

Land, Rights, Laws: Issues of Native Title



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

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Implications of the proposed amendments to the Native Title Act

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Editor's Introduction

The recognition of native title in the High Court's Mabo decision in 1992, the Commonwealth Native Title Act in 1993, and the Wik decision in 1996 have transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion

Recent Federal government proposals to amend the Native Title Act have been widely criticised, raising concern among those involved with the native title process and in many sectors of the community. In this paper, Tamara Kamien examines the proposed amendments and argues that they will not only disadvantage native title claimants but will not achieve the 'certainty' or 'workability' sought by the government.

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Introduction

The *Native Title Act 1993* (Cth) ("NTA") was enacted in response to the decision of the High Court of Australia in *Mabo v State of Queensland*, which recognised the common law native title rights of indigenous peoples in the Torres Strait Islands and Australia generally.^[1] The Act constitutes a code which provides for the recognition and protection of native title, and validates past acts invalidated because of the existence of native title.

Over the past four years there have been various court decisions which have had implications for the constitutionality, validity and the processes of the NTA and its provisions^[2]. Several Bills have been released which have sought to amend the NTA to deal with these and other issues. Most recently, the *Native Title Amendment Bill 1997* ("the Bill") which was introduced into Parliament by the Federal Government on 4 September 1997.

These amendments also purport to implement the Prime Minister's "10-Point Plan" which was released on 8 May 1997 in response to the decision of the High Court in *Wik*^[3]. The Government maintains that the Bill will "reduce [the] uncertainties, simplify native title processes [and] improve the workability of the act" while finding the "right balance among the rights and interests of all parties involved"^[4]. This Bill, however, effects a serious and unwarranted diminution of native title rights and in doing so is

likely to have precisely the opposite effect from that sought by the Government.

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Native Title Determination Applications

Federal Court Proceedings

Some uncertainty over the determination functions of the National Native Title Tribunal ("NNTT") arose from the *Brandy*^[5] case, in which the High Court held that the determination functions of the Human Rights and Equal Opportunity Commission were invalid as an unconstitutional exercise of judicial power by a non-judicial body. This rendered uncertain similar determination functions of the NNTT. Therefore, under the Bill all applications for a determination of native title or compensation will be lodged in the Federal Court (s13)^[6]. As well as being necessary to overcome the *Brandy* problem, this amendment leaves the NNTT free to pursue its mediation and arbitral functions without having to make decisions prejudicial to any of the mediation parties.

No acceptance test is applied upon filing of an application with the Federal Court. Rather, if certain specified requirements^[7] are not met a motion may be brought for the Court to strike out the claim (s84C). If the claim proceeds, the Court must refer the application to the NNTT for mediation unless it considers that mediation will be unnecessary or that there is no likelihood of the parties reaching agreement (s86B). The matter is then brought back into the Court for any determinations.

Under the proposed amendments, the Federal Court would be bound by the rules of evidence, except to the extent that the Court orders otherwise. The Act currently states that the Court is not bound by technicalities, legal forms or rules of evidence. In conducting its proceedings, the Court no longer must take account of cultural and customary concerns of Aboriginal and Torres Strait Islander people. It may take these things into account, but not so as to prejudice any other party to the proceedings.

Evidence in relation to native title has its basis in indigenous laws and there are inherent evidentiary difficulties in proving a right which is based in oral tradition. Additionally, in order to provide an environment in which the Court can be best placed to determine whether native title exists, proceedings must be conducted in a way which takes into account cultural and customary concerns. Therefore the proposed provisions are inappropriate for native title matters.

National Native Title Tribunal

The role of the NNTT is substantially altered by the amendments. Some functions have been transferred to the Federal Court as a result of *Brandy* and the Tribunal has been given some additional mediation and assistance functions. The NNTT must mediate with the aim of reaching agreement between the parties in relation to such matters as: the existence of native title, who holds it, the nature of the rights and what other interests may be affected (s86A).

