Historical context:** Mediation of native title issues does not occur in a historical vacuum. A constant feature that needs to be borne in mind is the effect of colonisation (including the actions of governments, agencies and individuals) on the rights and interests of native title holders. The challenges of historical circumstances to the establishment of native title have been recognised by the Australian Parliament,<sup>148</sup> judges<sup>149</sup> and others involved in native title proceedings.<sup>150</sup>

The consequential fragmentation of some traditional communities has had a significant impact on their capacity to make decisions about their native title in the context of mediation and, perhaps, to prove that they have native title.

**Economic context:** Aboriginal and Torres Strait Islander peoples are for the most part among the poorest people in Australia. Most claimants do not have the resources to effectively lodge native title applications, participate in intensive mediation, or prosecute those applications in court.

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<sup>141</sup> WEH Stanner, *After the Dreaming*, 1968 Boyer lectures, ABC, 1969, pp 44-45 reprinted in WEH Stanner, *White Man Got No Dreaming*, 1979, p 230.

<sup>142</sup> *The Queen v Toohey; ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 356-7 per Brennan J; *Rubibi Community v Western Australia* (2001) 112 FCR 409 at 411[1] per Merkel J; *Cubillo v Commonwealth* (2000) 103 FCR 1 at 467-468, 174 ALR 97 at 566-567 per O'Loughlin J; *Commonwealth v Yarmirr* (1999) 101 FCR 171 at 244, 168 ALR 426 at 491 per Merkel J.

<sup>143</sup> *Gerhardy v Brown* (1985) 57 ALR 472 at 522 per Brennan J.

<sup>144</sup> For a discussion of these issues see G Neate 'Land, law and language: Some issues in the resolution of Indigenous land claims in Australia', July 2003, available at [www.nntf.gov.au](http://www.nntf.gov.au) under Speeches.

<sup>145</sup> See land claim reports by Aboriginal Land Commissioners.

<sup>146</sup> See land claim reports of Land Tribunals.

<sup>147</sup> *Native Title Act 1993* s 109(2). In doing so, the Tribunal must not prejudice unduly any party to any proceedings that may be involved.

<sup>148</sup> See the preamble to the *Native Title Act 1993*.

<sup>149</sup> See e.g. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538, *De Rose v South Australia* [2002] FCA 1342, *Daniel v Western Australia* [2003] FCA 666.

<sup>150</sup> See e.g. Choo, C. and Hollbach, S. (eds) (2003) *History and Native Title, Studies in Western Australian History No. 23* Centre for Western Australian History, The University of Western Australia, Perth. and Neate, G (1997) "Proof of Native Title" in Horrigan, B and Young, S (eds), *Commercial Implications of Native Title*, Federation Press, pp 240-319.

The Parliament recognised this fact by legislating for native title representative bodies<sup>151</sup> which were established (or existing bodies were recognised) and are funded under the Act primarily to assist native title holders to prepare for, manage and prosecute claims.<sup>152</sup>

Representative bodies can play a vital role in the preparation and progress of native title claims and the strategic direction of claims within their geographic region. Resource priorities and information flow are very important issues for the mediation process.

The functionality or otherwise of a representative body will have a major impact on the ability of the native title claim groups to meaningfully and positively take part in the mediation process, and on the ability of other parties to negotiate with them.

Generally speaking, representative bodies are under-funded and under-resourced in terms of experienced personnel. The paucity of resources available to representative bodies has been the subject of much comment<sup>153</sup> and is the subject of comment in a recent report<sup>154</sup> and inquiry by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund.<sup>155</sup>

**Social context:** So far as Indigenous people are concerned, the recognition of native title can lead to a group of native title holders reinforcing their traditional pride and enhancing or enriching their cultural survival.

Given that few tangible proprietary or economic benefits are usually gained from the native title claim process, the motivation of some claim groups is the strongly held belief that the processes of negotiation constitute or manifest an element of respect and recognition of them as traditional owners of their country by parts of society that had previously either not afforded them that recognition or had not had an opportunity to do so.

The mediation of native title issues necessarily takes account of the diverse values and concerns of the various groups and communities to which the parties belong and that they bring to the process.

**Political context:** The mediation or other resolution of native title issues takes place within the political context of the state, territory or region where native title is said to exist. One factor is the policy of the relevant government(s) in relation to native title. As governments change, so may the policies (and hence potential outcomes for particular matters may be varied). But 'political' in this sense does not only involve a government or governments. It includes the

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<sup>151</sup> *Native Title Act 1993* ss.201A-203AI.

<sup>152</sup> *Native Title Act 1993* ss.203B-203BK.

<sup>153</sup> See e.g. Altman, J and Smith, D (1995) *Funding Aboriginal and Torres Strait Islander Representative Bodies under the Native Title Act 1993 Issues Paper No.8*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra; Kleeberg, K (1997) 'ATSIC Concerned Over Native Title Funding', *Law Society of South Australia Bulletin*; Ritter, D. (2001) 'You Get What You Pay For', *Indigenous Law Bulletin*, Volume 5 Issue 9; p.14 : Office of Evaluation and Audit, (1999) 'Evaluation of the Native Title Program Final Report 2000' ATSIC, Canberra; Human Rights and Equal Opportunity Commission (2000) *Native Title Report 1999* Report No. 1/2000; Love and Rashid, (1999) *Review of Native Title Representative Bodies (Chapter 5)*, ATSIC Canberra.

<sup>154</sup> See Parliament of the Commonwealth of Australia, Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Effectiveness of the National Native Title Tribunal*, December 2003, paragraphs 4.19-4.38. The report can be accessed at [www.aph.gov.au/native\\_title](http://www.aph.gov.au/native_title).

<sup>155</sup> The Committee is currently inquiring into 'the capacity of Native Title Representative Bodies to discharge their responsibilities under the Act with particular reference to ... resources available to Native Title Representative Bodies, including funding and staffing ...'. For the full terms of reference for the inquiry see [www.aph.gov.au/native\\_title](http://www.aph.gov.au/native_title).

politics of the local representative body, the politics of any industry organization that is likely to be a party or represent groups of parties, and the politics of the region in a broad sense.

The legal, indigenous cultural, historical, economic, social and political contexts all have potential implications for the design and conduct of native title mediation.

**(c) Purpose of native title mediation**

***Substantive native title outcomes:*** The purpose of mediation in relation to claimant applications is set out with some particularity in s 86A(1) of the Act. It is to 'assist the parties to reach agreement on some or all of the following matters:

- (a) whether native title exists or existed in relation to the area of land or waters covered by the application;
- (b) if native title exists or existed in relation to the area of land or waters covered by the application:
  - (i) who holds or held the native title;
  - (ii) the nature, extent and manner of exercise of the native title rights and interests in relation to the area;
  - (iii) the nature and extent of any other interests in relation to the area;
  - (iv) the relationship between the rights and interests in subparagraphs (ii) and (iii) (taking into account the effects of this Act);
  - (v) to the extent that the area is not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease - whether the native title rights and interests confer or conferred possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others.

The focus of the mediation is clearly on the matters that must be resolved for a determination of native title as described in s 225. That section provides that, where native title exists in relation to a particular area of land or waters, there will be a determination of:

- (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
- (b) the nature and extent of the native title rights and interests in relation to the determination area; and
- (c) the nature and extent of any other interests in relation to the determination area; and
- (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
- (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease – whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

***Related non-native title outcomes:*** It is clear that, in some parts of Australia, groups of Aboriginal people will find it difficult, if not impossible, to demonstrate that their relationship with their traditional country meets the standard of proof required for a determination that next title exists. It is equally clear that, in some areas where people have maintained strong traditional connection, few, if any, native title rights and interests will have survived the cumulative effect

of various dealings in relation to the land. In other words, as a matter of law, native title has been extinguished even though on the facts native title could subsist.<sup>156</sup>

Consequently, Indigenous groups and their representatives, governments, other parties and the Tribunal have been forced to take stock and assess how best to proceed in this more clearly delineated legal context. Sometimes it may be possible for a claimant application to be settled through a mixture of native title and non-native title outcomes,<sup>157</sup> or even by non-native title outcomes alone.

In each case, it might be appropriate for key parties (individually and collectively) to decide:

- whether a native title outcome (principally a native title determination, either by consent of the parties or otherwise) is a desirable and attainable objective;
- if so, whether a native title determination should be accompanied by one or more indigenous land use agreements and/or other forms of agreement that set out how the various rights and interests in relation to an area are to be exercised;
- whether, if a native title determination is not likely to be achieved, some other non-native title outcome is desirable and might be achieved by agreement so that the interests of the parties might be accommodated and the issues that prompted the application to be made might be resolved.

Ideally, such assessments would be made earlier rather than later in the mediation process so that the resources of the parties and their representatives (as well as the Tribunal and the Federal Court) are applied to useful research and potentially productive negotiations rather than being devoted to unnecessary and time consuming exercises which produce little if any outcome, but generate substantial costs, high levels of frustration and a general sense of dissatisfaction with the process.

In some cases, parties may wish to explore options other than, or in addition to, native title outcomes (such as determinations of native title) that will satisfy their interests and hence deal with some or all of the issues that prompted the claim group to make a native title application. These 'non-native title' outcomes could include statements of formal recognition of traditional ownership of lands in which native title had been or might have been extinguished, consultation or joint management agreements in relation to the use of traditional lands and the grants of interests in those lands under state or territory land rights legislation or other legislation.<sup>158</sup>

The statutory basis for negotiating procedural and other non-native title outcomes is found in s 86F of the Act. Subsection 86F(1) states:

Some or all of the parties to a proceeding in relation to an application may negotiate with a view to agreeing to action that will result in any one or more of the following:

- (a) the application being withdrawn or amended;
- (b) the parties to the proceeding being varied;
- (c) any other thing being done in relation to the application.

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<sup>156</sup> See *Ward v Western Australia* (2002) 191 ALR 1 at 18 [21] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; 158 [568] per Kirby J. See also *Yanner v Eaton* (1999) 201 CLR 351, 166 ALR 258 at [107] per Gummow J.

<sup>157</sup> See *Anderson v Western Australia* [2003] FCA 1058 at [20] per French J.

<sup>158</sup> See *Frazer v Western Australia* (2003) 198 ALR 303 at [24]; G Neate *Native Title and related outcomes*, presented at the Queensland Native Title Forum, Brisbane, 17 December 2003, available at [www.nntt.gov.au](http://www.nntt.gov.au).

The agreement may involve matters other than native title.

That section also provides that:

- The parties may request assistance from the Tribunal in negotiating the agreement.<sup>159</sup>
- The Federal Court may order an adjournment of the proceeding to allow time for the negotiations. It may do so on its own motion or on application by a party.<sup>160</sup>
- The Federal Court may order that the adjournment end. It may do so on its own motion, or on application by a party, or if the Tribunal reports that the negotiations are unlikely to succeed.<sup>161</sup>

Section 86F has been relied on, or referred to, in various claims to date. One Federal Court judge has described s 86F as one of the provisions of the Native Title Act which provides for means to assist in resolving issues without the necessity for judicial determination.<sup>162</sup>

In 2001 an agreement was reached under s 86F between the Australian Capital Territory Government and native title claim groups that provided that the claimants would withdraw their native title claim in exchange for benefits including involvement in the management of the Namadji National Park.<sup>163</sup> The agreement recited that there were two undetermined native title claims before the Federal Court, and that the parties believed that although the agreement involved matters other than native title it would lead to the resolution of those claims. It also stated that the agreement ‘is not an agreement about native title but is an agreement made under section 86F of the *Native Title Act 1993*’.

Consequently, although the court-ordered mediation of native title applications is focussed on matters specified in the Act, the parties may agree on those and other matters leading to creative and flexible solutions that deliver benefits beyond narrowly prescribed ‘native title’ outcomes, including various land use, ownership, management, access and planning agreements.

For some groups, the act of recognition is the principal outcome and benefit of the land rights or native title process. For others their recognition as traditional owners (or at least registered native title claimants) will have other tangible benefits. The nature and extent of those benefits will usually depend on circumstances beyond their control, for example, whether there are minerals under the surface of the land or whether other people want to carry out activities on the land. But where types of activity such as mining are proposed, the local Indigenous community will be entitled to have a say about whether the project goes ahead and, if so, on what terms and conditions.

***Indigenous land use agreements:*** The Native Title Act provides for indigenous land use agreements (or ILUAs). These are voluntary agreements, primarily about the use and management of land, made between a native title group and others – such as companies, governments, groups and individuals.

It is increasingly common for ILUAs to be part of a package of agreements which are part of the settlement of a native title application. As a result there is not only a formal court order that

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<sup>159</sup> *Native Title Act 1993* s 86F (2).

<sup>160</sup> *Native Title Act 1993* s86F (3), (5).

<sup>161</sup> *Native Title Act 1993* s 86F (4).

<sup>162</sup> *Smith v Western Australia* (2000) 104 FCR 494 at 499 [24] per Madgwick J.

<sup>163</sup> Details of the agreement are available on the Chief Minister’s Department’s website at <http://www.cmd.act.gov.au/community/indigenous/ATSIagreement.html>.

native title exists, there are agreements showing how the various rights and interests will be exercised on the ground.

Other ILUAs are ‘stand alone’ agreements for specific projects or purposes.

The flexibility of ILUAs is illustrated by the agreements registered and lodged for registration, ranging as they do from mining projects to defence facilities, Aboriginal community living areas, a marina development<sup>164</sup> and the construction of a city esplanade, a gas pipeline and a new national park.

At 23 November 2004 there were 139 ILUAs registered with the Tribunal, with many more in the pipeline.

