CHAPTER 6

THE AMENDED *NATIVE TITLE ACT 1993*

INTRODUCTION

6.1 The Native Title Amendment Bill 1997 was introduced into the Commonwealth Parliament on 4 September 1997. The Bill was passed into law by the Parliament on 8 July 1998, after the Government reached agreement with Independent Senator Brian Harradine, who held the balance of power in the Senate at the time. The *Native Title Amendment Act 1998* (NTAA) significantly amended the Native Title Act (NTA).

6.2 This chapter will consider what changes have been made to the scheme of the NTA which provides for the recognition, protection and extinguishment of native title. Further, the chapter will also consider whether, as a result of these changes, the amended NTA continues to be consistent with Australia's obligations under the CERD, and also under international law generally, to implement the principle of equality.

PART 1 – RECOGNITION OF NATIVE TITLE

6.3 The amended Native Title Act retained the original preamble. In addition, the objects of the amended NTA, as set out in s.3, remain the same. The only exception is that s.3(d) was altered to include reference to the validation of 'intermediate period acts'.

6.4 The amended NTA retains the original Act's definition of native title so that, as with the original NTA, there is no intention to codify native title rights and interests. However, the amendments were based on a particular construction of native title, which limited the recognition and protection afforded Indigenous title to land.

A Limited Concept of Native Title: The 'Bundle of Rights' View

6.5 As discussed in Chapter 4, the *Mabo No 2* decision foreshadowed a limited concept of native title, which was vulnerable to extinguishment, and possibly to partial extinguishment, by acts of the Crown. The speculation by the majority judges that native title amounted to a personal interest, or to usufructuary rights, left open the possibility that under native title traditional title would only be recognised in the form of a bundle of rights. Further, and only on Justice Brennan's view, the recognition of those rights might be extinguished to the extent that their continued exercise was prevented by (or inconsistent with) Crown grants or dealings with the land.

6.6 Prior to the amendments, there was no judicial endorsement of the view that native title amounted to merely a 'bundle of rights'. It was always possible that in future judgments the courts might give traditional title greater recognition.

6.7 The *Wik* case, discussed in Chapter 5, established that the grant of a form of tenure called a pastoral lease did not necessarily extinguish native title. The High Court decided in *Wik* that the rights of native title holders could coexist with the rights conferred on a pastoral lessee under the lease, with the proviso that where native title rights were inconsistent with the lessee's, the rights of the latter would prevail. The Court did not make it clear in the decision whether the rights of native title holders were extinguished to the extent of any inconsistency or merely suspended for the duration of the lease.

6.8 There were two possible interpretations of the *Wik* decision on the question of extinguishment of native title. The first was that native title was suspended to the extent of any inconsistency with the rights granted under the lease. This interpretation would leave open the possibility that the suspended native title rights would revive upon the expiration of the lease. The second was that native title rights were extinguished to the extent of any inconsistency with those granted under the lease. Neither of these interpretations received any endorsement from the majority judgments in the *Wik* case.[1]

6.9 The first interpretation would leave open the possibility that native title could amount to a form of title to land, which was able to survive an inconsistent grant or inconsistent dealings by the Crown. The second interpretation was based on the idea that native title amounted effectively to a bundle of personal rights, which were capable of being severally extinguished where their continued exercise was inconsistent with either the rights contained in a Crown grant or with Crown dealings with the land.

6.10 The NTAA was drafted on the basis of the second of these possible interpretations of the *Wik* decision – the interpretation founded on a more restricted concept of native title. Accordingly, the NTAA provided that native title rights which were inconsistent with the rights of a lessee would be permanently extinguished. Point four of the Ten Point Plan said that:

> As provided in the *Wik* decision, native title rights over current and former pastoral leases and any agricultural leases not covered under 2 above would be permanently extinguished to the extent that those rights are inconsistent with those of the pastoralist.[2]

6.11 The adoption of this interpretation of the *Wik* decision formed the basis of the limitations on the right to negotiate. It was also the basis of the formulation of the registration test, which native title claimants are required to pass before they can access the procedural rights under the future act regime, including the right to negotiate. As discussed in Chapter 4, the future act regime, and in particular the right

1 See also Ms Jennifer Clarke, *Official Committee Hansard*, 23 February 2000, pp 25-26.

2 The Ten Pont Plan is included as Appendix 3 to this report.

to negotiate, allows native title holders to ensure, to some extent, the protection of their title pending a determination.

6.12 As noted earlier, there had been no judicial endorsement of the 'bundle of rights' view when the NTAA was passed. However, since then the issue of whether native title is comprised of a bundle of rights has received judicial consideration in the case of *Ward v Western Australia*,[3] a case involving a determination of native title sought by the Miriuwung Gajerrong people from the East Kimberley region of Western Australia.

6.13 After a lengthy trial in the Federal Court the trial judge, Justice Lee, made a determination of native title in favour of the Miriuwung Gajerrong people. In his judgment, Lee J rejected the view that native title is a mere bundle of rights capable of several – or partial – extinguishment. Instead, he made a distinction between native title and parasitic or dependant rights, and observed that 'there cannot be a determination under the Act that native title exists, but that some, or all, "native title rights" have been "extinguished" '. Thus, Lee J gave native title the status of a title at common law, which gave rise to the 'bundle' of dependant rights such as the rights to fish, hunt, conduct ceremonies and collect resources from the land. Native title itself could not be extinguished merely by the grant of an overlying interest which was inconsistent with the exercise of particular dependant rights. Where native title *is* extinguished, Justice Lee found that 'rights that are parasitic or dependent upon that title fall with the extinguishment'.

6.14 The case was appealed to the Full Court of the Federal Court where, although the determination of native title in favour of the Miriuwung Gajerrong was confirmed, two of the three appeal judges affirmed the view that native title was merely a bundle of rights, overturning Justice Lee's decision on this point.[4] The Miriuwung Gajerrong will be seeking special leave to appeal to the High Court against the decision of the Full Court of the Federal Court. The special leave application will be heard on 4 August 2000. If the application for special leave to appeal is granted, one of the questions for consideration by the High Court will be the 'bundle of rights' conception of native title.

6.15 In evidence to this inquiry, Ms Philippa Horner from the Attorney-General's Department said that the decision of the Full Court of the Federal Court in Miriuwung Gajerrong:

> endorsed the Commonwealth proposition that native title is a bundle of rights not equivalent to the ownership of land.[5]

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3 *Ward v Western Australia* (1999) 159 ALR 483; also at: http://www.austlii.edu.au/au/cases/cth/federal_ct/1998/1478.html.

4 *Western Australia v Ward* [2000] FCA 191; also at: http://www.austlii.edu.au/au/cases/cth/federal_ct/2000/191.html.

5 *Official Committee Hansard*, 9 March 2000, p 157.

6.16 However, this does not address the requirements of the principle of equality, as contained in the CERD, and generally under international law. As noted in Chapter 3, native title holders are not able to enjoy title – their fundamental right to own and inherit property – to the same extent as those holding title under the general law, because of the vulnerability of native title to extinguishment under the common law. This unequal position of native title holders places the Australian Government under an obligation to implement measures which will ensure that native title is protected to an extent which provides true, actual or substantive equality with the protection given to title held under the general law.

6.17 Thus, if the courts endorse a 'bundle of rights' view of native title, which increases the vulnerability of the title to extinguishment, the obligation on the Australian Government to take positive protective measures is increased. The corollary is that the Government cannot take action to confirm the vulnerability to extinguishment of native title under the common law where this would result in inequality. This obligation on the Government arises pursuant to the principle of equality enshrined in the CERD, and in international law generally.

The *Brandy* Amendments

6.18 In order to ensure the validity of determinations of native title following the decision in *Brandy*,[6] it was necessary to ensure that determinations would be made by the Federal Court. Under the amendments all applications made on or after 30 September 1998 were to be filed in the Federal Court and all applications previously lodged with the National Native Title Tribunal were transferred to the Federal Court. Applications filed in the Federal Court were then referred back to the Tribunal for assessment against the registration test criteria, and for mediation.

6.19 Thus, while native title could still be determined by a negotiated agreement between the parties, the Federal Court was given a supervisory role in relation to all applications. In particular, the Court could order that no mediation occur, request reports on the progress of mediation from the Tribunal and order the cessation of mediation. [7]

6.20 It should be noted that failure to pass the registration test does not affect the procedures relating to an application. The application can still proceed to mediation and, if necessary, litigation. The registration test is discussed later in this chapter.

The Federal Court's Way of Operating

6.21 The amendments made some significant changes to provisions governing the Federal Court's way of operating in relation to determining native title.

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6 See the discussion in Chapter 5.

7 Sections 86B, 86E and 86C. Unless otherwise noted, all references in this chapter are to the amended Native Title Act.

6.22 Under the original Act the Federal Court was required to pursue the objective of providing a mechanism of determination that was fair, just, economical, informal and prompt. This requirement has been omitted from the amended Act.

6.23 The original Act provided that the Court was not bound by 'technicalities, legal forms or rules of evidence'. The amended Act provides that the Federal Court *is* bound by rules of evidence, 'except to the extent that the Court otherwise orders'.[8] Further, under the original Act the Court was required to take into account 'the cultural and customary concerns of Aboriginal and Torres Strait Islanders'. The amended Act merely provides that the Court *may* take Indigenous cultural and customary concerns into account in proceedings before it.[9]

6.24 As discussed in Chapter 5, above, the rules of evidence, together with the adversarial court process, place Indigenous people 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. It is important to realise that these rules and procedures have evolved under a particular cultural and epistemic paradigm. Rules of evidence do not lead inexorably to 'the truth' but rather operate to circumscribe the sorts of matters that can be considered by the Court in making its decision. If ordinary rules of evidence are enforced, or where the Court chooses not to take into account the cultural and customary concerns of Indigenous people, then elements of Indigenous culture and knowledge, which are important to proving their unique entitlement to land, may not be considered by the Court.

6.25 One example is where evidence is in the form of 'restricted knowledge'. Knowledge may be 'restricted' in the sense that only people of a particular gender and/or people who have attained a level of ritual seniority may have access to it. This may (and often does) mean that the custodians of restricted knowledge – for example, women, when knowledge is restricted to women only – are not prepared to reveal it in the presence of men, or where men may have access to it by reading the Court transcript. If the Court cannot accommodate this concern it may lead to this evidence being withheld, and therefore not taken into account in the ultimate decision as to whether the group as a whole has proven the existence and extent of its traditional title. Another example is that Indigenous knowledge is transmitted through stories, song, dance and art. Rules of evidence, such as the rule against hearsay, may militate against such evidence being heard, or given much evidentiary weight in Court proceedings.[10]

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8 Section 82(1)

9 Section 82(2)

10 The issue of the treatment of 'gender restricted evidence' was considered by the Full Court of the Federal Court in interlocutory proceedings in the litigation in the case of *Ward v Western Australia*. That decision was delivered by Hill, Branson and Sundberg JJ on 8 July 1997, and is reported as *Western Australia v Ward* (1997) 145 ALR 512.

6.26 The provisions in the original Act dealing with the Federal Court's way of operating were intended to address these problems, especially having regard to the fact that the legislation was intended to be beneficial and remedial. The amendment to these provisions reduces the likelihood that these problems can and will be addressed by the Federal Court in dealing with native title determinations.

6.27 Further, the disadvantage Indigenous people are under in achieving recognition of their traditional title as a result of the discriminatory impact of rules of evidence and court procedure, must be assessed against Australia's international obligations pursuant to the CERD, and international law generally. On the standards discussed in Chapter 3, Australia's obligations would require that measures be taken to eliminate this inequity. The amendments to the Federal Court's way of operating can therefore be considered a breach of Australia's international obligation to implement the principle of equality.

Native Title Representative Bodies

6.28 Representative Aboriginal and Torres Strait Islander Bodies, or Native Title Representative Bodies (NTRBs), were set up under the original Native Title Act to assist Indigenous people to seek recognition and protection of their native title. A review of NTRBs was conducted by the Aboriginal and Torres Strait Islander Commission (ATSIC) in 1995 (the Parker Report), in which the following observation was made about the important role of NTRBs:

> NTRBs are of fundamental importance to the NTA: they are the advocates and representatives of native title parties at the local, regional and State levels. The development of effective and accountable NTRBs will be instrumental in progressing native title claims and related agreements. Their credible operation will provide resource developers and governments with greater certainty; contribute to reduced transaction costs; and reduce costs for the legal system. Effective NTRBs are a prerequisite for the efficient operation of both the NNTT and the federal court system in relation to native title matters and ultimately for the workability of the NTA. The adequacy of coverage and clarity of the statutory functions of NTRBs is fundamental to their pivotal role in the future.[11]

6.29 The Parker Report noted that, in addition to the functions specified in s.202 of the NTA (which are set out in Chapter 4), NTRBs had other legitimate responsibilities undertaken in direct response to their functions under the NTA. The following activities undertaken by NTRBs were identified:

- the establishment and management of a native title office infrastructure and staff, and the development of professional expertise in native title and other land rights legislation;

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11 Aboriginal and Torres Strait Islander Commission, *Review of Native Title Representative Bodies 1995*, p 5.

- research and preparation of claimant applications;
- coordination and conduct of meetings with native title claimants;
- coordination and conduct of meetings with Indigenous NTRB boards or Governing Committees;
- native title mediation during pre- and post- claim lodgement stages;
- responding to non-claimant applications;
- responding to future act applications (expedited and non-expedited);
- preparation of compensation applications;
- site recording, clearance and protection;
- maintenance of site and land interests registers, and other data-systems management (computerised, library, geographical information systems, legal etc);
- negotiations with Commonwealth, State and local Governments;
- negotiations for regional agreements;
- liaison and coordination with other NTRBs;
- providing an educational and information role to Indigenous interests and the wider public; and
- court litigation in respect to native title issues.

