CHAPTER 5

COMMON LAW NATIVE TITLE AND THE *NATIVE TITLE ACT 1993*

Recognition and Extinguishment of Native Title: *Mabo (No 2)*

5.1 In *Mabo v Queensland (No 2)*[1] the High Court decided that the common law of Australia recognised the existence of native title to land, derived from the laws and customs observed by Aboriginal societies. The Court determined that native title would continue to exist:

- where Indigenous people have maintained their traditional connection with the land; and
- where native title has not been extinguished by a legislative or other act of government.

5.2 Prior to the decision in *Mabo (No 2)* the common law in Australia did not recognise native title. Thus, the decision constituted a significant development in the recognition of Indigenous rights in Australia.[2]

5.3 The South Australian Government has suggested that the *Mabo (No 2)* decision can itself be regarded as a special measure as it involved a change to the law to ensure the recognition and protection of title to property.[3]

5.4 However, the decision also established that native title was vulnerable to extinguishment by legislation or by the exercise of the Crown's power to grant inconsistent interests in the land, or to appropriate the land and to use it inconsistently with the enjoyment of native title.

Recognition and Protection of Native Title: The Native Title Act 1993

5.5 Because of the vulnerability of native title to extinguishment, the Government of the day thought it necessary to enact legislation that would ensure the protection of native title, and also its integration into Australian law and land management, so that future economic activity and development could proceed.

5.6 The main objects of the Native Title Act, as set out in s.3, are:

(a) to provide for the recognition and protection of native title;

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1 (1992) 175 CLR 1; also at: http://austlii.law.uts.edu.au/au/cases/cth/high_ct/175clr1.html.

2 This was noted by the CERD Committee in its decision 2(54).

3 State of South Australia, Submission 15, p 5.

(b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings;

(c) to establish a mechanism for determining claims to native title; and

(d) to provide for, or permit, the validation of past acts invalidated because of the existence of native title.

5.7 A description of the original Native Title Act was provided to the CERD Committee in the Australian Government's January 1999 response to the Committee's request for information under Article 9(1) of the CERD.

5.8 In the original Native Title Act the protection of native title was achieved through the creation of a legislative regime regulating all acts done by governments from 1 January 1994 on native title land. The legislative regime established the 'freehold test', which prevented governments from doing acts on land where native title existed if such acts could not be done on freehold land. It also established that, in the future, native title could generally only be extinguished in one of two ways:

- through an agreement between a government and the native title holders; or
- through a non-discriminatory compulsory acquisition for which just terms compensation was payable.

5.9 The original Act also provided a process by which governments could lawfully deal with land that might be the subject of native title. In particular, the original Act created a statutory right to negotiate for registered claimants and determined holders of native title, in relation to proposed acts of government which involved the creation of a right to mine, or the compulsory acquisition of native title so as to allow third parties to develop the land. Under the Act, State Governments were also able to establish right to negotiate regimes of their own which would replace the provisions in the Native Title Act.

5.10 To facilitate the recognition and protection of native title the original Act set up procedures to enable native title claims to be made, and to be determined by the National Native Title Tribunal and the Federal Court. The original Act did not specify the content of native title, or its relationship to non-native title interests, but left these matters to be determined by the courts in the future.

5.11 The original Act also established a system of Aboriginal and Torres Strait Islander representative bodies, set up and funded by the Commonwealth Government to assist native title holders with the claims process.

5.12 The original Native Title Act also made provision for the validation of potentially invalid past acts of governments, and native title holders were given an entitlement to compensation for the extinguishment or impairment of their rights as a result of this validation.

Equality and Non-Discrimination: The Original *Native Title Act 1993*

5.13 At the time the original Native Title Act was passed the principle of equality, or non-discrimination, was understood as meaning formal equality and additional special measures. This approach was taken as result of the High Court's interpretation of the meaning of 'discrimination' in the CERD and the RDA in *Gerhardy v Brown*. Mr Robert Orr, giving evidence to the Parliamentary Joint Committee on behalf of the Commonwealth, said in 1996 that:

> the Native Title Act was, on its face, drafted so as to comply with the Racial Discrimination Act by providing formal equality or providing special measures … the preamble of the Native Title Act says that it is a special measure. The second reading speech of the Prime Minister, introducing the bill, said that it was a special measure. The explanatory memorandum to the bill said that the bill was generally non-discriminatory or provided a special measure. That is the structure which … the law of Australia provides and which the Native Title Act complies with.[4]

5.14 Formal equality was provided through the 'freehold test' which, in remedying the vulnerable status of native title to extinguishment, accorded it the same protection that the holders of freehold title would have in relation to government action affecting their title. In the second reading speech for the original Native Title Bill, the then Prime Minister, Mr Keating, said that:

> Generally, governments may make grants over native title land only if those grants could be made over freehold title.
>
> This test is founded on a principle of non-discrimination. A government may not make a freehold or leasehold grant to somebody else over your or my freehold.[5]

5.15 In addition, 'special measures' were included in the original Act:

- the right to negotiate;
- a special procedure for the ascertainment of native title through conciliation;
- a special fund – currently the Aboriginal and Torres Strait Islander Land Fund – to assist in the acquisition of land for dispossessed Aboriginal and Torres Strait Islander peoples.[6]

5.16 The Preamble went on to state that the Native Title Act was intended to be a special measure within the meaning of Article 1(4) of the CERD and s.8 of the Racial Discrimination Act.