All over the country, these agreements are playing an important role for business – which is increasingly enthusiastic about negotiating them – and local communities which are benefiting on many levels. For example, on the west of Cape York Peninsula in Queensland, Comalco has entered into an indigenous land use agreement with 11 different traditional owner groups, the Cape York Land Council and the Queensland Government. Comalco now has certainty about its future mining operations in the area while the traditional owners are benefiting from a trust fund to which Comalco and the State Government are contributing \$4 million a year. Employment and youth education programs are key elements of the agreement.

Similarly in Mt Isa, ILUAs between the Kalkadoon People and the Queensland Government, and associated agreements with several major mineral exploration companies, have allowed around 60 exploration permits to proceed. In return the agreement gives the Indigenous parties cultural protection, economic security and employment opportunities.

***Other ‘stand alone’ outcomes:*** Along the way to a formal determination of native title much of the discussions and negotiation is concerned with the day-to-day matters of coexistence between Indigenous peoples and others. Mining companies and Indigenous peoples, for instance, are involved in the negotiation of agreements that ensure that Indigenous cultural heritage is protected during the process of exploration or the mining of minerals, that appropriate compensation is paid to particular Indigenous peoples for any impact on their native title, and that the company achieves a valid grant of tenure upon which to conduct its activities.

Similarly there are many negotiations between pastoralists and Aboriginal peoples who are seeking to achieve land use and access agreements. These agreements are about the day-to-day coexistence between pastoralists and Aboriginal peoples and concern the management of on-the-ground issues such as access, gates, guns, dogs and camping.

Other agreements have been reached with local government authorities and other governments around Australia that do not depend on a determination of native title, but involve Indigenous communities in a range of negotiations or decision-making processes.<sup>165</sup> Sometimes these ‘stand alone’ agreements are in the form of ILUAs registered under the Act.<sup>166</sup>

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<sup>164</sup> See *Murray v Native Title Registrar* (2003) 132 FCR 402.

<sup>165</sup> For examples of various agreements see *Talking Native Title*, a periodical magazine published by the Tribunal and accessible on its website [www.nntt.gov.au](http://www.nntt.gov.au).

<sup>166</sup> *Native Title Act 1993* ss.24BA-24EC, 199A-199F.

Important as ILUAs are, they will not be necessary or even appropriate forms of agreement to deal with a variety of circumstances. Parties are now negotiating agreements about specific activities.

For example, near Camooweal in north-west Queensland the Indjilangi people negotiated an agreement with the Queensland Department of Transport so that a road and bridge could be built on country the subject of a native title application. Under that agreement, around 25 Indjilangi people worked on the bridge construction project. They made up 50 per cent of the workforce. The native title application itself was still active but it did not stop the project from going ahead.

#### **(d) Some special features of native title mediation**

***Differences from the circumstances of most mediation:*** Native title mediation occurs in circumstances different from most mediation. For example:

- Most mediation involves people who know each other and have an existing relationship. Although some native title cases involve people who have been sharing the land for generations, native title mediation often involves people who do not know each other; hence, the Tribunal is involved in developing relationships for the purposes of the mediation.
- Most mediation is supported by a common understanding of or background to the matters in issue. Native title mediation requires the Tribunal to assist parties in understanding and reconciling culturally different views of land and waters. It necessarily involves the interaction between two legal systems: the traditional laws and customs that provide the foundation for native title rights and interests<sup>167</sup> and the general law of Australia under which other interests in land are created and land use is regulated.
- Most mediation is a form of alternative dispute resolution, yet native title mediation does not commence because of a dispute but by an application for a determination of (or in relation to) pre-existing rights that may affect the rights and interests of others. For example, a claimant application may be made without any history of past relations or dispute between the claim group and other persons with interests in the area of land or waters covered by the application (the claim area). Although the mediation does not necessarily involve the resolution of a particular matter in dispute, the involvement of diverse interests and groups means that native title proceedings may, and often do, give rise to or identify differences between parties that need to be resolved.
- Native title mediation can often take years before the issues are resolved.

The Tribunal conducts multi-party, cross-cultural mediation in relation to areas of land or waters, using a primarily interest-based model in a rights-based context.

***Multi-party:*** Most mediation (such as the mediation of commercial or matrimonial issues) involves two parties. Mediation in the native title context is multi-party because there are generally more than two parties. In relation to the mediation of some claimant applications there may be scores or hundreds of parties.<sup>168</sup> In the case of future act mediations or ILUA negotiations/mediations, there are usually fewer parties but two or more parties will be involved.

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<sup>167</sup> See *Native Title Act 1993* s 223, the definition of ‘native title’.

<sup>168</sup> For example, the Wotjobaluk people’s application originally involved 447 parties organised into 17 groups according to their interests. As at 2 August 2002, 243 of the 296 active claims in mediation had 50 or fewer parties, 40 had between 51 and 150 parties, and 13 had in excess of 150 parties.

**Cross-cultural:** Cross-cultural mediation acknowledges and takes into account the diverse values and concerns of the groups or communities to which the parties belong, including the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.<sup>169</sup>

The Tribunal seeks to ensure that such values and concerns are addressed in the design and implementation of the mediation process so that the ability of the parties to participate in mediation is optimised.

**Interest-based:** For the purpose of resolving native title issues, interest-based mediation focuses on the parties' interests as distinct from their positions or rights and adopts a problem-solving approach to negotiation or to conflict resolution in order to achieve mutually acceptable agreements. It should be noted that the 'interest' in interest-based mediation is not restricted to material questions between the parties or to legal interests. Rather, it refers to the reasons behind the positions that parties adopt, and includes their goals, wants or needs. In the native title context there will be spiritual, cultural and historical factors that fall within parties' interests.

The particular mediator seeks to create a mediation environment in which the parties are encouraged to identify and explore their own and other parties' interests, with a focus upon exploring possibilities for mutual problem-solving. This methodology involves the mediator taking an active role, where possible, in preventing parties from resorting to coercive or power-based tactics. Taking this role is intrinsic to effecting the statutory obligation on the Tribunal to conduct mediation in a fair and just manner.<sup>170</sup>

The interest-based approach to mediation adopted generally by the Tribunal has been developed in light of the requirements of the Act and various specific features of native title mediation.

The interest-based model is not rigidly prescriptive. It accommodates the use of aspects of other models and approaches within its general structure. This is important in native title mediation to assist in addressing cross-cultural issues and power imbalances between the parties.

**Rights-based context:** As noted earlier, mediation is conducted in a rights-based context in the sense that it is carried out within a legal framework whereby the parties may seek a judicial determination of their respective rights and interests at law. This rights-based context has various facets under the Act.<sup>171</sup>

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<sup>169</sup> *Native Title Act 1993* s.109(2).

<sup>170</sup> *Native Title Act 1993* s.109(1).

<sup>171</sup> For example:

- a) a native title determination application, revised native title application, or compensation application is made to the Federal Court and the court makes orders (whether by consent of the parties or otherwise): *Native Title Act 1993* ss.13, 61, 81, 87
- b) a determination that native title exists in relation to a particular area is, among other things, a determination of the nature and extent of the native title rights and interests in relation to the determination area; the nature and extent of any other interests in relation to the determination area; and the relationship between the various rights and interests: *Native Title Act 1993* s.225, see also the definition of 'interest' in relation to land or waters: s.253
- c) a determination of native title is a determination of rights *in rem*, not just the rights of the parties to the proceeding (see *Wik Peoples v Queensland* (1994) 49 FCR 1 at 6-8; 120 ALR 465 at 470-472 per Drummond J; *Fourmile v Selpam Pty Ltd* (1998) 80 FCR 151 at 175 per Drummond J; *Western Australia v Ward* (2000) 99 FCR 316 at 368-369, 375; 170 ALR 159 at 208-209, 214-215 per Beaumont and von Doussa JJ; *Mitakoodi/Juhnjar People v Queensland* [2000] FCA 156 at [12], [21] per Spender J); in other words, it is a real action in the sense that an order generally operates against the entire world, it does not only resolve an issue *inter partes*

**Factors affecting the pace and progress of native title mediation:** The pace and progress of mediation on a case-by-case basis will be influenced also by such factors as:

- *The number of parties, the range of interests and the variety of issues involved.* Where there are many parties, they may be grouped according to common interests (e.g. pastoralists, explorers, small miners) with common representatives.
- *The willingness of the parties to participate in the process.* Many people and bodies are drawn into the mediation of native title proceedings not because they want to be there but because they consider that they need to be involved, at least to some degree, to protect their interests. Some are reluctant participants and may resent the process. The willingness of parties to be involved at relevant stages is essential to the progress and any outcomes of the process. If key parties are unwilling to take an active role in mediation, the progress and potential outcomes will be impeded.
- *The capacity of parties (and their representatives) to participate in the process.* Whatever their attitude to the proceedings, the involvement of parties to actively engage in mediation will be influenced by their capacity to participate. In this context, capacity can include the resources available to them to participate (such as financial resources, properly qualified representation, and their own knowledge of the system and mediation process). The Federal Court has recognised that it is appropriate that within a particular region timetables may be staggered to reflect priorities within that region.<sup>172</sup>
- *The extent to which parties participate personally in the process.* It is increasingly common for legal or other representatives, rather than the parties, to attend native title mediation conferences. Often a person will represent more than one party (e.g. an industry group's nominee may represent scores of the group's members). Sometimes one person will represent a range of parties with different interests. The nature and extent of the representation may directly affect how mediation is conducted.
- *The predictability or consistency of the parties' approaches to the mediation.* Some parties are involved in many native title proceedings. For example, the relevant state or territory government will be the first respondent to every claimant application in its jurisdiction. Some governments have a publicly known position on key issues (e.g. what types of information are required to prove an Indigenous group's connection to the claim area) or publicly known practices in relation to steps in the process (e.g. what information it will need from the applicants before undertaking tenure research in relation to the claim area). Such positions and practices will affect the pace and possible outcomes of mediation.
- *The resolution of threshold issues.* Some parties will not wish to be actively involved in mediation until a threshold issue is resolved (e.g. overlapping and disputed claimant applications, or the establishment of a claim group's connection to the area).

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(*Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 109 at 114 [22], quoted with approval by Sackville J in *Kennedy v Queensland* (2002) 190 ALR 707 at 714 [30]) and it has an indefinite character which distinguishes it from a declaration of legal rights as ordinarily understood (*Western Australia v Ward* (2002) 191 ALR 1 at 21 [32] per Gleeson CJ, Gaudron, Gummow and Hayne JJ).

- d) a registered ILUA has effect, in addition to any effect that it might have apart from the Native Title Act, as if: (1) it were a contract among the parties to the agreement; and (2) all persons holding native title in relation to any of the land or waters in the area covered by the agreement, who are not already parties to the agreement, were bound by the agreement in the same way as the registered native title bodies corporate, or the native title group, as the case may be: *Native Title Act 1993* s.24EA(1).

<sup>172</sup>

See *Frazer v Western Australia* (2003) 198 ALR 303 at [28].

- *External time constraints or deadlines.* There are no statutory time limits on the mediation of native title applications, or on other types of negotiations under the Act. In that sense, the mediation process is ‘open-ended’. However, because the mediation of native title applications is initiated when an application is referred by the Federal Court to the Tribunal, and the Court then supervises the progress of mediation, the Court can impose a timetable and set various deadlines by which progress should be shown (or an agreement reached) or it will set the matter down for trial and may order that mediation cease.
- *Changes in the external environment.* As noted earlier, native title law and practice continues to change. Such changes can affect the range of outcomes that might be available to the parties or the conditions that need to be satisfied in order to achieve a particular outcome (e.g. a consent determination of native title). Because the process of resolving a native title application usually takes some years to complete, some of the parties may change or the attitude of a party may change during the mediation (e.g. as a result of a change of government after an election).

Such factors must be taken into account in each phase of the mediation process and must be factored into the design of the mediation of each application. They operate as constraints on both the design and the progress of mediation, and provide opportunities to the Tribunal to assist parties by developing their capacity to participate appropriately in the process.

#### (e) **Phases of native title mediation**

The interest-based mediation approach generally practised by the Tribunal, primarily for use in the mediation of claimant applications, provides the foundation for a mediation process with six main phases. Each phase involves activity by members and employees of the Tribunal. The references below to the mediator are to the Tribunal member(s) or consultant appointed by the President of the Tribunal to mediate a particular matter.<sup>173</sup>

**Phase 1** *Information gathering and giving:* in which parties are provided with information about the mediation process and what might be achieved, and the Tribunal obtains information about the parties and the general context in which mediation will occur to inform the design of the mediation process in relation to that application.

**Phase 2** *Process design:* in which the framework for the mediation of the application is established initially.

**Phase 3** *Capacity-building and party development:* in which parties may be assisted to prepare to participate in the later phases of the process.

The capacity of groups to engage in the mediation is crucial to the success of any agreement-making process. If they are well prepared, the parties will be able to concentrate and make informed decisions about their rights and interests rather than be distracted by misunderstandings or uncertainty about the process.

Different parties will have different resources (financial and human) and different levels of knowledge and experience (if any) in native title mediation. Their capacity to engage productively will be influenced by such factors.

The objectives of this phase are:

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<sup>173</sup> *Native Title Act 1993*, ss.123, 131A, 136A.

- to identify and implement strategies that increase the ability of the parties to participate effectively in mediation, and
- by that means, to enhance a mediation environment that is conducive to achieving outcomes acceptable to the parties.

The Tribunal usually arranges and pays for the hire of the venue and the provision of food and beverages for mediation conferences – ‘setting the table’ for mediation in a practical and conceptual way.