6.30 The Report noted that: 'All these activities have workload and funding implications',[12] and commented further that:

> There are strong economic, efficiency, equity and social justice grounds for funding NTRBs to operate effectively.
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> …
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> Provisions of the NTA which require NTRBs to represent native title parties and the complementary activities undertaken by the NNTT and the federal court system create workloads for NTRBs. NTRBs need to be adequately resourced to represent native title parties in this environment.[13]

6.31 The amendments to the NTA have significantly increased the workload of NTRBs. In 1999 a second review of NTRBs, the *Review of Native Title Representative Bodies* (the Rashid Report), observed that:

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12 Aboriginal and Torres Strait Islander Commission, *Review of Native Title Representative Bodies 1995*, pp 7-8

13 Aboriginal and Torres Strait Islander Commission, *Review of Native Title Representative Bodies 1995*, p 73.

> The legal and practical environment within which NTRBs operate has been fundamentally changed by the NTAA and case law developments … The resources provided to NTRBs must be reassessed so as to take account of:
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> - The substantial increase in future act notifications under Commonwealth and State regimes;
> - The NTAA's increased emphasis on conflict resolution between claimants;
> - The demands of the re-registration process;
> - The increased demand for ILUAs[14] and other agreements affecting native title; and
> - The increased accountability requirements of the NTAA.
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> Additionally, there arises from the NTAA a need for NTRBs to take an interest in broader issues of land management affecting native title.
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> An overarching consideration is that, in the past the functions of NTRBs were to some extent discretionary, under the NTAA they can be mandatory.[15]

6.32 In addition, in its submission to this inquiry the Aboriginal Legal Service of Western Australia (ALSWA) added the following other matters which have contributed to the workload of NTRBs:

- the number of claims now being referred to the Federal Court;
- the setting up of new State regimes for native title, which create new tribunals, new procedures and new regimes of notification and land management within which NTRBs must operate.[16]

6.33 As regards the referral of native title matters to the Federal Court the ALSWA stated that:

> *The Native Title Amendment Act* removed most native title matters from the Native Title Tribunal to the Federal Court. At the same time many of the native title determination applications were referred for trial, particularly in Western Australia.
>
> The Federal Court is not prepared to have native title claims dealt with in a different manner than other matters and is setting a strict agenda and time

14 Indigenous Land Use Agreements. These are discussed in more detail later in this chapter.

15 *Review of Native Title Representative Bodies*, prepared for ATSIC by Corrs Chambers Westgarth, Lawyers, and Senatore Brennan Rashid, Management Consultants, March 1999, p 38.

16 Aboriginal Legal Service of Western Australia, Submission 22, p 8.

> line.[17] … We understand that the Court has a general goal of settling all native title matters before it within 3 years.[18]

6.34 The ALSWA also drew attention to the resource intensive nature of the re-recognition process, according to which organisations already functioning as NTRBs had to reapply for re-recognition as representative bodies.[19]

6.35 The Aboriginal and Torres Strait Islander Social Justice Commissioner has commented that:

> The process of re-recognition has placed an added strain on the already stretched resources of representative bodies. Large amounts of money have been spent preparing applications for re-recognition. These are investments for which the re-recognised representative body will see little return.[20]

6.36 The Rashid Report noted that:

> the earlier work suggested that the funding requirements for NTRBs for the year ending 1997/98 should have been $67.6 million. The actual funding allocation by ATSIC in the same year was approximately $47 million. The Consultancy believes given the mandatory statutory obligations that the NTRBs will have to discharge in the future, an increase in funding allocation should be given serious consideration.[21]

6.37 The ALSWA has said that:

> All NTRBs have had their funding cut for the current 6 month period [1 January-30 June 2000]. ALSWA has been advised by ATSIC that available funds must be stretched to take into account an increasing demand for funding assistance to NTRBs to carry out their functions and the requirements to meet the considerable cost of administering and implementing the NTRB rerecognition process. There is no reserve of funds to support litigation, separate from the annual allocations made to the NTRBs, nor is there any indication that this situation will change in the foreseeable future.[22]
>
> ATSIC has devised a number of strategies to try to cope with the problem of under funding. These include:

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17 See the earlier discussion about the changes effected by the NTAA to the Federal Court's way of operating, and how this is likely to be detrimental to native title holders seeking the recognition of their title through a litigated determination.

18 Aboriginal Legal Service of Western Australia, Submission 22, p 9.

19 Aboriginal Legal Service of Western Australia, Submission 22, p 8.

20 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1999*, p 106.

21 *Review of Native Title Representative Bodies*, prepared for ATSIC by Corrs Chambers Westgarth, Lawyers, and Senatore Brennan Rashid, Management Consultants, March 1999, p 72.

22 See also Mr Peter Yu, *Official Committee Hansard*, 13 March 2000, p 179.

- NTRBs should consider alternative means to native title to attempt to assist clients such as land grants or economic initiatives.
- Negotiations should be pursued rather than litigation.
- NTRBs are discouraged from taking steps that may precipitate the referral of claims to trial without considering costs implications.
- Court proceedings can only be contemplated as a last resort.[23]

6.38 However, the alternative process of negotiation depends on the willingness of State and Territory Governments in particular to engage in negotiations with native title holders. As the ALSWA pointed out:

> In Western Australia the problem is exacerbated by the fact that a negotiated settlement of native title claims is not a feasible option given the policy of the State Government. The State Government has steadfastly pursued a course of litigation in native title matters at considerable expense to the taxpayer.[24]

6.39 The inadequacy of funding has serious consequences for the ability of native title holders to seek the recognition and protection of their rights. As the Aboriginal and Torres Strait Islander Social Justice Commissioner has noted: 'Without appropriate funding rights will be lost.'[25] In addition, under-funding NTRBs impacts on the ability of Indigenous people to participate effectively in various levels of decision making in the native title process.[26]

6.40 Dr Trees and Dr Turk have also observed, in their submission to this inquiry:

> For the NTA to achieve its objectives there is a huge administrative demand on ATSIC, Regional Land Councils and the Aboriginal Legal Service. Hence, whether the system provides for a fair recognition of native title rights depends to a large extent on how well the government resources such organisations. Giving poor people rights without resourcing them to use those rights amounts to a denial of rights.[27]

PART 2 – PROTECTION OF NATIVE TITLE

6.41 The procedural rights conferred by the future act regime, through the freehold test and the right to negotiate, are the central elements of the scheme provided in the NTA to ensure the protection of native title against future extinguishment or impairment.

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23 Aboriginal Legal Service of Western Australia, Submission 22, p 12.

24 Aboriginal Legal Service of Western Australia, Submission 22, p 12.

25 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1999*, p 105.

26 See the discussion of this issue in the Aboriginal and Torres Strait Islander Social Justice Commissioner's *Native Title Report 1999*, pp 91-94.

27 Dr Kathryn Trees and Dr Andrew Turk, Submission 31, p 4.

6.42 The amendments to the future act regime have substantially reduced the application of both these procedural rights in respect of the doing of future acts. The reduction in procedural rights is principally based on the Government's adoption of the 'bundle of rights' conception of native title.

The Freehold Test

6.43 Under the original Act the freehold test, or freehold standard, applied generally to future acts. Thus, a future act (other than a future act to which the right to negotiate applied) could be validly done by government over land where native title existed, or might have existed, if native title holders were accorded the same procedural rights in relation to the doing of the act as they would have had if they had held ordinary, or freehold, title.

6.44 The freehold test is retained in the amended Act but its scope is significantly reduced. A number of future acts to which the freehold test would have applied under the original Act now do not have to satisfy that test in order to be valid. The categories of acts excluded from the freehold test as a result of the amendments to the NTA are those involving:

- primary production activities;
- lease renewals;
- future acts on reserved land;
- the management of water and airspace; and
- public works.[28]

6.45 Although native title holders are given some procedural rights in respect of acts in these categories, these rights are significantly less than those enjoyed by freeholders.

Reducing the Freehold Standard – The Bundle of Rights Argument

6.46 The removal of the freehold standard in relation to the categories of future acts listed above is in part due to the Government's adoption of the bundle of rights conception of native title, which at the time the amendments were passed had received no judicial endorsement.

6.47 The Government has argued that the freehold test is not appropriate where native title rights coexist with other rights such as pastoral leases. The Government's view was expressed during debate on the Native Title Amendment Bill 1997 by Senator Nick Minchin, then Parliamentary Secretary to the Prime Minister:

28 See s.24AA(4)

> By definition, native title on Aboriginal land or vacant Crown land can be up to exclusive possession. Therefore, at least the freeholders' rights should attach to activity development on land, but there is this additional right to negotiate which we are essentially leaving on vacant Crown land and Aboriginal lands.
>
> But on pastoral lease land the native title rights by definition are only what rights survive after you take account of the rights granted to the pastoralist based on the *Wik* judgement. Any surviving native title rights are subject to the rights of pastoralists. Therefore the native title on a pastoral lease cannot amount to the same bundle of rights as it can on vacant Crown land or Aboriginal land. Therefore, a different approach to the procedural rights issue is appropriate.[29]

6.48 Thus, where the Government believed that native title had been partially extinguished by a coexisting interest it has, through the amendments, reduced the freehold test as the general standard of protection. Native title holders whose rights coexist with overlying interests, usually pastoral leases, are to enjoy lesser procedural rights than the freehold test would afford them, equivalent to those of the overlying interest holder (the pastoral lessee). Pastoral leases are themselves a bare form of interest: in most cases they confer on the lessee what amounts to a mere licence to graze livestock and to conduct other activities which are necessarily incidental to the purpose of grazing.

6.49 The freehold standard was the means by which formal equality – or equal treatment – was achieved in the original Act. At the time the original Act was passed the Government believed that formal equality was the standard required at international law. In any case, formal equality is also required under a substantive equality standard. Importantly however, in instituting the freehold standard the Government in 1993 understood that its obligation was to ensure equality between native title holders and other title holders in the enjoyment of fundamental rights. The nature, extent or character of the legal right (native title) was not relevant. Rather, what was important was that the fundamental human right of Indigenous people to own and enjoy their property received the same level of protection under the law as that of non-Indigenous title holders.[30] In reducing the scope of the freehold test, and the protection it afforded to the property rights of native title holders, the current Government has misunderstood its international obligations.

6.50 Moreover, in reducing the freehold standard, the Government has reduced the protection provided by the RDA to native title against impairment or extinguishment by acts of State and Territory Governments. In reducing the operation of the RDA in this way - that is, in nullifying the protection the RDA provided to native title – the NTA can be considered to have partially repealed the RDA.

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29 Senator the Hon Nick Minchin, *Senate Hansard*, 4 December 1997, p 10411.

30 See the relevant discussion in Chapter 4.

6.51 The Acting Aboriginal and Torres Strait Islander Social Justice Commissioner argued in her 1998 Native Title Report that equating native title with pastoral leases in determining the standard of protection fails to take into account its unique nature:

> This approach of containing native title rights within the boundaries of the rights associated with the co-existing tenure fails to recognise a fundamental feature of native title. It fails to recognise that native title is a unique title which takes its form from the traditions and customs of those who continue to hold and observe them. Because native title is unique, the protection which is drawn from equating rights with an entirely different order of interests such as pastoral leasehold interests, is inadequate and inappropriate.[31]

6.52 Even if the concept of native title at common law is defined by the courts to be a mere bundle of rights capable of partial extinguishment, such a view does not justify the reduced standard of protection. The lower the protection offered the traditional title of Indigenous people by the common law, the greater the obligation on governments to act to ensure that equal protection is achieved. Conversely, the Government is not authorised to confirm the vulnerability of Indigenous title under the common law. Rather, the Government is required by the CERD and international law generally to overcome the effects of that vulnerability in the interests of ensuring equality in the enjoyment of fundamental human rights – in this case, the right to own and enjoy property and the right to inherit.

6.53 Therefore, the Government's justification for removing the freehold test on coexisting tenures, such as pastoral leasehold, on the basis that native title can only be a lesser right than exclusive possession, is untenable. The reduced scope of the freehold test has significantly impaired the protection of Indigenous peoples' fundamental rights.

The Primary Production Provisions

6.54 The primary production provisions in the amended Native Title Act[32] relate primarily to future acts concerning pastoral activities. These provisions are one of the four sets of provisions, inserted by the NTAA, that were specifically referred to as discriminatory by the CERD Committee in decision 2(54) on Australia.

6.55 Pastoral leases cover approximately 40 per cent of Australia, and individual leases are often over very large areas of land. They usually amount to licences to graze livestock and carry out activities that are incidental to that activity. As the High Court noted in the *Wik* decision, pastoral leases are creatures of statute and not the common law.[33] They were created to address the particular historical and environmental

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31 Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, p 85.

32 Subdivision G and Subdivision I (which deals with the renewal of pastoral leases).

33 *Wik Peoples v Queensland* (1996) 187 CLR 1, per Toohey J at 174, Gaudron J at 204, Gummow J at 226, and Kirby J at 266 and 279-280.

conditions during the period of colonisation. In order to carry out any other activities on the land covered by their leases, pastoralists have to obtain the approval of the relevant State or Territory Government for authorisation to do these acts.

6.56 The primary production provisions have the effect of permitting or authorising future acts on the land subject to pastoral leases, in particular:

- primary production activities;
- off-farm activities that are directly connected to primary production activities;
- grants to third parties; and
- the upgrading of pastoral lessees' interests in the land.

6.57 The primary production provisions allow governments to authorise pastoral lessees to carry out a range of additional 'primary production' activities on the pastoral lease.[34] The definition of primary production was taken from the taxation legislation and, as the Prime Minister has noted:

> as we all know … definitions in the Taxation Act are very widely couched indeed.[35]

6.58 The definition of primary production activities for the purposes of the amended NTA is contained in s.24GA and includes the following:

- cultivating land;
- maintaining, breeding or agisting animals;
- taking or catching fish or shellfish;
- forest operations;
- horticultural activities;
- aquaculture activities; and
- leaving fallow or destocking any land in connection with doing any primary production activity.