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4 Mr Robert Orr, Inquiry into the Native Title Amendment Bill 1996, *Official Hansard Report*, 27 November 1996, p 3599.

5 Hon Paul Keating, *House of Representatives Hansard*, 16 November 1993, p 2880.

6 Preamble to the Native Title Act.

5.17 The case of *Western Australia v The Commonwealth* confirmed that the original Native Title Act was consistent with the Racial Discrimination Act and the CERD. The High Court said that:

> the Native Title Act can be regarded as either a special measure under s.8 of the Racial Discrimination Act or as a law, which although it makes racial distinctions, is not racially discriminatory so as to offend the Racial Discrimination Act or the International Convention on the Elimination of all Forms of Racial Discrimination.[7]

5.18 Notably, the High Court took the view that the original Native Title Act 'conferred on Aboriginal and Torres Strait Islanders a benefit protective of their native title', notwithstanding the provisions for extinguishment of native title.[8] The High Court said that:

> The Act removes the defeasibility of native title, and secures the Aboriginal and Torres Strait Islander people in the enjoyment of their native title subject to the prescribed exceptions which provide for native title to be extinguished or impaired. There are only three exceptions: the occurrence of a past act that has been validated, an agreement on the part of the native title holders, or the doing of a permissible future act. The Act confers its protection upon native title holders who ex hypothesi are members of a particular race. As the 'relationship between Aboriginal people and the lands which they occupy lies at the heart of traditional Aboriginal culture and traditional Aboriginal life' the significance of security in the enjoyment of native title by the Aboriginal people of Western Australia who hold native title is undoubted.[9]

5.19 In decision (2)54 the CERD Committee also took the view that the original Native Title Act fulfilled Australia's obligations under Articles 2 and 5 of the Convention. The CERD held this view notwithstanding that the original Native Title Act provided for extinguishment of native title, in particular through the validation of past acts. The CERD Committee noted that the Native Title Act 'recognises and seeks to protect native title' and that it provides:

> a framework for the continued recognition of indigenous land rights following the precedent established in the *Mabo* case.[10]

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7 *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 483-484.

8 *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 462.

9 *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 459. See also State of South Australia, Submission 15, p 4.

10 CERD/C/54/Misc.40/Rev.2, para 5, at: http://www.faira.org.au/cerd/cerd-decision-on-australia.html, and see the comments of the Country Rapporteur in her report to the CERD Committee at p 4.

The Need to Amend the Native Title Act

5.20 The original Native Title Act was this country's initial legislative response to a unique and complex area of law which the Parliament had not been required to address previously. Not surprisingly, soon after the original Act commenced operation a number of operational and jurisdictional issues emerged that prompted the need for amendments to the Act. Several of these arose out of court decisions affecting the operation and administration of the Native Title Act and the National Native Title Tribunal (NNTT). Among lawmakers, Indigenous and non-Indigenous interests there was general consensus that the Native Title Act needed to be amended. Amendments were considered necessary in order to:

- respond to the implications of the *Brandy* decision;
- introduce a more workable registration or acceptance test which did not allow vexatious claims to provide access to valuable statutory rights, such as the right to negotiate; and
- provide a better framework for binding agreements within the provisions of the Act.

5.21 Acknowledgment of the need to amend the Act was almost unanimous, although opinions differed as to the extent of the amendments that were required.

5.22 From 1995 there were several attempts to amend the Native Title Act. These included: the introduction of the Native Title Amendment Bill 1995 by the then Labor Government, which lapsed with the calling of the Federal election in January 1996, the introduction by the new Coalition Government of the Native Title Amendment Bill 1996 in June 1996, and further amendments ('The Exposure Draft') in October 1996. This Committee reported on the 1996 Bill and the Exposure Draft in its sixth and seventh reports.

5.23 Following the High Court decision in *Wik*[11] in December 1996, the Government believed that a comprehensive legislative response to the challenges of native title, in particular to the issues raised by the *Wik* decision, was required. The extensive parliamentary process by which this was achieved, and the extent of consultations with relevant groups, is considered in Chapter 7, below.