At any time after three months from the start of mediation, a party may apply to the Court to cease mediation. Where such an application is made, the Court must order that mediation cease unless the Court is satisfied that the mediation is likely to be successful in enabling the parties to reach agreement on any of the specified matters (s86B).

Registration Test

An important new function of the NNTT is the application of the registration test^[8] Entry upon the Register of Native Title Claims is necessary to obtain the right to negotiate and certain other processes, such as the statutory access right. Although a claim which does not satisfy the registration test may still proceed through the Federal Court, failure to pass this threshold test has serious implications for native title holders. The test is far more onerous than the current criteria for acceptance:

- It requires a much more detailed description of the area claimed, the rights and interests claimed, the native title claim group and the factual basis to support the assertion that native title exists.
- One member of the claim group must have or have had a traditional physical connection with the area covered by the application. This provision is contrary to the common law test which is maintenance of observance of laws and customs so far as it is practicable to do so.
- The claim cannot cover an area over which exclusive tenures have ever been granted, or where non-exclusive tenures have been granted if exclusive possession is claimed^[9]
- No claimant may be included in two overlapping claims and the application must be certified by a representative body or group (ss190B and 190C). This criteria may be difficult to administer where there is no requirement to name persons who are native title holders. Moreover, this criteria ignores the fact that overlapping claims may legitimately reflect traditional law and social organisation.
- While the test for registration of a native title determination application in the NTA has been interpreted by the courts as having a fairly low threshold, the test proposed in the 1997 Bill extends well beyond a reasonable balance. In the result, if any one of the native title rights claimed cannot be made out, then the whole application must be rejected.

Finally, if the government gives a notice under section 29 of the NTA, proposing to grant a mining lease or compulsorily acquire native title rights for the benefit of a third party, the Registrar must use 'best endeavours' to consider the claim within the three month notification period. Where a native title application is lodged late in the period, there is a real risk that the registration test will not be completed in the required time, resulting in the right to negotiate being lost through no fault of the claimants. If the registration test prevents bona fide native title holders from protecting their native title prior to a determination then it would be manifestly unjust.

The registration test will affect not only claims lodged after the commencement of the amendments, but will also apply to all prior claims over areas subject to new section 29 notices, to applications lodged on or after 27 June 1996 and before the commencement of the new provisions and to all applications covering a non-exclusive agricultural or pastoral

lease.

Equivalent State/Territory Bodies

States and Territories may establish their own bodies to exercise specific powers in substitution for the NNTT. To be an equivalent State/Territory body:

- members must have appropriate expertise;
- the procedures of the bodies must be fair, just, informal, accessible and expeditious;
- they must be adequately resourced; they must be able to perform their functions according to law; and
- any registers kept by these bodies must be maintained in a nationally integrated and accessible manner (s207B(4)).

Despite the requirements, these provisions may have serious implications for a nationally consistent scheme for the recognition of native title. Although the NTA currently allows for state and territory bodies, the maintenance of national standards is statutorily secured, promoting effective and efficient administration of claims.

Sunset Clause

Under the proposed amendments new claims would have to be made within six years from the date of commencement of the amendments (s13(1A)). Compensation claims for future acts could not be made later than six years after the time the amendments commence or the time when the act is done, whichever is the later (s50(2)).

Native title does not depend on the NTA for its existence. It is a title recognised by the common law of Australia and enforceable as such. Native title holders will still be entitled to make a common law claim. The proposed amendments will merely remove the mechanism by which native title claims can be resolved in a non-litigious manner. A particularly unjust implication of the sunset clause is that it denies the right to negotiate to those native title holders who have not made claims before the sunset date. Additionally, as evidenced by the Northern Territory experience, this clause will encourage a rush of applications upon the expiry of the six year period.