6.59 In addition, the primary production provisions allow both pastoralists and freeholders to carry out activities incidental to primary production activities on land adjoining that in which they have an interest. These incidental activities are:

- the grazing of livestock; and

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34 Section 24GB (acts permitting primary production on non-exclusive agricultural and pastoral leases) and s.24GC (primary production activities on non-exclusive agricultural or pastoral leases).

35 Transcript of the Prime Minister, the Hon John Howard MP, Address to participants at the Longreach community meeting to discuss the Wik Ten Point Plan, Longreach, Queensland, 17 May 1997.

- gaining access to water resources on adjoining land.[36]

6.60 The primary production provisions also allow governments to grant interests to third parties on pastoral leases and any other 'non-exclusive' agricultural leases to:

- cut and remove timber; or
- extract, obtain or remove sand, gravel, rocks, soil or other resources (except so far as doing so constitutes mining).[37]

6.61 In relation to future acts authorised by the primary production provisions, native title holders now have only the right to be notified and the opportunity to comment on the proposed act.[38]

6.62 The primary production provisions also allow the upgrade of the interest of the pastoral lease by:

- enabling the pastoral lessee to obtain the renewal of the pastoral lease for a term that was longer than the original term of the lease; and
- allowing a pastoral lease to be upgraded to a perpetual lease in lieu of the original pastoral lease.[39]

6.63 In the case of these upgrades, the native title holders are only afforded the right to be notified and the opportunity to be consulted.

6.64 Under the primary production provisions, native title holders also have a right to be compensated for any impairment of their title and the non-extinguishment principle applies.[40]

6.65 The primary production provisions, as outlined in the Ten Point Plan, were intended to ensure that:

> all activities pursuant to, or incidental to, 'primary production' would be allowed on pastoral leases, including farm-stay tourism, even if native title exists, provided the dominant purpose of the use of the land is primary production.[41]

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36 Section 24GD (acts permitting off-farm activities that are directly connected to primary production activities).

37 Section 24GE (granting rights to third parties etc. on non-exclusive agricultural or pastoral leases).

38 Section 24GB(9).

39 Section 24IC(4).

40 Note that the Government has argued that the application of the non-extinguishment principle counters the discrimination in the amended NTA because it minimises the effect of the act on native title and is effectively a compensating measure: Attorney-General's Department, Submission 24, Part II, pp 8-11 and 27.

41 Point 4, Ten Point Plan.

6.66 The Prime Minister assured pastoralists of this when he addressed a meeting in Longreach, Queensland, four months prior to the introduction into Parliament of the Native Title Amendment Bill 1997:

> The third very important guarantee I give you my friends is that no pastoral leaseholder can have their conduct or their activities in any way connected with the carrying out of a pastoral or a primary production activity interfered with by a native title claim. We've had all of this talk over the last few months that you'll need the permission of native title claimants to put in a fence, to sink a dam, or to do anything that is incidental to the carrying on of your business. Could I say no, no, no that cannot happen. Because under the guarantees that will be contained in this legislation, the right to negotiate, that stupid property right that was given to native title claimants alone, unlike other title holders in Australia, that native title right will be completely abolished and removed for all time in relation to the activities of pastoralists carrying on not only strictly defined pastoral activities, but also the full extent of primary production activities which you can possibly imagine.[42]

6.67 Under the original Act, native title holders had to be afforded the general procedural rights under the freehold test before activities additional or incidental to a pastoralist's rights under the lease could be authorised. The original NTA also allowed the renewal of pastoral leases without negotiation with native title holders, provided that no greater proprietary interest was created.[43] The right to negotiate only applied on pastoral leases where the Government proposed to acquire native title rights compulsorily in order to confer an interest on third parties, or alternatively where the Government proposed to grant interests that conferred a right to mine.

6.68 Pastoral leases generally confer a licence to graze livestock and to carry out any activity incidental to that purpose. Usually these incidental activities – which may involve building dams, erecting fences, digging boreholes etcetera, for the purpose of grazing and tending livestock – were not specified in the lease. The Government argues that this creates practical problems where native title continues to exist, or coexist with the rights of pastoralists, on pastoral leases. The practical problems arise, according to the Government, because it is not clear which of these unspecified incidental pastoral activities are authorised by the pastoral lease. Where these activities are not authorised by the pastoral lease, the freehold standard or test would apply to them. The Government argues that there was therefore a need to clarify what activities were authorised by the pastoral lease. In other words, the Government argued that there was a need to clarify what activities a pastoralist could do under the

42 Transcript of the Prime Minister, the Hon John Howard MP, Address to participants at the Longreach community meeting to discuss the Wik Ten Point Plan, Longreach, Queensland, 17 May 1997.

43 Section 235(7). See also, Australian Institute of Aboriginal and Torres Strait Islander Studies, Submission 11, p 16.

lease without the freehold standard procedural rights applying in relation to the activities. [44]

6.69 However, the primary production provisions far exceed the mere clarification of pastoralists' rights under their leases. Even if there was a need to clarify what pastoralists were able to do under the strict terms of their leases, the primary production provisions allow pastoralists to upgrade significantly their rights under their leases without any reference to native title holders (whose rights will be suspended to the extent of any inconsistency with the expanded rights of pastoralists).[45] Therefore, the primary production provisions cannot be justified on the basis that they were required merely to ensure certainty of the rights of pastoralists, and thus facilitate coexistence of the rights of pastoral lessees and native title holders. Rather, they allowed the expansion of pastoral lessees' rights at the expense of native title holders' rights.

6.70 In evidence to the Parliamentary Joint Committee during the inquiry into the Native Title Amendment Bill 1997, Mr Noel Pearson, then Chairman of the Cape York Land Council, made the point that:

> In January this year, our position on the Aboriginal side was to clarify and confirm, if necessary, the common law formula laid out in Wik – that is, the right to construct the bore hole, or the fence or the yard is a prevailing right. If there is a need to clarify that legislatively, our position in January this year was in support of it. But you are putting to me … that certainty requires the pastoral leaseholder to have potentially an aquaculture right, a forestry right, a right to factory production on the lease – a full range of primary production activities – that the leaseholders never in their wildest dreams imagined that they held. Do you see the narrow exercise of clarification and the huge increase in the rights of the leaseholder that you are proposing in this amending legislation? Do you see the difference?[46]

6.71 These provisions are discriminatory because they effectively allow the upgrading or embellishment of the rights of pastoral lessees and other overlying interest holders at the expense of native title holders. They are not, as the Government argues, necessary to ensure coexistence between the rights of pastoral leaseholders and the rights of native title holders. As Margaret Donaldson, from the Human Rights and Equal Opportunity Commission, advised in evidence as part of the current inquiry:

> We say that coexistence is not the basis of the primary production upgrade provisions, that it is preferring [the rights of pastoral lessees], and that, where there is an impairment of native title interests, then that impairment is

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44 Attorney-General's Department, Submission 24, Part II, p 31.

45 The non-extinguishment principle applies to activities authorised under the primary production provisions as explained in paragraph 6.72, below.

46 Inquiry into the Native Title Amendment Bill 1997, *Official Hansard Report*, 8 October 1997, p 1397.

> validated by the Native Title Act, and to that extent we say it is discriminatory.[47]

6.72 The Government has pointed to the fact that it employed the non-extinguishment principle in the primary production provisions, rather than providing for the extinguishment of native title. It is important to note that the effect of the confirmation of extinguishment provisions in the amended NTA means that native title is extinguished to the extent of any inconsistency with the rights of pastoral lessees. Therefore, the non-extinguishment principle will only apply to any remaining, or 'residual' native title rights.[48] The effect of the primary production provisions on any 'residual' native title rights may be tantamount to extinguishment, notwithstanding the non-extinguishment principle. For example, where the land is subject to intensive agricultural use, such as horticultural activities or the removal of timber from the land, the native title holders will not be able to use the land in the long-term because of the impact of the activities on the land. Further, in respect of the renewal and upgrade of pastoral leases, where native title holders' rights are suppressed to the extent of inconsistency with the rights of the overlying interest holder (especially if that overlying interest is a perpetual lease), the rights of native title holders will be permanently suppressed.

The Right to Negotiate

6.73 The right to negotiate was a procedural right afforded to registered native title claimants and registered native title holders[49] in recognition of the unique nature of their traditional interest in their land. The NTAA has affected the right to negotiate (RTN) in the following ways:

- it has altered the RTN procedure;
- it has reduced the ambit of the RTN; and
- where, under the amended Native Title Act, the right to negotiate continues to apply to future acts, it enables State and Territory Governments to set up alternative regimes to replace the RTN.

6.74 The other relevant factor which limits the protection that the RTN provides to native title holders is that they must now also pass a more onerous registration test in order to access the RTN procedure.[50]

6.75 The changes to the right to negotiate under the amendments constitute a significant reduction in the protection offered to native title. The amendments to the

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47 Ms Margaret Donaldson, *Official Committee Hansard*, 22 February 2000, p 35.

48 See the discussion in relation to the confirmation provisions later in this chapter.

49 See the relevant discussion in Chapter 4.

50 The operation of the new registration test is discussed below.

RTN were based on the bundle of rights conception of native title, and the idea that native title is capable of being partially extinguished by overlying interests.

The Right to Negotiate Procedure

6.76 Under the original Act, where the RTN applied it imposed an obligation upon the Government proposing to do the future act (the government party) to negotiate in good faith with the native title holders (the native title party) and the grantee (the third party upon whom the Government proposed to confer the interest). The aim of negotiations was to obtain the agreement of the native title party to the doing of the future act, subject to any agreed conditions. The scope of negotiations was to be as broad as possible. Provided that the Government had fulfilled its obligation to negotiate in good faith with the native title parties it could, after the expiration of the minimum negotiation period, seek an arbitral determination in relation to the doing of the act.[51] The Government could avoid the RTN by using the expedited procedure.[52]

6.77 The amended NTA significantly alters the right to negotiate procedure, notably by:

- stipulating that all parties (government, native title and grantee parties) are under an obligation to negotiate in good faith with a view to obtaining the agreement of the native title parties to the doing of the act; and[53]
- limiting the scope of good faith negotiations to matters related to the effect of the act on the registered rights of native title parties.[54]

6.78 The amended Act imposes stricter timeframes for the making of arbitral determinations. Further, under the amended act there is additional scope for ministerial intervention, either to override the decision of the arbitral body or to make a decision in lieu of an arbitral determination.[55]

Reducing the Ambit of the Right to Negotiate

6.79 As noted above, the right to negotiate was included in the original NTA to address the traditional interest in land of Indigenous people. For this reason, as ANTaR advised the CERD Committee, the right to negotiate was:

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51 See the reference to *Walley v Western Australia* in Chapter 5. The case established that negotiation in good faith on the part of the relevant government was a necessary condition precedent to the jurisdiction of the arbitral body (in that case the NNTT).

52 See the relevant part of Chapter 4.

53 Sections 30, 30A and 31.

54 Section 31(2).

55 Sections 36, 36A.

different from (but not always superior to) objection rights of other landowners in the mining context.[56]

6.80 The right to negotiate under the original Act[57] applied to a limited range of acts that involved:

- the grant or extension of a right to mine; or
- the compulsory acquisition of native title for the purpose of conferring an interest on a third party.

6.81 The RTN under the amended Act[58] applies to a similar class of acts, although a range of exceptions is specified, so that its operation has been significantly reduced and in some cases removed altogether.

6.82 As with the original Act, the right to negotiate still applies generally to acts done by governments which:

- involve the creation or variation of a right to mine; or
- involve the compulsory acquisition of native title rights.[59]

Exceptions to the RTN in relation to Mining Grants

6.83 As a result of the amendments the right to negotiate no longer applies to mining grants that are:

- for the sole purpose of constructing an infrastructure facility associated with mining;[60] or
- involve the renewal, re-grant, re-making or extension of a valid mining lease originally granted before 23 December 1996, which does not extend the area of the grant, is not for a longer term than the original grant, and which does not create any additional rights.[61]

6.84 The grant of a mining interest solely for the construction of infrastructure associated with mining attracts the lesser right to be notified of the proposed act and the opportunity to be consulted (hereafter referred to as the 'opportunity to be

56 Australians for Native Title and Reconciliation, Submission to the CERD Committee, March 1999, prepared by Ms Jennifer Clarke and Ms Krysti Guest, p 20.

57 Dealt with in Part 2 Division 3 of the original Act.

58 Now contained in Sub-Division P of Division 3, Part 2 of the amended Act.

59 Section 26.

60 Section 26(1)(c)(i).

61 Section 26D.

consulted'). The process to be followed by governments regarding this procedure is discussed below. [62]

Exceptions to the RTN in relation to Compulsory Acquisitions

6.85 Under the original Act, the right to negotiate did not apply to compulsory acquisitions by governments for the purpose of providing public facilities, and this exception is retained in the amendments.[63]

6.86 The amended Act provides for the following additional exceptions in the case of compulsory acquisitions of native title rights that are:

- for the purpose of conferring a benefit on a third party for the purpose of providing an infrastructure facility; or
- wholly within a town or city.[64]

6.87 The lesser procedural right – the opportunity to be consulted – applies where the compulsory acquisition confers a benefit on a third party for the purpose of constructing an infrastructure facility.[65] In relation to the compulsory acquisition of native title within a town or city, the freehold standard applies.[66]

The Opportunity to be Consulted

6.88 As noted above, in some limited circumstances where the right to negotiate has been removed, it is replaced with procedural rights which effectively amount to no more than the right to be notified and the opportunity to be consulted.

6.89 Registered native title claimants must lodge an objection to the doing of the act in order to secure the opportunity to be consulted. This is a contrast to the right to negotiate which applied automatically.

6.90 The opportunity to be consulted is a lesser procedural right than the right to negotiate. The right to negotiate requires the parties to negotiate in good faith with a view to obtaining the agreement of the native title parties to the doing of the act.[67] Significantly, the opportunity to be consulted imposes no requirement of good faith. In addition, consultation is only for the purpose of minimising the effect of the act on registered native title rights and interests, rather than for the purpose of obtaining the agreement to the doing of the proposed act.

