CHAPTER 5

THE NEED TO AMEND THE *NATIVE TITLE ACT 1993*

5.1 Most parts of the Native Title Act (the NTA)[1] commenced operation on 1 January 1994. In 1995 it became apparent that amendments to the Act would be required to accommodate the High Court's decision in *Brandy v The Human Rights and Equal Opportunity Commission* (*Brandy*).[2] The Native Title Amendment Bill 1995 was introduced into the House of Representatives on 29 November 1995 to deal with the effects of the *Brandy* decision and other miscellaneous matters. This Bill lapsed with the calling of the Federal election, and the dissolution of Parliament on 29 January 1996.

5.2 In 1996 amendments to the requirements of the threshold test for registration of native title determination applications were also necessary, following some decisions of the Federal Court in that year.

5.3 In March 1996 the Keating Government, which had passed the NTA, was voted out of office and was replaced by a Government led by Prime Minister Howard. The Coalition had gone to the election with a policy of making the Native Title Act 'workable'.[3] Shortly after its election the Howard Government released a discussion paper titled, *Towards a More Workable Native Title Act*. On 27 June 1996 the Native Title Amendment Bill 1996 was introduced into the House of Representatives. On 17 October 1996 the Government released an 'exposure draft' with further amendments. This Bill and the subsequent amendments were intended to respond to the *Brandy* and threshold test decisions as well as to address the issue of 'workability'.

5.4 On 23 December 1996 the High Court handed down its decision in *Wik Peoples v Queensland (Wik)*.[4] The Government felt that further amendments to the NTA were required in response to the implications of the *Wik* decision. Accordingly, the Government decided not to proceed with the 1996 Bill in its current form but instead to formulate a response that also dealt with the implications of the *Wik* decision.

5.5 The Howard Government released its (amended) Ten Point Plan on 8 May 1997, which it considered to be a comprehensive response to the need to amend the NTA. In particular, the Ten Point Plan was intended to respond to the *Wik* decision.

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1 All references in this chapter to the Native Title Act, or NTA, are references to the original Native Title Act, unless otherwise stated.

2 *Brandy v The Human Rights and Equal Opportunity Commission* (*Brandy*) (1995) 183 CLR 245.

3 Attorney-General's Department, Submission 24, Part I, p 31.

4 *Wik Peoples v Queensland* (1996) 187 CLR 1.

5.6 On 4 September 1997 the Government introduced the Native Title Amendment Bill 1997 into the House of Representatives. This Bill incorporated the proposed amendments from the 1996 Bill, and also included measures intended to address the implications of the *Wik* decision. The Native Title Amendment Bill 1997 was passed by the Senate on 5 December 1997, with amendments that were unacceptable to the Government. The Native Title Amendment Bill [No 2] 1997 was reintroduced into the House of Representatives on 9 March 1998, incorporating a number of amendments. The Senate passed the Bill on 8 April, with further amendments that the Government did not agree to. The Bill was then laid aside and constituted a trigger for a double dissolution election. On 1 July 1997 the Prime Minister announced that the Government had reached agreement with Independent Senator, Brian Harradine, over further amendments to the Native Title Amendment Bill 1997, which would secure its passage through the Senate.[5]

The *Brandy* Decision

5.7 In 1995, shortly after the commencement of the NTA, the High Court found in the *Brandy* case that the process for the making and registration of decisions of the Human Rights and Equal Opportunity Commission with the Federal Court involved an invalid exercise of judicial power, and was therefore unconstitutional.[6] The NTA contained a similar scheme for the registration of NNTT determinations of native title, and the invalidity of this scheme was confirmed in *Fourmile v Selpam*.[7]

5.8 Thus, it was necessary to amend the NTA to ensure the validity of agreed determinations of native title. The 'Brandy amendments', are discussed in more detail in Chapter 6.

The Threshold Test for Acceptance of Applications

5.9 As discussed in Chapter 4, the NTA included a threshold test for the formal acceptance and registration of applications for determination of native title. It was intended that only applications that passed the threshold test would be registered.[8] Once registered, native title claimants could access the right to negotiate procedure and other statutory benefits.

5.10 The case *Northern Territory v Lane*[9] established that native title applications must be registered immediately upon lodgement with the NNTT. Thus, claimants would have the right to negotiate upon lodgement of their application and the threshold test would be applied subsequent to registration.

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5 Commentary in the 2nd edition of the *Native Title Act 1993*, published by the Australian Government Solicitor, 1998, pp 12-14.

6 Under the Constitution, the judicial power of the Commonwealth must be exercised by a court.

7 *Fourmile v Selpam Pty Ltd and Another* (1998) 152 ALR 294.