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Intermediate Acts and Confirmation of Past Acts

Validation of Intermediate Period Acts

Several States in Australia have granted rights in land since 1994 without going through the process established by the NTA. In *Wik*, the High Court held that the grant of a Queensland pastoral lease did not necessarily extinguish native title, that native title rights and pastoral rights could co-exist and that the pastoral lessees rights prevailed to the extent of any inconsistency. The result was that grants made over land, without following the process of the NTA after 1 January 1994, are potentially invalid. Consequently, the Bill validates potentially invalid acts done in the period

between the commencement of the NTA (1 January 1994) and the date of the *Wik* decision (23 December 1996) (ss22A and 23B).

The effect of validation is to extinguish native title permanently where it is inconsistent with the intermediate period acts. This exceeds anything that is necessary to address any real or perceived problems arising from the *Wik* decision.

This amendment would abandon the compromise reached between government, pastoral and Aboriginal interests in the drafting of the NTA. This compromise provided for the protection of native title in relation to future acts done after 1 January 1994 and the validation of past acts which were potentially invalid due to the existence of native title. It has the effect of excusing or even rewarding breaches of the law by state governments which, on the basis of competent legal advice, should have been aware of the risks of assuming that pastoral leases extinguish native title. The NTA currently contains provisions to allow governments to make valid grants of interests in land. Affected native title holders are being asked to bear the cost of governments' failure to follow the law.

"Confirmation" of Past Extinguishment of Native Title

The amendments purport to "confirm" the effect on native title of certain acts occurring on or before 23 December 1996. Native title will be totally and permanently extinguished over "exclusive tenures", including:

- freehold estates, including grants of exclusive possession from the Crown in one capacity to the Crown in another. Native title will be permanently extinguished even where the title held by a statutory authority is less than freehold, but entitles the authority to grant certain further interests to third parties. Currently, the NTA expressly provides that these grants do not permanently extinguish native title;
- commercial leases, exclusive agricultural or pastoral leases, residential leases and community purposes leases;
- Scheduled interests^[10];
- mining townships; or
- any lease that confers exclusive possession granted on or before 23 December 1996.

Also included are acts done in good faith, a vague term at best, pursuant to a prior right, that take place after 23 December 1996, and public works, including stock routes (ss23B and 23C).

The proposed amendments would also permanently extinguish any native title rights, over valid non-exclusive agricultural and pastoral leases granted on or before 23 December 1996, which are inconsistent with the lessees' rights under current or former leases. Rights created on or before 23 December 1996 to grant such leases but exercised after that date would also extinguish native title.

The question whether native title can revive is left open at common law. To the extent that the common law contemplates revival, the Bill itself will amount to a legislative extinguishment of native title. Provisions preempting the determination of the question by a court unnecessarily risk unqualified Crown liability to pay just terms compensation for permanent

extinguishment of native title as provided by s51(xxxi) of the Constitution.

Extinguishment is taken to have happened when an act was done, irrespective of how long ago or whether the land had subsequently reverted to vacant Crown land. For example, native title rights may be extinguished by the grant, last century and for a limited duration, of an interest which falls into one of the above categories. Such a regime exceeds anything necessary to overcome real or perceived uncertainty arising from *Wik*. Additionally, this amendment could have the effect of impliedly repealing the *Racial Discrimination Act 1975*.

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Future Acts

The provisions render valid a wide range of future acts to which the right to negotiate does not apply and which were previously considered impermissible future acts. [\[11\]](#)

Valid Acts

The types of future acts which are deemed to be valid and which may proceed without the need to negotiate with native title holders include:

