

# Land, Rights, Laws: Issues of Native Title



## Native Titles Research Unit Australian Institute of Aboriginal and Torres Strait Islander Studies

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# RACIAL NON-DISCRIMINATION STANDARDS AND PROPOSED AMENDMENTS TO THE NATIVE TITLE ACT

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## Editor's introduction

The High Court Mabo decision in 1992, the passing of the Commonwealth Native Title Act in 1993, and the Wik decision in December 1996 mark a fundamental shift in the recognition of indigenous rights in Australia, transforming 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 other interested parties. Many of these will have to be decided in the courts.

The papers in this series contribute to the information and discussion, addressing the shift from notions of statutory land rights to the rights of indigenous peoples that pre-existed colonisation and exist within the broad spectrum of their human rights. Within these rights, land is an essential component.

Jennifer Clarke is a lecturer in law at Australian National University. She teaches constitutional law, mining law and the law relating to indigenous Australians.

Her paper addresses how proposed amendments to the Native Title Act 1993 relate to standards of non-discrimination and equality under international and Australian law. It considers the complex question of achieving equality whilst recognising difference. This important issue will be relevant to legislative and other proposals under consideration in response to the recent Wik case.

Examining the meaning of formal and substantive equality and the way in which legal interpretation has provided for recognition of cultural difference, the paper traces the application of formal and substantive notions of equality and the implementation of special measures as a means of providing equality, to the Act.

The author concludes that many proposed amendments will increase discrimination against native title holders, whether discrimination is measured on a formal or substantive standard, and suggests that such discrimination is likely to prompt complaints to UN human rights bodies.

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# RACIAL NON-DISCRIMINATION STANDARDS AND PROPOSED AMENDMENTS TO THE NATIVE TITLE ACT

Jennifer Clarke

## Executive Summary

The *International Convention on the Elimination of All Forms of Racial Discrimination* and the *International Covenant on Civil and Political Rights* protect the rights of individuals and minority groups and prohibit racial discrimination. Australia's international law responsibilities have been partly implemented in Australian legislation under the *Racial Discrimination Act 1975* (Cth.).

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## Providing for equality

How rights are best protected and equality provided for is not decided. There are at least two possibilities:

- i. *Formal equality* Defining equality as formal equality means treating everyone the same, regardless of some differences. Under a formal equality view, laws which provide for different treatment of people would be unfair or racially discriminatory toward the rest of the population. They are only justifiable as a special measure, for instance special entry to university. Special measures are described under international law as 'catch up' measures or those relating to a temporary situation.
- ii. *Substantive equality* The substantive view of equality supports a response to difference rather than an environment which fosters the achievement of sameness. It means treating people the same who are the same, but includes also treating people differently when their difference in some way requires recognition in order to provide justice. Native title may be seen, for instance, as an example of appropriate cultural difference. The substantive equality view suggests that the same treatment may not be enough to provide genuine equality.

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## Implications for discrimination arising from different views of equality

The *Native Title Act* includes both formal and substantive equality provisions. It has also been called a special measure.

Proposed amendments to the Act may be discriminatory:

- in both a formal and substantive sense, for example, the proposal to extinguish native title;
- by falling short of providing formal equality, for example, expansion of pastoralists' property rights;
- by falling short of providing substantive equality, for example, allowing the regranting of mining leases without the right to negotiate.

If amendments remove substantive equality provisions and special protections for native title holders, the Act may appear to bring about equality by treating everyone the same. Australia's international law obligations however require it to 'take special measures' for the protection of the rights of disadvantaged racial groups. Thus, even as a formal equality measure, the Act may breach this responsibility. The success of likely complaints to the United Nations is possible.

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## **Racial non-discrimination standards, their application and enforcement**

Non-discrimination (equality) standards are found in international and Australian law.

### **International Convention on the Elimination of All Forms of Racial Discrimination**

The Convention obliges Australia to refrain from engaging in racial discrimination against its citizens where to do so interferes with their equal enjoyment of human rights, (including property rights), to provide for equality before the law in the enjoyment of those rights and to take temporary special measures for the (sole) purpose of securing the adequate advancement, development or protection of disadvantaged racial groups, in order to ensure that those groups enjoy human rights equally with other Australians.

