CHAPTER 4

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

Colonisation and the Denial of Indigenous Property Rights

4.1 The early case law established that Australia was a settled territory – rather than conquered or ceded – on the basis that it was 'practically unoccupied, without settled inhabitants or settled law', with the consequence that the law of England applied.[1]

4.2 The law of England – the common law – included the doctrine of tenures which is founded on the feudal notion that, originally, all title to land was vested in the Sovereign, or the Crown, so that all private titles derive from an original Crown grant or, in other words, all land is held off the Crown. In England the notion of the Crown's original and absolute title was never more than a fiction. However, in a territory considered to have been settled on the basis of it being previously uninhabited, the result of the application of the doctrine of tenures was that the Crown was considered to be the absolute beneficial owner of all land, as there was no other proprietor.[2]

4.3 The question of whether the common law of Australia would recognise Indigenous title which pre-dated the acquisition of sovereignty was first raised in the case of *Milirrpum v Nabalco*.[3]

4.4 In considering whether, *inter alia*, a doctrine of communal native title existed at common law,[4] the trial judge, Blackburn J of the Supreme Court of the Northern Territory:

- confirmed the previous case law that Australia was a 'settled or peaceably occupied colony' to which English law applied on the basis that it was 'practically unoccupied without settled inhabitants or settled law';[5] and

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1 *Cooper v Stuart* (1889) 14 App Cas 286, see especially 291.

2 That the Crown was considered to have acquired absolute beneficial title to all land in the Australian colonies upon the acquisition of sovereignty was confirmed in the decision of *Attorney General v Brown* 1 Legge 312 at 316-318, (1847) 2 SCR (NSW) 30. See also *R v Steele* (1834) Legge 65 and *Hatfield v Alford* (1846) Legge 330 at 336 and *Doe d. Wilson v Terry* (1849) Legge 505. Also see *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 71 and *New South Wales v The Commonwealth* (1975) 135 CLR 337 (Seas and Submerged Lands Case), at 338-339.

3 *Milirrpum v Nabalco Pty Ltd* (1970) 17 FLR 141 (Gove Land Rights Case).

4 Blackburn J identifies this as the central issue, see *Milirrpum v Nabalco Pty Ltd* (1970) 17 FLR 141 at 151 and 199. Note that the reception of the common law in Australia was not raised as an issue in this case; rather the plaintiffs contended that the common law could recognise their pre-existing proprietary rights to land.

- confirmed that absolute beneficial ownership of land vested in the Crown upon the acquisition of sovereignty as a consequence of the doctrine of tenures, so that 'the doctrine of native title does not form, and has never formed, part of the law of any part of Australia'.[6]

4.5 The next case to consider the existence of a doctrine of native title at common law was *Mabo v Queensland (No 2)*.

Mabo v Queensland (No 2): The Recognition and Extinguishment of Native Title

Recognition of Native Title

4.6 In the case of *Mabo v Queensland (No 2)*[7] (*Mabo (No 2)*), the plaintiffs, on behalf of the Meriam people of the Murray Islands, sought a declaration from the High Court of their entitlement to ownership, possession, occupation, use and enjoyment of the islands according to their traditional laws and customs.

4.7 A majority of the High Court[8] confirmed the previous case authority that sovereignty over Australia had been acquired by Britain through settlement so that:

> the law of England was not merely the personal law of the English colonists; it became the law of the land.[9]

4.8 However, the Court rejected the proposition, established in the previous case law, that the common law doctrine of tenure automatically conferred absolute beneficial title to all land in Australia on the Crown. Instead, it was held that while the Crown gained a radical, final or ultimate title to the land as an incident of the acquisition of sovereignty, the antecedent rights and interests in land, possessed by the Indigenous inhabitants, remained as a burden on the Crown's title until they were extinguished. The Crown would take an absolute beneficial title, or an allodial title, to land in a settled territory only when there were in fact no inhabitants in the territory at the time sovereignty was acquired.[10]

4.9 Thus, the *Mabo (No 2)* decision established the doctrine of native title through which the common law of Australia was capable of recognising the existence of a

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5 A conclusion he reached notwithstanding his observation that the evidence showed 'a subtle and elaborate system' of law 'which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence' (p 267).

6 *Milirrpum v Nabalco Pty Ltd* (1970) 17 FLR 141 at 245.

7 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

8 The majority judgments of the Court were delivered by Justice Brennan (whose judgment is considered the lead judgment as Chief Justice Mason and Justice McHugh concurred), Justices Deane and Gaudron in a joint judgment, and Justice Toohey.

9 *Mabo (No 2)* (1992) 175 CLR 1, Brennan J at 420. Also Deane and Gaudron JJ at 438-439 and Toohey J at 420.

10 *Mabo (No 2)* per Brennan J at 424-427 and 434, per Deane and Gaudron JJ at 439-446, per Toohey J at 484.

traditional title, sourced in the laws observed by Indigenous societies in the period prior to the acquisition of sovereignty over the Australian continent by Britain. Where native title has not been extinguished it continues to exist, and reflects the entitlement of Indigenous people to their traditional lands in accordance with their laws and customs.

4.10 Native title is *sui generis* or, in other words, it is a unique interest. The nature and incidents of native title were to be ascertained by reference to the traditional laws and customs of Indigenous groups. Brennan J wrote that:

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[11]

4.11 It is important to understand that native title is a common law concept which *reflects* Indigenous traditional title. Stated another way, native title is not traditional title but rather it constitutes the means by which the common law can recognise traditional title which is sourced in the laws and customs of Indigenous societies.

4.12 Although the nature and scope of the common law concept of native title was to be ascertained by reference to traditional laws and customs (i.e. native title is to reflect traditional title), some of the judges did foreshadow a characterisation of the concept of native title, by way of incidental comment to their main reasoning. For example, Justices Deane and Gaudron said that:

> the title, whether of individual, family, band or community, is "only a personal … right" … it does not constitute a legal or beneficial estate in the actual land.[12]

4.13 In other words, Justices Deane and Gaudron were proposing that traditional title be given only a limited recognition by the common law. The common law concept of native title – the means by which traditional title sourced in traditional laws and customs could achieve recognition – may, on this view, be limited to the status of a personal right.

4.14 Brennan J opined (again by way of incidental comment) that native title may be 'proprietary or personal and usufructuary in nature'.

4.15 If characterised as a personal and usufructuary right, native title could be susceptible to extinguishment by a Crown grant or Crown dealings with the land which were inconsistent with the continued exercise of the rights and interests recognised through the common law concept of native title.[13]

11 *Mabo (No 2)*, Brennan J at 429, and also Deane and Gaudron JJ at 442.

12 *Mabo (No 2)*, Deane and Gaudron JJ at 442-443.

13 *Mabo (No 2)* at 443.

4.16 In discussing the possible limitations on the concept of native title, the majority judges foreshadowed some elements of what can be considered the doctrine of extinguishment of native title.[14] The idea that native title can be 'extinguished' is better understood as the circumstances under which the common law will cease to recognise native title. In other words, 'extinguishment' of native title does not mean that traditional title ceases to exist, rather it means that the common law will cease to recognise that traditional title through its concept of native title. The law on extinguishment has been developed further in subsequent decisions of the High Court and the Federal Court.