The design and conduct of a particular mediation will be influenced by the capacity of parties to engage effectively. Consequently, mediation conferences will not necessarily be convened immediately following the referral of a matter to the Tribunal for mediation.

**Phase 4**      ***Exploration and identification of issues, interests and options:*** in which parties meet collectively or in smaller groups to identify their interests and issues and explore options which satisfy their interests.

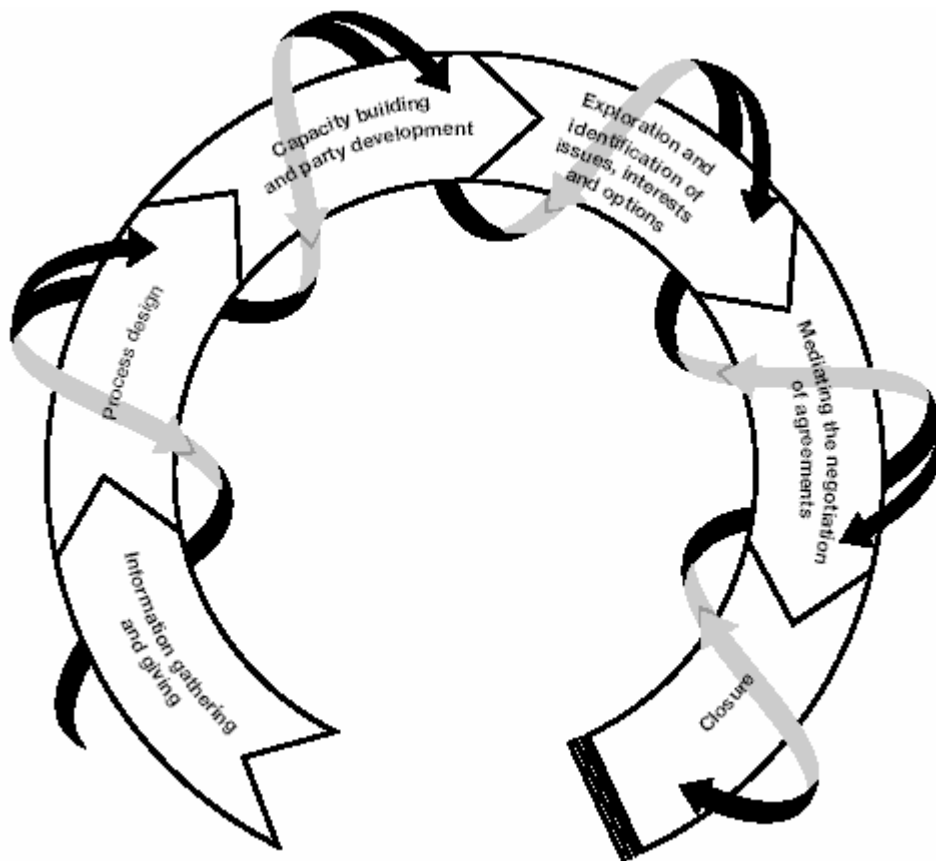
This is the phase where ‘typical’ mediation usually starts. It is marked by some or all of the parties meeting to start to explore each others’ interests and, hopefully, the issues or interests underlying those positions with the objective of ultimately determining whether it is possible for agreement to be reached on some or all of those interests.

It is the phase where the elements of the interest based model start to be put into practice.

**Phase 5.**      ***Mediating the negotiation of agreements:*** the formal mediation phase in which some or all of the parties, in a controlled environment, negotiate about the issues, interests and options they have explored and identified with a view to reaching an agreement in principle.

**Phase 6**      ***Closure:*** in which agreements are documented and other formal steps taken. This is the phase following the parties reaching agreement in principle. It is the period between agreement and the Federal Court determination. This phase essentially involves drafting, exchanging, agreeing and settling detailed and complex legal documents.

## **PHASES OF MEDIATION**



***Relationships of phases to each other:*** As a general rule the various phases of the process commence at the time when the Federal Court refers a native title application to the Tribunal for mediation. Although the first three (or four) phases are not ‘mediation proper’ or formal mediation, each phase is integral to the mediation of issues raised by native title applications. An application would usually move through each phase in that order, but aspects of some phases appear in other phases. Some phases may be repeated. Mediation is a dynamic process which need not proceed in a strictly sequential manner. Accordingly, the Phases of Mediation diagram shows a process:

- that has a beginning (usually when the application is referred to the Tribunal for mediation) and an end (e.g. a determination of native title or some other formal outcome)
- where each application in mediation moves through various phases between referral and conclusion
- in which the parties may move forward and backward between phases (or to an aspect of a particular phase), or where one phase has elements of (or is informed by) one or more other phases.

The diagram is in a curved format to emphasise the iterative (or repetitious) nature of mediation and the integral relationships of the phases. The diagram shows a continuum in which there is looping back between and within phases of the mediation process.

Although, as noted earlier, the Tribunal plays an active role in mediation, the way in which the mediation is conducted on a particular occasion will be influenced by a range of factors such as the number of parties present (or represented), the issues being considered, and the extent to which the parties (or their representatives) are familiar with the process and confident about

participating. For example, the way in which the Tribunal conducts the mediation might be different if:

- the mediation conference is about overlapping claimant applications and the native title claim groups are attempting to resolve the issues face-to-face on country in accordance with their traditional laws and customs, or
- the mediation conference is about deciding the terms of a pastoral lease access agreement between representatives of a pastoralist and representatives of an applicant.

The Tribunal might be more directive at some stages of the mediation than others, or at different times within a mediation conference. On some occasions the Tribunal may be more facilitative, its role being essentially to create an environment in which the parties (or their representatives) negotiate with each other.

*Some examples of mediation practice ‘in the field’:* As will be clear from the description of these phases, much of the Tribunal’s work can be described as ‘pre-mediation’ – assisting or preparing people to participate in the mediation process. The recognition of native title is a new, difficult and challenging concept. Someone has to explain it, and, in the absence of a broader education strategy by the relevant government (or local work by the native title representative body or other representative groups), it often falls to the Tribunal to do the ground work.

Our rationale is quite simple. Mediation will be less effective – perhaps totally ineffective – if the people at the table are ill-informed or misinformed, fearful and anxious. We need to create an environment in which people who have been drawn into a process that is not of their making feel that they can participate fully and that they will be heard. Some are sceptical, reluctant, apprehensive and even hostile participants in the process. We have to ensure that all the parties have an opportunity to be heard and that they realise they have an opportunity to engage constructively with other parties.

People will travel, sometimes over great distances, to attend mediation conferences. Negotiations take place in dry creek beds and community halls, back paddocks and boardrooms, on country and in office blocks. It is all part of establishing or strengthening relationships which, to a greater or lesser extent, will determine the outcome – and it all takes time.

It used to be necessary to have at least one meeting of all the parties. That is no longer required by the Act, but it may be useful to get everyone together at some stage. Such mediation conferences can pose logistical challenges. How do you get hundreds of people in the same place at the same time, and then conduct meaningful discussions about so many issues?

Some years ago I convened a conference of all the parties to an application in western Queensland. At that time, the application covered about 68,000 square kilometres of country. There were about 400 parties, including the native title claimants, pastoralists, oil companies and State and local governments. Some neighbouring Aboriginal groups supported the claim. At least one group opposed it and had lodged their own application which covered much of the same area.

The meeting was scheduled to be held in a community hall in a town within the claimed area. About 160 people came. Some of them had driven long distances to be there. Catering had been arranged – morning tea, lunch, afternoon tea and a constantly boiling urn are essential at these sorts of meetings. The local police had called in reinforcements in case there was trouble. The police attended at the hall but were politely told that their presence there was not necessary; indeed we were concerned that having uniformed officers would not help to resolve already

difficult issues. The meeting went all day and there were some lively moments as issues were raised and the areas covered by the application were changed. But progress was made.

These days most mediation meetings are far less charged with most people involved having a better understanding of the process and the benefits of mediated outcomes.

That story also illustrates one of the common challenges in native title mediation – the need to resolve differences between neighbouring groups of Aboriginal people about the extent of each group’s traditional country. It is not uncommon for two or more claimant applications to overlap. Sometimes the overlapping areas are quite extensive. Not every overlapping application is evidence of a dispute.

People from different groups might have traditional rights and interests in the same area of country, and the law recognises that possibility.<sup>174</sup>

There are several ways to deal with overlaps. One is to have a meeting between the groups on the area in dispute. This approach has been used with some success. Like other aspects of our work, it takes organising.

In one instance, various meetings had been held in a regional centre with the steering committees of the neighbouring groups. They agreed to meet on country and chose a particular dry creek bed near a road crossing. The Tribunal arranged for a marquee and portable toilets to be taken out to the site, and for food to be provided. We helped set up the marquee – an exercise that was slowed by a lively breeze and the difficulty of getting tent pegs to stay in the sand.

Members of the two applicant groups came in separate vehicles. It is usual for the group whose traditional country we meet on to welcome others. Because we were meeting on disputed country another protocol had to be developed. The issues were outlined by reference to the surrounding countryside and options were outlined on a map clipped to a board. People broke into small groups with their lawyers to discuss issues as they arose and to fashion a way for mediation to progress.

Some outcomes were agreed and written down. The document and marked-up map were signed by members of each group as the sun was setting. We packed up the marquee, tables and chairs, collected the rubbish, tidied the area and headed back to town. All the issues hadn’t been resolved, but the parties were another significant step along the way.

For the Tribunal members and staff involved it was like another day at the office.

Another example of this style of mediation occurred in May 2004 when approximately 350 people attended a series of mediation conferences at Spear Creek in South Australia. About 200 of these people were members of the nine participating native title claim groups (many of whose claims overlapped) and about 100 senior people from surrounding regions. Also involved were staff of the native title representative body, claimants’ legal representatives, interpreters, legal consultants, anthropologists and members of the Tribunal. A plenary mediation meeting was held to outline the work to be done. That plenary conference was followed over the next five days by more than 30 separate meetings, often held in parallel, which variously dealt with claim boundary overlaps and internal claim issues.

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<sup>174</sup> See *Native Title Act 1993* s 225(a) and for example *James on behalf of the Martu People v Western Australia* [2002] FCA 1208.

As a result of the mediation, agreement was reached that some of the claims be combined or withdrawn, boundaries were amended, and some people agreed to share on an equal basis an area covered by one of the claims or to recognise each other's interests in the area of overlap between two claims.

Various factors contributed to the outcomes of the mediation meetings. These included the role of senior Aboriginal people in the use of Aboriginal law and custom to resolve disputes between neighbouring groups, the selection of an appropriate venue for the meeting, pre-mediation preparation and flexibility in the conduct of the mediation, collaboration between the Tribunal and the native title representative body, and the use of advanced geospatial technology to record agreements about areas covered by the claims as those agreements were made.

## **5. MAKING AGREEMENTS THAT LAST**

The Native Title Act clearly reflects the Federal Parliament's policy objective that, where possible, native title issues be resolved by agreement, often by using a process of mediation. Numerous judges have noted that theme in the legislation and have commented on the benefits of agreement making in this area.

Although it is widely accepted that the best way to deal with native title issues is to negotiate agreements tailored to meet the local circumstances of the parties, relatively little attention has been given to what makes a sustainable agreement in the months and years after the ink of the signatures is dry.

After a decade of experience of the native title system, some have attempted to develop criteria for evaluating certain types of agreements or have suggested principles that should inform the negotiation of agreements. Others have looked at what characteristics make for enduring or sustainable agreements. Such an assessment can be made by reference to various criteria, including substantive and procedural components of agreements.

### **(a) Human rights principles**

At the principles level, the previous Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr Bill Jonas, has advocated a human rights framework for the economic and social development of Indigenous Australians. He has argued that human rights principles 'build a framework for economic and social development to occur within the cultural and political boundaries established by Indigenous peoples' traditional laws and customs. They require that Indigenous people control the direction that their development takes'.<sup>175</sup>

Dr Jonas referred to the United Nations *Declaration on the Right to Development* of 1986, Article 1 of which reflects a notion of development which goes beyond the economic growth of the State, making it instead a right of every human person and all peoples. Article 1 provides:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

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<sup>175</sup> W Jonas 'Promoting Economic and Social Development through Native Title', *Land, Rights, Laws: Issues of Native Title*, Volume 2, Issues Paper No 28, August 2004, p 3.

Dr Jonas argued that development must be carried out in a way which respects and seeks to realise peoples' human rights. Accordingly, economic and social development within Indigenous communities must be carried out in a way which is consistent with applicable human rights. In summary:<sup>176</sup>

- a non-discriminatory approach to development requires that Indigenous people enjoy equal protection of their property interests before the law (i.e. the right to equality)
- the right to development requires free and meaningful participation by all people in the development process
- the right to development is specifically directed towards the goal of realising the economic, social, and cultural rights of people (including the right to an adequate standard of living)
- there is a relationship between the right of peoples to self-determination and full sovereignty over their resources and the right to development.