The Convention is enforced by the United Nations Committee on the Elimination of Racial Discrimination (CERD) via state reports and individual complaints. Complaints can be brought after exhaustion of domestic remedies. A finding that Australia has breached the Convention cannot force Australia to remedy the breach, but it can embarrass us internationally. The Convention has no constitutional status in Australia. It cannot prevent enactment of racially discriminatory laws at home. Section 51(26) of the Constitution (the 'races' power) gives the Commonwealth Parliament power to pass laws with respect to 'the people of any race for whom it is deemed necessary [by Parliament] to make special laws'. As interpreted by the High Court, this power may allow laws which discriminate against, as well as laws which discriminate in favour of, indigenous Australians [1].

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## **International Covenant on Civil and Political Rights**

The Covenant prohibits discrimination on a number of grounds, including race, and provides that all people are equal before the law and entitled to its equal protection. The Covenant obliges Australia to refrain from denying members of minority groups (including indigenous people) the right to enjoy their own culture, religion and language. The Covenant binds Australia in the same way as the Convention. It has no constitutional status. Its non-discrimination and minority culture articles will not prevent enactment of racially discriminatory or assimilationist laws by the Commonwealth Parliament.

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## **The Racial Discrimination Act 1975**

This Act implements some of Australia's obligations under the Convention. It makes unlawful acts involving distinctions based on race which have the purpose or effect of interfering with the equal enjoyment of human rights. It provides that, where people of a particular race do not enjoy human rights enjoyed by members of another racial group, or enjoy them to a more limited extent than members of another racial group, the first racial group is to enjoy human rights 'to the same extent' as the second. However special measures as defined in the Convention are exempted from these provisions.

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## **Meaning of equality, non-discrimination and special measures**

### **How can equality be achieved when people are different?**

Equality and non-discrimination seem like simple concepts, but can be complex when applied to people who are different, or whose circumstances are different.

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### **Formal equality before the law - treating people 'the same'**

On one view, equality means treating everyone the same. In 1985, the High Court interpreted the *Racial Discrimination Act* as requiring this kind of equality [2], although its decision has been widely criticised. On this view, different treatment of indigenous Australians because of their cultural difference or socio-economic disadvantage is technically racial discrimination. Laws which do this are only justified as special measures. But the Convention definition of special measures suggests temporary, catch-up measures (like university special entry programs), not permanent measures which respond to cultural difference (like land rights and native

title). Where people are culturally different, the same treatment may not be enough to provide genuine equality.

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## Substantive equality before the law

The idea that the same treatment of different people can involve discrimination has been taken up by the High Court in constitutional cases [3]. International law supports this view:

To treat unequal matters differently according to their inequality is *not only permitted but required*. The issue is whether the difference exists. Accordingly, not every different treatment can be justified by the existence of differences, but only such as corresponds to the differences themselves, namely that which is called for by the idea of justice [4].

Equality means the same treatment of people who are the same, but appropriately (not inappropriately) different treatment of people who are different. Perhaps the clearest indication that different treatment of people of different cultures is not discrimination is provided by the Covenant. Its special cultural rights for minority groups:

merely allow minorities to enjoy rights which are enjoyed by the rest of the population [5].

On this interpretation, special measures include catch up measures which aim to place indigenous people in the same situation as other Australians. But land rights, indigenous heritage protection and native title laws do not do this. They treat indigenous Australians differently in a more permanent way. That different treatment should be appropriate to any difference between native title holders and other Australians. How are native title holders different?

- Native title is typically a group-based right;
- It does not depend for its existence on government action. People who prove native title have always held it - they do not obtain it when their claim is upheld;
- The content of native title depends on oral tradition, which can be hard to prove;
- That tradition involves relationships with particular land. The Aboriginal religious sense of land ownership involves land obligations, not just land rights;
- In coastal areas, the traditions on which native title depends can extend to the sea, shallow sea bed, islands and reefs;
- Aboriginal decision-making about land is measured, not rushed. It often places as much emphasis on traditional land-related activities (e.g. ceremonies) as it does on land-related rights and obligations under Australian law;
- Aboriginal and Torres Strait Islander cultural values regard social relationships as important;
- Indigenous Australians can be disadvantaged in litigation because of language barriers or a lack of education.