4.17 It is important to note that what the High Court judges said about the extent of the concept of native title, and also much of what they said about its extinguishment of native title, was by way of incidental comment to the main reasoning on the questions raised by the parties in the case.[15]

Extinguishment of Native Title

The Circumstances under which Traditional Title May Cease to Exist

4.18 Traditional title, and therefore native title, will cease to exist where traditional title holders lose their connection with the land. The judgments do not provide an exhaustive list of how this may occur. The death of the last remaining group member may be sufficient,[16] as may be physical separation from the land and the abandonment of traditional customs,[17] although traditional title will not cease simply as a result of a modified lifestyle and a change in the laws and customs in which that title is sourced.[18] Traditional title may also be surrendered voluntarily to the Crown by the holders of the title.[19]

The Doctrine of Extinguishment of Native Title

4.19 The acquisition of sovereignty exposed native title to extinguishment by valid legislative or executive acts of the Crown. From the majority judgments in *Mabo (No 2)* it appeared that extinguishment of native title would result from legislative acts which exhibited a 'clear and plain intention'[20] to extinguish native title, or where legislation expressed an intention to extinguish using 'clear and unambiguous words'.[21] Further, it appeared that executive acts which were

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14 See for instance the discussion in the judgment of Deane and Gaudron JJ at 443 and 453, in *Mabo (No 2)*.

15 In other words, their comments were largely by way of *obiter dicta*.

16 *Mabo (No 2)*, Brennan J at 435 and Deane and Gaudron JJ at 452.

17 *Mabo (No 2)*, Brennan J at 430, 435.

18 *Mabo (No 2)*, Brennan J at 435, Deane and Gaudron JJ at 452 and Toohey J at 488. See also *Legal Practice Briefing*, Attorney-General's Legal Practice Number 11, 29 April 1994.

19 *Mabo (No 2)*, Brennan J at 425 and Deane and Gaudron JJ at 452.

20 *Mabo (No 2)*, Brennan J at 434, and Toohey J at 489.

21 *Mabo (No 2)*, Deane and Gaudron JJ at 452.

inconsistent with the continued enjoyment of native title rights and interests would also have the effect of extinguishing native title.[22]

4.20 In addition, Brennan J indicated that native title may not be wholly extinguished by a Crown grant or dealing with the land but may be extinguished 'to the extent of inconsistency' with the same. In other words, it appears that he contemplated the possibility of partial extinguishment of native title, although his comments in this regard were made by way of incidental comment only:

> Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency.[23]

4.21 However, there was no consensus among the majority judges as to which acts would extinguish native title. The Attorney-General's Department noted that in *Mabo (No 2)*:

> The judgements variously considered the position of a range of land, such as freehold, leasehold, land appropriated by the Crown, national parks and land over which mining interests had been granted.[24]

4.22 This Committee's Fifteenth Report noted the comments of the Attorney-General's Department and concluded that:

> Accordingly, and with the benefit of hindsight, in 1992 (immediately following the *Mabo (No2)* judgment it should not have been considered possible to clearly articulate what may have been the implications of the judgment for extinguishment. At the most, native title could have been considered to have been extinguished over all country to the extent of inconsistency with freehold or leasehold grants, or which had been set aside for public use ... However, in that the High Court did not provide a definitive view about the extinguishing effects of leases in *Mabo (No2)*, it remained to be established whether forms of native title could have survived, or could be revived, over all but freehold grants in Australia.[25]

4.23 The power to extinguish native title is limited only by s.51(xxxi) of the Commonwealth Constitution, which requires that any acquisition of property by the Commonwealth is on 'just terms', and by the *Racial Discrimination Act 1975 (Cth)*, which limits the legislative power of the States and Territories. These limitations on the Crown's power to extinguish native title are discussed later in this chapter.

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22 *Mabo (No 2)*, Brennan J at 434, Deane and Gaudron JJ at 452 and Toohey J at 489.

23 *Mabo (No 2)*, Brennan J at 434.

24 *Legal Practice* Briefing, Attorney-General's Legal Practice Number 11, 29 April 1994.

25 Fifteenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, September 1999, p 18.

4.24 Only Toohey J found a common law limitation on the exercise of the Crown's power to extinguish native title. He held that the vulnerability of the title to extinguishment by the Crown, and the operation of the right of pre-emption (which precludes alienation of native title by the holders of the title to anyone but the Crown), give rise to a fiduciary obligation on the Crown, 'to ensure that traditional title is not impaired or destroyed without the consent of, or otherwise contrary to, the interests of the titleholders'.[26]

4.25 What emerged from the *Mabo (No 2)* decision can be briefly summarised as follows:

- a confirmation of previous judicial authority that Britain acquired sovereignty over the Australian continent by settlement.
- a confirmation that, as a result of the acquisition of sovereignty by settlement, the common law applied universally to the continent of Australia, so that the doctrine of tenures formed the basis of land law.
- a recognition that the Crown gained radical title to the land as a concomitant of having acquired sovereignty.
- a rejection of the proposition that the Crown automatically gained absolute beneficial title to land upon the acquisition of sovereignty. The Crown would gain full beneficial title to a settled colony had it been unoccupied; otherwise, the Crown's title is burdened by the prior interests in land of Indigenous peoples.
- the traditional title of Indigenous people to their land could be recognised by the common law through the concept of native title.
- the High Court determined that the nature and content native title is to be ascertained by reference to the traditional laws and customs of Indigenous groups.
- the traditional title of Indigenous people will cease to exist where the Indigenous group no longer observes the laws and customs that give rise to their title (including where the group ceases to exist).
- the emergence of a common law doctrine of unilateral extinguishment of native title, according to which:
    - native title is vulnerable to extinguishment by legislative acts which exhibit a clear and plain intention to extinguish native title, or express an intention to extinguish in clear and unambiguous words;
    - native title is extinguished by valid executive acts which are inconsistent with the ability of native title holders to enjoy their native title rights and interests.

26 *Mabo (No 2)*, Toohey J at 493.

- the common law offered no protection to native title against extinguishment by valid acts of the Crown. The legislative power to extinguish native title is limited only by s.51(xxxi) of the Commonwealth Constitution, and by the *Racial Discrimination Act 1975 (Cth).*

The Native Title Act: Recognition, Protection and Extinguishment

4.26 The *Native Title Act 1993 (Cth)* was enacted in response to the *Mabo (No 2)* decision. It was passed on 22 December 1993, a year and a half after the High Court decision, following extensive negotiations between the Commonwealth Government, Indigenous community representatives and the representatives of non-Indigenous interest groups.[27]

4.27 In his second reading speech in relation to the Native Title Bill 1993 the then Prime Minister, Mr Paul Keating, described the four key aspects of the Bill as:

- ungrudging and unambiguous recognition and protection of native title;
- provision for clear and certain validation of past acts – including grants and laws – if they have been invalidated because of the existence of native title;
- a just and practical regime governing future grants and acts affecting native title; and
- a rigorous, specialised and accessible tribunal and court processes for determining claims to native title and for negotiation and decisions on proposed grants over native title land.[28]

4.28 These key aspects were mirrored in the main objects of the Act which were set out in s.3:

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

Recognition

4.29 The Native Title Act sought to recognise and protect native title.[29] The common law concept of native title was incorporated into s.223 of the Act, which provided that:

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27 Discussion and footnotes in the following pages refers to the original Native Title Act, as passed in 1993.

28 *House of Representatives Hansard*, 16 November 1993, pp 2877, 2883.

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

4.30 It was not intended to codify native title rights, rather the Act left these to be ascertained in each particular case according to the laws and customs of the relevant Indigenous group.[30]

4.31 The *Mabo (No 2)* decision established that the common law was capable of recognising native title. However, in seeking recognition of their title, native title holders needed to prove its continued existence. Ordinarily this would involve native title holders and governments in lengthy and costly litigation. The Mabo litigation, for instance, had taken a decade before it was finally resolved.

