

Land, Rights, Laws: Issues of Native Title



Native Titles Research Unit

Australian Institute of Aboriginal and Torres Strait Islander Studies

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NEITHER RIGHTS NOR WORKABILITY: THE PROPOSED AMENDMENTS TO THE RIGHT TO NEGOTIATE

Elizabeth Keith

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The High Court Mabo decision in 1992 and the passing of the Commonwealth Native Title Act in 1993 mark a fundamental shift in the recognition of indigenous rights in Australia. The Act, like the High Court decision on which it is based, transforms the ways in which indigenous ownership of land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation, however, raises a number of crucial issues of concern to native title claimants and to other interested parties.

This paper addresses the likely impact of the introduction of amendments proposed in the Native Title Amendment Bill 1996 on the present right of Aboriginal and Torres Strait Islander people to negotiate native title claims and in relation to 'future acts' over such land. It argues that the proposed amendments are unlikely to achieve the Government's goals.

Liz Keith is a policy officer in the Native Title Unit of the Aboriginal and Torres Strait Islander Social Justice Commissioner. The paper is drawn from analyses of the amendments prepared by the Unit.

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NEITHER RIGHTS NOR WORKABILITY: THE PROPOSED AMENDMENTS TO THE RIGHT TO NEGOTIATE

Elizabeth Keith

Introductory Comments

Under the *Native Title Act* 1993 (Cth) (NTA), persons who have made a native title claim which has been registered by the National Native Title Tribunal (NNTT), and registered native title bodies corporate (which hold native title on trust once a determination has been made) have a 'right to negotiate' about the performance of specified 'future acts', namely:

- acts relating to mining (eg the granting of exploration and production tenements);
- compulsory acquisition of native title rights and interests for the benefit of a third party; and
- acts approved by the Commonwealth Minister.[\[1\]](#)

The NTA sets out a process which must be followed when the right to negotiate scheme applies to a future act. A Government must give notice of the proposed act in a prescribed way, and any native title holders who wish to negotiate about the act must respond to the notice within a certain time. The matter will then proceed to negotiation. If no agreement results within a set time limit, a party to the negotiations may apply to an arbitral body for a determination. The determinations of arbitral bodies may be overruled by the relevant Minister.

During October 1996, the Federal Government proposed amendments to the Native Title Amendment Bill 1996 (Cth). These amendments provide for far-reaching changes to the right to negotiate. The Government has described the purpose of the amendments as being 'to streamline the right

to negotiate processes so that unnecessary delays are eliminated while protecting the legitimate interests of native title holders. [2]

Upon examination, the proposed amendments appear unlikely to achieve either of these ends. Instead, they may bring about the opposite results. The amendments favour the interests of government and industry while dramatically reducing the accessibility of the right to negotiate to native title holders. If native title holders are unable to gain adequate protection of their property rights by utilising the mechanisms in the Act, they will be likely to look to the common law to protect those rights. Such a result will not 'streamline' the future act process - rather, it will lead to greater expense, delay and uncertainty for all stakeholders.

It should be noted at this point that there has been considerable debate as to whether any of the specific amendments to the right to negotiate, or the amendments as a package, discriminate against native title holders in a manner which is contrary to the Racial Discrimination Act 1975 (Cth) (RDA).

It should also be mentioned that the proposed amendments to the NTA include a stringent new registration test which is intended to act as a 'threshold' for access to the right to negotiate process. The test will require native title claimants to provide extensive information relating to their claim within a narrow time limit in order to gain access to the right to negotiate for that particular tenement. An analysis of this complex test is outside the scope of this paper [3]. The registration test must be kept in mind when assessing the full impact of the amendments package on the ability of native title holders to use the right to negotiate as a means for participating in development decisions affecting their property rights. The combination of the amendments to the right to negotiate and the registration test seriously curtail the effective level of protection provided to native title holders by the right to negotiate.

The discussion below outlines some of the major proposals for amendment to the right to negotiate, and considers the compatibility of these proposals with the two aims outlined above - reduction of delay and the protection of native title rights.