Dr Jonas argued that these policy concepts and human rights principles provide important guidelines for realising the economic and social development goals of Indigenous peoples. In his opinion, native title agreements provide a vehicle to apply these principles to traditional owner groups. Native title agreements aimed at economic and social development should:

- respond to the group's goals for economic and social development
- provide for the development of the group's capacity to set, implement and achieve their development goals
- utilise to the fullest extent possible the existing assets and capacities of the group
- build relationships between stakeholders
- integrate activities at various levels to achieve the development goals of the group.<sup>177</sup>

Dr Jonas argued that the native title system provides an invaluable opportunity for governments and traditional owner groups to tailor native title agreements to the real needs of the claimant group rather than the demands of the legal system. The negotiation of native title agreements also provides an opportunity for governments to understand the social and cultural context for the development objectives of the group and to recognise the basis for their social and cultural values.<sup>178</sup>

Human rights principles need not be considered only in relation to negotiations between governments and Indigenous groups. In its Corporate Report *Now and Beyond 2003*, Newmont Mining Corporation stated that the company 'subscribes to the Universal Declaration of Human Rights and associated conventions and standards'.<sup>179</sup> It highlights the cultural rights of Indigenous people as being 'of particular importance to Newmont'. The report states that Newmont's global standard on human rights awareness requires each Newmont operation to identify potential human rights issues and impacts; provide human rights training and awareness to employees and contractors; and develop a method for reporting and investigating human rights abuse allegations. The company participates in the Voluntary Principles on Security and Human Rights<sup>180</sup> and seeks to ensure that companies cause no harm to local communities and carefully

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<sup>176</sup> Ibid pp 3-5, citing *Declaration on the Right to Development* preamble, Articles 1(2), 2(3); *International Covenant on Economic, Social and Cultural Rights* Articles 6(1), 9, 11(1); *Universal Declaration on Human Rights* Articles 17(1), 22, 23(1), 25; *Convention on the Rights of the Child* Articles 26(1), 27(1); *International Covenant on Civil and Political Rights* Article 27.

<sup>177</sup> W Jonas, op cit, p 5.

<sup>178</sup> W Jones, op cit, p 1.

<sup>179</sup> For the Declaration see [www.un.org/Overview/rights](http://www.un.org/Overview/rights)

<sup>180</sup> These Voluntary Principles can be found on the US State Department website at [www.state.gov/g/drl/rls/2931.htm](http://www.state.gov/g/drl/rls/2931.htm).

consider the direct and indirect effects of their operations on the safety and rights of local people.<sup>181</sup>

The adoption of a human rights approach to agreement-making may influence both the negotiation process and the content of any agreement. However, such broad principles may not provide clear criteria for predicting or evaluating the detailed content of agreements in a variety of circumstances.<sup>182</sup>

### **(b) Evaluating critical components of agreements**

At a more specific level, Professor Ciaran O’Faircheallaigh has proposed criteria for assessing the following eight ‘critical components’ of agreements that deal with resource development projects:

- environmental management
- cultural heritage protection
- rights and interests and land
- financial payments
- employment and training
- business development
- Indigenous consent and support
- implementation measures.

Different sorts of criteria are developed to address each component, depending on the nature of the issue involved and the way in which it is dealt with in agreements.<sup>183</sup>

### **(c) Features of sustainable agreements**

In late 2003, the Tribunal commissioned some exploratory research to identify key issues in the implementation and resourcing of native title and related agreements. The research report, by Mr Malcolm Allbrook and Dr Mary Ann Jebb,<sup>184</sup> was intended to assist members and employees of the Tribunal in mediating and facilitating agreement-making between parties.

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<sup>181</sup> Newmont Mining Corporation, *Now and Beyond 2003 Corporate Report*, p 26.

<sup>182</sup> In *Gerhardy v Brown*, for example, Justice Mason wrote: ‘As a concept, human rights and fundamental freedoms are fundamentally different from specific or special rights in our domestic law which are enforceable by action in the courts against other individuals or against the State, the content of which is more precisely defined and understood. The primary difficulty is that of ascertaining the precise content of the relevant right or freedom... [T]he rights which are accorded to individuals in particular societies are the subject of infinite variation throughout the world with the result that it is not possible, as it is in the case of a particular society, or in the case of homogenous societies which are grouped together...to distil common values readily or perhaps at all. Although there may be universal agreement that a right is a universal right, there may be no universal or even general agreement on the content of that right.’: (1984) 159 CLR 70 at 101-102; 57 ALR 472 at 495. For example, in general, freedom of movement (considered as a human right or fundamental freedom) does not extend to access to property in private ownership. However, his Honour thought that, in exceptional circumstances, freedom of movement may include access to privately owned lands: (1984) 159 CLR 70 at 102-104; 57 ALR 472 at 495-497.

<sup>183</sup> C O’Faircheallaigh, ‘Evaluating Agreements between Indigenous Peoples and Resource Developers’, in M Langton, M Tehan, L Palmer and K Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, 2004, pp 303-328.

<sup>184</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004.

In conducting that work, the researchers considered relevant and recent agreements with Indigenous peoples<sup>185</sup> in relation to various activities<sup>186</sup> and the literature on effective agreement-making. Consistently with other research,<sup>187</sup> they found that, although large numbers of agreements have been concluded since the enactment of the Native Title Act and these agreements show ‘a diversity that equals the situations, aspirations and circumstances of the parties’, most of the literature ignores issues of implementation and sustainability, preferring to focus on matters of process such as setting up and conducting negotiations’. Thus, much of the literature ‘appears to conclude with signing off an agreement, “closing the deal”, while not addressing what happens after this has been done’.<sup>188</sup>

The researchers made various observations and suggestions which can only be summarised in this paper. The following summary lists many of those suggestions and observations in what approximates as a chronological order for dealing with them in the course of negotiations.

**Clarify the goals of an agreement:** The parties need to be clear about the goals of an agreement. These should be canvassed widely and continuously throughout the negotiation process. Getting to ‘agreement in principle’ may take a long time and many meetings, but clarity about the goals and parameters of a proposed agreement will be vital when issues of implementation are considered.<sup>189</sup>

**Deal with as many issues as possible ‘up front’:** During the negotiations it is important to consider what is likely to be sustainable in the longer term. Accordingly, parties should:

- deal with as many outcomes as possible early in the process rather than relying on subsequent discretionary engagement, and
- not make promises or enter agreements where there is any reasonable doubt that they can be kept.

Not only should parties resist the temptation to avoid considering the complex issues in the early stages of negotiation, they may find that working through these issues can have a positive outcome – even if these issues bring up conflict between the parties.<sup>190</sup>

**Take account of factors relevant to Indigenous communities:** One significant feature of all native title and related agreements is that they involve one or more Indigenous party. Some parties will be native title holders and some will be registered native title claimants, though agreements may be reached with groups who have not made a native title application or whose application has not been registered under the Native Title Act. The particular factors may vary, but negotiators should consider the following.

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<sup>185</sup> Existing databases demonstrate the number and scope of such agreements, for example, *Agreements, Treaties and Negotiated Settlements Project: Agreements Database*, The University of Melbourne, <http://www.atns.net.au/atns.html>.

<sup>186</sup> The agreements studied concerned exploration, mining, local government, pastoral and other land uses.

<sup>187</sup> See, for example, R Kelly and C O’Faircheallaigh, ‘Native title, mining and agreement making: best practice in commercial negotiations’ in *Native Title and Cultural Heritage in 2002*, Novotel Hotel, Brisbane, 2002, p 9; C O’Faircheallaigh, ‘Evaluating Agreements between Indigenous Peoples and Resource Developers’ in M Langton, M Tehan, L Palmer and K Shain (eds) *Honour among nations? Treaties and agreements with Indigenous people*, 2004, Melbourne University Press, pp 305-306.

<sup>188</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004, pp 7-8.

<sup>189</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004, p 17.

<sup>190</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004, pp 2, 9, 16.

- Agreements need to take account of the ‘structural limitations’ of Indigenous communities, including their socio-economic status, education, welfare and health. The capacity of a population to exercise the benefits envisaged in an agreement (such as employment and training) will inevitably have an impact on the eventual effectiveness of an agreement.
- The diversity and complexity of the community of Indigenous parties must be understood and acknowledged and must inform negotiations.
- Agreements should acknowledge and operate along principles of social sustainability. So, for example, when negotiating mining agreements it may be that some mining companies are ‘technician rich’ but have little understanding of social complexity or the delicacy of social relations. Social relations in all their complexity and diversity, between the company and Aboriginal communities are major elements of sustainability.
- Existing Indigenous organisations (such as native title representative bodies, prescribed bodies corporate and community councils) are part of the organisational landscape and may need to be involved at some level in the agreement – irrespective of their perceived capacity, representativeness, legitimacy and standards of governance.<sup>191</sup>

**Build relationships:** The kind of relationships that exist and develop between the parties will influence (perhaps dictate) the effectiveness and sustainability of an agreement. Sound relationships may provide the framework for flexible practices that are not formally recorded in the text of an agreement.<sup>192</sup>

**Ensure that the parties understand relevant legal procedures:** Where an agreement involves actions such as the grant of various tenures, the parties may need to understand the different legal procedures involved to achieve the outcomes envisaged in the agreement.<sup>193</sup> Similarly if the agreement is tied to the resolution of a native title application or the registration of an Indigenous land use agreement, the parties would need to understand the relevant legal processes and statutory timeframes involved.

**Provide for effective governance and capacity building:** Effective governance of each of the parties (including processes for communicating information, decision-making, executing decisions, and resolving problems) will be needed so that they can negotiate an agreement and make the agreement effective.

Effective decision-making processes are essential to both the negotiation and implementation of an agreement. The relevant Indigenous community or group needs to decide, for example, who will negotiate on its behalf, how the negotiator(s) will receive instructions, how information about the negotiations will be communicated to members of the group, and who has authority to ‘sign off’ on behalf of the group. Practical problems can arise if such issues are not resolved from the outset.

For long term agreements, issues of succession may need to be resolved to deal with people passing away or leaving the region, and the possible loss of ‘corporate memory’. Some parties

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<sup>191</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004, pp 12-13.

<sup>192</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004, pp 3, 27.

<sup>193</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004, p 27.

may need assistance to develop their skills or other capacity to engage in negotiations and implement an agreement.<sup>194</sup>

***Include employment and training as appropriate:*** Employment and training elements of an agreement may:

- satisfy some of the immediate employment and training needs of an Indigenous party;
- provide longer term programs that will contribute to the economic development of the Indigenous party and the sustainability of the agreement.

Compliance with employment and training provisions provide a relatively uncomplicated and public method of monitoring implementation of agreements and compliance with key provisions.<sup>195</sup>

***Specify how benefits will be distributed:*** Parties need to consider carefully how and to whom financial and other benefits should be distributed. That will generally require:

- detailed and careful consultation, informed agreement and sometimes external anthropological advice on group membership
- agreed structures (and review mechanisms) for the distribution of benefits.<sup>196</sup>

In some cases it may be necessary to ascertain the potential effect of payments to individuals on their other sources of income, such as social security payments. Similarly, it may be necessary to assess the taxation implications of proposed agreements before finalising how benefits should be distributed.<sup>197</sup>

***Have an implementation plan:*** It is relatively rare for an implementation plan to form part of a substantial agreement. An implementation plan could specify who is responsible for what actions, when those actions should occur (i.e. agreed and specified time frames), and what is the penalty or other consequence for failing to implement provisions of the agreement. An implementation could also include:

- performance indicators and specific provisions for monitoring and review
- an implementation budget and provision of resources to implement the agreement
- dispute resolution provisions.<sup>198</sup>

**Review mechanisms:** Review mechanisms are important elements in helping to keep an agreement ‘on track’, ensuring that there is on-going communication between the parties and that their respective expectations and objectives are managed. Rather than wait for a dispute to arise

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<sup>194</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004, pp 3, 27-28.

<sup>195</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004, pp 28-29.

<sup>196</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004, pp 3, 27.

<sup>197</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004, p 26.

<sup>198</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004, pp 3, 9-11, 14-15, 22-25, citing ATSIIC, *Regional Agreements Manual*. The checklist developed as part of this Manual is available online at [http://www.atsic.gov.au/About\\_ATSIC/Docs/Checklist.pdf+checklist+agreements+atsic&h1=en](http://www.atsic.gov.au/About_ATSIC/Docs/Checklist.pdf+checklist+agreements+atsic&h1=en).

before they communicate, parties may find it useful to stage the implementation of the agreement and undertake reviews when identified objectives or targets are reached.<sup>199</sup>

**Resources for implementation:** There is little point in negotiating an apparently useful agreement if the parties lack the resources, or access to the necessary resources, to give effect to it. Parties need to agree (preferably at an early stage of negotiations) about the availability of resources for implementation. For example, parties need to decide how institutional arrangements will be funded, who will provide the funding and how the funding will be administered. It may be appropriate to negotiate:

- the nature and amount of support needed immediately post-agreement to ensure effective implementation, and
- the availability of longer term support to build sustainability.<sup>200</sup>

**Dispute resolution:** It is probably inevitable that over time different interpretations will be given to various clauses of an agreement, particularly as different people become involved in the management of it. Consequently it is important to include dispute resolution procedures to facilitate the effective implementation and long term sustainability of an agreement. The types of dispute resolution procedures will depend on the scope and intent of the agreement and the parties to it. Such procedures should aim to be unambiguous and allow the parties to try to identify and resolve disagreements internally before becoming identified as a formal dispute with recourse to external mediators or arbitrators.<sup>201</sup>

**Staged implementation:** It may be possible to implement some of the agreed provisions before the agreement is formally signed. Indeed it may be valuable to the whole process, and provide ‘reality checks’, if the parties agree to implement certain measures immediately. A process that delivers some things along the way (such as respect for culture, high level recognition, capacity, trust, understanding, relationship building and a structure for decision-making) can avoid end-point pressure that derives from an ‘all or nothing’ style of agreement-making.<sup>202</sup>

**Attempt to deal with expectations and perceptions of others:** In some instances the perceptions of people not directly involved in the negotiations may have an impact on the prospects for other agreements. The negotiating parties may need to be briefed periodically on the achievements, milestones and alternatives.<sup>203</sup> They may also need to consider whether (and, if so, how) to explain the agreement to others.