4.32 The Act sought to provide a procedure involving negotiation and conciliation as an alternative to litigation:

> A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.[31]

4.33 The model adopted was that native title holders would seek recognition of their title through agreement with the relevant State or Territory government and any third parties who had an interest in the land over which they had an interest. The agreement would then be registered in the Federal Court as a determination of native title. The principal parties in any negotiation would be the native title holders and the State and Territory governments, even though the Act provided that anyone with an interest in the land could be a party to negotiations.

4.34 A negotiated determination of native title could cover:

- the terms of the recognition of native title;

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29 Sections 3(a) and 10. See also the Commentary to the Native Title Act, pp C9-C10.

30 *House of Representatives Hansard*, 16 November 1993, p 2879 (Hon Paul Keating MP, Prime Minister, Second Reading Speech for the Native Title Bill 1993).

31 Preamble to the *Native Title Act 1993*.

- the accommodation of existing non-Indigenous interests (although it should be noted that, where validly granted, such pre-existing interests could not be impugned by the existence of native title);
- the terms of future protection of native title and the future grant of non-Indigenous titles; and
- compensation to native title holders for the loss or impairment of their title.

4.35 The High Court has noted the benefit of the approach adopted in the Act:

> If it be practicable to resolve an application for determination of native title by negotiations and agreement rather than by the judicial determination of complex issues, the Court and the likely parties to the litigation are saved a great deal of time and resources. Perhaps more importantly, if the persons interested in the determination of those issues negotiate and reach agreement, they are enabled thereby to establish an amicable relationship between future neighbouring occupiers.[32]

4.36 A National Native Title Tribunal (the NNTT) was established principally as the provider of mediation services to facilitate agreed determinations of native title. The Tribunal was also to provide mediation services, when requested, in future act negotiations where the right to negotiate applied.

4.37 Native title holders seeking a determination recognising their title would lodge an application for determination with the NNTT and, following formal acceptance of the application by the NNTT Registrar, the application proceeded to mediation.

4.38 In carrying out its functions the Tribunal was to act in a fair, just, economical, informal and prompt way,[33] it could take into account the customary concerns of Aboriginal and Torres Strait Islanders,[34] and was not to be bound by technicalities, legal forms and rules of evidence.[35]

4.39 Litigation was to be a last resort where mediation and negotiation failed to produce an agreed result as between the parties concerned. To accommodate the unique character of native title the Federal Court, when hearing applications for a determination of native title, was enjoined to 'pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt'.[36] The Court was also required to 'take into account the cultural and customary concerns of

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32 *North Ganalanja Aboriginal Corporation v Queensland* (*Waanyi*) (1996) 135 ALR 225 at 617.

33 Section 109(1).

34 Section 109(2).

35 Section 109(3).

36 Section 82(1).

Aboriginal people and Torres Strait Islanders'.[37] The Act also provided that the Court 'was not bound by technicalities, legal forms or rules of evidence'.[38]

State and Territory Tribunals and Processes

4.40 The Act provided for the States and Territories to establish their own tribunals and procedures for determining native title applications. States and Territories could also establish their own procedures for dealing with future acts which would operate in the place of the relevant provisions of the Native Title Act; they could also establish their own tribunals to process and mediate applications for determination of native title. However, to do so State and Territory alternative procedures and tribunals were required to meet the minimum standards set out in the Native Title Act.

4.41 Thus, where there is to be a transfer of responsibility from the Commonwealth to State and Territory governments in dealing with Indigenous interests in land, the Commonwealth sought to ensure that this would not result in a reduction in the protection offered to these interests.

> The Commonwealth is … however, playing its proper role in setting national standards and establishing a national framework for dealing with native title.[39]

4.42 The Prime Minister at the time, Mr Paul Keating, said during his second reading speech on the Native Title Bill:

> States and Territories that wish to see a national system with proper recognition of their land management responsibilities, and with fairness for Aboriginal and Torres Strait Islander people, will find it in this bill.[40]

Protection

4.43 In *Western Australia v The Commonwealth* (*Native Title Act Case*)[41] the High Court observed that:

> The first of the enacted objects of the *Native Title Act* is "to provide for the recognition and protection of native title" (s.3(a)). This object is achieved by a statutory declaration (s.11(1)) that native title "is not able to be extinguished contrary to this Act". The protection given to native title by this provision removes its vulnerability to defeasance at common law by providing a prima facie sterilisation of all acts which would otherwise defeat native title. By that prima facie sterilisation s.11(1) ensures that the exceptions prescribed by other provisions of the Act which permit the

37 Section 82(2).

38 Section 82(3).

39 Hon Paul Keating MP, Prime Minister, *House of Representatives Hansard*, 16 November 1993, p 2879.

40 Hon Paul Keating MP, Prime Minister, *House of Representatives Hansard*, 16 November 1993, p 2879.

41 *Western Australia v The Commonwealth* (1995) 183 CLR 373.

> extinguishment or impairment of native title constitute an exclusive code. Conformity with the code is essential to the effective extinguishment or impairment of native title. The Native Title Act thus governs the recognition, protection, extinguishment and impairment of native title.[42]

4.44 The scheme for facilitating future dealings in land by governments, and for the protection of native title in relation to those future dealings, was the future act regime.[43]

4.45 The future act regime was based on:

- the freehold test;
- the non-extinguishment principle;
- compensation;
- the right to negotiate.

4.46 Generally, a future act by government[44] could be done to land over which native title exists, or may exist, if it could also be done to land which was the subject of ordinary title under the common law. Ordinary title means freehold title.[45] This meant that native title holders were to enjoy the same procedural rights as the holders of freehold title in relation to the appropriation or use of their land by government.

4.47 The non-extinguishment principle applied to all future acts[46] with the exception of compulsory acquisitions of native title rights and interests by government. According to the non-extinguishment principle, an act (for example a lease or other interest granted by government to a third party) which affects native title[47] was deemed not to extinguish native title. The existence of native title would not affect the validity of the act but, to the extent that the act was inconsistent with the continued exercise or enjoyment of the native title rights and interests, those native title rights and interests would be suspended for the duration of the act (that is, for the duration of the lease or other interest granted).[48]

4.48 Where the non-extinguishment principle applied, native title holders were entitled to compensation for the impairment of their title. Compensation was to be

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42 *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 453.

43 NTA Part 2 Division 3.

44 Future acts were defined in s.233 of the NTA. The exception to this general rule was 'low impact' future acts defined in (s.234), or future acts done on offshore areas (s.23(6)(b)).

45 Section 23(6)(a) and 253. Except in the ACT, where ordinary title is leasehold title.

46 Section 23(4)(a). It also applied to some validated past acts as discussed later in this chapter.

47 An act which affects native title was defined in s.227 as an act – either of the legislature of the executive – which extinguishes native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

48 Section 238.

determined on the basis that native title holders held freehold title to the land.[49] Where the doing of the future act would extinguish native title, native title holders were entitled to just terms compensation.[50]

The Right to Negotiate

4.49 Wherever possible, native title holders were to be provided with a 'right to negotiate' the form of compensation.[51] The provision of a right to negotiate was seen as appropriate in recognition of the special attachment that Aboriginal peoples and Torres Strait Islanders have to their land.[52]

4.50 The right to negotiate was made available to native title holders who were either:

- registered native title claimants; or
- registered native title holders.