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62 Section 24MD(6B).

63 Section 26(1)(c)(iii)(A).

64 Section 26(2)(f) and s.251. See discussion about the effect of compulsory acquisitions later in this chapter in relation to future extinguishment of native title.

65 Section 24MD(6B).

66 Section 24MD(6A).

67 Section 31(b).

6.91 To summarise the elements of this alternative procedure, native title claimants must be given:

- notification of the act;
- the opportunity to object to the doing of the act;
- the opportunity to be consulted in relation to minimising the effect of native title on registered native title rights and interests; and
- the opportunity to have any objection heard by an independent person or body;

The alternative procedure must also include provision for arbitration in relation to any objection. However, any decision of the arbitral body may be overridden by the relevant minister.[68]

Replacing the Right to Negotiate: Alternative State/Territory Regimes

6.92 The original Native Title Act allowed States and Territories to administer the future act process with an equivalent right to negotiate procedure.[69] Under the amended Act, States and Territories are now able to establish alternative regimes that reduce or remove the right to negotiate. In order to operate in lieu of the relevant provisions of the NTA, alternative State and Territory regimes must be approved by the Commonwealth Minister, whose decision can be disallowed by either House of Parliament.[70]

6.93 States and Territories can implement alternative regimes which replace the right to negotiate under the NTA with lesser procedural rights in relation to certain acts which are considered to have a 'low-impact' on native title. These are:

- the grant of mining rights at the exploration stage (s.26A);
- certain gold or tin mining acts (s.26B); and
- certain opal and gem mining (s.26C).

6.94 In relation to these regimes, native title holders are granted lesser procedural rights which vary but generally include:

- the right to be notified; and
- the opportunity for some form of consultation about the minimisation of the effect of the proposed act on native title.[71]

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68 Section 24MD(6B).

69 Original NTA, s.43.

70 Sections 43, 43A, 26A, 26B, 26C and 214.

71 Sections 26A(6)-(8), 26B(7)-(9) and 26C(5),(5A) and (6).

6.95 Under the original Act there was a category of 'low-impact' future acts which were exempted from the procedural rights in the future act regime (including the procedural rights under the general freehold standard). However, the low-impact future acts regime under the amended NTA exempts acts which can, in fact, have a substantial impact on the relevant land and waters. These are acts which were formerly subject to the right to negotiate under the original NTA.

6.96 Furthermore, notwithstanding the characterisation of these acts as low-impact under the amended NTA, the Government has alternatively argued that the full right to negotiate would impose a burden that would make it 'uneconomical and impractical' for many people to continue mining, and that they might therefore leave the industry.[72] This suggests that the real reason for the reduction in the right to negotiate in relation to exploration and certain mining activities was not a genuine assessment of their minimal impact on native title. Rather, it appears that it was intended to ensure that the existing interests of native title holders were subordinated to the interests of those who may in the future seek to acquire an economic interest in the land.

Replacing the Right to Negotiate: s.43A Alternative Schemes

6.97 The amended NTA also allows State and Territory Governments to implement comprehensive alternative regimes under s.43 and s.43A. Section 43 was included in the original Act and required States and Territories to enact an equivalent right to negotiate regime. The NTAA inserted s.43A which allows States and Territories to replace the right to negotiate with an opportunity to be consulted in relation to future acts on land that is, or was, the subject of coexisting tenures, principally pastoral lease and reserved land. The principal elements of the opportunity to be consulted are outlined above.

6.98 The operation of these alternative regimes either under s.43 or s.43A is subject to approval by the Commonwealth Minister (the Attorney-General) and also to parliamentary disallowance, as noted earlier in relation to low-impact future act regimes. This was intended to enable the Commonwealth Parliament to ensure that alternative State and Territory regimes would meet the minimum standards in the NTA. However, it has recently been noted that once these regimes have been approved, States and Territories may be able to amend the regimes to reduce the standards, with no further scope for monitoring by the Commonwealth Parliament.[73]

72 Attorney-General's Department, Submission 24, Part II, pp 38-39.

73 See the Senate debates in relation to the Northern Territory's proposed alternative regime: *Senate Hansard*, 31 August, 1999, pp 8027 ff. Note the distinction between the executive act of the Minister and the role of Parliament in relation to the monitoring of these schemes and ensuring their compliance with minimum standards.

Reducing the Right to Negotiate: The Government's Arguments

6.99 The amendments to the Native Title Act have reduced the right to negotiate principally in relation to what the Government has classified as 'low-impact' acts and where native title coexists with overlying tenures.

6.100 The Government has argued that the changes to the right to negotiate were justifiable because:

- the right to negotiate is inappropriate where the proposed activity will have a minimal impact on native title;[74]
- the right to negotiate is inappropriate where native title coexists with other interests (for example pastoral leases);[75] and
- where native title coexists with other interests there should be equality between the procedural rights of native title holders and those of holders of overlying interests.[76]

6.101 In relation to the Government's first two arguments above, the amendments to the RTN are based on the Government's adoption of the bundle of rights and partial extinguishment concept of native title. The Government is taking the approach that because native title has been partially extinguished where there are overlying coexisting interests such as pastoral leases, the RTN is not considered justifiable. Alternatively, in relation to land which has never been the subject of past grants to third parties, and where native title may therefore exist in its entirety, the Government accepts that the right to negotiate is still appropriate.[77]

6.102 At the time the amendments to the NTA were passed, there was no judicial confirmation of the bundle of rights approach. However, in any case, international standards would not authorise the Government to confirm the vulnerability of native title where this would result in inequality. Under its international obligations the

74 Attorney-General's Department, Submission 24, Part II, p 41. Also, in the Second Reading speech for the Native Title Amendment Bill 1997 the Attorney-General stated that: 'The Government proposes to remove the right to negotiate where it is inappropriate because of the nature of the rights to be granted, the minimal impact on the land, or the limited native title rights that can exist.' *House of Representative Hansard*, 4 September 1997, p 7891.

75 Attorney-General's Department, Submission 24, Part II, p 41. See also the Second Reading speech for the Native Title Amendment Bill 1997, *House of Representative Hansard*, 4 September 1997, pp 7886 ff.

76 Australian Institute of Aboriginal and Torres Strait Islander Studies, Submission 11, p 20. See also the unofficial transcript of Australia's appearance before the CERD Committee, 18 March 1999, at: http://www.faira.org.au/cerd/minutes-1323-cerd-meeting.html, and the Attorney-General's Second Reading speech for the Native Title Amendment Bill 1997, *House of Representatives Hansard*, 4 September 1997, p 7892.

77 Senator the Hon Nick Minchin, *Senate Hansard*, 4 December 1997, p 10411.

Government is required to ensure that the rights of native title holders are given a level of protection that is equal to that enjoyed by the holders of ordinary title.[78]

6.103 The Government's third argument for reducing the right to negotiate, as set out above, demonstrates that it has misunderstood the concept of equality. The standard of equality requires effective equality in the protection of fundamental human rights. In 1998 the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner pointed out the irony in the fact that one of the Government's arguments in support of reducing the standard of protection provided to the interests of native title holders is by reference to the need to ensure that pastoral lessees enjoy equal rights with native title holders:

> It is deeply ironic that, even if one is to accept the proposition that the right to negotiate is a special measure, the main attack on the measure applying specifically and exclusively to Aboriginal people is based on equality; a notion which comes from a history of struggle against racial discrimination and which is now employed to deny the rights of those who struggled for so long. Sadursky makes this point in relation to the assertion in the case of *Gerhardy v Brown* that section 19(1) of the *Pitjantjatjara Land Rights Act 1981* is discriminatory because it makes it an offence for a person other than a Pitjantjatjara person to enter the land without permission:
>
> > It would be ironic to defeat this protective regulation on the basis of the argument deriving from the history of invidious racial discrimination, and it would be perverse if the evils visited upon Aborigines in the past lent moral force to the claims of non-Aborigines to prevent even a partial redress for those evils.
>
> The same criticism can be made of the argument that the right to negotiate on pastoral leasehold land should be repealed because it is discriminatory against non-Indigenous leaseholders whose interest is actually founded on the past dispossession of Indigenous people.[79]

The Registration Test

6.104 Following the effect of the decision in *Northern Territory v Lane* on the threshold test in the original Act, there was consensus between Indigenous representatives and government on the need for a higher threshold test for the formal acceptance of claims.[80] As has been noted earlier, claims, or applications for native title, are placed on the Register of Native Title Claims upon formal acceptance. Hence, the acceptance, or threshold, test is sometimes referred to as the 'registration test'. Native title holders who have registered claims or applications (registered

78 See the discussion of these points earlier in this chapter.

79 Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, p 114. See also Sadursky W, '*Gerhardy v Brown* and the concept of discrimination: Reflections on the landmark case that wasn't' (1985) 11 *Sydney Law Review* 5, p 5.

80 See Chapter 5.

claimants) can access the RTN (or the opportunity to be consulted which has replaced the RTN in some instances under the amended Act).

6.105 The registration test was one issue in relation to the need for amendments which was uncontroversial. It is therefore one matter on which there could have been an agreed approach. However, the registration test criteria in the amended Act was developed without the agreement of Indigenous representatives, who were opposed to a test that would prevent *bona fide* native title holders from having their claims registered.[81] The fact that there was not an agreed approach points to the Government's attitude towards obtaining the agreement of Indigenous people to matters affecting their rights. This is discussed later in this chapter.

6.106 The amended Act contains a new, more stringent registration test, which claimants must pass either to remain on the Register of Native Title Claims or to be placed on the Register in the case of a new application.[82]

6.107 Failing the registration test does not prevent claims from continuing in the Federal Court. However, unregistered native title claimants are not able to access the right to negotiate and most other provisions of the future act regime, pending recognition of their native title through a determination.[83]

6.108 Claimants whose application is refused registration can apply to the Federal Court for a review of the decision of the Registrar or his delegate.[84] Review rights are also available under the *Administrative Decisions (Judicial Review) Act 1977*.

6.109 The substantive requirements for registration include:

i) identification of the claimant group;

ii) identification of the claimed native title;

iii) the factual basis for the native title rights and interests claimed; and

iv) the physical connection test.

6.110 The native title claimant group must be ascertained or ascertainable.[85] The manner in which this component of the registration test is being applied by the Registrar and his delegates to date indicates that they consider the identification test

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81 Native Title Amendment Bill 1997: Issues for Indigenous Peoples, October 1997, ATSIC at http://www.atsic.gov.au/issues/native_title/iip/main.htm#6.

82 Sections 190A-190C. For a discussion of the registration test see Richard Bartlett, *Native Title in Australia*, Butterworths, 2000, pp 130-138.

83 Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission 32, Annexure B: Submission to CERD, p 16.

84 Section 190D.

85 Sections 190B(3)(a) and (b).

an objective one. This arguably places a more onerous burden of proof on native title claimants than would be required to achieve recognition through the common law.

6.111 Native title claimants are also required to identify each individual native title right and interest claimed, and provide the factual basis of the claimed right.[86] In addition, native title claimants must provide evidence of the factual basis of the native title rights and interests that they are claiming. The Registrar of the National Native Title Tribunal, or his delegate, must be satisfied that the factual basis supports at least some of the claimed native title rights and interests on a *prima facie* basis.[87]

6.112 Only the native title rights and interests that the Registrar is satisfied can *prima facie* be made out can be registered.[88] This is important, as under the future act regime in the amended Act the right to negotiate and the lesser procedural rights, such as the opportunity to be consulted, only relate to *registered* native title rights and interests. This element of the registration test is another example of the bundle of rights conception of native title that informed the amendments to the Act. It reduces the ability of native title claimants to protect their native title rights pending formal recognition of these rights through a determination by the Federal Court.

6.113 The claimants must also prove that at least one member of the group currently has, or previously had, a traditional physical connection to at least part of the claim area. There is an exception to this requirement if the group can show that physical connection would have been maintained but for an act of the Crown, any statutory authority of the Crown, any leaseholder or anyone acting under the authority of the leaseholder. This is known as the 'locked gate' exception. However, this exception is unlikely to have any practical effect. Any claimant group that has been prevented from maintaining physical access to their land will have difficulty establishing other registration test criteria: for example, proving that at least some of the native title rights and interests can be made out on a *prima facie* basis.

6.114 The physical connection requirement is arguably a more onerous test than that which is required at common law, or to achieve a determination in the Federal Court. As Dr Lisa Strelein of the Australian Institute of Aboriginal and Torres Strait Islander Studies explained in evidence to the Parliamentary Joint Committee:

> In Australian law prior to the Native Title Amendment Act there was a strong inclusion of the spiritual aspects of indigenous people's connection with the land in the concept of native title … In the *Mabo* decision the courts presented quite a non-physical representation of Indigenous people's rights over land. The physical connection test makes it impossible to

86 Section 190B(4) & (5).

87 Section 190B(6).

88 Section 186(1)(g).

> establish a connection based on absence, which for a lot of people over the history of dispossession means that this is difficult to prove.[89]

6.115 Section 190C of the amended Act, also places onerous procedural requirements on claimants, more so because the Tribunal Registrar is adopting a strict interpretation of those requirements.[90] To pass the registration test, native title claimants are required to provide the Registrar with voluminous amounts of material, including the tenure history of the claim area, information held by State and Territory Governments. Also, personal and genealogical information must be provided by claimants which raises privacy issues.[91] Dr Sarah Pritchard advised in evidence to the Parliamentary Joint Committee that:

> The limited experience that native title lawyers have had to date with this aspect of the amended legislation confirms a very real danger that *bona fide* native title holders are being denied the procedural protections of the Act because of the rigours of the new registration test.[92]

6.116 The intention of the registration test was to ensure that only those claims with merit were registered and gained access to the right to negotiate, the opportunity to be consulted and the ILUA provisions in the amended Act.[93] The registration test should facilitate the effective interim protection of native title pending a determination. On the contrary, it appears that the registration test is operating to prevent *bona fide* claimants from accessing these procedures.