- Acts permitting primary production [\[12\]](#) on non-exclusive agricultural or pastoral leases (s24GB), certain off-farm activities which take place on areas adjoining or near the area the subject of the freehold or leasehold grant used for primary production (s24GD) and acts which grant rights to third parties to take timber, gravel and certain other resources from non-exclusive agricultural and pastoral leases (s24GE) [\[13\]](#)
- Acts which relate to the management or regulation of surface and sub-surface water, living aquatic resources and airspace (s24HA).
- Acts involving renewals and extensions, pursuant to a legally enforceable right, made on or before 23 December 1996 (s24IA) [\[14\]](#) The new provisions also allow for upgrading of leases, for example to perpetual leasehold (s24IC(4)).
- Acts done pursuant to a valid reservation, made by the Crown, and leases granted to a statutory authority, for a particular purpose, if the act is done for that purpose or a purpose which has an equivalent impact on native title (s24JA) [\[15\]](#)
- Certain future acts relating to the construction, operation, use, maintenance or repair of facilities for services to the public [\[16\]](#), if the act does not prevent native title holders accessing the land except during construction or for safety reasons and if adequate provision is made for the protection of significant sites (s24KA) [\[17\]](#)
- Acts that pass the freehold test. These are acts which apply in the same way, or no less beneficially, to native title holders as they do to ordinary title holders [\[18\]](#) (s24MD).
- Acts affecting offshore places (s24NA) [\[19\]](#).
- Acts over areas where a non-claimant application has been made and at the expiry of the notification period, no claimant application has been made (s24FA).

These provisions have the effect of extending the area over which activities that affect native title may be validly carried out without regard to the

interests of native title holders. Of particular concern is the very wide definition of "primary production activity" and the extension of these activities beyond leasehold and freehold land.

Indigenous Land Use Agreements

The Bill provides a more detailed regime than that contained in s21 of the current Act, in which agreements can be made relating to future acts that may be done on native title land and how native title and non-native title rights are to be exercised. Indigenous Land Use Agreements fall into three categories: body corporate agreements, area agreements, and alternative procedure agreements (ss24BA, 24CA and 24DA). Agreements are essentially distinguished by the identity of the parties to them. Body corporate and area agreements may provide for the surrender and extinguishment of native title whereas alternative procedure agreements can not.

The provisions relating to indigenous land use agreements on the whole provide a flexible system to assist in the making of agreements which may affect native title. Agreements allow for negotiation and timely resolution of native title issues as opposed to litigation which can be lengthy, expensive and uncertain.

While agreements represent a lasting and economical means of resolving native title issues, there must be an incentive for interest holders to engage in the process. The validation of a wide range of future acts and the restricted right to negotiate does little in the way of providing incentives for agreed outcomes.

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Right To Negotiate

The right to negotiate only applies if the registration test is satisfied. It applies to the creation and variation of rights to mine, the compulsory acquisition of native title rights and interests for the benefit of third parties, providing the conferral is not for the purposes of providing an infrastructure facility^[20], and any other act approved by the Commonwealth Minister (s26(1)).

Excluded Acts

Several wide classes of future acts are expressly excluded from the right to negotiate process. These are:

- *Approved exploration acts, approved gold or tin mining acts, and approved opal or gem mining areas.* Before the Minister can grant approval for these acts, a number of conditions must be satisfied, such as the degree of impact of the activity, notification of representative bodies and the public, and invitations to make submissions and consideration of those submissions. An act may be determined to be an approved exploration act if it is "unlikely to have a significant impact on land or waters". By this test an act could be approved even where it substantially impacts on native title rights and interests. Apart from the notification provisions, the

procedural requirements are those that would apply to other persons with an interest in the land in similar circumstances (s26A(6)(b)). The Bill does not take account of the inherent differences between the interests in land of native title holders and other title holders, namely the spiritual and cultural significance of native title rights and interests.

- *Renewals, re-grants or extensions of valid mining leases.* If a valid earlier right to mine, created on or before 23 December 1996, is renewed, re-granted or the term extended, the right to negotiate provisions do not apply (s26D). Where a right to mine is created following a right to explore, the right to negotiate does not apply (s26D(2)). The "once only" right to negotiate may create many difficulties, as exploration permits would be treated, for the purposes of the NTA, as rights to mine, making the process of obtaining them more cumbersome. In addition, it would often not be practical to negotiate at the exploration phase in respect of potential mining operations not yet planned. The current dual right to negotiate recognises the fundamental practical differences between rights to prospect and rights to mine.
- *Acts relating solely to land or waters wholly within a town or city.* Whether an area is a town or a city depends upon the State or Territory in which the area is located. The ordinary meaning of the term does not apply. The Commonwealth Minister may make a determination that an area is a town or city if the Minister is of the opinion that the area was a town or city on 23 December 1996. Western Australia, South Australia and the Northern Territory contain additional areas which are defined as a town or city pursuant to legislation. The Northern Territory government has previously used a similar Territory provision to declare Darwin to be three times the area of greater London for the purposes of defeating a land claim under Northern Territory land rights legislation.