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Removal of exploration, prospecting and fossicking from the right to negotiate

The Government initially proposed to entirely remove the grant of exploration titles from the right to negotiate [4]. However, it has now conceded that there are 'practical difficulties' involved in such an approach [5]. Without the right to negotiate, native title holders would be compelled to rely on the procedural protections provided to freeholders (which the RDA would ensure that they enjoyed) which in some States incorporate a limited right of veto [6].

Instead of pursuing wholesale exclusion, the Government has developed a mechanism which is designed to facilitate the exclusion from the right to negotiate process of State and Territory procedures for the granting of exploration titles.

Under the proposed mechanism, the Commonwealth Minister would be able to approve acts for exclusion from the right to negotiate provisions where:

- the acts are 'unlikely to have a significant impact on land or waters'; and
- there is a legislative or administrative scheme in place in the relevant State or Territory which will ensure that native title holders:
 1. have a right to be notified,
 2. have the same right to be heard by an independent person or body as any other interest holder, and,
 3. are consulted by the miner or developer about access, site protection and the way in which the act is to be done, for the purpose of minimising the impact of the act on the area and the exercise of their rights; and
- relevant representative bodies are notified and given a chance to make submissions [7].

Removing negotiation at the exploration stage may decrease the likelihood of parties reaching agreement about the more complex issues involved in production, thus causing a greater number of production proposals to be resolved by arbitration or Ministerial intervention. It is therefore possible that any advantage in time achieved by removing the right to negotiate at the exploration stage will be lost during the production stage.

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Procedural rights of native title holders

The proposed scheme ensures that native title holders will have certain specific procedural rights where an exclusion from the right to negotiate is granted - that is, a right to be notified and to make submissions, a right to be heard by an independent person or body (if other title holders have such a right) and a right to be consulted by the developer. At the same time, however, an amendment to s.23(6) specifically removes a guarantee that native title holders will have the same procedural protections as ordinary title holders [8] in relation to acts excluded from the right to negotiate under this mechanism.

This clearly constitutes a failure to protect the property rights of native title holders, and is inconsistent with the Racial Discrimination Act 1975 (Cth) (RDA), breaching the Government's undertaking to respect that Act. At the very least, in order to remain consistent with the RDA, it must be ensured that the procedural rights of native title holders do not fall below those provided to people holding ordinary title. The rights of ordinary title holders may extend beyond those set out in the exclusions mechanism. For example, where ordinary title holders have an ability to veto the grant of an exploration licence (which they do in some States [9]), native title holders must have an equivalent ability in order for consistency with the RDA to be maintained.

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State legislative/administrative schemes

Proposed s.26A(4) requires the Minister to be satisfied that the relevant State or Territory legislative or administrative schemes will ensure that native title holders have certain rights. State planning, environmental and heritage legislation is presumably expected to protect the property rights of native title holders in the absence of the right to negotiate. Compelling native title holders to rely on such procedures to protect their rights and interests may well result in significant injunctive action, with consequent delays. It is difficult to see how this will enhance the 'workability' of native title procedures.

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'Significant impact on land or waters'

The new mechanism states that acts cannot be excluded from the right to negotiate unless they are 'unlikely to have a significant impact on land or waters' [10].

Proper protection of native title requires the protection of the title, not just the protection of land and waters per se. The current provisions of the Act are therefore necessary, stating that the Minister must consider that an act excluded from the right to negotiate will have 'minimal impact on any native title concerned' [11]. The approach taken in the proposed amendments ignores the potential for native title to be affected by people entering or behaving inappropriately in areas of significance or by their dealing in a culturally inappropriate way with native title holders, even though the degree of physical impact on the land or waters is low. Critically, the proposal ignores the spiritual attachment of native title holders to their land and waters [12].

Proposed s.26A(2) states that if the exclusion relates to a **single** act, the Minister must take account of the impact of the particular act on the actual land or waters which would be affected; whereas if it relates to a **class** of acts, the Minister need only be satisfied in general terms that such grants would be 'unlikely to have a significant impact on land or waters' [13]. The process for excluding classes of acts is of great concern, as the potential impact of a certain kind of act on native title may vary greatly depending on where the act is to be performed.

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Consultation by miners

The new provisions state that, in order for exclusion to occur, the relevant State or Territory scheme must require the miner or developer to 'consult' with native title holders about various matters [14]. This requirement fails to provide any real protection to native title holders, who have no means of ensuring that adequate consultation takes place, or that miners and developers implement the recommendations arising from such consultations.