**Adopt a holistic approach to agreement-making:** The researchers have argued that the elements of agreement-making should be considered as a whole. It is ‘neither realistic nor useful to set boundaries between considerations of process, content, implementation and sustainability. They all influence and feed off one another, and lack of attention to one will inevitably have an impact on the others.’<sup>204</sup>

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<sup>199</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004, p 22.

<sup>200</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004, pp 3, 10, 18, 22.

<sup>201</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004, p 23.

<sup>202</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004, p 17.

<sup>203</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004, p 26.

<sup>204</sup> M Allbrook and MA Jebb, *Implementation and resourcing of native title and related agreements*, 2004, p 16.

**Implications for the Tribunal:** When the Tribunal is involved in assisting parties to negotiate agreements, we will encourage parties to focus on both the substantive terms of agreements and the structures which will strengthen the durability of the agreements. The research will help us provide that assistance.

## 6. OUTCOMES AND OUTSTANDING ISSUES

The various land rights and native title schemes in different parts of Australia have been the product of local circumstances. From the perspective of Indigenous Australians, there have been ebbs and flows in the recognition of their rights to land, and attempts to compensate them for some of the losses which they and their ancestors suffered.

It is possible, however, to make some broad assessments of what has been achieved to date and of the challenges for the years ahead.

### (a) Outcomes

**Areas of land granted and where native title determinations have been made:** The statutory land rights schemes, enacted in the 25 year period between 1966 and 1991, have resulted in the grant of title over significant areas of land to Aboriginal and Torres Strait Islander communities in many parts of Australia. Some of the areas are large. The Pitjantjatjara and Maralinga lands comprise respectively 10.4 % and 7.7% of South Australia.<sup>205</sup> The total area of grants under various Commonwealth, state and territory statutes is 1,101,623 square kilometres or 14.32% of the area of Australia or almost 60 times the area of Fiji.

Similar outcomes have emerged from native title determinations. As at 23 November 2004 there were 54 determinations of native title, most (35) that native title exists and some (19) that native title does not exist. So far, native title has been determined over a total area of 453,162 square kilometres, or 5.73% of the area of Australia.<sup>206</sup>

The scale and significance of these determinations can be considered from different perspectives. Some areas are large. The determination in favour of the Martu people of Western Australia covers an area of 136,200 square kilometres. The determination in favour of the Nganawongka, Wadjari and Ngarla peoples of Western Australia is 47,540 square kilometres. The determination in favour of the Kiwirrkurra people covers an area of 42,860 square kilometres. Some are much smaller, measured in hectares rather than square kilometres, reflecting the extent of the traditional country of the Indigenous community or group, and the area where the general law recognises native title once account is taken of previous dealings with land in the region.

Whatever the size of the determination area, the number of Indigenous people who benefit from each determination is relatively small, usually hundreds or thousands (not tens or hundreds of thousands).

**Social benefits:** Such statistics tell only part of the story. People are involved at every stage in the proceedings. For some Indigenous groups, the process of giving evidence to a court or tribunal and proving their claims can be daunting but, if their claim succeeds, it may be viewed as a positive and affirming experience. The process of negotiating native title agreements can

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<sup>205</sup> The Pitjantjatjara land is 102,630 km<sup>2</sup> and the Maralinga land is 76,420 km<sup>2</sup>.

<sup>206</sup> This figure includes areas of sea: 2,880 km<sup>2</sup> around Croker Islands, 9,509 km<sup>2</sup> around Wellesley Islands.

result in the creation or strengthening of relationships that can be as valuable as the agreements reached.

One should not underestimate the social and psychological benefits for a group of Aboriginal people or Torres Strait Islanders of being recognised as the people for a particular area by the Australian legal system and, through those formal processes, by the rest of Australia.

This is land where the rights of a specific group have been recognised by others for the first time in more than two hundred years. So far as the broader community is concerned it has gone from being *terra nullius* – no one’s land – to the land where a living, identifiable community or group has rights and interests.

The broader community has, through its legal institutions, recognised belatedly what the local Indigenous people have always known – that this is their traditional country. They can now stand tall. Yvonne Stewart, an Arakwal woman from Byron Bay in New South Wales, recently said:

No-one cared about the traditional owners of Byron before native title. We weren’t even invited to be involved in the land management decisions before. It took native title to open their eyes because Byron Bay has never really seen a big Aboriginal community before. They didn’t have to deal with it before.

Our mob is walking around much prouder with their heads up. People smile much more now. There’s worth put back into our people. There was never any respect before.

Mabo made us believe it was possible. That gave us the right to speak. There was no other way before that.

Terry Waia, chairperson of the Torres Strait Regional Authority, expressed his people’s response in these terms:

knowing that our native title rights have been legally recognised, is a good feeling. When people saw the official documents signed off and that our native title rights were legally recognised, it gave people a good feeling. To the old people it is like a dream come true.

From the standpoint of native title laws, the ‘tide of history’ may have washed away the links of some groups to their land. But as a result of the land claims process in parts of Australia, some groups have renewed relationships with each other and have strengthened their cultural ties to areas of traditional land. For those groups, it might be said that ‘cultural revival is survival’.<sup>207</sup>

Nor does the tide of history only flow one way. Although, after lengthy court proceedings, the Yorta Yorta people failed to prove their native title, they have since negotiated ways of working in partnership with the State. Less than two years after the High Court ruled against them, they entered an agreement with the State of Victoria to be formally involved in the management of designated areas of their traditional lands and waters. The State recognised that the Yorta Yorta peoples are the ‘traditional owners of and have a unique inherent relationship with and responsibility to their country’. The State and the Yorta Yorta Nation of Peoples agreed to work

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<sup>207</sup> In an early land rights case, Justice Brennan observed: ‘As Aboriginal tradition within a local descent group is eroded or renewed with the passing of time, so the strength of the group’s spiritual affiliations to sites on their land and their spiritual responsibility for those sites and for that land may wane or wax.’ *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR at 359, 44 ALR 63 at 89.

together to ensure the Yorta Yorta Peoples' informed consent and long term participation in land and water management over Yorta Yorta country. Each party agrees to adopt a 'flexible and learning approach' to each other.

***A broader understanding of Australian history and society:*** There now is a vast literature on the links between groups of Indigenous peoples and their traditional areas of lands and waters. In addition to scholarly research, much has been done to prepare for land rights and native title claims. The research reports, evidence given at hearings, reports of tribunals and judgments of courts demonstrate in detail the nature, extent and strength of those ties to different parts of Australia.

## **(b) Outstanding issues**

Despite the tangible outcomes that have been achieved by and for Indigenous peoples in recent decades, much remains to be done to ensure that our native title and land rights systems are just and effective in recognising and protecting the interests of Indigenous Australians while operating in the interests of (or at least not contrary to) the interests of governments, industries and the public..<sup>208</sup> There are many critics of aspects of land rights and native title schemes, and many practical issues have to be resolved.

***Finalising native title and land claims – the quest for certainty:*** The land claims processes in the Northern Territory, New South Wales and Queensland are well advanced. Many of the claims have been decided and areas of land have been granted.

The native title scheme is much more recent. Despite the number of determinations to date, and the areas covered by them, at 23 November 2004, there were 620 active claimant and non-claimant applications to be resolved.

In some areas, it is clear that native title has been extinguished. In other areas the uncertainty about native title will continue for years. Some, perhaps many, native title claim groups will find it difficult if not impossible to clear the legal hurdle to establish that they have native title in accordance with the terms of the Native Title Act as interpreted by the courts in judgments such as the High Court's ruling in the *Yorta Yorta* case.<sup>209</sup>

Even when they overcome that hurdle, some groups may find that the native title rights and interests that they can demonstrate as a matter of fact have been progressively whittled away by the effect of past dealings with the land.<sup>210</sup> As a result, so far as the law is concerned, little remains in their bundle of rights. However small the bundle of recognised rights may be, such groups of native title holders will retain valuable procedural rights under the Native Title Act (such as the right to negotiate) which will give them a seat at the negotiation table that they would not have otherwise.

***Overlapping and disputed claims:*** Land claims and native title proceedings have highlighted disputes between some neighbouring Aboriginal groups about the extent of their traditional countries. Although some overlapping claims reflect the ongoing connection that two or more groups have, under their traditional laws and customs, to the same area of land (a possibility

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<sup>208</sup> See the discussion of a similarly worded challenge in N Pearson, 'Where we've come from and where we're at with the opportunity that is Koiki Mabo's legacy to Australia', *Mabo lecture*, June 2003.

<sup>209</sup> See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 194 ALR 538.

<sup>210</sup> See *Western Australia v Ward* (2002) 213 CLR 1, 191 ALR 1.

expressly contemplated by judges<sup>211</sup> and the Native Title Act<sup>212</sup>), many overlapping claims indicate ongoing disagreement.

Such disputes can delay the resolution of claims, and may lead to long court cases. Such disputes also can reduce the prospect of agreements about other land uses, such as exploration and mining, giving rise to criticisms from governments and industries about processes that require negotiations with Indigenous peoples, yet are impeded by disagreements between them.

***Traditional and historic links to land:*** As noted earlier, some land rights legislation provides for land to be granted on the basis of traditional ownership while other legislation allows for grants where people can establish historical links to the land or current residence in the region, or where land is needed for economic purposes.

Native title can only be established by people who have maintained substantial ongoing traditional links to land from the time when the Crown first asserted sovereignty. In some parts of Australia where the history of dispossession and dispersal of Aboriginal people has been extensive, tensions can arise where groups assert native title rights over areas where others reside. People with historical links to land may have been there for some generations and may not have, or desire to activate, any rights to their traditional country.

***Cost and delay of claim processes:*** Many people (including Indigenous people, governments and industries) have criticised the opportunity and transaction costs of land rights and native title processes. The administration of the legislation and the costs of preparing and prosecuting claims are often significant, particularly when compared with the returns in terms of native title determinations, land grants, economic and social advantages for Aboriginal people.<sup>213</sup> These costs and delays can lead to frustration and disappointment within Indigenous communities, and with others (such as governments and miners) who want certainty that they are dealing with the correct people for each area of land.

***Cost and delay of exploration and mining:*** There has been much criticism of the procedural obstacles that have to be overcome by explorers and miners wishing to have access to Aboriginal land (under statutory land rights schemes) or areas where native title exists or may exist. The Minerals Council of Australia has argued that the 'right to negotiate' regime under the Native Title Act has been particularly complex, expensive and ineffective for both native title holders and mineral companies in reaching agreement in accessing land for minerals exploration and development. The maze of processes which must be negotiated in order to obtain an exploration tenement is often costly and time consuming.<sup>214</sup> These costs can contribute to investment

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<sup>211</sup> See for example *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 190 per Toohey J. See also *Ward v Western Australia* (1998) 159 ALR 483 at 550-551, 544, per Lee J; *Northern Territory v Doepel* [2003] FCA 1384 at [38] per Mansfield J.

<sup>212</sup> Section 225 of the *Native Title Act 1993* provides that a determination that native title exists is a determination of, among other things, 'who the persons, or each group of persons', holding the common or group rights comprising the native title are. For an example of a consent determination of native title in favour of two distinct groups over the same area of land, see *James on behalf of the Martu People v Western Australia* [2002] FCA 1208, particularly at [11] per French J. See also *Daniel v Western Australia* [2004] FCA 849.

<sup>213</sup> See for example N Pearson 'Where we've come from and where we're at with the opportunity that is Koiki Mabo's legacy to Australia' *Mabo Lecture*, June 2003.

<sup>214</sup> Mineral Exploration in Australia: Recommendations prepared by the Strategic Leaders Group for the Mineral Exploration Action Agenda, 7 July 2003, p 12. See also: *Exploring: Australia's Future – impediments to increasing investment in minerals and petroleum exploration in Australia*, House of Representatives Standing Committee on Industry and Resources, (Prosser Report), 21 August 2003, Canberra, p 88.

decisions, such as whether exploration will take place in various parts of Australia or overseas. It has also been argued that the consent provisions in relation to some areas of Aboriginal land have effectively delayed or prevented new mining activity over much of Australia.

***Economic uses of land that is inalienable or native title areas:*** Although extensive areas of land have been granted under land rights legislation and native title has been recognised over other large areas, neither the land rights title nor declarations of native title have direct economic worth to Indigenous communities. In most cases, land rights land is inalienable freehold title, that is, it cannot be sold or mortgaged (although leases and other interests in the land can be granted). Native title is not a form of tenure and so has no market value.<sup>215</sup>

Thus, although many Indigenous groups have an extensive land base, there are limited opportunities to use that as security for economic developments.

It should be recognised, however, that the procedural rights which Indigenous groups have under relevant legislation enable some groups to negotiate economically advantageous agreements with miners and others who wish to have access to their land. But the potential for those economic developments depends largely on whether resources such as minerals are found on or near the group's land.

It should also be recognised that not all economic benefits require land to be used as a commodity. Joint land management schemes (such as in national parks), training and employment (from mining ventures), business partnerships and fishing strategies<sup>216</sup> can bring significant benefits to local communities who are recognised as being the people for those regions.

***Governance of land:*** The grant of title to land, or the recognition of native title rights in relation to land, does not of itself ensure long term benefits to the relevant Indigenous communities. Lands have to be properly administered. In some large areas with resident communities there is a high degree of social autonomy, and good governance is essential for the social, physical and economic well-being of people resident on the land. In other areas, the appropriate resourcing of bodies who administer rights in relation to the land will affect the capacity of groups to negotiate agreements with others who wish to have access to and use that land, and to deal with the financial and other benefits obtained under those agreements.