The Passage of the *Native Title Amendment Act 1998*

5.24 A working draft of the new Native Title Amendment Bill was released for public comment on 25 June 1997. The Native Title Amendment Bill 1997 was introduced into the House of Representatives on 4 September. It incorporated the changes the Government believed were necessary to deal with the implications of the *Wik* decision, and generally to ensure the workability of the Native Title Act. The House agreed to refer the bill to the Parliamentary Joint Committee for report by

11 *Wik Peoples v Queensland* (1990) 187 CLR 1; also at: http://www.austlii.edu.au/au/cases/cth/high_ct/unrep299.html.

27 October 1997. The Committee tabled its tenth report on that date. The report recommended that the Bill be adopted subject to a number of conditions.

5.25 On 2 October 1997 the Senate had referred the bill to the Senate Legal and Constitutional Legislation Committee to examine and report on the constitutional aspects of the bill, and to report by 10 November 1997. The majority report concluded that, on balance, it believed that the High Court would find the bill constitutionally valid.[12]

5.26 The Native Title Amendment Bill 1997 passed the House of Representatives and was initially debated in the Senate between 25 November and 5 December 1997. Both the Government and the Opposition moved a large number of amendments to the Bill. The Senate passed an amended bill on 5 December. The following day the House of Representatives voted against the majority of the non-Government amendments passed by the Senate.

5.27 The Native Title Amendment Bill 1997 [No2] was reintroduced into the House of Representatives on 9 March 1998. This version of the bill contained most of the amendments accepted by the House of Representatives. The Senate again passed amendments to the Bill which the House of Representatives did not accept.

5.28 In late June 1998 the Prime Minister announced that the Government had reached agreement with Independent Senator Brian Harradine on amendments to secure passage of the legislation through the Senate. The House of Representatives then passed 88 additional amendments to the Bill. The Senate finally accepted these on 7 July 1998 and passed the amended Bill on 8 July 1998. The *Native Title Amendment Act 1998* received royal assent on 27 July, with most of the Act's provisions commencing on 30 September 1998.

Outline of the Amendments to the Native Title Act

The Brandy Decision

5.29 In *Brandy v Human Rights and Equal Opportunity Commission*,[13] the High Court found that a statutory device for the registration and enforcement of the determinations of a non court – the Human Rights and Equal Opportunity Commission – with the Federal Court was unconstitutional because it involved the Commission in an improper exercise of judicial power. The decision raised considerable doubts about the National Native Title Tribunal's power to make native title and compensation determinations. These doubts were confirmed by the full Federal Court in *Fourmile v Selpam Pty Ltd and Another*.[14] In that case the court held that there was no relevant difference between the scheme established by sections 166,

12 Senate Legal and Constitutional Legislation Committee, *Constitutional Aspects of the Native Title Amendment Bill 1997*, November 1997, p 35.

13 (1995) 183 CLR 245.

14 (1998) 152 ALR 294.

167 and 168 of the NTA and the scheme held to be invalid by the High Court in *Brandy*'.

5.30 In response to the *Brandy* decision, the Native Title Act was amended to provide that all new native title claimant and compensation applications are made to the Federal Court. Applications are then referred to the National Native Title Tribunal for mediation, unless the Court determines that this would not be helpful. All old applications are deemed to have been made to the Federal Court on 30 September 1998, the date of the commencement of most of the provisions of the *Native Title Amendment Act 1998*.

The Registration Test

5.31 The *Native Title Amendment Act 1998* introduced a new registration test, which requires native title claimants to meet a series of more stringent requirements before their claim is entered on the Register of Native Title Claims. Problems with the original registration test became obvious early in the implementation of the Act. A number of decisions by the Native Title Tribunal and the courts highlighted the fact that the existing requirements were ineffectual.[15]

5.32 The new registration test requirements are contained in ss.190A-D of the amended Act. An application for a determination of native title must meet both procedural and substantive criteria. Criteria relevant to the substantive aspects, or merits, of the claim include:

- the identification of native title claim groups (s.190B(3));
- the identification of the native title rights and interests claimed (s.190B(4));
- the establishment of a factual basis for the claimed native title (s.190B(5));
- the establishment of a prima facie claim (s.190B(6)); and
- proof of maintenance of traditional physical connection with the claimed area (s.190B(7)).

5.33 In order to meet the procedural criteria for registration, applicants must satisfy the Registrar that, among other matters:

- there are no previous overlapping claim groups (s.190C(3)); and
- the application has been certified by the relevant Aboriginal or Torres Strait Islander Representative bodies, or by an authorised member of the applicant claim group (s.190C(4)).

15 *Northern Territory v Lane* (1996) 138 ALR 544; *North Ganalanja Aboriginal Corporation v Queensland* (*Waanyi*) (1996) 185 CLR 595.