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MINISTERIAL INTERVENTION

Early Ministerial intervention

It is proposed that at any time after the end of the three month notification period set down in the right to negotiate the relevant Minister shall be able to intervene to make a determination, if the Minister considers that:

- the act will be of 'substantial economic benefit to Australia';
- this economic benefit will be substantially reduced or will not arise if a determination is not made at that time;
- if the act is done, there will be significant benefits to the native title holders in relation to the land or waters concerned; and
- it is in the national or State/Territory interest to make a determination at that time.

This amendment clearly undermines the right to negotiate process, and greatly increases the opportunity for development to be quarantined from negotiations. The condition that the act provide 'significant benefits' to native title holders would permit the go-ahead to be given to projects providing financial rewards regardless of any detrimental impact on native title itself or on the groups to whom that title belongs. Further, where State governments have created native title regimes, State Ministers will be able to authorise projects on the basis of 'economic benefit to Australia'.

Use of the intervention mechanism is bound to lead to challenges to the Minister's interpretation of the provision. Indigenous parties may feel that their native title is placed in such jeopardy by ministerial 'green lighting' of acts that they have no alternative to legal action.

It is notable that when industry and Indigenous representatives met during June 1996 to discuss the amendments in discussions organised by the Council for Aboriginal Reconciliation, the published outcomes included a joint statement of concern about the proposal for Ministerial intervention [\[15\]](#). It is also significant that prior to this meeting RTZ-CRA's Century Zinc had rejected the Federal Government's offer of special legislation to authorise a mining project on land under native title claim in the Gulf of Carpentaria. The company realised that agreement, not the exercise of executive power, is the most solid foundation for large scale, long term projects. It also understood that premature ministerial intervention is simply not required in order for the future act processes to be workable, provided that they are initiated in a timely fashion.

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Intervention after consideration by arbitral body

It is proposed that at the end of the notification period the 'relevant Minister' will be able to set a time limit of not less than four months within which the arbitrator must make a determination. The Minister will be able to intervene to make a determination if this time limit is not met, where the Minister believes that the body is 'unlikely to make its determination within a reasonable period' and that intervention is in the national and or State/Territory interest [\[16\]](#).

In a submission to the Parliamentary Joint Committee on Native Title, John Basten QC explained the inappropriateness of the power to intervene, as

follows:

Future acts will usually involve development activities in particular States and Territories, which will often be treated as requiring expeditious treatment by the government of the State or Territory concerned. That government will also be a party to negotiations. Giving a Minister of such a government a power to intervene in circumstances which will readily be fulfilled and a power to make a determination untrammelled by the criteria to be considered by the Tribunal, is to allow the negotiation process to be sidestepped by one party. The role of the independent arbiter is thus severely undermined. The possibility of such intervention will have a chilling effect on all negotiations... Any party which believes its interests are more likely to be met by a relevant Minister is likely to resist reaching a negotiated agreement on terms less favourable than those it expects from the Minister... [17].

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APPLICATION OF THE RIGHT TO NEGOTIATE ON A 'ONCE ONLY' BASIS

Various measures have been proposed which aim to ensure that the right to negotiate will apply only once during the life of a project.

Removal of the right to negotiate from renewal, re-grant or extension of mining titles

Under the amendments tabled in October, any mining titles [18] which have been issued since the commencement of the NTA under the right to negotiate process would be exempted from the right to negotiate when they are renewed, re-granted or extended. Previous amendments tabled in May of 1996 permit the renewal, re-grant or extension of mining titles granted **before** the commencement of the NTA to take place outside the right to negotiate process. If these various amendments are passed, native title holders will never have a right to negotiate on the renewal, re-grant or extension of mining titles affecting their traditional lands, regardless of the impact or length of these titles.

In many jurisdictions mining titles do not contain legally enforceable rights of renewal. Consequently, the renewal, re-grant or extension of such titles lies within the relevant Minister's discretion. The amendments give rise to a situation in which the mere expectations of mining companies are clearly favoured above the protection of native title holders' property rights.