***Uneven distribution of benefits for Indigenous Australians:*** Land rights laws permit grants of certain categories of land and then only to people who satisfy the relevant criteria. Native title will only survive in areas where it has not been extinguished by prior dealings in land. In other places, native title may continue over only part of the traditional country of some groups. Many Indigenous people live in areas where native title is extinguished and land rights laws do not apply or offer little benefit to them.

It must be recognised that, as a general rule, land rights and native title legislation does not threaten the land interests of others. It does not extinguish or derogate from rights in land

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<sup>215</sup> Noel Pearson has argued that, by contrast with Canadian jurisprudence, Australian courts have 'reduced native title to what they conceive of as a social and cultural artefact, not a legal title to land that encompasses any economic meaning or benefit': N Pearson 'Where we've come from and where we're at with the opportunity that is Koiki Mabo's legacy to Australia', *Mabo lecture*, June 2003.

<sup>216</sup> The National Native Title Tribunal is engaged with governments, Indigenous bodies and the fishing industry to develop a National Indigenous Fishing Strategy that may involve defined, regions-specific, customary fishing rights which are non-commercial plus mechanisms to access the commercial fishing industry.

granted by the Crown or by legislation. Indeed, native title law expressly provides that the interests of others prevail to the extent of any inconsistency with native title rights.

Noel Pearson has said that ‘native title ... is all about what is left over. ... And land rights have never been about the dispossession of the colonisers and their descendents. Whether it be statutory land rights or common law land rights – these land rights have always been focussed on remnant lands.’<sup>217</sup>

Consequently land rights laws and native title were never going to deliver direct benefits to all groups of Aboriginal people and Torres Strait Islanders.

It is my view that far too great a weight of expectation has been put on native title to deliver what it was not capable of delivering. There are areas of Australia where native title will deliver little or nothing. That much was reasonably clear from the *Mabo* judgment and is apparent from the preamble to the Native Title Act, which states, among other things:

It is important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests ....

That is why the Indigenous Land Corporation was established. The Act expressly foreshadowed the establishment of a ‘special fund’ to ‘assist them to acquire land’.<sup>218</sup> Other funds have been created for the purchase of land.<sup>219</sup>

Yet because some people had such high expectations of native title, the disappointment and dejection were all the more profound when those expectations were not met.

**Reviews of legislation:** The recognition of Indigenous peoples’ rights to land and the grant of titles to areas of land have raised numerous novel legal, social, economic and political issues. It is, perhaps, not surprising that as successive legislative schemes are put into place it has been necessary to review the effectiveness of those schemes from time to time. The *Aboriginal Land Rights (Northern Territory) 1976*, for example, has been the subject of extensive reviews.<sup>220</sup> The Native Title Act was extensively amended four years after it commenced to operate in light of practical experience and some significant court cases. Other legislation has been changed to bring it into line with the Native Title Act.

The periodic review of legislative schemes allows, on the one hand for refinement and improvement, but is sometimes criticised because there is a sense in which such schemes remain unsettled and the gains made under them may appear insecure.

## 7. SOME RELATED ISSUES – AN OVERVIEW

The resolution of issues about Indigenous peoples’ rights to land and waters should be considered in the broader context of three other related issues.

### (a) Sovereignty

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<sup>217</sup> N Pearson, ‘Where we’ve come from and where we’re at with the opportunity that is Koiki Mabo’s legacy to Australia’, *Mabo lecture*, June 2003.

<sup>218</sup> *Native Title Act 1993* preamble

<sup>219</sup> See, for example, under the *Aboriginal Land Rights Act 1983* (NSW).

<sup>220</sup> The most recent review was J Reeves, *Building on land rights for the next generation*, ATSIIC, 1998.

Some Aboriginal people continue to declare that, despite more than two centuries since the British Crown asserted sovereignty over Australia, Aboriginal people have never ceded their sovereignty and hence the courts and governments of Australia have no sovereignty over persons of Aboriginal origin.<sup>221</sup> The domestic law of Australia clearly states otherwise.

Our highest Court has held that the Crown's acquisition of sovereignty over Australia cannot be challenged in the municipal court of Australia,<sup>222</sup> sovereignty adverse to the Crown does not reside in the Aboriginal people of Australia,<sup>223</sup> and Aboriginal people are subject to the laws of the Commonwealth and of the states or territories in which they respectively reside.<sup>224</sup> Consequently, the rights and protections they have as citizens are either conferred by or (in the case of native title) recognised by the applicable general laws of Australia.

## (b) Customary law

There are relatively few references to Aboriginal customary law in statutes other than those that deal with native title.<sup>225</sup>

It was apparent in the early years of European settlement that courts were unlikely to recognise Aboriginal customary law.<sup>226</sup> Yet in his 1971 decision in the *Gove Land Rights Case*, Justice Blackburn held that the clans in the Gove Peninsula area had a recognisable system of law which he described as:

a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called a 'government of laws, and not of men', it is that shown in the evidence before me. ... Great as they are, the differences between that system and our system are, for the purposes in hand, differences of degree. I hold that I must recognize the system revealed by the evidence as a system of law.<sup>227</sup>

Aspects of customary law are sometimes taken into account in the criminal law, for example, when sentencing a person who committed an offence that was sanctioned by traditional law or who will be punished under traditional law even if the court sentences the person to prison.

In the native title context, Justice Brennan stated that the common law will not protect indigenous laws and customs that are 'repugnant to natural justice, equity and good conscience',<sup>228</sup> and other judges have quoted that statement.<sup>229</sup>

<sup>221</sup> See e.g. *R v Buzzacott* [2004] ACTSC 89.

<sup>222</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Coe (on behalf of the Wiradjuri tribe) v The Commonwealth of Australia* (1993) 118 ALR 193 at 200 per Mason CJ.

<sup>223</sup> *Coe (on behalf of the Wiradjuri tribe) v The Commonwealth of Australia* (1993) 118 ALR 193 at 200 per Mason CJ; *Thorpe v Commonwealth of Australia (No 3)* (1997) 144 ALR 677 at 683 per Kirby J.

<sup>224</sup> *Coe v Commonwealth* (1979) 24 ALR 118 at 129 per Gibbs J (with whom Aickin J agreed), quoted with approval by Mason J in *Walker v State of New South Wales* (1994) 182 CLR 45 at 48.

<sup>225</sup> See e.g. *Adoption Act 1988* (SA) s 11; *Community Services Act 1972* (WA) s 3; *Aboriginal Heritage Act 1972* (WA) ss 7, 8; *Aboriginal Affairs Planning Authority Act 1972* (WA) s 35.

<sup>226</sup> See e.g. *R v Jack Congo* (1836) 1 Legge 72; B Bridges, 'The Extension of English Law to the Aborigines for Offences Committed Inter Se, 1829-1842', (1973) JRAHS 264.

<sup>227</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 267, 268. This paragraph has been quoted by other judges: see *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 39 per Brennan J; 186 per Toohey J; *Ward v Western Australia* (1989) 159 ALR 483 at 512 per Lee J.

<sup>228</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 61.

<sup>229</sup> *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1 at 15 per Lockhart J; *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 549, 590 per Olney J; *Commonwealth v Yarmirr* (2000) 101 FCR

But the possible recognition of Aboriginal customary law in aspects of the general law is a live issue and has been considered by various law reform bodies in Australia.<sup>230</sup>

### (c) Cultural heritage

Alongside the land rights laws are laws aimed at protecting areas and objects of significance to Indigenous people generally or particular groups of Aboriginal people or Torres Strait Islanders. Numerous laws have been passed by Commonwealth, state and territory legislatures in recent decades.<sup>231</sup>

For the purposes of this paper, it is relevant to note that, although land rights and native title laws only operate directly on certain types of land, cultural heritage laws apply more broadly. Thus, the protections that might not be achieved under land rights laws might be obtained under cultural heritage laws. Not surprisingly, there is an increasing trend for negotiations about land to include negotiations about the protection of culturally significant sites and areas.

## 8. ASSESSING AUSTRALIA FROM AN INTERNATIONAL PERSPECTIVE

### (a) Local factors

The ways in which Australia has dealt with and will deal with Indigenous land issues reflect the interplay of local social, historic, demographic, economic and constitutional factors.

Although we are an island nation and have developed our own legal system, we draw on ideas and experiences from other countries.

From time to time Australia's performance in this area is the subject of international scrutiny and comparisons are made with the efforts of other countries to resolve indigenous land issues. Any comparison between Australia and other countries must take into account various factors such as:

- whether there are historical treaties between the state and the Indigenous people<sup>232</sup>
- the content and current legal effect of those treaties
- whether there is an ongoing treaty-making process between the state and the Indigenous people<sup>233</sup>
- whether the rights and interests of Indigenous peoples are constitutionally protected<sup>234</sup>

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171 at 192 [59], 168 ALR 426 at 442 [59], per Beaumont and von Doussa JJ, 101 FCR 171 at 264,[386], 300 [565], 314 [627]; 168 ALR 426 at 510 [386], 545 [565], 559 [627] per Merkel J; *Western Australia v Ward* (2000) 99 FCR 316 at 339 [61] per Beaumont and von Doussa JJ; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244 at 274 [106], 275 [108], 276 [114]; 180 ALR 655 at 684 [106], 685 [108], 686 [114] per Branson and Katz JJ; *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 163 [177] per McHugh J, 213 [343] per Callinan J.

<sup>230</sup> See e.g. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, AGPS, Canberra, 1986. Northern Territory Law Reform Committee, *Report on Aboriginal customary law: report of the Committee of Inquiry into Aboriginal customary law*, 2003. See also various background papers prepared for the Law Reform Commission of Western Australia, Northern Territory Law Reform Committee, and the Australian Law Reform Commission.

<sup>231</sup> These laws are described in detail in *Halsbury's Laws of Australia*, Butterworths, volume 1(1), Aboriginals and Torres Strait Islanders.

<sup>232</sup> Such as in Canada, New Zealand and the USA.

<sup>233</sup> As in British Columbia.

<sup>234</sup> As in Canada and the Philippines.

- the judgments of courts in relation to such matters as native title (or aboriginal title) and aboriginal rights
- the structure of national government and the concentration or distribution of relevant legislative powers between levels of government
- the legislative schemes for protecting Indigenous peoples' rights and interests, including processes for identifying, recognising, protecting and exercising them
- the extent of areas of land and waters in which Indigenous peoples have legally recognised interests, and the natural resources in those areas
- whether natural resources (such as minerals) are privately owned or are owned by the state
- the number of Indigenous people as a proportion of the total population and their political influence at various levels of government.

Such a range of factors will influence what is being done (or could be done) from place to place and from time to time. Any comparison between countries, or assessment of what has been achieved in a particular country, must bear such factors in mind.

### (b) International law and human rights standards

International law can also provide some basis for assessment.

The development of the common law on native title in Australia was influenced by international law. In the lead judgment in *Mabo v Queensland (No 2)*, Justice Brennan noted that the common law does not necessarily conform with international law, but international law is 'a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'. In his view, a common law doctrine founded on 'unjust discrimination in the enjoyment of civil and political rights demands reconsideration'. He concluded that, if it were permissible in past centuries to keep the common law in step with international law, 'it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination'. Accordingly, an 'unjust and discriminatory doctrine', such as that of *terra nullius* 'can no longer be accepted'.<sup>235</sup>

The preamble to the Native Title Act recites that the Australian Government has acted to protect the rights of all its citizens, and in particular its Indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms.<sup>236</sup>

The Native Title Act is intended to be a 'special measure' for the purposes of Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination and the *Racial Discrimination Act 1975* (Cth).<sup>237</sup>

There have, however, been arguments domestically<sup>238</sup> and internationally that aspects of the Native Title Act are in breach of the international convention.<sup>239</sup>

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<sup>235</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 41-42.

<sup>236</sup> The preamble recites that such action has occurred through the ratification of the International Convention on the Elimination of All Forms of Racial Discrimination and other standard-setting instruments such as the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights; and the enactment of legislation such as the *Racial Discrimination Act 1975* (Cth) and the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

<sup>237</sup> *Native Title Act 1993* (Cth) s 7(1).

<sup>238</sup> See, for example, N Pearson, 'Where we've come from and where we're at with the opportunity that is Koiki Mabo's legacy to Australia', *Mabo Lecture*, June 2003.

The Act expressly provides for that critique by requiring that each year the Aboriginal and Torres Strait Islander Social Justice Commissioner prepare and submit a report to the Commonwealth Minister on the operation of the Act and the effect of the Act on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders.<sup>240</sup>

## 9. FUTURE TRENDS:

It is a risky venture to try to predict future trends in the volatile area of native title law and practice. However, events and outcomes in recent years suggest that the following observations can be made with reasonable confidence:

- The volume of native title work will increase – not only because there are hundred of native title applications to deal with but because, as native title rights are established, more people will have procedural rights to be involved in negotiations about a wide range of proposed land uses.
- Agreement making will become the usual method of resolving native title issues – be they claimant applications or land use proposals.
- The form and content of agreements will vary from place to place, having regard to local circumstances, including variations in laws and policies in different states and territories.
- Timeframes for negotiating agreements should, on average, be reduced as parties become more experienced in negotiations and the scope of potential outcomes becomes more predictable in light of increased certainty about the law and knowledge about agreements previously negotiated on similar subjects.
- There will be an increased focus on ‘second generation’ issues – such as what happens after a determination of native title is made or an Indigenous land use agreement is registered.
- The level of resources available to the parties – principally money, qualified individuals and time – will directly affect the pace and quality of agreement making.
- The Federal Court will continue to affect, if not drive, native title processes.
- There will be an increased focus on who can have access to and use information generated in relation to native title matters – including connection reports and commercial agreements.
- Land planning, land access and land use laws may need to be revised or refined to fit within the overall native title regime.
- International legal developments, particularly in the human rights arena, will continue to be relevant to native title law and practice.