Authorisation of Future Acts Through Agreement

6.117 As noted in Chapter 4, in addition to the right to negotiate, s.21(1)(b) and (2) of the original Native Title Act allowed native title holders to reach agreement with governments to authorise future acts, or classes of future acts.

6.118 The amended Act replaces s.21 agreements with a more detailed scheme of agreements, through the Indigenous Land Use Agreement (ILUA) provisions. The Act provides for three types of agreements: Body Corporate Agreements, Area Agreements and Alternative Procedure Agreements.[94] An ILUA must be registered and, once registered, binds all native title holders in the area, not just those who are parties to the agreement.[95] Generally, compensation for extinguishment or impairment

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89 Dr Lisa Strelein, *Official Committee Hansard*, 22 February 2000, p 54.

90 Dr Sarah Pritchard, *Official Committee Hansard*, 22 February 2000, p 67.

91 See the decisions of Carr J in *Western Australia v The National Native Title Registrar* [1999] FCA 1591; also at: http://www.austlii.edu.au/au/cases/cth/federal_ct/1999/1591.html

92 Dr Sarah Pritchard, *Official Committee Hansard*, 22 February 2000, p 67.

93 Commentary in the 2nd edition of the *Native Title Act 1993*, published by the Australian Government Solicitor, 1998, pp 53-54.

94 Sections 24BA-DM.

95 Section 24EA(1).

of native title under the ILUA provisions is limited to what is contained in the agreement.[96]

6.119 An ILUA can override any other provisions in the amended NTA which:

- state that an act is invalid;
- require the RTN to be complied with before an act can validly done;
- validate past and intermediate period acts; or
- prevent the extinguishment of native title.[97]

6.120 The Government argues that the ILUA provisions are new provisions which are beneficial. However, it is important to note that there was the capacity for agreements about future acts to be reached under the original Act. As Dr Mick Dodson advised:

> it has to be made clear that ILUAs are not something new. They were called something different in the 1993 Act. Under section 21.4 they were called regional agreements. There was the capacity to do it there.[98]

6.121 Dr Dodson also advised in evidence that the agreement provisions in the amended Act were undermined by other amendments to the future act regime, such as the reduction in the right to negotiate:

> the way in which the right to negotiate was dealt with under the original Act and the way in which it is dealt with under the present Act reduces our capacity in ILUAs or regional agreements, because we are not in as strong a bargaining position. In fact, it is largely based on goodwill and largesse. That is what we have to rely on, and that is hardly an equal position.[99]

PART 3 – EXTINGUISHMENT

6.122 The original Native Title Act validated some past acts of government and 'confirmed' extinguishment in relation to some of those acts, and also provided for extinguishment in the future through the compulsory acquisition of native title by government. Otherwise, native title was to be protected from extinguishment by the future act regime. Moreover, the original Act constituted an agreement between government and Indigenous people which included the discriminatory past act provisions in exchange for measures that would ensure the future protection of native

96 Sections 24EB(4), (5),(6), (7) and 24EBA(5).

97 Sections 24BB, 24CB, 24DB and 24EBA.

98 Dr Mick Dodson, *Official Committee Hansard*, 22 February 2000, p 56.

99 Dr Mick Dodson, *Official Committee Hansard*, 22 February 2000, pp 56-57.

title and also address the disadvantage suffered by Indigenous communities as a result of their past dispossession.[100]

6.123 The Native Title Amendment Act provided for further extinguishment of native title through the validation of 'intermediate period acts' and the 'confirmation of extinguishment' in relation to certain types of tenures, including the scheduled leases.

Intermediate Period Act Validation and Extinguishment of Native Title

6.124 The NTAA inserted into the NTA provisions which validated potentially invalid 'intermediate period acts' done by the Commonwealth,[101] and allowed the States and Territories to legislate to validate intermediate period acts done by them.[102]

6.125 Intermediate period acts are acts by governments (including public works) over freehold and leasehold land (including pastoral leasehold)[103] done between the commencement of the original NTA on 1 January 1994 and the date of the *Wik* decision on 23 December 1996 (the 'intermediate period').[104]

6.126 The amendments also set out the effects of the validation of intermediate period acts. Category A intermediate period acts extinguish native title. Category B intermediate period acts extinguish native title to the extent of inconsistency with the continued exercise of native title rights and interests. The non-extinguishment principle applies to category C and category D intermediate period acts.[105]

6.127 The original NTA required all future acts by governments on land over which native title exists, or may exist, to comply with the provisions of the future act regime. The procedural rights guaranteed by the future act regime were the mainstay of the protection offered native title.

6.128 The potential invalidity of intermediate period past acts arose because State and Territory Governments had continued to grant interests in land – in other words, to do future acts – after the commencement of the original Act, without complying with the future act regime. This was the case particularly in relation to land which was the subject of pastoral leases.

6.129 As indicated in the discussion in Chapter 4, the protection afforded native title by the future act regime was derived from the protection native title holders would at

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100 See the relevant discussion in Chapter 4.

101 NTA Part 2, Division 2A, Sections 21, 22A, B and C.

102 Section 22F.

103 Except land that is the subject of a mining lease.

104 Section 232A. See also the Explanatory Memorandum to the Native Title Amendment Bill 1997, pp 35-36.

105 See sections 232B-E and 22B(a)-(d).

any rate enjoy under s.10 of the Racial Discrimination Act. The RDA also constrained the legislative power of States and Territories.

6.130 Thus, failure to comply with the future act regime where native title did exist, or may have existed, meant that State and Territory grants of interests or public works (i.e. the conduct of future acts) may have been invalid due to the operation of s.10 of the RDA.

6.131 The relevant future acts, by State and Territory Governments in particular, primarily involved grants of mining and other interests over pastoral leases, which cover 40 per cent of the land mass of Australia. In enacting the NTAA the Commonwealth Government thought it necessary to ensure that States and Territories could validate those acts done in the 'intermediate period' between the commencement of the NTA and the High Court's decision in *Wik*, which confirmed that native title may continue to exist over land which is the subject of pastoral leases.

6.132 The Commonwealth has argued that in granting titles over pastoral leases without using the future act provisions of the NTA, it and State and Territory Governments were acting on the assumption that native title had been extinguished by the grant of a pastoral lease. It was therefore not necessary to comply with the future act regime in the doing of future acts over pastoral leases, because native title could not be affected.

6.133 The Commonwealth Government claims that the 'clear balance of legal opinion' in 1993 was that native title was extinguished by the grant of a pastoral lease. The Government's view was derived from the judgment of Brennan J in *Mabo (No 2)* that the grant of a lease would extinguish native title. However, Justice Brennan's view on the question of whether leases extinguished native title was not in any way conclusive.[106]

6.134 Further, the Government claims that the original NTA was drafted on this basis and that it was never intended that the future act regime would apply to future acts done over pastoral leases.[107] This understanding about the extinguishment of native title on pastoral leases was expressed in the *Commentary to the Native Title Act 1993* and in the preamble to the Act. However, as the Fifteenth Report of the Parliamentary Joint Committee has noted, the Government at the time consistently maintained that the question of the existence of native title over pastoral leases should be left to the courts to determine finally.[108]

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106 See the Fifteenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Interim Report for the s.206(d) Inquiry, Proceedings of Conference on 12 March 1999*, September 1999, pp 15-18; also the discussion in Chapter 4 on the question of extinguishment in the majority judgments in *Mabo (No 2)*.

107 Attorney-General's Department, Submission 24, Part II, pp 2-3. See also Ms Philippa Horner, *Official Committee Hansard*, 9 March 2000, p 159.

108 Fifteenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Interim Report for the s.206(d) Inquiry, Proceedings of Conference on*

6.135 Barrister and former Special Counsel with the Commonwealth Attorney-General's Department, Mr Ernst Willheim, stated in evidence that from 1994 the Commonwealth and State and Territory Governments were, in fact, of the opinion that the question of the existence of native title on pastoral leases was yet to be resolved by the courts.

6.136 Mr Willheim drew this Committee's attention to submissions made on behalf of the Commonwealth and some State and Territory Governments in litigation before the Federal Court and the High Court between 1994 and 1996. For example, at a very early stage in the proceedings in *Ward v Western Australia*,[109] Mr Willheim noted the Commonwealth Government's arguments, in submissions made by the Attorney-General on 8 September 1991, that:

> it is in the public interest that uncertainty as to the effect of the past grant of a pastoral lease on any subsisting native title be resolved at the earliest opportunity.[110]

6.137 Mr Willheim cited similar arguments put to the High Court by the Commonwealth Attorney General in the *Waanyi* case:

> where again this question of whether pastoral leases extinguish native title was in issue before the High Court of Australia … In paragraph 10 of the Commonwealth's submissions, the Attorney-General says 'It is in the public interest that the uncertainty as to the legal effect of any subsisting native title of the past grant of pastoral leases, whether subject to reservations providing for Aboriginal access and usage rights or not, be resolved by the Court at the earliest opportunity'. … the Attorney General refers to '… the uncertainty faced by governments in future land and resource management proposals involving land subject to current or historical pastoral leases'.[111]

Several States and Territories also participated in High Court proceedings in *Waanyi*.[112]

6.138 The submissions of the Commonwealth Government in litigation during the intermediate period clearly demonstrate that it did *not* hold a genuine belief that the question of the continued existence of native title on pastoral lease had been settled on the clear balance of legal opinion. The submissions reveal instead that the Commonwealth believed that there was uncertainty surrounding the question, which

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12 March 1999, September 1999, p 26. See also Senator Gareth Evans QC, *Senate Hansard*, 20 December 1993, p 5338.

109 Western Australia and the Northern Territory were opposing the Miriuwung Gajerrong people's application for a determination of native title in this case.

110 Mr Ernst Willheim, *Official Committee Hansard*, 13 March 2000, p 182, and see generally pp 182-183. The Commonwealth appeared by way of intervention in the case.

111 Mr Ernst Willheim, *Official Committee Hansard*, 13 March 2000, p 183.

112 Mr Willheim mentioned this in his evidence: 'The States and Territories were in that case.' *Official Committee Hansard*, 13 March 2000, p 183.

needed to be resolved as a matter of urgency by the courts. As Mr Willheim pointed out:

> Governments were saying the court should … have decided the pastoral lease question … At the time you had the Commonwealth Government and the New South Wales, South Australian, Victorian, Western Australian and Northern Territory Governments all saying in the forum where these issues are determined [ie the courts] that there is uncertainty. It was in the public interest that this uncertainty be resolved and the uncertainty was affecting land administration.[113]

6.139 From as early as 1993 governments had received warnings and advice about the danger of ignoring the future act regime when granting interests over pastoral leases. As Dr Dodson advised the Parliamentary Joint Committee:

> In 1993 the court was already seized of *Wik*; it was already afoot … Shortly after 1993 … I warned this Parliament, as is my duty … when I was at the time Social Justice Commissioner … There were lots of lawyers running around; there were lots of ex-judges running around saying, 'Look, this is dangerous ground. You comply with the Native Title Act. Don't issue titles willy-nilly here.' The agreement with the then Labor Government and the Indigenous negotiators was that that was a matter to be left for the courts. It is a nonsense to suggest that people were not apprised of the dangers of what they did.[114]

6.140 In his 1994-95 Native Title Report to the Government, Dr Dodson, as Social Justice Commissioner, advised that:

> It is one thing to take a position about extinguishment, but it is an entirely different matter for governments to act on that position before it is confirmed in law. It is alarming that state and territory governments have limited their use of the future act regime and the protection that it provides to Indigenous peoples on the basis of assumptions about extinguishment. Given the uncertainty around the issue, I find such an approach extraordinarily risky.[115]

6.141 Ms Krysti Guest, Legal Officer with the Kimberley Land Council, told the Parliamentary Joint Committee that in Western Australia the State Government 'was on notice that taking those intermediate period acts would probably be invalid under the Native Title Act'. This was because since 1994 the Native Title Tribunal had been accepting applications for determination of native title over pastoral leases.[116] A

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113 Mr Ernst Willheim, *Official Committee Hansard*, 13 March 2000, p 183.

114 Dr Mick Dodson, Australian Institute of Aboriginal and Torres Strait Islander Studies, *Official Committee Hansard*, 22 February 2000, p 56.

115 Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report *July 1994 – June 1995*, p 158.

116 That is, in accepting applications for determination of native title over pastoral leases, the NNTT was taking the view that there was an arguable case that native title continued to exist over pastoral leases.

further indication that the State was aware of the risk was that between 1996 and 1998 the Western Australian Government granted 211 titles over pastoral lease in relation to seven major development projects, primarily mining projects without reference to the future act provisions. Ms Guest pointed out that:

> In the leases that the Government granted in relation to those seven major developments, there is a specific indemnity in relation to the State. The companies had to agree to indemnify the Minister and the State if there was invalidity in the lease due to the fact that it been granted without reference to the Native Title Act. In another case the recitals in the lease agreements contained a request that the companies had specifically asked for the leases without implementation of the right to negotiate provisions.[117]

Clearly, the Western Australian Government saw the need to protect itself from the real possibility that such acts were invalid as a result of the continuing existence of native title.

6.142 Ms Guest advised that the 211 titles were among those validated as intermediate period past acts pursuant to the amendments to the NTA, and went on to say:

> I think in Western Australia, at the very least, the fact of those grants, which were, as I said, validated by the intermediate period acts, puts paid to the idea that validation was necessary to protect titles honestly granted without reference to the NTA by reason of mistake. I think the WA Government knew the situation perfectly well and has said it in specific leases.[118]

6.143 Where there is a possibility that native title may exist, it was intended that the future act provisions would offer some protection to native title, pending its formal recognition through a determination. The corollary is that where there is a possibility that native title may exist (or where the fact of its extinguishment has not been established beyond doubt), governments must use the future act provisions of the NTA. The use of the future act provisions of the NTA puts the validity of the interests granted to third parties beyond doubt, and it also ensures that the traditional title of Indigenous people is afforded some protection, or at least that Indigenous people have some procedural rights in respect of the extinguishment or impairment of their title. In addition, such a course of action would minimise the liability of the Crown to pay compensation to native title holders (or to third party interests holders if such a situation arises), which may be required if the future act provisions are not used. In this way, the future act regime can be considered a benefit to the Government as well as to third parties who are acquiring an interest in land in which native title may continue to exist, and also to the holders of Indigenous traditional title in the land.