These cultural differences justify interim protection of native title from

government interference pending determination of claims, although that protection need not be available for hopeless or improper claims. The differences also justify appropriately different structures for landholding by, and representation of, native title holders and claimants and the use of negotiation and mediation, rather than litigation, to resolve native title disputes (including disputes between native title parties).

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## **Non-discrimination and equality standards and the present *Native Title Act***

### **Does the present Act operate to accord formal equality?**

Under the future acts regime applicable from 1994, the general principle is that the Act provides prospective formal equality (the same treatment as for ordinary title holders) [6].

However, significant discriminatory exceptions to this principle exist within the Act:

- Governments may authorise low impact future acts on native title land whether or not they can do so to ordinary title;
- Many titles granted over native title land before the Act's commencement can be renewed, whereas they couldn't be renewed over ordinary title without consent;
- The Act introduces a concept previously unfamiliar to Australian land law: compulsory acquisition of rights to land by government in order that other rights over it may be granted to a third party. While the same state compulsory acquisition laws will apply to native title and ordinary title, an interesting question arises as to whether government practice will be to acquire mainly native titles, giving rise to racial discrimination in the administration of law [7];
- The past acts regime discriminates against native title holders by privileging titles granted by the Crown in the period 1975-1994 over any competing native titles, in many cases by extinguishing native titles [8];
- Native title holders may agree to governments granting rights over their land when those rights could not be granted over ordinary title;
- Native title holders could lose their rights if they don't respond quickly (with their own claim) to a non-claimant application but ordinary title holders could not have their rights extinguished in this way.

These exceptions will attract compensation, but compensation doesn't overcome discrimination.

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### **Does the present Act accord substantive equality?**

Much of the present Act ignores relevant cultural differences between native title holders and ordinary title holders [9]. However, the right to negotiate is informed by a substantive concept of equality. It aims to give

native title holders (including people who have not yet proven their title) roughly equivalent - but ultimately inferior - protection for land of cultural significance to them as the protection provided to farmers for improved, agricultural or pastoral land under state law [10]. The claims mediation provisions of the Act treat native title holders differently from ordinary title holders by providing a process better suited to indigenous cultural values than is litigation. The provisions relating to prescribed bodies corporate and native title representative bodies acknowledge the group-based nature of native title and its holders' need for assistance in enforcing it [11].

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## **If equality means substantive equality, why call the present Act a special measure?**

There has been a lot of debate about whether the *Native Title Act* is a special measure to overcome indigenous disadvantage or an equality measure recognising cultural difference. In my view, it is an equality measure. However, the Act has been characterised as a special measure by Parliament and the CERD. The High Court's view (expressed in passing) is that the Act is either a special measure or an equality measure. If it is a special measure, this characterisation surely depends on the fact that it improves on the common law position of native title holders, and the fact that indigenous people were involved in drafting it [12]. If the Act is amended to remove provisions which benefit native title holders without their consent, it may be examined more critically by a body like the CERD, which knows that governments can disguise discrimination as special measures.

The Commonwealth says that, if the Act is a special measure, amending it to remove special protections for native title holders will bring about equality because all landowners will then be treated the same. But even if formal equality is all that the international standards aspire to, they still require Australia to take special measures in order to get there. Even if native title holders are only entitled to the same protections as other landowners in the longer term, the fact that their title has been denied for 204 of the past 209 years would justify special interim protection of it now. Such special protection is not a matter of governmental discretion - it is a matter of international obligation.

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## **Proposed amendments and non-discrimination and equality standards**

### **Proposals for the extinguishment of native title on pastoral leasehold land**

Removal of property rights from members of one racial group (native title holders) in order to benefit other people (pastoralists), most of whom are members of another racial group, is racial discrimination, on both formal and substantive standards. We have two High Court decisions which tell us this [13]. The only difference between those cases and this proposal is that, in those cases, the discriminatory action was taken by the states,

giving rise to a constitutional inconsistency with the *Racial Discrimination Act*. In this case, the discriminatory action would be taken by the Commonwealth, giving rise to a breach of international law. It would also require payment of 'just terms' compensation [14].