The proposed amendments will 'shift the goalposts' in relation to any agreements which have been reached in circumstances where all parties assumed that further negotiations would take place on renewal, re-grant or extension of the titles.

Mining titles are often of extremely long duration, with standard renewal periods of similar length. Although negotiation takes place when the title is first issued, circumstances may change considerably during the life of a project. A mine may have a greater or different impact on native title than

can be anticipated at the initial negotiation stage. For this reason, native title holders must be able to negotiate the terms on which a title is extended and renewed.

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Exploration permits

In circumstances where exploration is not excluded from the right to negotiate under the mechanism outlined above, the amendments provide that there would be only one right to negotiate at the exploration stage, if the agreement or determination developed at the exploration stage included conditions relating to production.

These amendments would lead to 'once only' negotiations over projects which are in very early stages of development and which may be contingent on the outcome of exploration. This would compromise the ability of both native title holders and industry to take a practical and informed approach to negotiations. Further, the amendment allows the arbitral body to impose conditions about production while making a determination about exploration. The Minister could do likewise in the course of overruling a determination. Despite the fact that these conditions may prove to be unsuitable for any production scheme which ultimately arose, their existence would remove the need for negotiation at the production stage [\[19\]](#).

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TIME LIMITS ON NEGOTIATION AND ARBITRATION

At present, negotiation and arbitration periods are four months where an exploration or other licence is proposed and six months in other cases. The negotiation time frames have the potential to cause significant difficulties for native title claimants, who are often widely dispersed and economically disadvantaged. It is now proposed that there will be a time limit of four months for all negotiation. Arbitration is to occur as soon as practicable.

At present, the negotiation period commences at the time that notice of the proposed act is given by the relevant government party under s.29. Under the proposed amendments, claimants not already registered must then have become registered within three months of the s.29 notice in order to gain the right to negotiate. Due to the considerable work involved in responding to future act notices, it will, realistically, often take longer than this for a claim to be organised and lodged. Indeed, if the onerous new registration test is enacted, most claimants will find it extremely difficult to compile registrable claims within the three month time period. Where, against the odds, claims are lodged within time, they are most likely to be registered just inside the three month period. This will potentially leave a period of **one month** after lodgement during which negotiation can take place. The prospects of anything productive resulting from this are remote, taking into account the number of parties, the distances, and the complexity of the issues which may be involved in large scale mining

projects [20]. As the Cape York Land Council has explained:

This proposal is particularly regressive when the government has simultaneously increased the potential scope for negotiations. Allowing 30 days for a 'once only' negotiation of an agreement for a mine which might involve a bundle of project acts, which might have a life of 50-100 years and where there is no second chance at the renewal stage is a sick joke. It could render the obligation to negotiate in good faith almost meaningless [21].

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THE EXPEDITED PROCEDURE AND INTERFERENCE WITH COMMUNITY LIFE

In order to attract the 'expedited procedure' and potentially avoid the right to negotiate process, a relevant future act must not 'directly interfere with the community life' of native title holders [22]. It has been held by the Federal Court in *Ward v Western Australia* [23] that in determining whether such interference may occur, the impact of proposed acts on a community's spiritual attachment to land is a relevant consideration. It is now proposed to amend the Act so that the only kind of 'interference' which is relevant is direct physical interference with the community life of native title holders.

This proposal has received strong criticism from the Aboriginal and Torres Strait Islander Social Justice Commissioner, who has said that it:

...completely fails to understand the nature of native title as defined by the High Court in the *Mabo* decision. It shows a total lack of comprehension and respect for Indigenous culture, and trivialises Indigenous attachment to land. Spirituality lies at the heart of native title [24].

It has been argued that the amendment is inconsistent with the Government's obligations under the RDA and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) to eliminate racial discrimination in the enjoyment of human rights such as freedom of religion and participation in cultural activities. It has also been argued that it runs contrary to Article 27 of the International Covenant on Civil and Political Rights, which provides that minorities shall not be denied the right to enjoy their own culture and religion [25]. It may, therefore, attract challenges at the international level.