## 10. CONCLUSION

It is more than a decade since the *Native Title Act 1993* commenced to operate, and 12 years since the historic High Court judgment in *Mabo v Queensland (No 2)*.<sup>241</sup>

The law is complex and developing. Although there has been little new native title legislation in recent years (and very few amendments to the Native Title Act since 1998), adjustments have been made to state legislation to take account of the Native Title Act and a steady stream of judgments continues to flow from the Federal Court.

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<sup>239</sup> See various *Native Title* reports by the Aboriginal and Torres Strait Islander Social Justice Commissioner, and the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund.

<sup>240</sup> *Native Title Act 1993* (Cth) s 209.

<sup>241</sup> (1992) 175 CLR 1.

Although the numerous judgments and pieces of legislation in that period have provided greater clarity about many issues, native title remains a difficult and demanding area of law.

Most parties to native title proceedings (particularly native title claim groups and governments) would prefer negotiated rather than litigated outcomes. Although court cases are sometimes desirable or even necessary to authoritatively decide outstanding questions of fact or law, native title litigation is an uncertain and expensive exercise, the outcomes of which will not necessarily satisfy the parties (and may result in appeals). Whatever the results, judgments will not specify the day-to-day, on-the-ground operations that will give effect to any determination that native title exists over a particular area of land or waters.

Agreement-making is increasingly the method for dealing with native title issues, whether they arise from claimant applications or proposed future acts (such as the grant of mining tenements) and agreement-making – particularly in relation to determinations of native title – must be informed by the current state of the law.<sup>242</sup>

But agreements need not be confined to what the law says may be contained in a determination of native title. Indeed, given the legal requirements for such determinations, many Indigenous groups may not obtain them. The challenge is to develop agreements that:

- meet the reasonable aspirations of the parties; and
- are expressed in ways that ensure their long term effectiveness.

Parties can choose from a suite of options to develop something that meets their local circumstances. These may include determinations of native title, ILUAs, and/or non native title components such as grants of title to land.

As more agreements are negotiated over a wider range of subjects, people can draw on a greater body of knowledge and experience to see what might meet their needs and aspirations and what structures might be adopted to ensure that the agreement operates effectively after the ink on the signatures is dry.

The National Native Title Tribunal has a role to play at each stage of the process. We work with people ‘to develop an understanding of native title and reach enduring native title and related outcomes’. By assisting to negotiate such agreements, we work towards achieving our vision of ‘an Australia where native title is recognised, respected and protected through just and agreed outcomes’.<sup>243</sup>

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<sup>242</sup> For example, any description of the ‘nature and extent of the native title rights and interests in relation to the determination area will be prepared having regard to the rights and interests that are recognised by the common law of Australia: *Native Title Act 1993* ss 223(1)(c), 225(b).

<sup>243</sup> National Native Title Tribunal *Strategic Plan 2003-2005*.

## LAND RIGHTS LEGISLATION – AN OVERVIEW

The range of land rights legislation in various states and territories of Australia<sup>244</sup> reflects, among other things, the different circumstances of Indigenous communities and the different historical events that shaped each statute. It is possible, however, to make some comparison of the various regimes by asking the following questions:

- What land is available for grant or claim?
- What is the basis on which a group of people can claim or be granted those areas of land?
- What is the process for claiming or granting land?
- What form of title to land is granted?
- Who holds the title and on whose behalf is it held?
- What restrictions are there on access to, and dealings with the title to, land?
- What rules apply to the use of the land, including for exploration and mining?
- What other special features apply to the land rights schemes?

In 1996 South Australia was the first state in Australia to enact Aboriginal land rights legislation.<sup>245</sup> It created the Aboriginal Lands Trust of South Australia for three purposes:

- to secure title in the existing Aboriginal reserves to Aboriginal people
- to have a body to which statutory royalties from mineral exploitation on reserve land could be paid and used for the acquiring of further land
- to have a body to which funds could be provided so that the lands vested in it could be developed.

Land rights legislation does not breach the *Racial Discrimination Act 1975* (Cth) because:

- in the case of Commonwealth legislation after 1975, the later legislation prevails to the extent of the inconsistency,<sup>246</sup> or
- more generally, because it is a ‘special measure’ to which the *International Convention on the Elimination of All Forms of Racial Discrimination* Article 1(4) applies and consequently the *Racial Discrimination Act 1975* (Cth) Part II does not apply.<sup>247</sup>

***Land available for claim or grant:*** Land rights legislation usually identifies categories of land which will be granted or which may be claimed for possible grant.

<sup>244</sup> The various land rights statutes are described in detail in *Halsbury’s Laws of Australia*, Butterworths, volume 1(1), Aboriginals and Torres Strait Islanders.

<sup>245</sup> *Aboriginal Lands Trust Act 1966* (SA).

<sup>246</sup> *Pareroultja v Tickner* (1993) 42 FCR 32; 117 ALR 206 pp 220-222.

<sup>247</sup> *Racial Discrimination Act 1975* (Cth) s 8; *Pareroultja v Ticker* (1993) 42 FCR 32; 117 ALR 206 at 220-224. See also *Gerhardy v Brown* (1985) 159 CLR 70; 57 ALR 472, 59 ALJR 311. The preamble to the *Native Title Act 1993* recites that the Act is ‘intended ... to be a ‘special measure’ for the advancement and protection of Aboriginal peoples and Torres Strait Islanders’ and s 7(1) states that the Act ‘is intended to be read and construed subject to the provisions of the *Racial Discrimination Act 1975*’. Note also that the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) recite that it is ‘the intention of the Parliament to make provision, by the special measures enacted by this Act, for the adequate and appropriate recognition of the interests and responsibilities’ of the relevant peoples ‘in relation to land and thereby to foster the capacity for self-development, and the self-reliance and cultural integrity’ of those peoples.

Those categories include:

- Aboriginal reserves or former Aboriginal reserves, and other reserves or areas of historic or cultural significance<sup>248</sup>
- former Aboriginal Lands Trust land<sup>249</sup>
- unalienated Crown land (that is, Crown land in which no person other than the Crown has an estate or interest)<sup>250</sup>
- Crown lands that are reserved or dedicated, but are not lawfully used or occupied and are not likely to be needed as residential lands or for an essential public purpose<sup>251</sup>
- land in which all estates and interests not held by the Crown are held by or on behalf of Aboriginal people (e.g. Aboriginal owned pastoral leases)<sup>252</sup>
- identified national parks<sup>253</sup>
- parts of pastoral leases to be used as community living areas<sup>254</sup>
- other areas specified or declared to be available for grant, transfer or claim.<sup>255</sup>

**Basis for claim or grant:** The basis on which land is granted or may be claimed by Indigenous groups varies between jurisdictions around Australia, reflecting something of the history of Indigenous communities in those jurisdictions since European settlement commenced.

In some areas land is granted to, or may be claimed by people who have traditional links to the land which entitle them to use, control and occupy the land.<sup>256</sup> Such people are variously described as the ‘traditional Aboriginal owners’ of the land or people who have ‘traditional affiliations’ to the land. Those terms are defined in legislation using words that attempt to describe the nature of the links between people and land as they understand those links under their traditional laws. So, for example, in the Northern Territory ‘traditional Aboriginal owners’ are defined to be ‘a local descent group of Aboriginals who ... have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land, and ... are entitled by Aboriginal tradition to forage as of right over that land’.<sup>257</sup>

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<sup>248</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 3, 4, 10, 12, Schedules 1-4; *Aboriginal Land Act 1991* (Qld) ss 12-16; *Torres Strait Islander Land Act 1991* (Qld) ss 10-13; *Aboriginal Lands Trust Act 1966* (SA) s 16(1); *Aboriginal Lands Act 1995* (Tas) ss 27, 38, 39, Schedules 3, 4; *Aboriginal Lands Act 1970* (Vic) s 9, Schedules 1, 2; *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth); *Aboriginal Lands Act 1991* (Vic); *Aboriginal Land (Manatunga Land) Act 1992* (Vic).

<sup>249</sup> *Aboriginal Land Rights Act 1983* (NSW) s 36(1).

<sup>250</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* ss 3, 50; *Land Administration Act 1997* (WA).

<sup>251</sup> *Aboriginal Land Rights Act 1983* (NSW) s 36(1)

<sup>252</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 3, 50.

<sup>253</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981* (NT); *Parks and Reserves (Framework for the Future) Act 2003* (NT); *Aboriginal Land Act 1991* (Qld) ss 24, 83; *Torres Strait Islander Land Act 1991* (Qld) ss 21, 80. *Pastoral Land Act 1992* (NT).

<sup>254</sup> *Aboriginal Land Act 1991* (Qld) ss 12-16; *Torres Strait Islander Land Act 1991* (Qld) ss 11-13 (**check**); *Pitjantjatjara Land Rights Act 1981* (SA) s 4, Schedule 1; *Maralinga Tjarutja Land Rights Act 1984* (SA) s 13, Schedules 1, 2; *Aboriginal Land (Northcote Land) Act 1989* (Vic); *Aboriginal Land (Manatunga Land) Act 1992*

<sup>255</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981* (NT) Preamble; *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld); *Pitjantjatjara Land Rights Act 1981* (SA) (and see discussion in *Gerhardy v Brown* (1985) 159 CLR 70, 57 ALR 472); *Maralinga Tjarutja Land Rights Act 1984* (SA); *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth).

<sup>256</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 3(1). Under the *Aboriginal Land Act 1991* (Qld) s 53 a claim based on ‘traditional affiliation’ is established if the Land Tribunal is satisfied that the

In Queensland, some areas can be claimed on the basis that people have ‘historical association’ with the land<sup>258</sup> or that it is needed for the ‘economic or cultural viability’ of the group.<sup>259</sup>

In Tasmania, areas of historic or cultural significance have been granted to promote reconciliation with the Tasmanian Aboriginal community.<sup>260</sup>

In New South Wales the legislation has cultural and economic purposes. It is beneficial and remedial legislation, designed to give important rights to the representatives of the Aboriginal people who have suffered substantial injustice and loss consequent upon the deprivation of their land following the settlement of Australia. Although its preamble recognises the traditional ownership and occupation of land by Aboriginals; the spiritual, social, cultural and economic importance of land to them; and their need for land; the concept of land rights in New South Wales has little to do with restoring land to Aboriginal people that has traditional or religious significance to them. Rather, it is concerned with improving Aboriginal self-sufficiency and economic well-being.<sup>261</sup>

**Process for grant or claim:** In some parts of Australia areas of land (such as former Aboriginal reserves or vacant Crown land, other reserves, or areas of historic or cultural significance) have been granted to, or vested in, the relevant body.<sup>262</sup>

In other areas groups of people claim specified areas or categories of land and their claims are:

- assessed by a tribunal which, if satisfied that the statutory criteria are satisfied, recommends the grant of the land<sup>263</sup> or
- assessed by the relevant Minister<sup>264</sup> and, if successful, title is granted.

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members of the claimant group have a common connection with the land based on spiritual and other associations with, rights in relation to, and responsibilities for, the land under Aboriginal tradition.

<sup>258</sup> *Aboriginal Land Act 1991* (Qld) s 54; *Torres Strait Islander Land Act 1991* (Qld) s 51. A claim on the ground of ‘historical association’ is established if the Land Tribunal is satisfied that the group has an association with the land based on them or their ancestors having, for a substantial period, lived on or used the land or land in the district or region in which the land is located.

<sup>259</sup> *Aboriginal Land Act 1991* (Qld) s 55; *Torres Strait Islander Land Act 1991* s 52. A claim on the ground of ‘economic or cultural viability’ is established if the Land Tribunal is satisfied that granting the claim would assist in restoring, maintaining or enhancing the capacity for self-development, and the self-reliance and cultural integrity, of the group.

<sup>260</sup> *Aboriginal Lands Act 1995* (Tas) long title.

<sup>261</sup> *Aboriginal Land Rights Act 1983* (NSW) preamble, s 3(a); *Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154 at 157; 62 LGRA 409 at 411; *New South Wales Aboriginal Land Council v Minister Administering Council Lands (the Winbar Claim (No 2))* (1988) 64 LGRA 240 at 244; *Briggs v Lockwood* (1998) 98 LGERA 186 at 191-192; *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Department of Education Claim)* (1992) 76 LGRA 192 at 194.

<sup>262</sup> *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) s 10; *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Aboriginal Land Rights Act 1983* (NSW) s 35 (repealed); *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld); *Aboriginal Lands Trust Act 1966* (SA); *Pitjantjatjara Land Rights Act 1981* (SA); *Maralinga Tjarutja Land Rights Act 1984* (SA); *Aboriginal Lands Act 1995* (Tas) ss 27, 38, 39, Schedules 3, 4; *Aboriginal Lands Act 1970* (Vic); *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth); *Aboriginal Land (Northcote Land) Act 1989* (Vic); *Aboriginal Lands Act 1991* (Vic); *Land Administration Act 1997* (WA).

<sup>263</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld).

<sup>264</sup> *Aboriginal Land Rights Act 1983* (NSW) ss 36, 36A.

Where a tribunal recommends that land be granted, it will usually have to advise on the Minister about the potential benefits of that grant to the relevant group of Aboriginal people and the detriment (if any) to others.<sup>265</sup> This allows the government to assess the implications of the proposed grant, a decision which is ‘pregnant with political controversy’.<sup>266</sup>

In addition to granting title to or interests in the land, the Crown may also reserve areas of land for Aboriginal inhabitants<sup>267</sup> or acquire land by agreement or compulsory process and transfer the land to a body established for the benefit of Aborigines.<sup>268</sup>

**Form of title:** In most places freehold (or fee simple) title is granted.<sup>269</sup> Freehold title is the most complete form of title to land under Australian law and is close to total ownership.