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## **Proposals for the statutory conversion of native title on pastoral leasehold land**

In theory, standardisation of native title as a bundle of statutory rights need not deprive native title holders of rights. This would be the case where only basic native title rights were converted to statutory rights, and others were left to be proven as native title [15]. However, there is a risk that standardisation of native title will involve extinguishment of some native title rights. Native title is different in different parts of Australia and has been affected to different degrees by the grant of extinguishing interests in land. Aboriginal and Torres Strait Islander land-related traditions are different in their content. The traditions which underpin native title have been affected to different degrees by dispossession and child removal. Conversion to standard statutory rights is likely to deprive at least some native title holders of some property rights. This partial extinguishment would be discriminatory and would also attract 'just terms' compensation.

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## **Other proposals for the Act's amendment**

The Commonwealth released other proposed amendments in the *Native Title Amendment Bill* 199 [16]6 and an exposure draft [17] of amendments to this Bill [18]. In significant respects, these proposals not only fail to meet substantive equality standards but diverge from standards of formal equality. More importantly, many of those amendments are capable of impliedly amending (rolling back) the *Racial Discrimination Act* [19], which now operates to overcome racial inequality in state land, resources and native title laws. Rolling back the *Racial Discrimination Act* creates the potential for further discriminatory amendments to state laws, consistently with an amended *Native Title Act*.

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## **The following proposed amendments clearly fall short of providing native title holders with formal equality:**

- Allowing re-grants of pastoral leases, expansion of pastoral lease covenants and uses and enlargement of pastoralists' property rights (including upgrading to perpetual leasehold) on native title land [20]. Governments do not grant rights like these over ordinary title land. Only the landowner may do so, unless governments first purchase or compulsorily acquire the land [21]. These provisions are highly discriminatory on both formal and substantive standards even though the non-extinguishment principle applies and native title holders receive compensation for suppression [22] of their rights;
- Allowing the extinguishment of one group's native title rights as the result of surrender or agreement by another group [23]. While it is in

the interests of certainty that any third party rights (future acts) consequent on the surrender or agreement are valid [24], such a principle is discriminatory [25]. To provide formal equality, the Act would need to state that native title holders may surrender, or authorise acts over, only those native title rights which they hold;

- o Extending the scope for native title land to be dealt with, and extinguished, pursuant to non-claimant applications [26]. As noted, the present Act allows native title holders to lose their rights if they do not respond quickly to a non-claimant application with their own claim, and governments proceed to grant inconsistent titles over their land. This amendment will make the indigenous response to non-claimant applications more difficult to make, by insisting that any counter-claims lodged meet the seven-step registration test for the right to negotiate (discussed below);
- o Expansion of the definition of low impact future act in section 234 to include certain types of excavation, land and vegetation clearing and land reclamation. While some of these activities may be authorised under some legislation applicable to some ordinary title land, they are not generally permitted without the landowner's permission.

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**Depending on the content of state law [27], the following proposed amendments may fall short of providing formal equality:**

- o Removal of the non-extinguishment principle from compulsory acquisition of native title [28]. Formal equality will be denied where a state compulsory acquisition Act allows other landowners to reclaim their land if it is not used for the acquisition purpose, but fails to extend this treatment to native title holders;
- o Removal of the guarantee of the same procedural rights as ordinary title holders enjoy in the case of approved scheme acts [29]. The Minister may determine that an act is an approved scheme act if satisfied that native title holders enjoy natural justice and consultation rights in relation to it under state law [30]. But where state law gives ordinary title holders better procedural rights [31], the amendment may permit formal inequality, whereas the present *Racial Discrimination Act* invalidates such inequality.