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OBLIGATION TO NEGOTIATE IN GOOD FAITH

Duty of all parties to negotiate in good faith

The Federal Court has found that under s. 31(1)(b) of the NTA, the National Native Title Tribunal's (NNTT's) jurisdiction to arbitrate does not arise unless the Government party has negotiated in good faith [26]. It is now proposed to require all parties to negotiate in good faith, while

providing that the NNTT must arbitrate where the party applying for a determination has negotiated in good faith, even where other parties have not done so.

These provisions could potentially be manipulated in a manner which would hobble the negotiation process and see matters 'fast tracked' to arbitration. As explained by John Basten QC:

Protection would be available if the amendment ..read: (1A) The arbitral body shall not make a determination that the act may be done unless satisfied that the Government and grantee parties each negotiated in good faith as required by s. 31(1)(b). The absence of such protection, particularly in combination with the Ministerial intervention power in s.36A [allowing intervention where arbitral body determinations are 'unreasonably delayed'] could allow the complete subversion of the negotiation process. The mere existence of such a power would affect the perceived bargaining positions in an unacceptable manner [27].

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The subject matter of 'good faith' negotiations

It is also proposed to define the scope of good faith negotiations, so that a refusal to negotiate about matters 'unrelated to the effect of the act on the determined or claimed native title' cannot constitute a failure to negotiate in good faith [28].

Again, problems with this proposal have been outlined by John Basten QC:

At the very least, there is a danger that the terminology adopted will discourage imaginative solutions to disputes. It is quite plausible and appropriate that, if the proposed act is the establishment of a mine, Indigenous people might wish to negotiate a level of employment. Arguably, such issues are unrelated to the effect of the mine on native title as such, and hence would not be part of the good faith negotiation process under the proposed amendment. Surely such a result cannot have been intended?

Furthermore, the phraseology directs attention away from a pragmatic resolution of differences and directs it towards that matter which cannot be resolved before a determination of native title has been made, namely the precise native title rights and interests existing [29].

The proposed limitation of the scope of negotiations runs contrary to existing provisions in the NTA. Section 33, for example, permits negotiations (although not arbitration) to include the possibility of native title holders being entitled to royalty-type payments. Additionally, an arbitral body attempting to make a determination under the present Act is required to take into account a wide range of considerations, which go beyond 'the effect of the proposed act on native title rights and interests' [30].

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CO-EXISTING RIGHTS

According to the Government's outline, concern exists about non-Indigenous parties being required to negotiate where native title holders have claimed to have a right to exclusive possession, while '[i]t may be apparent...from the nature of the other interests in the land in question... or previous legislative action that the native title rights and interests must be something less than have been claimed' [31]. An amendment is proposed 'to make clear that in right to negotiate negotiations and arbitral determinations the existence of non-native title rights and interests in land and uses of the land by persons other than native title negotiating parties can be taken into account (eg the fact that there is legislation which gives mineral rights to the Crown or that there is a pastoral lease on the area which would operate as an impairment on native title rights and interests)' [32].

The government claims that the need for this amendment arises from 'legal uncertainties about the contents of native title' [33]. At the same time, it is far from certain that the existence of other interests such as mining leases or reserves mean that native title rights do not amount to exclusive possession in relation to parties other than the grantee parties. The Act expressly provides that the 'non-extinguishment principle' applies to many grants of title. It is also curious to suggest that confirmation of Crown ownership of minerals makes it 'apparent' that exclusive possession rights do not exist. Freeholders and leaseholders would certainly be surprised to hear that their rights of exclusive possession were negated on this basis.

For the purposes of negotiating between interest holders where no determination of native title has been made, it is not necessary to reach conclusions as to the precise nature of native title in an area, or of the precise impact of other rights, interests and uses on that title. The role of the arbitral body in the right to negotiate process is not to determine the existence and scope of native title. This matter lies ultimately with the Court. Rather, the right to negotiate scheme is intended to facilitate negotiation between stakeholders about future uses of areas where native title is 'claimed' to exist, as well as where it has been determined to exist. Negotiation in such situations is based on the fact that the claimants purport to have rights and interests in the relevant area, which give rise to certain statutory rights, with fall-back provisions providing for arbitration and ministerial determination if agreement cannot be reached with other stakeholders.

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TRANSITIONAL PROVISIONS

The proposed amendments contain extensive 'transitional provisions' outlining how native title claims which have already been lodged will be dealt with, should the amending legislation come into force. These provisions will significantly reduce the application of the right to negotiate, by applying the 'registration test' to claims which have already been made.