8 Section 63(1).

9 *Northern Territory v Lane* (1995) 138 ALR 544; 59 FCR 332.

5.11 In *North Ganalanja Aboriginal Corporation v Queensland* (*Waanyi*)[10] the Federal Court decided that an application must be accepted if it raised an issue of law in relation to the existence of native title that was 'fairly arguable'.

5.12 The effect of these court decisions was that it was easier for native title claimants seeking a determination of native title to have their applications registered, and to access, in particular, the right to negotiate.

5.13 It is generally accepted that governments and Indigenous groups believed that amendments to the Act were required to provide a more effective threshold test.

The 'Workability' of the Native Title Act and the *Wik* Decision

5.14 The amendments to the NTA, discussed in Chapter 6, sought to address the issue of the viability or 'workability' of the Native Title Act. The issue arose because of the lack of commitment by State and Territory Governments in particular, to implementing the NTA. No legislation is workable or effective in achieving its aims where there is a lack of commitment by governments to its implementation.

5.15 The 'workability' of the NTA was an issue in Western Australia even before the Act was passed. On 2 December 1993, a few weeks prior to the passing of the NTA, the Western Australian Government passed its own legislation, the *Land (Titles and Traditional Usage) Act 1993 (WA)* (the LTTUA). The WA Act purported to extinguish native title in the State and replace it with statutory 'rights of traditional usage' (s.7) which were subordinate to all other titles (s20), and to the application of general laws relating to land use and management (s.17). Rights of traditional usage were also subject to extinguishment or suspension by ministerial notice (s.26), and would be overridden by other grants of title or acquisitions by the State Government, subject to consultation with the relevant Indigenous groups.[11]

5.16 The justification for enacting the LTTUA was set out in a statement by the State Attorney-General, Cheryl Edwardes:

> The Commonwealth Act targets and seeks to override this Parliament's legislation. Confronted with this Commonwealth assault on the most fundamental and essential powers and responsibilities of this Parliament, and the Commonwealth's attempt to impose, in Western Australia, an inefficient, uneconomical and unworkable regime of land and resource management the Government decided to take the appropriate means of legal redress by challenging the constitutional validity of the Commonwealth Native Title Act in the High Court.[12]

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10 *North Ganalanja Aboriginal Corporation v Queensland* (*Waanyi*) (1996) 185 CLR 595.

11 Richard Bartlett, *Native Title in Australia*, Butterworths, 2000, p 42. Bartlett notes that the consultation procedure could be 'disapplied' by the minister under the LTTUA.

12 *High Court Challenge by Western Australian Government to the Validity of the Commonwealth Native Title Act*, Ministerial Statement by Hon Cheryl Edwardes MLA, Attorney-General, 7 April 1994. The

5.17 In 1995, in the case of *Western Australia v The Commonwealth*,[13] the High Court declared the LTTUA to be constitutionally invalid for inconsistency with s.10 of the RDA. The LTTUA was repealed by the *Acts Amendment and Repeal (Native Title) Act 1995 (WA)*. It should be noted, however, that approximately 9000 titles were granted to third parties under the LTTUA provisions, in breach of the standards of the NTA and the RDA. The issue of the validity of these titles has never been resolved.[14]

5.18 The 'workability' of the NTA is best considered in relation to:

- the operation of the right to negotiate; and
- the achievement of determinations of native title by agreement.

The Right to Negotiate

5.19 The right to negotiate was the main procedural right which accrued to native title claimants prior to a determination confirming recognition of their traditional title under the legal system established since colonisation. As such, it has been the focal point for criticisms of the NTA. For example, in 1996 the Commonwealth Government said that:

> the right to negotiate process appears to act as a brake on mineral exploration and mining activity because it necessarily involves delay. [15]

5.20 As seen in Chapter 4, under the future act regime, registered native title claimants had a right to negotiate (RTN) in respect of some future acts (especially the grant of titles which created a right to mine). The future act regime, and the RTN in particular, was intended to protect native title pending a formal determination. Thus, where native title did exist or was likely to exist, the future act provisions were intended to be used to ensure the protection of native title and the validity of the title granted to third parties.[16]

5.21 Most State and Territory Governments chose not to apply the right to negotiate provisions over pastoral leases until the High Court's *Wik* decision,[17] and in

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statement was made in relation to WA's arguments in the case of *Western Australia v The Commonwealth*, which at the time had not yet been decided. See also footnote 10.