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**The following proposed amendments relating to the right to negotiate fall short of providing substantive equality by rendering the right unavailable:**

- o Allowing re-grants of mining leases without the right to negotiate [32]. Even if they have the same rights as farmers in relation to agricultural land, native title holders will have no negotiation rights in relation to re-grant of a mining lease on land of cultural importance to them;
- o Removal of the right to negotiate from approved scheme acts which have a substantial non-physical impact on native title (e.g. an impact contrary to tradition) or its holders (e.g. an impact interfering with their social or economic life) [33]. Even if they have the same rights

as farmers in relation to agricultural land, native title holders will have only rights to be notified of and consulted about exploration on land of cultural significance to them. Other laws will not necessarily fill the equality gap: for example, the National Native Title Tribunal has acknowledged that state Aboriginal heritage legislation is inadequate to protect the Aborigines-land relationship [34];

- Removal of the right to negotiate from compulsory acquisitions of native title for private purposes involving public infrastructure facilities [35]. Removal of the right from these acquisitions places native title and ordinary title holders in a position of formal equality under state law. However, as noted, it is possible that compulsory acquisitions to benefit third parties occur in a racially discriminatory manner. If the practical reality is that mainly native titles are being acquired for these purposes, arguably native title holders need special negotiation rights - especially when they are not part of the public which benefits from the facility [36];
- Restricting the right to negotiate to the exploration phase [37]. This amendment will require native title holders to participate in negotiations about mining on land of cultural significance to them when the only information available to them (and to the miner) is of a speculative kind. Other landowners are not in this position when it comes to land of significance to them - they make the decision at the mining stage;
- Consolidating multiple grants of mining tenements as project acts [38], so that one right to negotiate applies to them all at once [39]. The substantive inequality problem here arises not so much from the consolidation but from the short time frame, a period of between one and four months, in which the right to negotiate must be exercised;
- Allowing the expedited procedure to apply to tenement grants which interfere with the spiritual aspects of indigenous community life [40]. The expedited procedure allows automatic grant of tenements without negotiation. By allowing negotiation where the spiritual aspects of community life are interfered with, the present Act protects the religious basis of Aboriginal land traditions. The amendment removes this appropriate treatment of cultural difference;
- Requiring claims to meet an insurmountable registration test before claimants are entitled to the right to negotiate [41]. Some kind of registration test - even a tighter test than the present test - may be appropriate, given the problems of proof which native title holders face. However, the practical effect of the proposed amendments will be to afford the right to negotiate to the Meriam (whose title was proven in *Mabo No 2*) but deny it to others who it turns out later are native title holders. Claimants (including people who now have the right to negotiate [42]) will have to satisfy seven conditions, most involving the registrar's discretion, for registration [43].

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**The following proposed amendments to the right to negotiate fall short of providing substantive equality by substantially weakening the right's content:**

- The proposal to limit the requirement to negotiate in good faith to negotiations about 'the effect of the act on the... native title' [44].

- The amendment may prevent negotiations from dealing with land-related matters of cultural importance to native title holders;
- The proposal to allow the Minister to override negotiation processes before they are complete [45]. The amendment will leave affected native title holders with no negotiation rights regarding land of cultural or heritage significance to them, while leaving the agricultural land veto of some farmers intact. These farmers' vetoes cannot be overridden by state ministers - special legislation is required to override them;
  - The proposal to allow the Minister to step in at the arbitration stage to decide that a tenement may be granted [46]. This will also increase the inequality between native title holders and farmers whose veto cannot be overridden without special legislation;
  - The proposal to shorten the negotiation period for mining lease grants from six to four months [47]. This amendment denies the practical realities of Aboriginal culture. Six months is a much more reasonable time for measured decision-making about land.

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### **The following proposed amendments to claims processes may fall short of providing substantive equality by ruling out mediation:**

- Allowing the Federal Court to order that there be no mediation where a claim is too large [48]. It would be better to allow the Court to divide claims into smaller claims;
- Requiring the Federal Court to order that mediation cease unless satisfied it is likely to be successful [49]. The Court should be permitted to terminate mediation if satisfied that it will not succeed, but should not be required to terminate mediation where it cannot yet be demonstrated that mediation will succeed. This will place unnecessary pressure on mediation processes.

The proposed amendment of the definition of 'waters' removes from the Act substantively equal treatment of native title holders whose title extends to low water mark [50]. Treating the inter-tidal zone as waters rather than land means that the same treatment as freehold principle no longer applies there. Instead, inter-tidal native title will be treated as waters adjoining freehold land [51] - it will be less protected, despite its cultural significance.