4.51 A person or persons were registered native title claimants if they had lodged a native title determination application with the NNTT, and the application had been formally accepted – that is, it had passed the 'acceptance' or 'registration' test – and recorded on the Register of Native Title Claims. To pass the acceptance/registration test an application had to meet certain formal requirements and the Registrar had to be satisfied that the application disclosed a *prima facie* case, and was not otherwise frivolous or vexatious.[53]

4.52 Registered native title holders were native title holders who had obtained a determination of native title, either through litigation or negotiation, and that determination had been recorded on the National Native Title Register.[54]

4.53 Thus, in addition to the general procedural rights provided (according to the 'freehold test' as discussed above), native title holders who were registered native title claimants or registered native title holders also had a right to negotiate[55] over a limited class of future acts which:

- conferred a right to mine; or

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49 Sections 23(4)(b), 240 and also Part 2, Division 5.

50 Sections 23(3)(c).

51 Preamble to the *Native Title Act 1993*.

52 Commentary to the Native Title Act, p C17.

53 Sections 61, 62 and 63 and see generally Part 7.

54 NTA Part 8.

55 Section 31(1) and see generally Subdivision B of Division 3 of Part 2.

- involved the compulsory acquisition of native title rights and interests for the purpose of conferring an interest on third parties.[56]

4.54 Two exceptions to the right to negotiate were provided. The right to negotiate would not apply if:

- the Government declared that the act was subject to the expedited procedure because it considered that the act would not directly interfere with the community life and sites of significance to the native title holders or would not cause major disturbance to the relevant land or waters;[57] or
- if the act was the subject of a ministerial determination under s.26(3)(b) and (4), excluding it from the right to negotiate process.

4.55 Where a government proposed to do an act of the class mentioned above (and provided the act was not made subject to the any of the exceptions to the right to negotiate procedure), the right to negotiate procedure set out in s.31(1) of the Native Title Act required governments to negotiate in good faith with native title holders over the terms of the impairment or extinguishment of their title.

4.56 The scope of negotiations was to be as broad as possible. Section 33 of the Native Title Act provided that:

> *Without limiting the scope of any negotiations*, they may, where relevant, include the possibility of including a condition that has the effect that native title parties are to be entitled to payments worked out by reference to:
>
> (a) the amount of profits made; or
>
> (b) any income derived; or
>
> (c) any things produced;
>
> by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done. [emphasis added]

4.57 The right to negotiate did not constitute a veto over the doing of the class of acts to which it applied. Under the Native Title Act, negotiations were subject to short timeframes, and provision was made for an arbitral determination by the NNTT (or any recognised State/Territory tribunal operating in lieu of the NNTT) regarding the doing of the act, at the expiration of the minimum negotiation period.[58] Arbitral

56 Section 26(2).

57 Sections 32 and 237. If the relevant government made such a declaration then, in order to secure the right to negotiate, native title holders needed specifically to lodge an objection to the act with the Tribunal and show that the act would, in fact, cause either interference with community life, or interference with sites of significance or cause major disturbance to the relevant land or waters. In other words, to secure the right to negotiate in relation to an act declared subject to the expedited procedure was an onerous and expensive process for native title holders and their representative bodies.

58 Section 35.

determinations were to be expeditious[59] and could be overruled by the relevant minister.[60]

4.58 The importance of the right to negotiate in protecting native title pending a determination (recognition) of native title was explained by the High Court:

> It is erroneous to regard the registered native title claimant's right to negotiate as a windfall accretion … If the claim is well founded, the claimant would be entitled to protection of the claimed native title against those powers and interests which are claimed or sought by persons with whom negotiations might take place under the Act. Equally, it is erroneous to regard the acceptance of an application for determination of native title as a stripping away of a power otherwise possessed by Government to confer mining rights and the other rights to which Sub-div B applies. If the claim of native title is well founded, the power [to grant such titles] was not available to be exercised to defeat without compensation the claimant's native title. The Act simply preserves the status quo pending a determination of an accepted application claiming native title in land subject to the procedures referred to.[61]

4.59 In addition to the procedural rights provided by the future act regime, s.21(1)(b) and (2) of the Native Title Act provided that native title holders might, under an agreement with the Commonwealth, a State or a Territory, authorise any future act that would affect their title, 'for any consideration, and subject to any conditions, agreed by the parties'.

4.60 Thus, if they wished to do so, governments could negotiate the validity of classes of future acts with the relevant native title holders.

4.61 Under s.43 of the Native Title Act, States and Territories which met certain minimum standards set out in that section, could set up equivalent right to negotiate provisions to operate in lieu of the right to negotiate provisions contained in the Act.

<u>Aboriginal and Torres Strait Islander Representative Bodies</u>

4.62 The Native Title Act recognised that Indigenous people must be provided with the means to seek the recognition and protection of their interests:

> It is important that appropriate bodies be recognised and funded to represent Aboriginal peoples and Torres Strait Islanders and to assist them to pursue their claims to native title and compensation.[62]

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59 Section 36.

60 Section 42.

61 *North Ganalanja Aboriginal Corporation v Queensland (Waanyi)* (1996) 135 ALR 225 at 616.

62 Preamble to the *Native Title Act 1993*.

4.63 Thus, the Act made provision for the recognition and funding of Aboriginal and Torres Strait Islander bodies where amongst other things, the body is broadly representative of Aboriginal peoples or Torres Strait Islanders in the area.[63] The functions of the funded bodies included:

- facilitating the researching, preparation or making of claims for determinations of native title or for compensation for acts affecting native title; and
- assisting such individuals and groups by representing them, if requested to do so, in negotiations and proceedings relating to the doing of acts affecting native title and the provision of compensation in relation to such acts.[64]

Extinguishment

Future Extinguishment

4.64 The Act provided for future extinguishment of native title through compulsory acquisition of land by government subject to the right to negotiate for registered claimants.

4.65 It is important to note the vulnerability of native title to extinguishment, even under the protective scheme provided by the future act regime. Where a government sought to extinguish native title by compulsory acquisition, native title holders had no right to prevent the extinguishment of their title. Their only procedural right – and only available to native title holders who had become registered as native title claimants – was the right to negotiate which, as noted above, did not constitute a veto over proposed government action. If native title holders did not agree to the compulsory acquisition of their title, and provided the government had negotiated in good faith, then the Government could apply for an arbitral determination by the NNTT (or any approved State or Territory body) allowing it to proceed with the acquisition. The NNTT (or any other arbitral body), after hearing the matter could determine that the act was not to go ahead[65]. However, any decision could be overruled by the relevant minister, if it was considered to be a matter of national or State or Territory interest to do so.[66]

4.66 Thus, although the NTA provided a process which offered some protection to native title against unilateral extinguishment by government acts, governments continued to have the power to extinguish native title against the wishes of Indigenous people. This underscores the importance of governments (especially State and Territory governments) committing to implementing the NTA in good faith and with a view to achieving the objects of the legislation. It is only through such a commitment

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63 Sections 202, 203.

64 Section 202(4).

65 Section 38(1)(a).

66 Section 42.

by governments that the interests of Indigenous people in land can actually receive the recognition and protection that the NTA sought to provide.

4.67 Another factor contributing to the vulnerability of native title to extinguishment was that participation in arbitral determinations to prevent a compulsory acquisition of rights was resource intensive, and would place an onerous burden on the limited resources of Native Title Representative Bodies.