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117 *Official Committee Hansard*, 13 March 2000, p 181.

118 *Official Committee Hansard*, 13 March 2000, p 181.

6.144 The forgoing discussion indicates that after the enactment of the original NTA and prior to the High Court's decision in *Wik*, governments were aware that native title might not have been extinguished by the grant of a pastoral lease. Thus, the failure by governments to comply with the future act regime appears to have been motivated by a deliberate disregard for the original NTA (and the standards of the RDA) and its important aim of recognising and protecting native title, rather than by a genuine belief in the state of the law, as the Commonwealth has claimed in its submission to this inquiry. Moreover, this course of action placed the interests acquired by third parties in the land at risk of invalidity.

6.145 The recent response of the Western Australian Government to the decision of the Full Court of the Federal Court in the case of *Western Australia v Ward* provided another example of the deliberate disregard by that Government for protection offered native title by the future act regime. In November 1998 Justice Lee of the Federal Court determined that the Miriuwung Gajerrong group had established the continued existence of their traditional title to tracts of land, most of which lay within the State of Western Australia.[119] The State appealed against the decision of Lee J, and in May 2000 the Full Court of the Federal Court[120] delivered a decision on appeal, which confirmed that the Miriuwung Gajerrong group had established their traditional title to the land in question. However, the majority of the three appeal judges reversed aspects of the decision of Lee J on the question of extinguishment. Importantly, the majority judges found that pastoral leases in Western Australia partially extinguished native title and also that some forms of tenure, such as mining leases, extinguished native title totally. The effect of the Federal Court appeal decision is that, although it was accepted that the Miriuwung Gajerrong people had established the continued existence of their traditional title to land, the recognition of that interest by the common law – through the concept of native title – was found by the majority judges to have ceased or to have been extinguished due to the effect of overlying tenures.

6.146 An application for leave to appeal against the decision of the Full Court of the Federal Court on, among other things, the question of extinguishment, is due to be heard in the High Court of Australia on 4 August 2000. There is a real possibility that the High Court may grant leave to appeal and may overturn the decision of the Full Court of the Federal Court on the questions relating to extinguishment of native title. In the interim, pending a final decision of the High Court, a State Government which is committed to the protection of native title should utilise the provisions of the future act regime in granting future interests in land where the question of extinguishment remains to be clarified by the High Court. Instead, the Western Australian Government has announced that it will use the Federal Court appeal decision as the basis of determining the extent of extinguishment of native title in the State. Thus, where native title, according to the Federal Court appeal decision, has been extinguished, the State Government will issue titles to third parties (i.e. do future acts)

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119 *Ward v Western Australia* (1999) 159 ALR 483.

120 *Western Australia v Ward* [2000] FCA 191; also at: http://www.austlii.edu.au/au/cases/cth/federal_ct/2000/191.html.

without using the future act provisions. Most of these titles will be mining and exploration titles.[121]

6.147 In taking this course of action ahead of the decision of the High Court, the Western Australian Government is gambling on the final outcome of matters before the High Court. In the event that the decision of the Full Court of the Federal Court is overturned (meaning that the titles would have been issued in breach of the NTA), the titles issued will potentially be invalid. The only way of ensuring the validity of these titles will be through yet further Commonwealth amendments to the NTA to allow validating State legislation. Further, native title holders will have to be compensated for the validation of any invalid titles authorised by Commonwealth legislation. In other words, in pre-empting the High Court decision, the WA Government is risking the invalidity of the titles it grants to third parties, and it is exposing itself or any future government – the Crown – to possible compensation payments. The simple alternative is to comply with the provisions of the future act regime.

6.148 As with the past act validations in the original Act, the provisions in the amended NTA for the validation of intermediate period acts are discriminatory because they validate non-Indigenous title at the expense of Indigenous title. The additional validation provisions were inserted into the NTA to remedy for governments the potential invalidity resulting from their disregard of the future act provisions, of acts done by them in the intermediate period.

6.149 The Government argues that the validation regime under the amended Act is justifiable because it is more limited than the scheme under the original Act, and that the CERD Committee, 'apparently had no concerns with this much more extensive regime'.[122]

6.150 However, there are two fundamental differences in the circumstances relating to validation in 1993 compared with 1997-98. The first is the 'radically different state of knowledge in 1997-98 about the existence of native title'.[123] While the original NTA validation provisions were seen as a reasonable response to the novel situation which arose as a result of the recognition of native title in *Mabo (No 2)*, as the ANTaR submission to the CERD Committee stated:

> the 1998 'validation' provisions are designed to overcome the more predictable consequences of the unwillingness of (mainly state) governments to comply with clear, specific standards in Commonwealth law (the original *Native Title Act*) after having been made aware of native title's

121 'WA: WA to bypass native title and grant mining, exploration', AAP Wire, 16 June 2000; 'Mining industry welcomes WA govt native title move', AAP Wire, 16 June 2000; 'Premier speaks out on native title and lease applications', AAP Wire, 18 June 2000.

122 Attorney-General's Department, Submission 24, Part II, p 10.

123 Dr Sarah Pritchard, *Official Committee Hansard*, 22 February 2000, p 66.

> potential existence on the land with which they were dealing and of the likely invalidity of their actions as a result. [124]

6.151 Secondly, and most importantly, the original validation provisions were included in the Act with the consent of Indigenous people. Moreover, this consent was given in exchange for the important protections offered to native title through the freehold test and the right to negotiate, as discussed above.

6.152 In the amended Act, not only is there provision for the additional extinguishment of native title *without* the consent of Indigenous people, but the protection which was guaranteed to Indigenous people in exchange for extinguishment under the original Act has been reduced, also without their consent.

6.153 The South Australian Government has also raised a public policy issue as a justification for the validation of intermediate period acts. Essentially, the question is: what is to be done about non-Indigenous interest holders who have acquired interests by relying on the validity of the title being conferred upon them by governments? The South Australian Government submits that:

> Validation is the obvious answer. Compensation needs to be paid … We say that there cannot be a sensible argument against that validation.[125]

This public policy issue only underscores the extent of the problems that may result where governments take a risk in choosing to avoid the future act provisions of the NTA when granting titles over land where native title may continue to exist.

6.154 The first critical point to note in relation to this public policy issue is that blanket validation of invalid third party interests is not appropriate. Rather, the specific circumstances of the cases at hand must be considered in determining the way forward in dealing with this issue. The second point is that there is no reason why non-Indigenous interests should automatically be preferred over Indigenous interests in land, especially given that it is non-Indigenous interests that are more easily valued in monetary terms and therefore more easily compensated.

6.155 In fact, in determining the way forward, the first question to ask is which interests will best be compensated by monetary payments? Generally, it will be non-Indigenous titles which better lend themselves to monetary valuation.[126] However, there may be circumstances in which a third party may have undertaken significant work – such as the construction of a mine or a dam – on the land. In such circumstances negotiation with the relevant native title holders is necessary in determining a solution. In other words, where it is proposed to invalidate existing

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124 Australians for Native Title and Reconciliation, Submission to the CERD Committee, March 1999, p 18.

125 State of South Australia, Submission No 15, p.2.

126 See the discussion in this chapter on the adequacy of monetary compensation for the extinguishment of native title. Where the government proposes to rescind the grant of a third party title it may need to negotiate the terms of the compensation payment with the third party interest holder.

valid native title, in order to validate invalid third party titles, negotiation with native title holders must be undertaken. And this, in fact, is the requirement under international law.

6.156 Dealing with the validation of invalid third party titles is a difficult political issue for government, especially where the situation has arisen from its own risk taking. Ultimately, however, governments must bear the consequences of their own risk taking. This point was made by Dr Sarah Pritchard in evidence before this Committee:

> **Senator ABETZ:** What should happen to a farmer, pastoral lease or a small miner who undertook invalid activities?
>
> **Dr Pritchard:** It is a very difficult question.
>
> **Senator ABETZ:** The CERD just brushed it aside, saying it is in breach.
>
> **Dr Pritchard:** No, it did not.
>
> **Senator ABETZ:** Yet, when you are dealing with the practical consequences of their determination, I would suggest to you, you have some very real and difficult problems to deal with.
>
> **Dr Pritchard:** Perhaps the Australian Government has those problems, with respect, because it is the Australian Government that proceeded to enact amendments to the Native Title Act that were contrary to Australia's international obligations. So it is a difficulty that the Government now needs in good faith to address.[127]

6.157 Blanket validation of invalid third party titles means that the Government forces the consequences of the risk it has taken in choosing to ignore the future act provisions, on native title holders who, as a result, will have their native title extinguished or impaired, subject only to a right of monetary compensation which can never actually compensate them for the value of the land. The consequences of this risk taking by government also falls upon the public at large as the cost of monetary compensation must come from public funds.

6.158 As discussed in Chapter 4, the consent of Indigenous people to the provisions of the Native Title Act in 1993, including the discriminatory aspects, was critical to the CERD Committee's assessment that it complied with Australia's obligations under the Convention. The lack of consent or agreement in relation to the 1998 amendments is further evidence of the fact that the amended Act does not meet Australia's international obligations. The importance of negotiation and consent to this assessment is discussed later in this chapter.

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127 Dr Sarah Pritchard, *Official Committee Hansard*, 22 February 2000, p 73.

6.159 The end result of the introduction into the NTA of the intermediate period validation provisions is that it has increased the extinguishing effect of the Act on the interests of native title holders. Further, this extinguishment is the consequence of the disregard by governments of the very provisions – the future act regime – that were intended to protect native title.

Confirmation of Extinguishment Provisions and the Scheduled Leases

6.160 The Native Title Amendment Act inserted into the Native Title Act Division 2B, which allows the 'confirmation of past extinguishment' of native title by certain valid or validated acts (the 'confirmation of extinguishment provisions'). Under these provisions certain acts attributable to the Commonwealth, that were done on or before 23 December 1996 (the date of the High Court decision in *Wik*), will have completely or partially extinguished native title.[128]

6.161 The amended Act now provides that a 'previous exclusive possession act' will completely extinguish native title. A previous exclusive possession act is defined as the grant of a freehold estate and any other act which is deemed under the amended Act to confer exclusive possession, including an act which is a 'scheduled interest'.[129]

6.162 Part 5 of the amended NTA contains a schedule of leases which are deemed to have extinguished native title ('scheduled interests'). Any other interest in land can be declared a scheduled interest merely by regulation, provided that the relevant Minister – in this case the Attorney-General – is satisfied that the interest confers a right of exclusive possession.[130] Conversely, there is a discretion in the amended Act for the Attorney-General to remove interests from the Schedule by regulation.[131] This means that in the absence of a judicial decision on the effect of specific tenure types, the Attorney-General is empowered to make an administrative decision to the effect that native title is extinguished, which would have serious consequences for the relevant Indigenous groups: they would have to exclude the land covered by scheduled interests from any native title determination application, and therefore would not have any future act procedural rights in relation to that land.

6.163 Any rights and interests granted by a 'previous non-exclusive possession act' (i.e. the grant of an interest which does not confer exclusive possession on the grantee)[132] which are inconsistent with native title rights and interests will:

- partially extinguish native title to the extent of the inconsistency where extinguishment would occur 'apart from this Act' (i.e. under the common law); or

128 Section 23A(1).

129 Sections 23(2) and 23B.

130 Section 249C.

131 Section 23B(10).

132 Section 23F.

- where native title is not extinguished, suspend native title to the extent of the inconsistency.[133]

6.164 States and Territories are authorised 'to legislate, in respect of certain [intermediate period] acts attributable to them, to extinguish native title in the same way as is done under this Division for Commonwealth acts'.[134] Most States and Territories have introduced legislation to 'confirm' extinguishment in accordance with the provisions of the NTA.

6.165 Extinguishment is now defined in the amended NTA to mean permanent extinguishment.[135]

6.166 There are some exceptions to the confirmation provisions which include:

- Aboriginal Land;
- where the non-extinguishment principle applies;
- national parks; and
- Crown to Crown grants. This is sometimes called 'fake-freehold' and relates to grants by governments to their statutory authorities.[136]

6.167 The Government has stated that the confirmation provisions 'only' apply to approximately 21 per cent of Australia, with the scheduled interests making up 7.7 per cent of that. However, as ATSIC noted:

> This gives absolutely no comfort to those native title holders whose traditional country falls within the 21%. Their native title rights have been permanently extinguished. They have been denied their day in court to argue for coexistence of rights. Compensation, itself difficult and costly to obtain, cannot restore loss of ancestral native title rights and of consequent rights of access and of having a say in what happens on their traditional country.[137]

6.168 The Government has also made a significant point, in its submissions to the CERD and to this inquiry, of what it refers to as the 'restitution of native title' provisions, which are exceptions to the confirmation regime. Native title claims can be made over historic tenures that are now vacant Crown land or Aboriginal reserves,

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133 Section 23G.

134 Section 23A(4).

135 Section 237A. The fact that native title is permanently extinguished by the grant of freehold title was upheld by the High Court in *Fejo v The Northern Territory*, following the passage of the NTAA. The extinguishing effect of other forms of title was not determined in that case.

136 Sections 23B(9), (9A), (9B), (9C). Aboriginal and Torres Strait Islander Commission, *Detailed Analysis of the Native Title Amendment Act 1998*, p 6.