The Bill allows States and Territories to establish their own right to negotiate regimes as an alternative to the right to negotiate provisions in the NTA. A new system would be introduced for future acts affecting non-exclusive pastoral leases and "public purpose" reserves. This system allows the States and Territories to compulsorily acquire native title on leased or reserved land for the benefit of third parties, without the right to negotiate applying. Native title holders have procedural rights equivalent to that of the title holder with an interest in the land or waters concerned (s43A). This further erodes the protection of native title by leaving the States with a discretion over the operation of alternative procedures and restricting the area over which the right to negotiate applies.

In general, the exclusions severely limit the right to negotiate by expressly excluding classes of acts which might have otherwise fallen within the right to negotiate procedures. These amendments are likely to create uncertainty as indigenous peoples seek to enforce their rights, by way of litigation, to ensure protection of native title rights and interests, enshrined in the common law.

The process

Before an act is done which attracts the right to negotiate, the relevant government must give notice of the act in accordance with section 29. Applications for a determination of native title or applications to become a

native title party must be lodged, considered and registered within three months from the 'notification day' (being a day by which it is reasonable to expect all notices have been received). Given the stricter threshold test for registration, the three month period for preparation, lodgement and scrutiny of an application in response to a section 29 notice is extremely short. There are three procedures:

- *The normal negotiation procedure.* In the proposed 'normal negotiation procedure' all parties must negotiate in good faith with a view to obtaining an agreement. Under the amendments there can be no refusal or failure to negotiate in good faith if the refusal or failure is about matters unrelated to the effect of the act on the native title rights and interests of the native title parties (s31(2)).
- *Expedited procedure.* If the notice contains a statement that the act attracts the expedited procedure, and no objections are lodged within the three month period, the act may be done. If an objection is lodged, the arbitral body must determine whether the act is an act attracting the expedited procedure. If so, the act may be done; if not, the normal negotiation procedure applies (s32). Section 237, which identifies criteria to be satisfied for the act to attract the expedited procedure, is proposed to be amended to change the test from direct interference with the community life of native title holders to direct interference "with the physical aspects of the community life" of native title holders. This is a serious erosion of the protection provided by the right to negotiate process in relation to spiritual and cultural matters.
- *Arbitration.* If an agreement cannot be reached within four months from the notification day, any negotiation party may apply to the relevant arbitral body for a determination in relation to the act (s35). If a native title party becomes registered at the end of the notification period, this may leave only a brief period for negotiation. In any event, the amendments reduce the negotiation period from six months in some instances to four months in every case.

The arbitral body must make a determination if requested to do so by any party even if the other parties did not negotiate in good faith (s36(2)) [21]. The determination must be made as soon as practicable and with regard to certain criteria relating to Aboriginal culture, non-native title interests and the public interest. Arbitration is not directed to making a finding in relation to the existence of native title rights; rather, it is to assess the effect of the proposed act on the enjoyment of native title. Consideration of the effect of the act on native title rights and interests has been narrowed and additional criteria have been added to include detriment to a person who is not a native title party and the extent of existing non-native title rights and interests. Criteria relating to environmental matters have been excluded (s39).

If a determination is not made within four months the arbitral body must write to the Commonwealth Minister advising of the reasons for the delay and when a determination is likely to be made (s36(3)). This period may not be sufficient to enable the parties to adequately put their case to the arbitral body.