It is proposed that the registration test will be applied to all claims lodged on or after 27 June 1996, which was the date on which the Native Title

Amendment Bill 1996 (Cth) was tabled. If a 's. 29 notice' advising of a future act which attracts the right to negotiate is issued after commencement of the amendments, the Registrar must try to finish consideration of the claim, under the registration test, within three months, or as soon as possible after this. All claims which do not pass the test will be removed from the Register, and the right to negotiate will be lost in relation to all relevant matters; even those of which notice was given prior to the commencement of the amendments.

Further, it is proposed that the registration test shall be applied to claims lodged **prior** to 27 June 1996, where a new s.29 notice which relates to the area is issued after commencement of the amendments. The Registrar will be obliged to try and make a decision within three months, or as soon as possible after this. If a claim fails the test it will not attract the right to negotiate in relation to the proposed act, although it will retain the right to negotiate for any acts of which notice was given before commencement of the amendments.

In both cases, the Registrar must advise the claimant that the claim is being considered, and provide a 'reasonable time' for additional information to be provided.

The provisions are likely to create significant practical problems. Where, after commencement of the amendments, a s.29 notice is issued which applies to an area in which a native title claim has been accepted, the Registrar must determine whether the claim satisfies the registration test, and must try to make this decision within three months. As outlined above, it is proposed to reduce the negotiation period in the right to negotiate process to four months in all cases. This period may elapse while the registration test is applied, particularly as the Registrar must provide a 'reasonable opportunity' for the claimants to provide additional information. During the negotiation period all parties will, therefore, be uncertain as to whether they are actually obliged to negotiate, and no time for meaningful negotiations will be left once this issue has been resolved.

The proposed amendments would also disrupt some negotiations which may have already been commenced. Any claim lodged after 27 June 1996 which fails the new registration test will lose the right to negotiate, even where it may pass the acceptance test, and even if negotiations are already underway. This will be to the detriment of all parties involved in such negotiations in the period leading up to commencement of the amendments.

The Government has justified this situation by stating that '[a]ll claimants lodging claims after 27 June 1996 would have been aware that the Government intended that the claim be subject to the new registration test - this was announced in the discussion paper released on 22 May'. However, until the matter is finally dealt with by Parliament, there can be no certainty as to which, if any, of the proposed transitional arrangements will become law.

The complex transitional arrangements appear to fly in the face of the Government's purported desire for 'workability'. A genuinely more workable approach would be to provide that any amendments which are made to the threshold to the right to negotiate should only become effective after the commencement of the new legislation.

The Government has claimed that the fact that the registration test will only be applied in relation to **new** future acts means that the transitional provisions do not affect rights which have accrued to the claimants. While the backdated application of the registration test to post-27 June claims may not constitute retrospective legislation in the most strict and technical sense, the amendments clearly permit the removal of the right to negotiate from parties who have already achieved an ongoing entitlement to it. Persons who have become 'registered native title claimants' under the present requirements are defined in the NTA as being 'native title parties' who have a continuing right to negotiate whenever notice of a new act relating to the area of their claim is issued. The transitional provisions take away these continuing entitlements, which have been legitimately gained under the legislation as it stands.

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CONCLUSION

The proposed amendments to the right to negotiate oil the wheels of development for industry and government, by significantly reducing the circumstances in which negotiation with native title holders will be required. The extremely limited protection which the current right to negotiate provides to native title holders (under which they possess no right of veto, and determinations are subject to Ministerial override) is reduced to a point where effective and genuine negotiations will be under constant and serious jeopardy. In the larger term, this will also be to the detriment of government and industry.

If the mechanisms contained in the amended Act provide native title holders with no effective means of protecting their property rights, they will presumably return to the common law in order to obtain such protection. It is difficult to see how any stakeholder's interests would be promoted by such a result.

Secure and durable arrangements for development affecting native title will only emerge from a system of negotiation that fully respects the human rights of native title holders. It is not necessary to place development interests above human rights. Economic progress and respect for Indigenous title are fully consistent. There needs be no ambiguity about this.

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Footnotes

[1] Section 26(2) NTA.