4.68 Native title could also be extinguished in the future through the voluntary surrender of native title rights and interests to government.[67]

Past Extinguishment

4.69 The Act also provided for the extinguishment of native title in relation to the validation of some past acts.

4.70 Although, under the common law, native title was vulnerable to extinguishment by valid legislative and executive action, it was substantially protected against extinguishment by the Racial Discrimination Act (RDA), which became operative on 31 October 1975. (The effect of the RDA is considered later in this chapter).

4.71 The protection offered by the RDA could possibly have invalidated some acts done by governments since 1975, the year it commenced operation. It was therefore seen as necessary to include in the Native Title Act provisions which would ensure the validation of past acts[68] – legislation or grants by governments – which might potentially have been invalid because of the operation of the RDA.

4.72 The Native Title Act included provisions which confirmed the validity of any past acts of the Commonwealth which may have been rendered invalid due to the existence of native title. States and Territories were authorised to validate their own past acts on similar terms.[69]

4.73 Some validated past acts were deemed to have extinguished native title either wholly, in the case of Category A past acts, or partially in the case of Category B past acts. All other past acts – Category C and Category D past acts – were subject to the non-extinguishment principle. [70]

4.74 The past act validation provisions were considered discriminatory because they validated existing Crown grants which were potentially invalid, at the expense of valid existing native title. However, as discussed later in this chapter, the provisions

67 Section 21(1)(a).

68 Section 228.

69 NTA Part 2, Division 1, Subdivision B.

70 Sections 229-232.

for the validation of past acts were included in the Native Title Act with the consent of Indigenous community representatives.

The Land Fund and the Social Justice Package

4.75 In order to address the disadvantage of Indigenous people caused by their gradual dispossession, the Native Title Act made provision for a land fund to assist Indigenous people to acquire land. The land fund was provided in recognition:

> that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests.[71]

4.76 The Government also made a commitment to a social justice package which did not form part of the Act, but was to be delivered at a later date.

The Status of the Protections in the Native Title Act

4.77 *Mabo (No 2)* proposed that governments had the power to extinguish native title unilaterally by valid legislative or executive acts subject to s.51(xxxi) of the Commonwealth Constitution and the protection offered by the Racial Discrimination Act.

The Constitution

4.78 Any acquisition of property by the Commonwealth is subject to the requirement in s.51(xxxi) of the Constitution that it be on just terms. The requirement of just terms compensation binds the Commonwealth Parliament but not State Parliaments.

4.79 The principle of providing compensation on ‘just terms’ for extinguishment of native title formed the basis of the compensation scheme in the Native Title Act.

The Racial Discrimination Act 1975

4.80 Australia ratified the CERD on 30 September 1975. The Racial Discrimination Act 1975, which came into force on 31 October 1975 was enacted in partial fulfilment of Australia’s obligations under the CERD.

4.81 Section 10 of the Racial Discrimination Act, which was enacted to implement Article 5 of the CERD, provides a guarantee of a right to equality before the law, in the following terms:

> 10(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin, do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that

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71 Preamble to the *Native Title Act 1993*.

> law, persons of the first mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
>
> 10(2) A reference in sub-section (1) to a right includes a reference to a right of the kind referred to in Article 5 of the Convention.

4.82 In the case of *Mabo v Queensland (No 1)* (*Mabo (No 1)*)[72] the High Court considered the scope of s.10 of the RDA. A majority of the Court[73] decided that the RDA would provide the holders of native title with the same degree of protection from legislative interference with their human right to own and inherit property as is enjoyed by members of the general community.[74]

4.83 The majority judges noted the distinction between legally enforceable rights which arise under municipal law, and human rights. Human rights are different in nature from legal rights: human rights are fundamental rights, which preserve and advance the dignity and equality inherent in all human beings.[75]

4.84 The majority held that the 'rights' referred to in s.10 of the RDA are not necessarily restricted to legal rights but include 'human rights' of the kind covered by Article 5 of the CERD. The rights covered by Article 5 (as noted in Chapter 3 of this report) include the right to own and inherit property, which implicitly also includes the right not to be arbitrarily deprived of property.[76]

4.85 The question to be asked is whether Indigenous people enjoy a protected right – the human right to own and inherit property – to a more limited extent than other members of the community.[77] If so:

> persons of a particular race, colour or national or ethnic origin who are disadvantaged by the operation of the … law, shall, by force of s.10 itself, enjoy the relevant "right" to the same extent as persons of another race, colour or national or ethnic origin who are not so disadvantaged.[78]

4.86 Thus, the effect of the RDA was that native title holders were to enjoy the same protection against interference with their property rights by acts of the Crown as non-Indigenous people would enjoy under the law in relation to their property rights.

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72 *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

73 The majority comprised Brennan, Toohey and Gaudron JJ in a joint judgment and Deane J in a separate judgment. Mason CJ, Wilson and Dawson JJ dissented.

74 *Mabo v Queensland (No 1)*, Brennan, Toohey, Gaudron JJ at 219 and Deane J at 232.

75 *Mabo v Queensland (No 1)*, Brennan et al at 217.

76 *Mabo v Queensland (No 1)*, Brennan, Toohey, Gaudron JJ at 217 and Deane J at 229.

77 *Mabo v Queensland (No 1)*, Brennan, Toohey, Gaudron JJ at 217 and Deane J at 231.

78 *Mabo v Queensland (No 1)*, Deane J at 232 . See also Brennan, Toohey and Gaudron JJ at 217 and 219.

4.87 Following the recognition of native title in *Mabo (No 2)* the Government canvassed two ways in which the RDA could possibly affect the acts to which it applied:

- the RDA either protects native title from extinguishment and renders the relevant legislation or acts under that legislation wholly or partially invalid; or
- the RDA operates so as to provide a right of compensation for the extinguishment of native title.[79]

4.88 The Government proceeded on the basis of the first of these possibilities. Hence, the Government saw the need for legislation validating potentially invalid past acts (as the RDA could have rendered invalid acts done since it came into operation on 31 October 1975). It also shaped the Government's view of how to ensure that future acts could be validly done.

4.89 As the RDA is not entrenched, it does not limit the legislative power of the Commonwealth Parliament, and can therefore be repealed or overridden by subsequent Commonwealth legislation. However, as a result of s.109 of the Constitution,[80] the RDA will prevail over inconsistent State and Territory laws. This is especially significant because, as States have primary responsibility for land management, most future acts will involve the State and Territory governments.

4.90 In constructing a process which would enable future dealings over land to proceed validly, the starting point was the constraints that s.10 of the RDA would impose on State and Territory legislatures in dealing with land over which native title exists, or could exist.

4.91 On the authority of *Mabo (No 1)*, s.10 of the RDA guarantees equality in the enjoyment of rights. In the context of property rights it was not the nature, extent or character of the legal rights that was relevant. What was relevant was whether the human right of Indigenous people to own and enjoy their title was provided with the same level of protection from interference as that available under the law to non-Indigenous title holders.

4.92 The highest form of protection that is available to interest holders under the law is the procedural rights which attach to a freehold estate. Thus, under the Native Title Act, native title holders were given the same procedural rights against interference with their interests by the Crown as they would have had if they held freehold title.

4.93 This was the 'freehold test'. It did not mean that native title was necessarily equated with freehold title; as stated above the nature, extent or character of the legal

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79 Commentary to the *Native Title Act 1993*, p C6.

80 Section 109 of the Constitution provides that 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of inconsistency, be invalid'.

rights is not a relevant consideration. The obligation is to ensure commensurate enjoyment of a fundamental human right and this obligation was framed as the 'non-discrimination principle'.