13 *Western Australia v The Commonwealth* (1995) 183 CLR 373; 128 ALR 1. The case was brought against the State of Western Australia by the Worrora and Mardu people, who claimed that the LTTUA breached the guarantee of racial equality contained in s.10 of the RDA. The State of Western Australia brought into issue the validity of the Commonwealth's NTA. The constitutional validity of the NTA, with the exception of s.12, was confirmed by the High Court.

14 See the relevant discussion in Chapter 6.

15 *Towards a More Workable Native Title Act: An Outline of Proposed Amendments*, Commonwealth of Australia, May 1996, p 7.

16 See also the relevant discussion in Chapters 4 and 6.

17 See the discussion in relation to intermediate period acts in Chapter 6.

this way the RTN was, to a large extent, avoided.[18] The RTN was avoided notwithstanding that well before the *Wik* decision in 1996 all Governments in Australia were aware that native title may continue to exist on pastoral leases.[19]

5.22 After the *Wik* decision was handed down, the following observation was made by the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, Ms Zita Antonios, about the implementation by the Queensland Government of the RTN:

> The Centre for Aboriginal Economic Policy Research has carried out a further study into the right to negotiate and the utilisation by the Queensland government in 1997 of the section 29 notification process after the decision in the *Wik* case was handed down. Two of the recommendations of the study were:
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> - that in order to facilitate industry development especially in mining, State Governments need to engage with native title processes in a timely and administratively efficient manner across all sectors of the mining industry;
> - that the mining industry is increasingly apprehensive about the capacity of governments to support industry development, not least because of the kind of political strategies currently used to deal with native title issues.

5.23 The Acting Social Justice Commissioner further observed that:

> The study criticises the delays caused by the inefficiencies in the issuing of section 29 notifications by the Queensland state department rather than the delays caused by the rights which the NTA conferred on native titleholders.[20]

5.24 Similarly, criticism has been made of the Western Australian State Government that in applying the RTN, it did so with the intent of making the RTN unworkable by reducing its compliance with the RTN to a matter of form rather than substance.[21] This strategy was outlined by the Leader of the State Opposition Dr Geoff Gallop in Parliament:

> the State of Western Australia had a strategy to frustrate the operation of the Native Title Act by relying on legal form rather than substance, particularly with respect to its obligations regarding the right to negotiate … Initially the State interpreted its compliance with the right to negotiate as merely holding itself ready and willing to participate and sit out the negotiation period. It

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18 Pastoral leases cover an area amounting to 40 per cent of the Australian land mass.

19 This issue is discussed in Chapter 6.

20 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, p 109. See also Finlayson, J.D., 'The right to negotiate and the miner's right: A case study of native title future act processes in Queensland', *Discussion Paper No. 139/1997*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 1997.

21 Following the repeal of the LTTUA in 1995 the Western Australian Government began applying the provisions of the future act regime (including the RTN) in relation to grants over (among other things) land held under pastoral lease.

> was prepared to convene meetings, but it was not prepared to actively engage in negotiations. As a matter of practice it applied for arbitral decisions by the Native Title Tribunal straight after the expiry of the six-month negotiation period. This minimalist strategy came under fire in the 1996 Federal Court case of Walley v the Government of Western Australia. The Federal Court found that Western Australia had generally ignored its duty to negotiate in good faith with respect to the granting of mining tenements. This forced the State to draw up a set of procedures by which it could fulfil its obligation to negotiate in good faith, although in a number of ways it still took a restricted approach. For example, the procedures limit the scope of negotiations to matters relating to the grant of a tenement only. The Government refuses to consider site protection issues. The procedures limit the authority of the Government's representative, the land access unit of the Department of Mineral and Energy, to only those matters falling within the jurisdiction of the department. In other words, by a variety of mechanisms the Government has been determined to frustrate the effective operation of the Federal Native Title Act.[22]

Agreed Determinations of Native Title

5.25 The Act provided the framework for the determination of native title through agreement. The NNTT was set up under the Act to provide mediation services to facilitate negotiated agreements of native title. Litigation was to be a last resort. A negotiated determination of native title could cover:

- the terms of the recognition of native title;
- the accommodation of existing non-Indigenous interests;[23]
- 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.[24]

5.26 The Act provided the framework for the negotiation of comprehensive agreements with Indigenous people over the recognition and accommodation of their interests in land management in the future. In other words, the Act provided a starting point for a lasting settlement or accord between Indigenous and non-Indigenous

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22 Parliament of Western Australia, *Hansard*, Wednesday, 24 November 1999 (Dr Geoff Gallop). See also a speech by Hon Giz Watson, Parliament of Western Australia, *Hansard*, Wednesday, 24 November 1999. Dr Gallop and Ms Watson were speaking on the occasion of the Second Reading of the Native Title (State Provisions) Bill 1999. Also Bartlett R., 'The State's duty to negotiate in good faith: *Walley v WA & WMC & NNTT*; *Taylor v WA & Ors*; *Collard v WA & Ors*; *Smith v WA & Ors*', *Aboriginal Law Bulletin* Vol 3 No 82, July 1996, and Smith D., *The Right to Negotiate and Native Title Future Acts: Implications of the Native Title Amendment Bill 1996*, Centre for Aboriginal Economic Policy Research (CAEPR), Discussion Paper No 124, 1996.