In practice, the combination of an onerous registration test, the deemed validity of a wide range of future acts and the diminished right to negotiate

may mean that few native title holders will have a real say over development on their country. The combined effect of the amendments means there is great potential for future uncertainty, as the denial of formal protection of native title rights is likely to lead to native title holders resorting to court actions or other remedies to have their common law rights respected and enforced. Additionally, the right to negotiate provisions may fall foul of the *Racial Discrimination Act* and the Constitution as they are heavily weighted against the maintenance and protection of native title. There is a possibility that the right to negotiate amendments themselves amount to an acquisition of property which would require just terms compensation under paragraph 51(xxxi) of the Constitution.

Ministerial Intervention

The provision for Ministerial override of a determination is expanded. Provision is now made for Ministerial determination during the negotiation period where no agreement has yet been reached and the various public interest criteria relating to economic benefit, urgency and the national or State interest are satisfied (s34A). The Minister may again make an early determination, in the interests of the State or Territory or the national interest, that the act should proceed if the arbitral body has not made a determination within four months from the date of referral to arbitration (s36A).

The proposed amendments give the Minister significant powers to intervene in a variety of circumstances which may readily arise and a power to make a determination which does not have to be based upon the criteria that the Tribunal must consider. The possibility of intervention before the determination stage is likely to inhibit good faith negotiations.

Statutory Access Right

If a claim is registered, covers a non-exclusive agricultural or pastoral lease, and one or more members of a claim group regularly had physical access to that lease for the purpose of carrying out traditional activities at 23 December 1996, the Bill provides a conditional statutory access right to those areas while the claim is in progress. The rights of the leaseholder prevail over statutory access rights (ss44A and 44B). Additionally, while the statutory right of access applies, no person can enforce any native title rights or interests in relation to the whole or part of the land covered by the lease.

In some instances, Aboriginal people were forcibly moved from their traditional country and continue to be denied access to that land. The statutory right of access will not be available in those circumstances. Additionally, it is difficult to ascertain the basis for suspension of native title rights where the access right exists. Ultimately, this is a very hollow right.

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Representative Aboriginal/Torres Strait Islander Bodies

Amendments relating to Representative Bodies are split into two Parts in the Bill. The first Part has two main aspects: it confers new functions on Representative Bodies in what is called the "transitional period", and

provides a new process of recognition of Representative Bodies as a prelude to the establishment of what is called the "new regime". The second Part details the "new regime" which will operate from the end of the transitional period, and deals with functions, finances, subjection to Ministerial scrutiny, variations in Representative Body areas of jurisdiction, de-recognition and other matters. During the "transitional period" the Minister will invite applications from existing Representative Bodies and Aboriginal corporations to be recognised as Representative Bodies

Representative bodies will continue to perform their existing functions as well as the additional functions of certifying applications for a determination of native title and applications for registering indigenous land use agreements, assisting native title holders with issues relating to future acts, compensation and rights of access, facilitating and participating in indigenous land use agreements, dispute resolution functions, notification functions and internal review functions (ss202(4) and 203B(1)).

Representative bodies will also be subject to various obligations under the new regime. The capacity of representative bodies to satisfactorily represent the interests of native title holders, to consult effectively with indigenous communities in the area for which they are responsible and perform their functions effectively will be the major considerations in their recognition as representative bodies (s203AD(1)).

Funding of representative bodies will be provided in the form of grants from ATSIC and representative bodies will be accountable directly to ATSIC in relation to financial matters regarding native title. Each representative body must prepare a strategic plan. Proper accounting records are to be kept, payments are to be properly made and annual reports must be prepared in respect of each financial year (s203D). Standards are set for the conduct of the directors and executive officers of representative bodies (s203E). The Commonwealth Minister will have a wide discretion to intervene in Representative Body affairs.

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Conclusion

It is readily acknowledged that certain aspects of the NTA require improvement, while other amendments became necessary in light of various court decisions. However, the Bill overreaches the amendments that are necessary to address these matters.

The Bill declares extensive extinguishment with consequent taxpayer liability for compensation on just terms. It renders valid a wide range of future acts which are currently impermissible future acts, and attempts to severely limit the right to negotiate. The Bill is incompatible with the *Racial Discrimination Act 1975* and is likely to be constitutionally challenged.