The proposed regime governing native title representative bodies [52] does not provide formal equality, but this kind of regime is needed to achieve substantive equality. However, some provisions go beyond appropriate treatment to excessive (discriminatory) regulation. For example, some proposed powers of the Minister [53] and functions and obligations of representative bodies [54] duplicate controls in other legislation. The Minister will also be able to give preference to bodies incorporated under the bureaucratic *Aboriginal Councils and Associations Act 1976* (Cth) over those accountable under less onerous state laws where, in the Minister's opinion, state law and the representative bodies regime do not provide 'an appropriate level of accountability' [55]. Bodies with established land-related expertise (e.g. the Pitjantjatjara Council) may be unable to be recognised.

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## Conclusions

The present *Native Title Act* already falls short of providing full, formal equality. A number of proposed amendments will increase this discrimination and allow further erosion of the same treatment principle under state land, resource and native title laws.

International law standards recognise that the same treatment of inherently different people and things can itself produce discrimination, whereas appropriately different treatment of inherently different people and things will produce equality. The present Act's right to negotiate, mediation, inter-tidal and representative bodies provisions acknowledge the differentness of both native title and the indigenous cultures which give rise to it. Erosion of the right to negotiate, mediation and inter-tidal protection provisions will result in substantive inequality. While the new representative bodies regime is designed to achieve substantive equality, excessive regulation of representative bodies under overlapping legislative standards may achieve discrimination.

If the *Native Title Act* is a special measure, this character is unlikely to survive its discriminatory amendment without Aboriginal and Torres Strait Islander consent. If the Act is amended in this manner, Australia can expect complaints to UN bodies relating to breaches of its international obligations. Those complaints could be successful.

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## Footnotes

[1] *WA v Commonwealth (The Native Title Act case)* (1995) 183 CLR 373 at 484, a unanimous decision upholding the constitutionality of the *Native Title Act*, despite its discriminatory provisions.

[2] *Gerhardy v Brown* (1985) 159 CLR 70. The Court might have done this because section 10 of the *Racial Discrimination Act* uses the words 'the same'.

[3] *Street v Queensland Bar Association* (1989) 168 CLR 461 and *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436.

[4] *South West Africa cases (Second Phase)* [1966] ICJR at 305-6, quoted by Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70 at 129. My emphasis.

[5] McKean, *Equality and Discrimination Under International Law*, quoted by Brennan J in *Gerhardy* at 130.

[6] Ordinary title means leasehold title in the ACT and Jervis Bay and freehold title elsewhere.

[7] 'Inequality in the enjoyment of [the] human right [to own and inherit property (including a human right to be immune from arbitrary deprivation of property)] may occur by discrimination in the provisions of the municipal law or by discrimination in the administration of the municipal law or by both': *Mabo (No 1)* per Brennan, Toohey and Gaudron JJ at 217. See also Deane J at 229-30.

[8] In other cases, this 'privileging' is achieved by the suppression of native

title under the non-extinguishment principle.

[9] For example, governments can grant any titles they like over native titles to coastal waters or the sea bed beyond low water mark. The same treatment as freehold principle doesn't apply because, under Australian law, ordinary titles are not usually granted beyond low water mark.

[10] The law of two states - WA and NSW - allows farmers to veto mining on agricultural land. In WA, this veto applies to exploration as well as mining, and extends to grazing land. A veto is stronger than the right to negotiate, which can be overridden by the Commonwealth or state Minister. Landowners all over Australia can also prevent mining on improved land - e.g. land on which there is a dam.

[11] Generally speaking, other landowners need to prove their titles in court. Ordinary title holders exercise their rights individually, not through representative organisations.

[12] That is, Aboriginal leaders participated in negotiations leading up to the Act's enactment.

[13] *Mabo (No 1)* (1988) 166 CLR 186 and *WA v Commonwealth* (1995) 183 CLR 373.