137 Aboriginal and Torres Strait Islander Commission, Submission 10, p 8.

regardless of the tenure history, provided that they are currently occupied by native title holders.[138] The Government states in its submission that:

> the amended Native Title Act contains (for the first time) provisions which allow the courts to make a finding that native title exists in areas that have previously been the subject of extinguishing tenures. That is, it allows for the restitution of native title previously lost.[139]

6.169 It has been accepted that these measures do provide for the protection of native title over the common law standard. However, as the Aboriginal and Torres Strait Islander Social Justice Commissioner's submission noted:

> The issue that concerned the CERD Committee is whether the protection of native title through the NTA is sufficient to meet Australia's international obligations. The fact that the provision may provide some protection against extinguishment of native title at common law is not itself determinative of this issue.[140]

6.170 Given the vulnerability of native title to extinguishment, particularly if the bundle of rights view is ultimately endorsed by the High Court, these provisions are not sufficient to ensure the equal protection of the fundamental rights of Indigenous people, as outlined in Chapters 3 and 4.

Developing the Schedule of Interests: Negotiation and Consent

6.171 The confirmation provisions, and in particular the Schedule of extinguishing leases, was determined as the result of discussions and negotiation between the various governments. Indigenous people were largely excluded from the development of the Schedule.

6.172 The Government has argued that Indigenous people had the opportunity to comment on the Schedule *once it was released*, and that certain interests, such as Crown to Crown grants, were removed as a result of these comments.[141]

6.173 The Government submission also cites representations by the Queensland Indigenous Working Group (QIWG) to the Queensland Government over the inclusion in the Schedule of Grazing Homestead Perpetual Leases (GHPLs), as an example of this consultation.[142] GHPLs cover approximately 12 per cent of Queensland, and on the legal opinion obtained by the QIWG are more conducive to

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138 Sections 47A and 47B, but note that the requirement that native title holders currently 'occupy' the land is a more onerous requirement than requiring that the demonstrate a continuing traditional connection to the land. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission 32, pp 16-17.

139 Attorney-General's Department, Submission 24, Part II, p 17.

140 Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission 32, p 16.

141 Attorney-General's Department, Submission 24, Part II, p 21.

142 Attorney-General's Department, Submission 24, Part II, p 21.

coexistence with native title rights than the leases considered in the *Wik* case.[143] The fact that these leases were included in the Schedule, and confirmed by the Queensland legislation to extinguish native title, in spite of these representations by Indigenous people, highlights the lack of effective participation of Indigenous people in this process, and indeed their exclusion from any meaningful negotiations. The issue of negotiation and consent in relation to Indigenous participation in developing the amendments is discussed in detail later in this chapter.

Pre-empting the Common Law on Extinguishment of Native Title

6.174 The 'confirmation of extinguishment' provisions were intended to implement points 2 and 4 of the Ten Point Plan. Point 2 of the Plan sought the confirmation of extinguishment of native title on 'exclusive' tenures, while point 4 sought the extinguishment of native title to the extent of inconsistency with the rights conferred on pastoral lessees under the terms of their leases.

6.175 The provisions were based on the bundle of rights conception of native title. Thus, the individual rights and interests that comprised native title were to be severally extinguished by legislation to the extent that an overlying tenure prevented their continued exercise.

6.176 In its submission to this inquiry the Government has argued that the confirmation provisions are not intended to effect any extinguishment of native title, but merely to confirm where native title has already been extinguished at common law, in the interests of certainty for all stakeholders.[144]

6.177 However, as noted earlier in this chapter the Court in *Wik* did not consider the bundle of rights view of native title, nor did the Court in that case advance the law in relation to extinguishment. Thus, at the time the NTAA was passed the Government could not have been confirming settled law on the question of extinguishment of native title. Rather, it was imposing the bundle of rights view of native title ahead of judicial endorsement of this view.

6.178 The Explanatory Memorandum to the Native Title Amendment Bill 1997 states that:

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143 Relevant legal opinion by Mr Walter Sofronoff QC. Queensland Indigenous Working Group, Submission 9, pp 11-12 and Attachment 2. In any case, the fact that there was a legal opinion by an eminent practitioner indicating the possibility that native title could coexist with these leases indicates that the continued existence of native title in relation to GHPLs was an open one. Also, see Dr Sarah Pritchard, *Official Committee Hansard*, 22 February 2000, p 66.

144 Attorney-General, 2nd Reading Speech for the Native Title Amendment Bill 1997, 4 September 1997, pp 7888-7889; Attorney-General's Department, Submission 24, Part II, pp 12-14.

> This Division [Division 2B containing the confirmation of extinguishment provisions] … seeks to reflect the Government's understanding of the common law of native title after the *Wik* decision.[145]

6.179 In other words, the Government adopted as the basis of the confirmation provisions its own understanding of the nature of native title, with no judicial precedent to support its view. Further, as noted earlier, in legislating to impose its own understanding of the law the Government sought to pre-empt a judicial determination on the nature of native title and the circumstances of its extinguishment. The Government's intention that the confirmation of extinguishment provisions should pre-empt the common law is clearly indicated in the Explanatory Memorandum to the 1997 Bill:

> Generally speaking, the existing NTA [ie the original NTA] provides a framework for dealing with native title. The NTA currently says little about whether or where native title may still exist in Australia, and apart from the very limited [past act] validation provisions … says nothing about whether native title may or may not have been extinguished. The NTA generally leaves these issues to be determined by the common law. This has given rise to significant uncertainty for native title claimants and the holders of other interests in land.
>
> The purpose of the proposed amendments dealing with confirmation of extinguishment of native title is to limit this uncertainty. The effect will be to confirm that native title is extinguished on exclusive tenures (such as freehold and residential leases) and extinguished to the extent of inconsistency on non-exclusive agricultural and pastoral leases. Consistent with the *Wik* decision, the rationale for such confirmation is that the rights conferred and/or the nature of the use of the land is such that the exclusion of others (including native title holders) must have been presumed when the tenure was granted. The amendments will put the matter beyond doubt.[146]

6.180 Dr Michael Dodson, at the time the Aboriginal and Torres Strait Islander Social Justice Commissioner, commented in his 1996-97 Native Title Report to the Commonwealth Government that:

> [The confirmation provisions] answer the question of whether there is extinguishment by statutorily turning exclusive possession into extinguishment; permanent extinguishment. They create extinguishment where the Courts have not even been asked to look.
>
> …
>
> By purporting to 'confirm' extinguishment by inconsistent grants, the Commonwealth is purposely pre-empting the development of the common law. For all the need for 'certainty' and 'workability', there is the balancing

145 Explanatory Memorandum to the Native Title Amendment Bill 1997 p 53.

146 Explanatory Memorandum to the Native Title Amendment Bill 1997 p 53.

> objective of allowing sufficient time to integrate the belated recognition of native title into Australia's land management system.[147]

6.181 The CERD Committee Country Rapporteur, Ms Gay McDougall, has described the confirmation provisions in the amended Act as representing a 'significant encroachment' on common law native title protections. This was because they 'deemed' certain tenures to extinguish native title where the common law would not and they provided that this extinguishment was permanent.[148]

6.182 The confirmation provisions rely on a broad definition of the tenures, such as community purpose and commercial leases, that are considered by the Government to have conferred a right of exclusive possession and therefore to have extinguished native title. It was noted by Mr Michael Banton, a member of the CERD Committee from Great Britain, that:

> The confirmation of extinguishment provisions fail to accord native title holders equality before the law in that they bear only upon the Indigenous Peoples and affect titles of a kind that could well have been left undisturbed. Such as those which appear in the document submitted to us by Australians for Native Title and Reconciliation at the bottom of page 19.
>
> We have a phrase, Mr Chairman – the devil is in the detail. Just look at the detail here … which says that for example under the Act, 'All community purpose leases including those granted historically will have extinguished Native Title. However, community purpose leases is a category which potentially catches leases granted 100 years ago for bush race tracks which were used once a year for only a short period of time.' And there is more of this going on to road and rail corridors, which in some parts of remote Australia are 200 or more metres wide. So that's the detail where the devil often resides.[149]

6.183 The Government has said that the leases included in the Schedule are those which the Commonwealth and the relevant State or Territory believed 'with reasonable certainty' had conferred a right of exclusive possession and had therefore extinguished native title.[150] However, the large number of leases included in the Schedule makes it difficult for Indigenous groups to ascertain whether each and every lease which is deemed to extinguish native title did, in fact, have this effect.

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147 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1996 – June 1997*, p 76.

148 Unofficial transcript of the report to the CERD Committee by the Country Rapporteur, at: http://www.faira.org.au/cerd/racial-discrimination.html.

149 Mr Banton, Unofficial transcript of Australia's hearing before the CERD Committee, 18 March 1999, at: http://www.faira.org.au/cerd/minutes-1323-cerd-meeting.html.

150 Attorney-General's Department, Submission 24, Part II, pp 19-20.

6.184 The Government argues that the recent finding of the Full Federal Court in *Western Australia v Ward*[151] is 'consistent with the fundamental principles underlying the amended Native Title Act'.[152] This decision, as noted earlier, endorsed the bundle of rights approach to native title, holding that native title was fully or partially extinguished to the extent of any inconsistency with non-native title rights. The Government argues that this decision supports its position that the confirmation of extinguishment provisions merely confirm the common law on the question of extinguishment. However, as noted above, the decision is likely to be appealed to the High Court, and the 'bundle of rights' conception of native title will be one of the questions for consideration.

6.185 As previously noted, at the time the amendments were passed there was no judicial endorsement of this view. The Government's adoption of this conception of native title as the basis of its confirmation provisions, ahead of the Courts, points to a degree of bad faith on its behalf as regards the protection of Indigenous title. It has been noted earlier that although the Keating Government believed, at the time the original Act was passed, that pastoral leases extinguished native title, it left the issue to be clarified by the Courts, rather than adopting it as the basis of the original Act.

6.186 Further, in relation to the Schedule the Commonwealth Government has argued that it has it has been cautious in determining which interests to include in the Schedule. It claims in its submission that its caution in this regard is highlighted by the fact that it has been accused by State and Territory Governments of being 'too conservative' in its approach to the Schedule:

> Officials of WA, SA, Tasmania, NSW and Queensland gave evidence to the Parliamentary Joint Committee on 30 September 1997 that they believed the Commonwealth had taken a particularly conservative approach to the inclusion of tenures in the Schedule, and had not included a number of leases which they believed should have been included.[153]

6.187 However, Australia has an obligation at international law to ensure the equal protection of the fundamental rights of Indigenous people. This means that even if at common law native title has been partially extinguished by overlying interests such as pastoral leases, the Government's obligation is to ensure that the remnant title of Indigenous people in land is accorded equal protection with that of non-Indigenous title holders. The reasoning on this issue was set out by the High Court in *Mabo (No 1)*.[154] Therefore, the Government cannot rely on the fact that the common law is itself discriminatory in passing legislation to confirm or entrench this

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151 *Western Australia v Ward* [2000] FCA 191;
also at: http://www.austlii.edu.au/au/cases/cth/federal_ct/2000/191.html.

152 Attorney-General's Department, Submission 24(a), para 7.

153 Attorney-General's Department, Submission 24, Part II, p 13.

154 *Mabo v Queensland (Mabo (No 1))* (1998) 166 CLR 186.

discrimination.[155] As the Aboriginal and Torres Strait Islander Social Justice Commissioner's submission argues:

> Rather than seeing this development in the common law as a basis for alleviating governments of their duty to Indigenous titleholders under international law, it places a greater onus on governments to provide additional protection to native title in order to overcome the discriminatory effect of the common law.[156]

Future Extinguishment of Native Title

6.188 Under the original Native Title Act, native title could be extinguished in the future through compulsory acquisition. Native title could also be extinguished by voluntary surrender by native title holders to governments, pursuant to an agreement under s.21 of the original NTA.[157]

6.189 Similarly, under the amended Act native title can be extinguished in the future either through compulsory acquisition or through voluntary surrender under ILUAs, which have replaced s.21 agreements under the original Act.[158] What is significant, however, is that under the amended NTA the procedural rights enjoyed by native title holders in relation to the future extinguishment of their interests through compulsory acquisition have been substantially reduced.

6.190 Under the original Act native title holders had the right to negotiate with respect to a compulsory acquisition of their native title where the compulsory acquisition was for the purpose of conferring an interest on a third party. However, under the amended Act, the right to negotiate has been removed in the following circumstances where there is a compulsory acquisition of native title for the purposes of conferring an interest on third parties:

- for an infrastructure facility; or
- on land or waters wholly within towns or cities.[159]

6.191 Where the compulsory acquisition is for the benefit of a third party for the purpose of providing an infrastructure facility, the lesser opportunity to be consulted applies.[160] The opportunity to be consulted contains no requirement of good faith and only applies to minimising the effects of the compulsory acquisition on native title

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155 See the relevant discussion in Chapters 3 and 4.

156 Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission 32, p 17.

157 See the relevant discussion in Chapter 4.

158 See the evidence of Mr Robert Orr, Unofficial transcript of Australia's hearing before the CERD Committee, 18 March 1999, at: http://www.faira.org.au/cerd/minutes-1323-cerd-meeting3.html.

159 Sections 26(2)(f) and 251.

160 The elements of the opportunity to be consulted are set out earlier in this chapter in the discussion on changes to the right to negotiate.

rights and interests. In contrast, the right to negotiate requires parties to negotiate in good faith with a view to reaching agreement about doing the act. In other words, under the right to negotiate, the Government was required to attempt to obtain the consent of native title holders to an extinguishment of their title, but such a requirement no longer applies.