4.94 Thus, generally, under the future act regime, native title holders were given the same level of protection of their title as the holder of a freehold estate would have, and native title holders would also enjoy the same rights of compensation for dealings with their land. In addition, as the grant of overlying interests over freehold land would not, in most cases (such as a mining lease), extinguish the freeholder's rights and interests, the non-extinguishment principle was provided to preserve the rights and interest of native title holders.[81]

4.95 A right to negotiate over the grants of some titles was also provided (as discussed above). The status of the right to negotiate is considered below.

4.96 An exception to the non-discrimination principle was the provisions validating past acts of the Commonwealth, and enabling the validation of State and Territory past acts. As noted earlier, these provisions were considered discriminatory because they validated invalid existing Crown grants at the expense of valid existing native title.

A Special Measure

4.97 Some measures in the Native Title Act - such as the right to negotiate, the procedure for determining native title and the land fund - were described in the preamble to the Act as 'special' indicating that they were considered to be additional or beneficial measures.[82] The preamble also declared that the Act itself was a 'special measure' for the purposes of the RDA (which allows for special measures) and the CERD. The status of the Native Title Act as a 'special measure' within the meaning of s.8 of the RDA and the CERD is considered below.

The Native Title Act and Equality

The Native Title Act as a Special Measure

4.98 The Act was clearly intended to be a benefit to Indigenous people, notwithstanding its discriminatory provisions. It was intended that that Act would address the historic disadvantage of Indigenous people in the period since

81 See Prime Minister Paul Keating, *House of Representatives Hansard*, 16 November 1993, p 2880.

82 Although it should be noted that native title holders enjoy lesser rights in respect of the grant of mining tenements than those enjoyed by freeholders in WA. Under the *Mining Act 1978 (WA)* freeholders enjoy an effective right to veto the entry of mining lease holders onto their lands, while native title holders rights under the right to negotiate provisions of the Native Title Act do not amount to a veto (note the limited negotiation period and provision for an arbitral determination in the event that no agreement is reached). Native title holders would have had more rights had acts involving the creation of a right to mine been included instead under the general provisions of the future act regime.

colonisation, and also that it would provide for the accommodation in Australian law of their unique rights, so belatedly recognised.[83]

4.99 The preamble to the Native Title Act states that the Act is intended to be a special measure for the protection and advancement of Aboriginal peoples and Torres Strait Islanders for the purposes of the CERD and the RDA. This characterisation of the Native Title Act was based on what the Government of the day understood as its obligations under the CERD and the *Racial Discrimination Act 1975*.

4.100 The purpose of the RDA was 'in particular, to make provisions for giving effect to the Convention'.[84] Section 9 of the RDA declared racial discrimination to be unlawful, and racial discrimination was defined in identical terms to the definition contained in Article 1(1) of the CERD. Section 8 of the RDA provided that special measures to which Article 1(4) of the CERD applies are an exception to the prohibition on discrimination.

4.101 At the time the Native Title Act was drafted, the major case authority on the meaning of racial discrimination under the RDA and the CERD in Australia was the High Court decision in *Gerhardy v Brown*.[85] In that case, the High Court considered whether provision in South Australian legislation – the *Pitjantjatjarra Land Rights Act 1981 (SA)* – which gave Pitjantjatjarra people control over some of their traditional land, and restricted the access of non-Pitjantjatjarra people to the land, breached the prohibition on discrimination contained in s.9 of the RDA and Article 1(1) of the CERD.

4.102 The High Court found that the legislation was discriminatory within the meaning of the RDA and the CERD, but it could nonetheless be upheld as a special measure. The South Australian Government had argued that 'discrimination' under the CERD meant distinctions that were arbitrary or for an invidious purpose. Such a construction would mean that distinctions, or differential treatment, based on race but aimed at achieving true or substantial equality (ie which were beneficial), would not be discriminatory.[86] The Court rejected these arguments, ruling instead that under the CERD and the RDA any distinction based on race is discriminatory, and will therefore be prohibited unless it falls within the special measures exception.[87]

4.103 *Gerhardy v Brown* was authority for the proposition that the principle of non-discrimination under CERD and the RDA required strict or formal equality, so that any differential treatment is prohibited unless it is a special measure. Conversely, special measures are discriminatory but allowed. In *Gerhardy v Brown* Brennan J described special measures as discriminatory in that they denied 'formal equality

83 See the preamble and the Prime Minister's Second Reading Speech.

84 The preamble to the RDA. The Convention referred to is the CERD.

85 *Gerhardy v Brown* (1985) 159 CLR 70.

86 *Gerhardy v Brown* (1985) 159 CLR 70 at 72.

87 *Gerhardy v Brown* (1985) 159 CLR 70, Wilson J at 114, Brennan J at 130.

before the law in order to achieve effective and genuine equality'.[88]According to the High Court, the CERD and the RDA did not contemplate a concept of substantive equality under which differential treatment on the grounds of race, aimed at achieving true or effective equality, would not be considered discriminatory.

4.104 From the discussion in Chapter 3 of this report, it is clear that the construction given to the principle of equality under the CERD by the High Court in *Gerhardy v Brown* was incorrect. Under the CERD, and at international law generally, differential treatment provided to racial groups whenever it is necessary to address their disadvantage, or to ensure that the members of such groups are able to enjoy their unique rights as a minority group, is required by the principle of equality, and does not amount to discrimination.

4.105 The High Court has since indicated in the case of *Western Australia v The Commonwealth*[89] that it may be prepared to adopt a substantive equality interpretation of the RDA. However, there has been no decision of the Court on this matter to date.

4.106 Thus, at the time the Native Title Act was drafted, the Commonwealth Government proceeded on the basis that the principle of equality – or non-discrimination – required formal equality, with an exception for special measures:

> This dualistic approach of formal equality, subject only to the provisions of special measures, is also the basis upon which the NTA was enacted. Thus, many of the basic provisions of the NTA, provide for equality of treatment of native title holders with 'ordinary title holders', in respect to whether an act can be done and what compensation and procedural rights apply … whilst others including the right to negotiate (RTN) were justified in terms of being 'special measures'. This understanding of the NTA and the RTN provisions appears in the Preamble to the Act, and the Second Reading Speech and Explanatory Memorandum to the *Native Title Bill 1993*.[90]

4.107 The difference between whether a measure provides formal equality and special measures or substantive equality is most often a matter of construction. For example, the same piece of legislation – such as the Native Title Act – can be characterised as either implementing formal equality with special measures, or implementing substantive equality. The High Court has said that the Native Title Act:

> can be regarded either as a special measure under s.8 of the Racial Discrimination Act or as a law which though it makes racial distinctions, is not racially discriminatory so as to offend the Racial Discrimination Act or

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88 *Gerhardy v Brown* (1985) 159 CLR 70, Brennan J at 130.

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

90 Submission 82 (Senator the Hon Nick Minchin: Opinion for the Attorney-General's Department and the Department of Prime Minister and Cabinet) submitted to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, in its inquiry into the Native Title Amendment Bill 1996 and the Racial Discrimination Act, p 3.

the International Convention on the Elimination of All Forms of Racial Discrimination.[91]

4.108 The fact that the Commonwealth Government assumed that its obligation was to provide formal equality when enacting the Native Title Act does not prevent the Act being considered a substantive equality measure.

4.109 As noted in Chapter 3, measures ensuring formal equality and those aimed at achieving substantive equality are not alternatives. The principle of equality at international law requires, in the first instance, that formal equality is guaranteed and, where it is necessary to address disadvantage and/or protect minority rights, substantive equality measures must also be provided.[92]

4.110 The NTA was intended to provide formal equality through such devices as the freehold test, and the non-extinguishment principle. The Act also included other measures, in particular the right to negotiate, which can be characterised as either special measures in the sense of being discriminatory, or alternatively, as measures designed to ensure that native title holders are able to enjoy their unique rights to an extent that is equal to the protection afforded to the rights of the majority non-Indigenous population.