[14] Section 51(31) Constitution requires the payment of 'just terms' compensation to people whose property is acquired under Commonwealth law. Cases on 'just terms' focus on the market value of other rights and titles to land, and on the circumstances in which those rights and titles are acquired. What constitutes 'just terms' in the native title context remains an open question, and one likely to generate significant litigation.

[15] I understand that proposals of this kind have been made by Aboriginal groups.

[16] Introduced June 27, 1996.

[17] Released October 8, 1996.

[18] My discussion here is based on a consolidation of the Act and proposed amendments prepared by Tamara Kamien and others for the National Native Title Tribunal, October 1996.

[19] A later law overrides an earlier law of the same parliament to the extent of any inconsistency between them. In particular, a specific law (amendments to the *Native Title Act* relating to mining) overrides a general law (the *Racial Discrimination Act*) where the two appear inconsistent.

[20] See proposed section 25.

[21] Compulsory acquisition for the purpose of giving rights to a third party is only permitted in some states.

[22] 'Suppression' is really the wrong word for the impact of many of these provisions on native title. Where pastoral leases become perpetual, the suppression will be forever. It is for this reason that some Aboriginal groups have referred to the provisions as achieving 'extinguishment by stealth'.

[23] See proposed new section 21A(2)(c). Under an amended section 23(1), the non-extinguishment principle will not apply to such agreements.

[24] This is provided for by the proposed new section 21A(2)(a) and (b).

[25] Generally speaking, the law does not permit other title holders' land to be dealt with by third parties.

[26] Proposed amendments to section 24.

[27] Including state law amended to reflect a 'rolled back' *Racial Discrimination Act*.

[28] See proposed amendment of section 23(3)(a).

[29] See proposed amendment of section 23(6).

[30] The Minister may do so after giving natural justice to representative Aboriginal/Torres Strait Islander bodies in the following circumstances:

where state law entitles native title holders to natural justice in relation to decisions about the proposed act and where persons acting under it will be obliged by law or 'procedures' to consult with native title holders in order to minimise impact on native title. Consultations should canvas sites of particular significance, land access and operations.

[31] For example, in relation to exploration under the *WA Mining Act 1978*.

[32] See proposed section 25(1B), amendments to section 26(3)(a) and new section 26B(1).

[33] See proposed amendment to section 26(3)(b) and new 26A.

[34] *Re Koara People*, National Native Title Tribunal, 21 June 1996, 34.

[35] See proposed new sub-section (d) of 26(2).

[36] This will be the case, for example, where the facility is a petroleum pipeline across remote native title land to urban markets.

[37] See proposed new section 26B(2).

[38] See proposed new section 29(5) and (6).

[39] See proposed new section 42A.

[40] See proposed amendment to section 237(a).

[41] See proposed amendments to section 190 and new section 190A(6)-(14).

[42] There are already 369 native title claims. Most claimants enjoy the right to negotiate.

[43] See proposed new section 190A (4).

[44] See proposed new subsection 31(1A).

[45] See proposed new ss. 28(1)(e) and 34A.

[46] The Minister could also decide that the tenement may *not* be granted.

[47] See proposed new section 25. These time limits can be even shorter where indigenous people have not made a native title claim at the time that a state government proposes to grant a mining tenement over their traditional land. In such a case, they could be as short as one month.

[48] See proposed new section 86A(5) and (7).

[49] See proposed new section 86A(10) and (11).

[50] Defined in section 253.

[51] See the definitions of 'permissible future act' in the present section 235.

[52] See Part 11.

[53] The Minister's power to appoint an auditor or inspector to a representative body (proposed section 203DF) duplicates powers of the Minister and ATSIC to request an audit report on the body under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) and powers of the Registrar of Aboriginal Corporations to investigate the body under the *Aboriginal Councils and Associations Act 1976* (Cth). The Minister's power to appoint a financial administrator to the body covers situations covered by the Registrar's power to appoint an administrator to it.

[54] Requirements to provide proper accounting and reports are imposed by the *Councils and Associations Act* and proposed sections 203D-DD. Disputes between members could be arbitrated by the Registrar under the *Councils and Associations Act* or by the representative body under proposed section 203BF. Proposed section 203CD supplements ATSIC's grants powers under its Act.

[55] Proposed section 203AC(4).

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