23 Although as noted in Chapter 4, where validly granted, such pre-existing interests could not be impugned by the existence of native title.

24 See the discussion of the NTA in Chapter 4.

Australians, but it required the commitment of governments – especially State and Territory Governments.

5.27 In its document, *Towards a More Workable Native Title Act*, the Commonwealth Government observed that:

> Disappointment has been expressed by interested parties and the wider community about the lack of outcomes from the NTA process for recognising native title rights. To date, there have been no determinations that native title exists from either from (sic) the NNTT or the Federal Court. Most claims have not progressed beyond the mediation stage.

5.28 The document stated that:

> Contributing factors have been the lack of judicial authority on what extinguishes native title and the lack of precedent on the elements of native title and on the evidence necessary to demonstrate its continued existence.[25]

5.29 In fact, none of these factors would have prevented a government genuinely committed to negotiating determinations of native title with Indigenous groups from doing so. Thus, the 'lack of outcomes' was a product of the attitude with which governments approached the implementation of the Act. This was observed by Dr Gallop in relation to the Western Australian Government:

> This attitude [of the WA Government toward implementation of the RTN] is important, not only because of the legislative process but also because it sets the scene for reaching agreements in our community. The attitude of the State of Western Australia frustrates and makes difficult the achievement of agreements.[26]

5.30 The reluctance of the WA State Government to engage in negotiations towards agreed determinations of native title was also referred to By Dr Kathryn Trees and Dr Andrew Turk in their submission to this Committee:

> the NTA is essentially flawed because parties can negotiate in bad faith or opt out of the negotiation process altogether. The determination of the WA government to limit (if not eliminate all together) native title meant that the negotiations in the case of the claim made by the Ngarluma and Indjbandi peoples had no chance of succeeding [through negotiation]. The NNTT was forced to abandon the negotiations, referring the case to the Federal Court. Thus for the Ngarluma and Indjibandi peoples, as for many indigenous groups, the NTA effectively becomes a single highly legalistic process because the parties are not obliged to negotiate in good faith. Hence, the

25 *Towards a More Workable Native Title Act: An Outline of Proposed Amendments*, Commonwealth of Australia, May 1996, p 7.

26 Parliament of Western Australia, *Hansard*, Wednesday, 24 November 1999.

> way the NTA delivers indigenous peoples land rights must be (primarily) discussed in terms of how well the Federal Court system works.[27]

5.31 As Dr Trees and Dr Turk noted, where State and Territory Governments refuse to participate in negotiations with Indigenous groups regarding determinations of native title, the only other option is litigation.[28] Chapter 6 of this report discusses how Indigenous people are at a considerable disadvantage in establishing the continued existence of their traditional title to land. In addition, Indigenous people have particular customary concerns that cannot be accommodated under the ordinary rules governing court procedure and evidence.[29] Dr Trees and Dr Turk have drawn this Committee's attention to some of the difficulties that the litigation process poses for Indigenous people:

> A major way that we feel that the amended NTA does not deliver appropriate rights to Indigenous Australians is through the action of the procedures used in the Federal Court hearings of native title claims. The nature of this legal process, and the adversarial manner in which it is played out, seriously disadvantages Indigenous participants. It is not a procedure which matches their modes of truth finding or problem solving. The discourse is systematically biased against them They are required to reveal cultural and social information to a level of detail which would not be tolerated by other Australians and would not be demanded of them, except perhaps in a serious criminal trial. Indeed Indigenous participants feel as if they are on trial.
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> The requirement for detailed genealogies constitutes a gross invasion of privacy - a continuation of the colonial anthropological project. The requirement to tell sacred/secret information is also of immense concern. The judicial system, now educated to know that Indigenous people do not respond well to an adversarial method of questioning, persist in using it.[30]

5.32 Dr Trees and Dr Turk went on to give examples to illustrate the disadvantage Indigenous people are under in the litigation process:

> In late 1999 and early 2000 the Ngarluma and Indjibandi peoples have been appearing as witnesses in their native title case before the Federal Court. This very difficult process was made still more difficult by the ways in which the lawyers for the State [WA] and for the Pastoralists and Graziers Association spoke to witnesses. Their language was often too difficult for ease of understanding. Their mode of address was sometimes aggressive and offensive. Series of questions relating to the same point were asked in several different ways which witnesses often found confusing. Rather than

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27 Dr Katherine Trees and Dr Andrew Turk, Submission 31, p 2.