4.111 The decision in *Gerhardy v Brown* does not prevent the Commonwealth Government characterising either the NTA or any other piece of its legislation as a substantive equality measure. The RDA does not limit the legislative power of the Commonwealth Parliament. Also, the High Court's interpretation of the CERD is not definitive of the obligations of the Commonwealth Government under CERD.

4.112 The characterisation of the Native Title Act is important, as it determines the extent to which the Government can reduce or withdraw the measures provided in the Act without breaching its obligations under the CERD. If the Native Title Act is interpreted as providing formal equality plus special measures, the Government can more easily justify reducing or withdrawing a special measure such as the right to negotiate, because these are considered additional (discriminatory) measures provided above the standard of formal equality. If a measure is characterised as a substantive equality measure, particularly if it is a minority rights measure, it is more difficult for the Government to justify reducing or withdrawing it because it is integral to the provision of equality.

4.113 It should be noted, however, that whether differential treatment is characterised as discriminatory beneficial measures, or as non-discriminatory substantive equality measures, the Government cannot reduce or withdraw the

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

92 Although, and as discussed in Chapter 3, the current Government has, in error, understood formal equality and substantive equality to be alternatives. The current Commonwealth Government characterises the position as being that where differential treatment is provided on the basis of it being a substantive equality there is no need to also ensure a basic standard of formal equality.

differential measures if the disadvantage or special needs which they were intended to address still remain.

4.114 The Government of the day intended that the Native Title Act comply with Australia's international obligations including its obligations under CERD. The preamble to the Act stated that:

> The Australian Government has acted to protect the rights of all of its citizens, and in particular its indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms through:
>
> (a) the ratification of the International Convention on the Elimination of All Forms of Racial Discrimination and other standard setting instruments such as the International Covenants of Economic, Social and Cultural Rights and on Civil and Political Rights; and
>
> (b) the acceptance of the Universal Declaration of Human Rights;

4.115 Further, both international law generally, and the CERD, incorporate the standard of substantive equality as being required by the principle of equality.

4.116 Thus, if Australia is to comply with its international obligations as was intended at the time the NTA was enacted, the Act must be considered as a substantive equality measure.

The Native Title Act as a Substantive Equality Measure

4.117 In 1994, the year the Native Title Act became operative, the Aboriginal and Torres Strait Islander Social Justice Commissioner (at the time Dr Mick Dodson) identified substantive equality as the standard required in ensuring equality in the protection and enjoyment of native title:

> Governments should be aware however, that native title holders have to be afforded the same procedural rights as freeholders, but the procedural rights must also be non-discriminatory. There will be cases where there is no difference between the two requirements. In other cases the protection of genuine equality rather than formal equality may mean there needs to be a degree of flexibility in these procedures to ensure that native title holders can utilise their procedural rights to the same extent as freeholders.[93]

4.118 In evidence before this Committee Mr Peter Yu also made it clear that Indigenous people considered the Act a substantive equality measure which went some way towards recognising and protecting their unique rights:

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93 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report January – June 1994*, p 138.

> **Mr SECKER:** … Are you suggesting that the 1993 Native Title Act was a special measure?
>
> **Mr YU:** No, it was not a special measure.
>
> **Mr SECKER:** I am asking you whether you thought that the 1993 Native Title Act was considered a special measure by Indigenous people.
>
> **Mr YU**: No, we did not consider that it was a special measure because it did not relate to the question of formal equality. We see special measure as being tied to the question of formal equality, on the basis that it is there to enable a significant improvement in the immediate situation. When the circumstances have improved significantly enough for Indigenous people to participate as equal citizens, then that measure could be done away with. The fact is that the issue of substantive equality is a matter of the inherent customary position of Aboriginal people.[94]

4.119 The Act contained measures such as the land fund that addressed the disadvantaged status of Indigenous people in Australian society. The Government also made a commitment to the social justice package, although this was not part of the Act. In addition, the Act included measures which were aimed at recognising the unique nature of Indigenous property rights, and ensuring their equal protection and enjoyment. These measures were principally the right to negotiate, together with the other procedural rights provided in the future act regime. The procedure which provided for recognising native title through negotiation and mediation can also be considered a measure designed to accommodate the special nature of native title.

4.120 The 1998 *Native Title Report* of the Aboriginal and Torres Strait Islander Social Justice Commissioner (at the time, Ms Zita Antonios) made this distinction between measures in the Act aimed at addressing the historic disadvantage of Indigenous people due to the effects of past discrimination, and measures that recognised and protected the unique property rights of Indigenous people:

> The proposed social justice package and the land fund, established under the NTA, are examples of measures originally intended to overcome the destructive cultural, social and economic impact of dispossession on Aboriginal and Torres Strait Islander people. The social justice package, of course, never developed beyond a proposal. The land fund has been a useful measure in achieving economic equality for [Indigenous] people.
>
> …
>
> the right to negotiate is not a special measure. It is not a measure taken by government in order to redress the injustice of historical dispossession even though it may co-incidentally have this effect. It is a measure designed to

94 *Official Committee Hansard*, 13 March 2000, p 179.

> recognise the traditional rights and protect the cultural identity of [Indigenous] people.[95]

Negotiation and Consent

4.121 As noted earlier, the Native Title Act contains discriminatory provisions, as well as provisions which deliver measures that can be considered beneficial. The question then arises whether legislation that contains discriminatory measures can be characterised, as a whole, as a substantive equality measure designed to ensure the adequate development and protection of Indigenous people.

4.122 The reference to special measures in Article 1(4) of the CERD is to 'Special measures taken for the sole purpose of securing the adequate advancement of…' Article 2(2) of the CERD does not expressly contain this limitation, referring instead to 'special and concrete measures to ensure the adequate development and protection of…'

4.123 Notwithstanding the discriminatory provisions, the CERD Committee accepted that the original Act fulfilled Australia's obligations under the CERD, as a measure which addressed the disadvantage suffered by Indigenous people as a result of the past discriminatory practices, and also the unique traditional and cultural identification of Indigenous people with their land. In decision (2)54 on Australia the CERD Committee stated that it:

> welcomed … the Native Title Act of 1993, which provided a framework for the continued recognition of indigenous land rights following the precedent established by the *Mabo* case.

4.124 The fact that the Native Title Act had the consent of Indigenous people, won by a lengthy process of negotiations between the Government and Indigenous community representatives, was important in the CERD Committee's characterisation of the Act as being a beneficial measure. Further, in decision (2)54, the CERD Committee noted that the:

> 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders.

4.125 It seems, therefore, that the CERD Committee accepts that it is possible for Indigenous people to 'contract out' of the protections contained in the CERD by agreeing to discriminatory provisions.[96]

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95 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, p 113. It should be noted that delivery of the social justice package, which was part of the agreement reached with Indigenous representatives over the 1993 Native Title Act, remains part of the policy platform of the Australian Labor Party: See *Official Committee Hansard*, 22 February 2000, p 52, where Committee member Mr Daryl Melham MP (also ALP spokesperson on Aboriginal Affairs) said that 'the Labor Party is committed to delivering on the third tranche of the social justice package … It is current ALP policy to deliver.'