In some instances a lease over the land is granted.<sup>270</sup>

**Who holds the title and on whose behalf is it held:** Title granted under such legislation is usually held by, or vested in, a body comprising people from the relevant Aboriginal community such as an Aboriginal Community council,<sup>271</sup> land council<sup>272</sup> or land trust<sup>273</sup> or other corporate body<sup>274</sup> which holds the land in trust for the relevant Aboriginal people, and is to act in the interests of those people in relation to the land.

The title holding body may hold the land for a large and diverse group. For example Aboriginal land in the Northern Territory is held for ‘the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land concerned, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose, or permission’.<sup>275</sup>

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<sup>265</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* s 50(3); *Aboriginal Land Act 1991* (Qld) s 60(5); *Torres Strait Islander Land Act 1991* (Qld) s 57(5).

<sup>266</sup> *R v Toohey; Ex parte Meneling Station Pty Ltd* (1987) 158 CLR 327 at 362; 44 ALR 63 at 91 per Brennan J.

<sup>267</sup> *Crown Lands Act 1992* (NT) ss 76-82; *Land Act 1994* (Qld) ss 3, 31(1), Schedules 1, 6, see also ss 30, 32-34.

<sup>268</sup> *Aboriginal Land Rights Act 1983* s 39; see also former ss 50, 52, 53.

<sup>269</sup> E.g. *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) ss 10, 55; *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 3(1), 10, 11, 12; *Pastoral Land Act 1992* (NT) ss 98, 108-111; *Aboriginal Land Rights Act 1983* (NSW) s 36(9); *Aboriginal Land Act 1991* (Qld) ss 27, 29, 30, 60, 63, 66, 69; *Torres Strait Islander Land Act 1991* (Qld) ss 25, 27, 28, 57, 60, 63, 66; *Aboriginal Lands Trust Act 1966* (SA) s 15(1); *Pitjantjatjara Land Rights Act 1981* (SA) s 15(1); *Maralinga Tjarutja Land Rights Act 1984* (SA) s 13; *Aboriginal Lands Act 1970* (Vic) s 9; *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) ss 6,7; *Aboriginal Land (Northcote Land) Act 1989* (Vic); *Aboriginal Lands Act 1991* (Vic); *Land Administration Act 1997* (WA) s 83(3); *Aboriginal Affairs Planning Authority Act 1972* (WA) s 83(1).

<sup>270</sup> *Aboriginal Land Rights Act 1983* (NSW) s 36(9), 36(9A), 36(9B), a lease in perpetuity over land to which the *Western Lands Act 1901* (NSW) applies; *Aboriginal Land Act 1991* (Qld) ss 60, 64, 66, 68, 70 and *Torres Strait Islander Land Act 1991* (Qld) ss 57, 61, 63, 65, 67 – a lease in perpetuity, or a lease for a specified term of years is granted if a claim is established on the grounds of economic or cultural viability.

<sup>271</sup> *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* ss 4-6, 15-36, 50, 52.

<sup>272</sup> *Aboriginal Land Rights Act 1983* (NSW); *Aboriginal Lands Act 1995* (Tas) s 27.

<sup>273</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 4, 5, 7, 10, 12; *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981* (NT) s 5; *Parks and Reserves (Framework for the Future) Act 2003* (NT) ss 4, 9; *Aboriginal Land Act 1991* (Qld) ss 28, 29, 65; *Torres Strait Islander Land Act 1991* (Qld) ss 26, 27, 62; *Aboriginal Lands Trust Act 1966* (SA) ss 5-16; *Aboriginal Affairs Planning Authority Act 1972* (WA).

<sup>274</sup> *Pitjantjatjara Land Rights Act 1981* (SA) ss 4-15; *Maralinga Tjarutja Land Rights Act 1984* (SA) ss 4-13.

<sup>275</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 4(1), see also s 11(4).

Some land in Queensland is held for the benefit of Aboriginal people or Torres Strait Islanders generally (and their ancestors and descendants)<sup>276</sup> while other areas are held for the benefit of specified persons or classes of persons.<sup>277</sup>

**Restrictions on access to land:** Public access to much Aboriginal land is restricted. In some places, certain classes of people may enter and others need a permit to enter and remain on the land unless they are on the land for specified purposes<sup>278</sup> or people can have access to places that the relevant Minister has declared are places to which the public is to have a right of access<sup>279</sup> or where relevant laws provide that all or part of the land is a public place.<sup>280</sup>

In other areas, the general law of trespass applies subject to certain modifications under relevant statutes.<sup>281</sup>

**Restrictions on land use:** There are specific procedures for exploration and mining on Aboriginal land, usually requiring the agreement or consent of the relevant Aboriginal people or body.<sup>282</sup>

Some laws require that amounts equivalent to the amounts paid to the Crown by way of fees or royalties for mining on that land (or some proportion of those amounts) be paid to the relevant Aboriginal peoples or their corporate bodies.<sup>283</sup>

**Ownership of minerals:** As a general rule, the Crown<sup>284</sup> owns the minerals and petroleum on and under the land. There is general legislation to that effect.<sup>285</sup> Some land rights legislation states that minerals are excluded from any grant of title or that rights to those minerals remain

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<sup>276</sup> *Aboriginal Land Act 1991* (Qld) ss 10-11, 27-28; *Torres Strait Islander Land Act 1991* (Qld) ss 9-10, 25-26.

<sup>277</sup> *Aboriginal Land Act 1991* (Qld) ss 63, 64; *Torres Strait Islander Land Act 1991* (Qld) ss 60, 61.

<sup>278</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* ss 70, 71, 73(1)(b); *Aboriginal Land Act 1978* (NT); *Pitjantjatjara Land Rights Act 1981* (SA) ss 18, 19; *Aboriginal Affairs Planning Authority Act 1972* (WA)

<sup>279</sup> *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) ss 48, 49. (See also *Gerhardy v Brown* (1985) 159 CLR 70, 57 ALR 472); *Maralinga Tjaritja Land Rights Act 1984* (SA) ss 17, 18; *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth).

<sup>280</sup> E.g. *Land Act 1994* (Qld) s 56; *Aboriginal Lands Act 1995* (Tas) s 27.

<sup>281</sup> E.g. *Aboriginal Land Act 1991* (Qld) ss 26, 82-87, 132; *Torres Strait Islander Land Act 1991* (Qld) s 24, 79-84, 129; *Aboriginal Affairs Planning Authority Act 1972* (WA) s 31.

<sup>282</sup> E.g. *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) s 44; *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) Part IV; *Aboriginal Land Rights Act 1983* (NSW) ss 41, 45; *Aboriginal Land Act 1991* (Qld) ss 87, 131; *Torres Strait Islander Land Act 1991* (Qld) ss 84, 128; *Pitjantjatjara Land Rights Act 1981* (SA) ss 20, 21; *Maralinga Tjarutja Land Rights Act 1984* (SA) ss 21, 22; *Mineral Resources Development Act 1995* (Tas) s 179; *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) s 31.

<sup>283</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 62, 63, see also ss 35, 64, 64A, 65; *Aboriginal Land Rights Act 1983* (NSW) s 46; *Aboriginal Land Act 1991* (Qld) s 88; *Torres Strait Islander Land Act 1991* (Qld) s 85; *Pitjantjatjara Land Rights Act 1981* (SA) ss 21-23; *Maralinga Tjarutja Land Rights Act 1984* (SA) ss 24-26.

<sup>284</sup> The Crown could be the Crown in right of the Commonwealth or the relevant state or territory.

<sup>285</sup> See for example the *Mining Act 1978* (WA) s 9(1) which provides that, in most cases, gold, silver, precious metal and other minerals in their natural condition on or below the surface of the land are the property of the Crown. The *Land Administration Act 1977* (WA) s 24 provides that minerals and petroleum in Crown land are reserved to the Crown and remain so reserved after the Crown land is transferred in fee simple under that Act. The *Mineral Resources Act 1989* (Qld) s 8 provides that gold, most coal and other minerals are the property of the Crown, and every deed of grant or lease of unallocated State land must contain a reservation of minerals on and below the surface of the land and a reservation of the right of access for prospecting, exploring and mining.

with the Crown,<sup>286</sup> although in some instances certain mineral resources are included in the transfer or vesting of land.<sup>287</sup>

**Restrictions on dealings with title:** As a general rule, most Aboriginal and Torres Strait Islander land cannot be sold or mortgaged<sup>288</sup> (it is inalienable freehold title)<sup>289</sup> and there are restrictions on dealings with interests in the land, e.g. by granting leases only in certain circumstances.<sup>290</sup>

Significantly, there are constraints on the relevant level of government acquiring areas of Aboriginal or Torres Strait Islander land. Under some legislation, the State can only acquire the land if a special Act of parliament is passed.<sup>291</sup>

**Limitations on the application of some laws to the land:** Although the general law applies to Aboriginal and Torres Strait Islander land<sup>292</sup> some land rights legislation expressly varies or excludes the operation of specific laws dealing with such things as:

- mining or exploration for minerals<sup>293</sup>
- the payment of rates or taxes in respect of the land<sup>294</sup>
- the payment of stamp duties on the transfer of Aboriginal lands<sup>295</sup>

**Other special features:** Aboriginal land rights legislation in New South Wales provided for annual payments for 15 years of amounts equal to 7.5 per cent of land tax to be paid by the State

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<sup>286</sup> *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) s 14; *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 12(2); 12 (2AA); *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981* s 13(3); *Crown Lands Act 1992* (NT) s 21; *Aboriginal Land Act 1991* (Cth) ss 42, 89; *Torres Strait Islander Land Act 1991* (Qld) ss 39, 7; *Aboriginal Lands Trust Act 1966* (SA) s 16(2); *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* ss 6, 7, 8.

<sup>287</sup> The *Aboriginal Land Rights Act 1983* (NSW) provides that mineral resources (other than coal, petroleum, gold or silver) and other natural resources are included in any transfer, vesting or purchase under that Act: ss 45(2), 45(11), 45(12). See also *Aboriginal Lands Act 1995* (Tas): oil, atomic substances, geothermal substances and helium are not vested in the Aboriginal Land Council of Tasmania.

<sup>288</sup> *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) s 38; *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 19; *Aboriginal Land Rights Act 1983* (NSW) s 40, but see ss 40C, 40D; *Aboriginal Land Act 1991* (Qld) ss 76, 77; *Torres Strait Islander Land Act 1991* (Qld) ss 73, 74; *Pitjantjatjara Land Rights Act 1981* (SA) s 17; *Maralinga Tjarutja Act 1984* (SA) s 15; *Aboriginal Lands Act 1995* (Tas) s 30.

<sup>289</sup> *Murray Meats (NT) Pty Ltd v Northern Territory Planning Authority* (1982) 18 NTR 13 at 15; 51 LGRA 130; 69 FLR 32; *Northern Territory Planning Authority v Murray Meats (NT) Pty Ltd* (1983) 51 LGRA 158; 66 FLR 394; 48 ALR 188 at 190, 209.

<sup>290</sup> *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) s 38; *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 5, 19, 20; *Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981* (NT) ss 16, 39; *Parks and Reserves (Framework for the Future) Act 2003* (NT) ss 4, 9; *Aboriginal Land Act 1991* (Qld) ss 39, 76; *Torres Strait Islander Land Act 1991* (Qld) ss 36, 73; *Aboriginal Lands Trust Act 1966* (SA) s 16; *Pitjantjatjara Land Rights Act 1981* (SA) ss 6, 7; *Maralinga Tjarutja Land Rights Act 1984* (SA) ss 5, 7, 8; *Aboriginal Lands Act 1995* (Tas) s 28; *Aboriginal Lands Act 1970* (Vic) s 11(3).

<sup>291</sup> *Aboriginal Land Rights Act 1983* (NSW) s 42; *Aboriginal Land Act 1991* (Qld) ss 41, 78; *Torres Strait Islander Land Act 1991* (Qld) ss 38, 75; *Pitjantjatjara Land Rights Act 1981* (SA) s 17; *Maralinga Tjarutja Land Rights Act 1984* (SA) s 15; *Land Acquisition Act 1993* (Tas) s 5A.

<sup>292</sup> See e.g. *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) s 46; *Aboriginal Land Rights (Northern Territory) Act 1976* s 74; *Aboriginal Land Act 1991* (Qld) s 26; *Torres Strait Islander Land Act 1991* (Qld) s 24.

<sup>293</sup> *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* ss 43, 44; *Aboriginal Lands Trust Act 1966* (SA) s 16.

<sup>294</sup> *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* s 45; *Land Tax Act 2000* (Tas) s 19(c); *Local Government Act 1993* (Tas) s 87(1)(da).

<sup>295</sup> *Aboriginal Land Rights Act 1983* ss 36(15), 40A(3); *Aboriginal Lands Act 1995* (Tas) s 34.

government into the New South Wales Aboriginal Land Council Account. Some of the money is used for the administration of land councils in that state and some is invested.<sup>296</sup>

Aboriginal organisations may purchase, lease or hold property or may acquire property by gift, devise or request.<sup>297</sup>

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<sup>296</sup> *Aboriginal Land Rights Act 1983* (NSW) s 28(1) (repealed). The period was 1984 to 1998 and the Capital Value of the account as at 31 December 1998 (\$485.3 million) is to be maintained: see ss 149, 150.

<sup>297</sup> E.g. see *Aboriginal Land Rights Act 1983* (NSW) s 38.