28 See also Chapter 4.

29 See the discussion in Chapter 6 on the amendments to the NTA dealing with the Federal Court's way of operating.

30 Dr Katherine Trees and Dr Andrew Turk, Submission 31, p 4.

> acknowledging that these strategies were causing confusion and distress, and therefore ceasing to use them, they were employed as tactics in a clearly unequal struggle. QCs with vast experience in court procedures induced naïve witnesses to make particular statements, the meaning and consequences of which they often did not understand. This process is demonstrably flawed when examined from the context of a search for a shared understanding of what has actually occurred in the past, for a summary of the stakeholders current opinions, needs and desires and for a workable plan for the future use of land and the social and economic health of the community.[31]

5.33 The difficulties that the litigation process poses for Indigenous people seeking the protection of their traditional title, and indeed their vulnerability in the litigation process, places a moral obligation on governments to secure the recognition and protection of native title through agreement, rather that litigation.

The Wik Decision

5.34 Prior to *Wik* the extent to which pastoral leases extinguished native title was uncertain.[32] In December 1996 the High Court handed down its decision in the *Wik* case in which, by a 4:3 majority, it found that certain pastoral leases in Queensland did not grant exclusive possession to the lessees, and therefore may not have extinguished native title. The decision established that pastoral leases were a creation of Australian statute, not the common law, so that to determine the nature and extent of a lessee's rights under the lease, regard must be had to the terms of the relevant statute.

5.35 According to *Wik*, where native title was not extinguished by the grant of a pastoral lease, it would coexist with the rights of the lessee under the lease, although where the rights of the lessee and the native title holders were inconsistent the rights of the lessee would prevail. Importantly, the Court never clarified whether native title holders rights would be extinguished or merely suspended for the duration of the lease, to the extent that they were inconsistent with those of the lessee.[33]

5.36 In May 1997 the Attorney General's Department published an assessment of the implications of the *Wik* decision. The assessment concluded that there was considerable uncertainty as to the practical operation of coexistence:

> The rights of a pastoral lessee must be determined by reference to the terms of the lease and statute under which it was granted. However, such rights are not generally set out in any detail in either the lease instrument of the relevant statute. Similarly, any co-existing native title rights are undefined. This makes it extremely difficult to ascertain what activities are authorised

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31 Dr Kathryn Trees and Dr Andrew Turk, Submission 31, p 5.

32 See the discussion in Chapter 6 on the validation of intermediate period acts.

33 See the Fifteenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, pp 26-29.

> by a lease and what incidents of native title must yield.[34] Further, the Court's confirmation that native title could exist on land which was subject to pastoral leases also posed a problem for government which had granted third party interests (mainly mining and exploration titles), or acquired interests themselves on pastoral leases, without using the future act provisions, especially the rights to negotiate.

5.37 Another matter of concern to the Government was that, as mentioned above, the *Wik* decision did not clarify whether native title was extinguished, or merely suspended to the extent of inconsistency with the rights of the lessee. The Government thought that it was necessary to 'confirm' that native title rights were extinguished where they were inconsistent with the rights of the lessee under the lease.[35]

The Solution to Wik *and Unworkability: The Ten Point Plan and the Native Title Amendment Bill (No 2) 1996*

5.38 As noted above, the Howard Government was elected in March 1996 having promised to make the Act 'workable'. To this end the Government had introduced the Native Title Amendment Bill 1996 into the House of Representatives on 27 June 1996. Following the *Wik* decision the Government withdrew the NTAB and on 8 May 1997 released its (amended) Ten Point Plan, which contained the Government's proposals for dealing with the implications of the *Wik* decision, and the general issue of the Act's 'workability', together with the amendments necessary to address the *Brandy* decision and to provide a more effective threshold test.

5.39 The Native Title Amendment Bill 1997 was reintroduced into the House of Representatives on 9 March 1998. The passage of this Bill through the Commonwealth Parliament, and the resulting amendments to the NTA, will be considered in Chapter 6.

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34 Legal Practice Briefing 20 May 1997.

35 See the Ten Point Plan, Point 4.