4.126 In his evidence before this Committee, Mr Peter Yu said that the discriminatory validation provisions had been agreed to by Indigenous representatives in exchange for the future protection of native title through the right to negotiate, and the other provisions in the future act regime:

> The 1993 Act, we believe, was an agreement with the Australian governments. It was not an agreement with Mr Paul Keating, the Prime Minister at that time, nor was it an agreement with the Australian Labor Party. It was an agreement with the Australian governments in relation to the validation of non-Indigenous title post 1975 and, in return, the recognition that, because of our special interest in land, there should be this right to negotiate provision and that freehold standards would be set in relation to recognition of native title.[97]

4.127 Dr Mick Dodson also gave evidence that Indigenous consent to the validation provisions had been given in exchange for the protective measures in the Act and the measures designed to address Indigenous disadvantage (including the social justice package):

> one of the things that ought to be kept in mind – and this is a mark of the process that occurred in 1993 that was absent in arriving at the 1998 amendments – is that the Indigenous representatives negotiated and agreed to a fairly substantial bit of racial discrimination in the 1993 Act. We agreed to a huge act of racial discrimination in 1993 in the validation provisions, but on balance we thought – and ultimately the [CERD] Committee in 1994 agreed when it was examining Australia's periodical report – that the discrimination was cancelled out.
>
> …
>
> You had the Act and certain things that we had negotiated in there, including accepting racial discrimination. We had the Indigenous Land Fund as the second tranche, and we had the social justice package as the third tranche. That was a careful balancing act, and the 1998 amendments upset that.[98]

4.128 Even if the Act had contained no discriminatory provisions and was intended to be wholly beneficial, as discussed in Chapter 3, the informed consent of Indigenous people to measures that affect their rights is an essential requirement in characterising those measures as falling within the principle of equality. The reason for this is clearly set out by Brennan J in *Gerhardy v Brown*.[99]

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96 This suggestion was raised by Mr John Basten QC, Submission 21, and referred to in Chapter 3.

97 *Official Committee Hansard*, 13 March 2000, p 176.

98 *Official Committee Hansard*, 22 February 2000, p 52.

99 *Gerhardy v Brown* (1985) 159 CLR 70 at 135, and see the discussion in Chapter 3.

4.129 Securing the informed consent of Indigenous people is also important in ensuring their effective participation in public life in accordance with Article 5(c) of the CERD. Ensuring the effective participation of Indigenous people in public life is of particular importance when the matters at issue are ones that affect their fundamental rights.

4.130 As discussed above, most dealings with land are conducted by State and Territory Governments, which have land management powers under the arrangements for the division of legislative power between the Commonwealth and the States. The decisions in *Mabo (No 1)* and *Mabo (No 2)* established that s.10 of the RDA operated to protect native title to the same extent as other forms of title were protected under the law, in relation to dealings by State and Territory Governments with land over which native title existed, or may have existed. Thus, the standards of the freehold test and the non-extinguishment principle in the future act regime were derived from the protection that the RDA would otherwise have conferred on native title, in relation to the bulk of future dealings with land by the Crown.

4.131 In providing specific procedures to be followed in proceeding with future acts, that would meet the standards required by the RDA, the Native Title Act provided certainty for governments and non-Indigenous land users. If the future act procedures were followed, governments could be certain that their acts were validly done. In this way the future act provisions of the Native Title Act were also beneficial to governments and non-Indigenous land users. In addition, the provision for a procedure for determining native title which allowed the expense of litigation to be avoided was an added benefit to both native title holders and governments. It is important to acknowledge that the Native title Act afforded a benefit to governments and the rest of the community, as well as native title holders. This was emphasised by the then Prime Minister in his Second Reading Speech on the Native Title Bill 1993, when he said of the future act regime:

> As well as clearing up the uncertainties of the past, [through the validation of past acts] this bill provides for the future – it delivers justice and certainty for Aboriginal and Torres Strait Islander people, industry and the whole community. It provides for the determination of native title and for dealings over native title land.

4.132 However, the commitment of the Commonwealth Government of the time to negotiation in good faith with Indigenous people over the terms of the Act must be acknowledged.

4.133 The process of negotiation between the Government and Indigenous representatives is set out briefly in the Commentary to the Act. A committee of ministers, chaired by the Prime Minister, was established to engage in negotiations on

behalf of the Government. Industry groups and State and Territory governments were also involved in the negotiation process.[100]

4.134 In evidence before this Committee, after noting that 'the underpinning principle of the original Act of 1993 was one of mediation and negotiation', Mr Peter Yu said that:

> In 1993 it was perhaps the first time that there had ever been direct engagement in formal negotiations with the government at that particular level about such a major and fundamentally important issue to the nation.
>
> …
>
> I would say that, without a doubt, while we did not agree with everything and at the end of the day we did not get everything, there was a capacity to be able to forcefully put our point of view and for the government to forcefully put its point of view.[101]

4.135 Prime Minister Paul Keating had made the Government's response to the *Mabo (No 2)* decision 'a personal priority'[102] and in a speech made six months after the judgment was delivered by the High Court, he identified a principled response to the decision as being an important step in the larger process of 'reconciliation':

> Perhaps when we recognise what we have in common we will see the things which must be done – the practical things.
>
> There is something of this in the creation of the Council for Aboriginal Reconciliation.
>
> The Council's mission is to forge a new partnership built on justice and equity and an appreciation of the heritage of Australia's indigenous people.
>
> In the abstract these terms are meaningless.
>
> We have to give meaning to "justice" and "equity" – and as I have said several times this year, we will only give them meaning when we commit ourselves to achieving concrete results.
>
> …
>
> We need these practical building blocks of change.
>
> The *Mabo* judgment should be seen as one of these.

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100 See the Commentary to the Native Title Act 1993 and also the Prime Minister's Second Reading Speech.

101 *Official Committee Hansard*, 13 March 2000, p 177.

102 Hon Paul Keating MP, *House of Representatives Hansard*, 16 January 1993, p 2878 (Second Reading Speech for the Native Title Bill 1993).

> By doing away with the bizarre conceit that this continent had no owners prior to the settlement of Europeans, Mabo establishes a fundamental truth and lays the basis for justice.
>
> …
>
> Mabo is an historic decision – we can make it an historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians.[103]

4.136 The preamble to the NTA also recorded that the legislation was 'intended to further advance the process of reconciliation among all Australians'.

4.137 In introducing the Native Title Bill into the House of Representatives on 11 November 1993, the Prime Minister made note of how negotiations with Indigenous representatives had contributed to the reconciliation process:

> Already in the process of developing the bill, we have learned a great deal about each other and how to work together. We have extended the frontier of our mutual understanding. Perhaps the most outstanding, but by no means the only, example of this has been the participation of representatives of the combined Aboriginal and Torres Strait Islander Organisation Working Party in the unprecedented negotiations leading to this legislation.[104]

4.138 The Prime Minister went on to conclude:

> In hailing what she termed 'a remarkable settlement and historic agreement', Lois O'Donoghue, the Chairperson of ATSIC, said and I quote, 'indigenous affairs will never be the same again in our nation'. It is for that reason, above all, that I commend this bill to the House.[105]

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103 Speech by Prime Minister Paul Keating at the Australian Launch of the International Year for the World's Indigenous People, Redfern, Sydney, 10 December 1992.

104 Hon Paul Keating MP, *House of Representatives Hansard*, 16 January 1993, p 2883 (Second Reading Speech for the Native Title Bill 1993).

105 Hon Paul Keating MP, *House of Representatives Hansard*, 16 January 1993, p 2883.