The Agreement Provisions

5.34 The original Native Title Act provided some scope for agreements about native title issues, particularly under section 21. However, where there was no determination of native title, a s.21 agreement could only bind those claimants who signed it, leaving open the possibility that competing claimants could object to elements of the agreement. This provided no certainty for land users.

5.35 The *Native Title Amendment Act 1998* included provisions to broaden substantially the potential for agreements under the Native Title Act. This is achieved through the availability of Area, Body Corporate and Alternative Procedure Indigenous Land Use Agreements (ILUAs). The ILUA provisions are substantially based on the model developed and proposed by the National Indigenous Working Group on Native Title (NIWG).

5.36 Indigenous Land Use Agreements can cover a broader range of activities including:

- authorising acts that affect native title;
- the surrender of native title;
- compensation;
- the doing of an act that could otherwise not be done under the amended NTA (for example the acquisition of native title without complying with the right to negotiate; and
- giving native title parties different procedural rights to those which they are entitled to under the amended NTA (e.g. notification and objection).

5.37 Under the amended Act, ILUAs are legally binding on all native title holders once registered, regardless of whether or not they are a party to the agreement. An ILUA can only be registered following a comprehensive public notification and objection process.[16] ILUAs create certainty as they have a contractual and binding effect and can ensure that all future acts authorised under an ILUA are valid under the provisions of the Native Title Act. [17]

5.38 ATSIC's *Detailed Analysis of the Native Title Amendment Act 1998* supports the ILUA provisions and predicts that:

> If there is sufficient goodwill to continue to pursue agreements, the improved ILUA provisions will be crucial in facilitating them.[18]

16 Native title holders can object to an ILUA being registered pursuant to ss.24BI, 24CI and 24DJ.

17 Sections 24EA and 24EB.

18 *Detailed Analysis of the Native Title Amendment Act 1998, Revised Edition, October 1998,* at: http://www.atsic.gov.au/native_title.

The Wik Decision and the Four Sets of Contentious Provisions

5.39 Central to this inquiry is the focus in the CERD Committee's decision 2(54) on four sets of provisions in the amended Act that the Committee labelled discriminatory. Three of these, the validation, primary production and right to negotiate provisions were enacted specifically to respond to the implications and uncertainty caused by the *Wik* decision. The fourth, providing for confirmation of extinguishment, was considered necessary for the related reason of providing certainty under the Act about when native title could continue to exist and where it had been extinguished. The confirmation provisions were intended to reflect the common law on extinguishment.

5.40 On 23 December 1996 the High Court handed down its decision in the *Wik* case.[19] By a 4:3 majority the Court held that the grant of a pastoral lease did not necessarily extinguish native title, and that the rights of native title holders and pastoral leaseholders could potentially coexist. Where there was any inconsistency between the two the native title rights would yield to the rights held under the pastoral lease. This gave rise to considerable uncertainty, particularly in relation to government grants and future acts on pastoral leasehold land.

5.41 One of the most significant problems caused by the *Wik* decision arose from the fact that the original Native Title Act had been drafted on the assumption that native title could not exist over leasehold land, including pastoral leases. While some critics of the amended Act argue that such an assumption was premature, there is no doubt that the view was widely held and that it was supported by the weight of legal precedent. This issue is discussed in detail in Chapter 6, below. The fact remains that the original legislation was not able to deal with the issues raised by the Court's decision, and that appropriate amendments were necessary.

5.42 The amended Act validated certain acts over leasehold or freehold land that had been granted between the commencement of the NTA in January 1994, and the date of the *Wik* decision (23 December 1996). These were called 'intermediate period acts'. These provisions effectively mirrored the validation of past act provisions in the original Act, but were more limited in their scope.

5.43 Provisions which allow the upgrading of pastoral lease interests were included in the amendments to the Act to deal with the uncertainty over what acts could be undertaken over pastoral leases where there was the possibility that native title rights could coexist with the rights of pastoralists. This uncertainty was compounded by the fact that the original Act had been drafted on the assumption that native title was extinguished by the grant of a leasehold interest, including a pastoral lease.

5.44 The amended Act also streamlined the Right to Negotiate provisions that existed in the original Act. In some cases, the right to negotiate was removed

19 *Wik Peoples v Queensland* (1990) 187 CLR 1; also at: http://www.austlii.edu.au/au/cases/cth/high_ct/unrep299.html.

altogether. In other cases it has been replaced by lesser procedural rights such as the right to be consulted, the right to object, and the right to have that objection heard by an independent body. States and Territories are also able to implement their own right to negotiate schemes,[20] or to replace the right to negotiate with an alternative scheme of their own, provided that such a scheme meets certain criteria set out in the Act.[21]

5.45 These four provisions are considered in detail in Chapter 6.

20 Section 43

21 Section 43A