Ultimately, the proposed amendments are complex, and neither provide "workability" or "certainty", nor a sustainable resolution of issues of legitimate concern.

Endnotes

[1] 1992 175 CLR 1.

[2] *WA v Commonwealth* (1994-95) 183 CLR 373; *Brandy v Human Rights and Equal Opportunity Commission* (1994-95) 183 CLR 245; *Northern Territory v Lane* (1995) 59 FCR 332; *North Galanjanja Aboriginal Corporation v Queensland [Waanyi]* (1996) 185 CLR 595; *Kanak v National Native Title Tribunal* (1995) 132 ALR; *Walley v State of Western Australia* (1996) 137 ALR 561.

[3] *Wik Peoples v Queensland* (1996) 187 CLR 1.

[4] Attorney-General and Minister for Justice Mr Williams, Australian House of Representatives, Parliamentary Debates, 4 September 1997, p7526.

[5] *Supra* note 2.

[6] Section references refer to proposed sections of the Bill.

[7] These are requirements pursuant to ss61, 61A and 62.

[8] This test is in response to the decision of the Full Federal Court in *Kanak* (*supra* note 2) which held that an application must be registered on the Register of Native Title Claims immediately upon lodgement with the Tribunal. See also *Northern Territory v Lane* (*supra* note 2).

[9] Freehold or residential leasehold are examples of exclusive tenures. Non-exclusive agricultural and pastoral leases are examples of non-exclusive tenures.

[10] Schedule 4 of the Bill lists numerous interests in land or waters that will be confirmed as extinguishing native title. The Schedule only lists general grants and interests and it is not certain that the effect of those grants bears any relation to the common law position.

[11] The non-extinguishment principle applies to most acts that are rendered valid under this Division (s24AA(6)).

[12] Primary production activity is given an extremely wide meaning, it includes cultivating land, maintaining, breeding or agisting animals, taking or catching fish or shellfish, forest operations, horticultural activities, aquacultural activities and leaving fallow or de-stocking any land in connection with the doing of any thing that is a primary production activity. The term does not include mining (s24GA).

[13] Notification provisions apply to third party rights, however, no right to negotiate exists.

[14] If the act consists of the grant of a freehold estate or the conferral of a right of exclusive possession the act extinguishes any native title in relation to the area. In any other case the non-extinguishment principle applies to the act (s24ID).

[15] It is uncertain what this phrase means. Given this, and the fact that it is inconsistent with the common law set out in *Mabo*, litigation is inevitable. If the act consists of the construction or establishment of a public work, native title is extinguished. If the act does not consist of the construction or establishment of a public work, the non-extinguishment principle applies (ss24JB(2) and (3)).

[16] Roads, jetties, electricity supply, street lighting, pipelines, sewerage irrigation and communication facilities are deemed to be public facilities (s24KA(2)).

[17] The native title holders obtain procedural rights equivalent to those of the title holder of the land covered by the claim (s24KA(7)).

[18] Validity, however, is subject to the right to negotiate procedures being complied with, where applicable. The non-extinguishment principle applies unless the act is a compulsory acquisition of native title which permits compulsory acquisition of both native title and non-native title rights and interests.

[19] The non-extinguishment principle applies to the act unless the act is a compulsory acquisition of native title rights which permits compulsory acquisition of both native title and non-native title rights and interests. The native title holders have the same procedural rights as they would have on the assumption that they instead held any corresponding rights and interests in relation to the offshore place that are not native title rights and interests.

[20] Infrastructure facilities may be public or private and include roads and other transport facilities, jetties or ports, electricity transmission facilities, dams and other water management facilities, communication facilities and other facilities of a similar nature to those listed (s253). This seriously limits the scope for negotiation in relation to compulsory acquisitions.

[21] Presumably this provision is in response to *Walley* (supra note 4) which held that the arbitral processes cannot be commenced unless the negotiations have been pursued by the government party in good faith.

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