[2] The Parliament of the Commonwealth of Australia, *Explanatory Memorandum: Native Title Amendment Bill 1996 Supplementary Explanatory Memorandum*, Exposure Draft, ('Explanatory Memorandum') p 2.

[3] For an analysis of the registration test, see Basten QC, J, *Further Submission to the Parliamentary Joint Committee on Native Title*, 6 December 1996, pp 2-4; and Cape York Land Council, *Submission to the Parliamentary Joint Committee on Native Title and the*

Aboriginal and Torres Strait Islander Land Fund - The Native Title Amendment Bill 1996, 6 December 1996, ('CYLC Submission'), pp 10-13.

[4] Commonwealth of Australia, *Towards a More Workable Native Title Act: An Outline of Proposed Amendments*, May 1996, paragraphs 27-30. Note that 'exploration' as used in this discussion incorporates fossicking and prospecting.

[5] Commonwealth of Australia, *Outline of the Proposed Amendments to the Native Title Amendment Bill 1996*, ('Outline 10/96'), 8 October 1996, p 4.

[6] See ss. 8, 29, *Mining Act 1978* (WA), ss 4,45, *Mineral Resources Development Act 1990* (Vic), s 31, *Mining Act 1992* (NSW).

[7] Outline 10/96, *op cit*, p 4.

[8] 'Ordinary title' is defined in the NTA as meaning a freehold estate in fee simple outside the ACT, or a lease in the ACT, other than such titles which are granted only to or for the benefit of Aboriginal and Torres Strait Islanders (see s. 253, NTA).

[9] See footnote 4, above.

[10] Amendments to the *Native Title Amendment Bill 1996*, item 98J.

[11] NTA s. 26(4).

[12] CYLC Submission, p 6.

[13] Outline 10/96, *op cit*, p 4

[14] Outline 10/96, *op cit*, p 4.

[15] Council for Aboriginal Reconciliation, *Native Title Stakeholders Meeting - Outcome on Workability of the Act*, Sunday 16 June 1996, point 3.

[16] Amendments to the Native Title Amendment Bill 1996 (Cth), item 98ZK.

[17] Basten QC, J, *Further Submission to the Parliamentary Joint Committee on Native Title*, *op cit*, p 10. As is indicated by this paragraph, the Minister is not required to take into consideration the criteria which are laid down for consideration by the arbitral body in making a determination - see s 39, NTA.

[18] Mining titles cover all kinds of mining activity.

[19] CYLC Submission, *op cit*, p 7.

[20] As explained below at page 10, the practical problems created by the reduced time limit may be exacerbated by proposed 'transitional provisions' which require the Registrar to apply the 'registration test' to claims lodged before 27 June 1996 when notice of a new future act is given, after giving claimants a 'reasonable time' to produce additional material in order to satisfy this test. In these circumstances, the entire 4 month period may elapse while the threshold question of access to the right to negotiate is being determined.

[21] CYLC Submission, *op cit* p 8.

[22] NTA s. 237(a).

[23] (1996) 136 ALR 557.

[24] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Further Submission on the Commonwealth's Proposed Amendments to the Native Title Amendment Bill 1996*, 5 November 1996, p 5.

[25] For further discussion see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1994-1995*, AGPS, 1995, p 144.

[26] *Walley v WA* (unrep. 20 June 1996).

[27] Basten QC, J, *Further Submission to the Parliamentary Joint Committee on Native Title*, *op cit*, pp. 7-8.

[28] Explanatory Memorandum, *op cit*, p. 26.

[29] Basten QC, J, *Further Submission to the Parliamentary Joint*

Committee on Native Title, op cit, p 8.

[30] For further discussion see Basten QC, J, *Further Submission to the Parliamentary Joint Committee on Native Title, op cit, p 8.*

[31] Outline 10/96, *op cit, p 5.*

[32] Outline 10/96, *op cit, p 5.*

[33] Outline 10/96, *op cit, p 5.*

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Native Title Research Unit

Australian Institute of Aboriginal and Torres Strait Islander Studies

Acton House, Marcus Clarke Street, Acton

GPO Box 553 Canberra ACT 2601

Telephone 06 246 1153 Fax 06 249 1046

Email ntru@aiatsis.gov.au

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