6.192 Compulsory acquisitions for the purpose of conferring an interest on a third party or which take place within a town or city must satisfy the freehold test. [161]

6.193 Most compulsory acquisitions for the purposes of conferring interests on third parties take place within towns or cities, or are for infrastructure facilities. The broad definition given an infrastructure facility should be noted: the amended Act provides that an infrastructure facility includes any of the following:

(a) a road, railway, bridge or other transport facility;

(b) a jetty or port;

(c) an airport or landing strip;

(d) an electricity generation, transmission or distribution facility;

(e) a storage, distribution or gathering or other transmission facility for:

(i) oil or gas; or

(ii) derivatives of oil or gas;

(f) a storage or transportation facility for coal, or any other mineral concentrate;

(g) a dam, pipeline, channel or other water management, distribution or reticulation facility;

(h) a cable antenna, tower or other communication facility;

(i) any other thing that is similar to any or all of the things mentioned in paragraphs (a) to (h) and that the Commonwealth Minister determines in writing to be an infrastructure facility for the purposes of this paragraph.[162]

6.194 The removal of the right to negotiate in respect of these classes of compulsory acquisitions represents a significant reduction in the ability of native title holders to prevent the future extinguishment of their native title. Moreover, the rights of

161 Section 26(2)(f). Towns and cities are defined in s.251C.

162 Section 253.

Indigenous people have been reduced for the benefit of potential non-Indigenous title holders.

6.195 It is important to remember why native title holders (who were registered claimants, or registered native title holders)[163] had the right to negotiate in respect of certain types of compulsory acquisitions under the original NTA. The RTN applied under the original Act where a government proposed to extinguish Indigenous title by compulsorily acquiring it, for the purpose of conferring a benefit on other groups in the community. The RTN, in most cases, conferred on native title holders greater procedural rights than the holders of ordinary title would have where a government was proposing to acquire their (ordinary) title. The reason the original Act ensured that native title holders would have the RTN in respect of such compulsory acquisitions (rather than the procedural rights attaching to ordinary title) is because native title is not the same thing as ordinary title. Native title is a unique right, the nature of which cannot be compared with ordinary title. Critical elements of native title which are incomparable with ordinary title are its spiritual dimension, and the importance of traditional title to the distinct cultural identity of Indigenous groups.[164] The extinguishment of native title then, is of much greater significance to Indigenous people than the extinguishment/compulsory acquisition of ordinary title would be for ordinary title holders. Because of these unique elements, compensation in monetary terms cannot adequately reflect the loss to Indigenous communities that the extinguishment of native title entails. The RTN went some way (although arguably not far enough) to accommodating the unique elements of native title and its special significance to Indigenous communities.

6.196 Under the amended NTA, where the right to negotiate does not apply, native title holders have the same procedural rights as if they instead held freehold, or ordinary title to land. The Government has argued that the freehold standard ensures a wholly 'non-discriminatory' compulsory acquisition process in the sense that native title holders will be treated *the same as* ordinary title holders. In other words the compulsory acquisition meets the standard of formal equality.[165]

6.197 Thus, the amended Act provides that a compulsory acquisition (other than one that falls within the exceptions discussed earlier) extinguishes native title completely where it is done in a 'non-discriminatory' way, that is:

- the compulsory acquisition is authorised under a law that permits the acquisition of both native title and non native title rights and interests (i.e. a 'non-discriminatory' acquisition);
- the whole or equivalent part of all non-native title rights and interests are also acquired; and

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163 See Chapter 4 for an explanation of these terms.

164 See also Chapter 8.

165 Attorney-General's Department, Submission 24, Part I, p 23.

- the procedures adopted in acquiring the native title rights and interests do not cause any greater disadvantage to native title holders than that caused to non-native title holders when their rights are similarly acquired.[166]

6.198 The first point to be made in response to the Government's arguments about the adequacy of the formal equality standard in respect of compulsory acquisitions of native title is that, even where native title holders enjoy the same rights as freeholders/ordinary title holders in respect of a compulsory acquisition for the purposes of conferring interests on third parties, there is considerable scope for the provisions to be used in a way that does, in fact, discriminate against native title holders. As Jennifer Clarke advised the Committee:

> The language of the legislation gives the impression that it is only ever possible for governments to acquire native title rights to land compulsorily, where they also do so in relation to other property rights in land. The defect in these provisions, though, is that there may be land in which only native title rights exist, and it is highly likely to be land that is under demand by development oriented State Governments. In those circumstances, compulsory acquisition powers can be used in a way that soaks up native title. For political reasons it would be unlikely that governments would use their compulsory acquisition powers on other titles.[167]

6.199 Further, in draft comments on the Native Title Amendment Bill 1997, the Australian Law Reform Commission expressed concern that these provisions were discriminatory because their purpose and effect was to acquire native title rights and interests for the benefit of non-native title holders. The Commission stated that:

> The fact that section 24MD stipulates that in the event of acquisition all relevant non-native title rights must also be acquired does not of itself protect the section from this charge. Such non-native title rights are merely incidental to the purpose of the section which is clearly to acquire land from native title holders for the upgrading of leases that currently (or may soon) co-exist, in whole or in part, with native title rights.[168]

6.200 Ms Clarke also raised concerns about the provisions that specify that pastoral lessees are not liable to pay compensation for the acquisition of native title rights by governments for the benefit of pastoral lessees.[169] She stated that:

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166 Section 24MD(2).

167 Ms Jennifer Clarke, *Official Committee Hansard, 23* February 2000, p 126.

168 Australian Law Reform Commission, *Draft Comments on the Native Title Amendment Bill 1997*, 22 September 1997, p 7: Appendix 2, Minority Report, Tenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *The Native Title Amendment Bill 1997*, October 1997.

169 Section 24MD(3).

> It seems to me that these powers in the Act can be used in a way that might take both a native title and a lease title and then give the double set of rights back to a lessee … at public cost.[170]

6.201 Article 2(1)(c) of the CERD requires Australia to take effective measures to review policies and rescind or nullify laws or regulations which have the effect of creating or perpetuating racial discrimination. The fact that, on paper, the compulsory acquisition laws appear to treat native title equally with other forms of title is not sufficient if the actual effect of the laws, and their application, is discriminatory.

6.202 The second point to note in response to the Government's arguments about the adequacy of a formal equality standard in respect of compulsory acquisitions of native title, is that Australia is required to implement measures which ensure real or substantive equality. Given the unique nature of native title and its importance to the distinct identity and cultural life of Indigenous groups, measures which merely ensure formal equality with ordinary title holders do not meet Australia's international legal obligations.

Compensating for Extinguishment

6.203 The validation, confirmation, primary production and many of the future act provisions of the amended Act provide for compensation for any extinguishment or impairment of native title rights caused by the operation of those provisions. Unless otherwise provided, compensation is available in accordance with the provisions in Part 2, Division 5 of the amended Act.

6.204 The Government has pointed to the availability of compensation as ameliorating or negating any discrimination inherent in the amended Act. It argues that the provision of just terms compensation, and the requirement that respondents to compensation applications must negotiate in good faith in relation to requests for non-monetary compensation, are measures that address the special nature of native title.[171]

6.205 Section 51(1) states that:

> Subject to subsection (3), the entitlement to compensation under Division 2, 2A, 2B, 3 or 4 is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests.

6.206 Where the future act is a compulsory acquisition, compensation is to be on just terms. It is not clear what just terms means with respect to native title. In some circumstances (for instance where the act is not a compulsory acquisition), the NTA attempts to set the measure of compensation at the freehold standard under what is

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170 Ms Jennifer Clarke, *Official Committee Hansard*, 23 February 2000, p 126.

171 Attorney-General's Department, Submission 24, Part I, p 25.

known as the 'similar compensable interest' test. Section 240 states that an act satisfies the similar compensable interest test:

> if compensation would, apart from this Act, be payable under any law for the act on the assumption that the native title holders instead held ordinary title to any land or waters concerned and to the land adjoining, or surrounding, any waters concerned.

6.207 However, it is not clear whether the freehold value of land is adequate compensation for native title, given the unique nature of native title rights, and in particular the fact that those rights encompass a spiritual component. Moreover, where land is located in extremely remote areas, for example the Great Sandy Desert, the freehold value of the land might amount to virtually nothing.

6.208 The inadequacy of monetary compensation was recognised in the original NTA and this is one of the reasons that the right to negotiate was included in the form that it was. The preamble made this clear:

> Justice requires that, if acts that extinguish native title are to be validated or allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of native title.

The winding back of the right to negotiate is therefore particularly significant in light of this fact.

6.209 Arguably, any attempt to compare native title to freehold or ordinary title, particularly for the purposes of placing a monetary or economic value on compensation for the extinguishment or impairment of native title, is inappropriate. This was highlighted in the few native title compensation applications considered by the National Native Title Tribunal prior to the amendment of the Act. In *Western Australia v Thomas*, the presiding members stated that:

> Conceptually it is difficult to adequately compare the nature of native title rights with fee simple rights. For example, if an integral component of ordinary fee simple title is the right of the owner to alienate the land and if an integral component of native title is that it cannot be alienated … how can such a comparison be made? By reference to these components alone, is native title said to be more valuable, as valuable, or less valuable than fee simple title? That question is merely indicative of the difficulties inherent in a comparison of unalike rights and interests.[172]

6.210 Further, in *Koara*, the Tribunal members raised similar concerns about the inappropriateness of comparing native title with freehold title, regarding:

172 *Western Australia v Thomas* (1996) 133 FLR 124 at 202.

> any attempt to make a comparison by way of a percentage between the incidents of a particular native title and the incidents of a freehold title as artificial and arbitrary.[173]

6.211 Despite the inappropriateness of equating the value of native title with freehold title, in the amendments to the NTA the Government has attempted to limit just terms compensation to the equivalent of the freehold value of the land or waters concerned.[174]

6.212 The amended Act makes some provision for negotiation of non-monetary forms of compensation. Requests for non-monetary compensation by native title claimants must be considered,[175] but the emphasis in the compensation scheme is on monetary compensation. Notably, s.51(5) states that generally, compensation may only consist of the payment of money. In its General Recommendation XXIII, the CERD Committee called on State parties to:

> recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.[176]

The form of compensation available under the amended Act is not sufficient to meet Australia's international legal obligations under the CERD.

PART 4 – DOES THE AMENDED NATIVE TITLE ACT 'WIND BACK' THE PROTECTIONS OF THE *MABO (NO 2)* DECISION AND THE ORIGINAL ACT?

6.213 In its decision 2(54) the CERD Committee noted in particular the four sets of discriminatory provisions inserted into the NTA by the NTAA and expressed the view that:

> the Amended Act appears to wind back the protections of indigenous title offered in the *Mabo* decision of the High Court of Australia and the 1993 Native Title Act. As such the amended Act cannot be considered to be a special measure within the meaning of Articles 1(4) and 2(2) of the

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173 *Re Koara People* (1996) 132 FLR 73 at 78, per Seaman QC, Smith and McDaniel.

174 Section 51A.

175 Section 51(6) and s.79.

176 CERD Committee General Recommendation XXIII (51) concerning Indigenous Peoples, 18 August 1997, para 5.

> Convention and raises concerns about [Australia's] compliance with Articles 2 and 5 of the Convention.

The Protections of the Common Law: the *Mabo (No 2)* Decision

6.214 As seen in Chapter 4, the *Mabo (No 2)* decision established that the common law was capable of recognising Indigenous traditional title through the concept of native title. However, the decision also established that the common law offered no protection to native title against extinguishment by valid acts of government.

6.215 Thus, the amended NTA wound back the protections offered native title by the common law only to the extent that the confirmation of extinguishment provisions (including the schedule of extinguishing leases) provide for the extinguishment of native title, where extinguishment would not have resulted at common law.

6.216 However, the fact that the amended NTA provides more protection to native title than that which is available under the common law does not mean that Australia's international legal obligations regarding the implementation of the principle of equality is met. The reasons for this are discussed in Chapter 7.

The Protections in the Original Native Title Act [177]

The Future Act Regime

6.217 The original Act provided for the protection of native title primarily through the future act regime, which was based on:

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

6.218 The freehold test was based on the protection that native title holders would have had anyway in relation to the acts of State and Territory Governments that affected their title as a result of the operation of the Racial Discrimination Act. The freehold test was intended to comply with the requirements of the RDA by ensuring that generally, native title holders would enjoy a level of formal equality with the holders of ordinary title.

6.219 As discussed in this chapter, the amended Native Title Act has reduced the scope of the freehold test. Moreover, to the extent that the amended Act allows State and Territory Governments to provide a lesser standard of protection to the interests of native title holders than that provided to the interests of ordinary title holders, the amended NTA has impliedly repealed the RDA.

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177 See Chapter 4.

6.220 Native title holders who were either registered claimants, or registered holders of native title, also had the right to negotiate in respect of a limited range of future acts. The amended NTA has reduced the scope of the RTN by exempting a range of acts from its operation. In addition, the amended NTA enables State and Territory Governments to provide native title holders with an 'opportunity to be consulted' instead of the RTN.[178] In reducing the scope of the RTN in this way the amended Act has reduced the protection offered by the one measure in the future act regime which sought to accommodate the special, unique nature of native title.

Limitation of Extinguishment

6.221 The original Act was a code on the extinguishment of native title: it provided for limited extinguishment of native title through the past act validation provisions, but thereafter native title was not to be extinguished except in accordance with the future act provisions. Moreover, the original Act represented an agreement between Indigenous representatives and the Government whereby the validation of potentially invalid past acts was consented to in exchange for the future protection of native title. The amended Act, in extending the provisions for extinguishment of native title, can be considered to have 'wound back' the protection of native title under the original Act.

Recognition of Native Title

6.222 The future act regime operates to provide interim protection of native title pending its formal recognition. Although native title is a pre-existing interest in land, its existence must be proved, and formally recognised by the legal system established since the colonisation of Australia. Ordinarily this would mean that native title holders would have to prove their title in lengthy, expensive court proceedings. The recognition of native title is the means by which its protection can best be secured.

6.223 The original NTA made provision for native title to be 'determined' – or formally recognised – through a process of mediation and negotiation, with litigation being a last resort in the event that negotiations failed to produce an agreed result. The original Act also sought to ameliorate the inevitable disadvantage that native title holders would suffer, in the event that they did have to prove the continued existence of their title in court, by ensuing that, among other things, the cultural and customary concerns of Indigenous people would be taken into account by the Federal Court. The amended Act, in amending the provisions relating to the Federal Court's way of operating, is likely to make it more difficult for Indigenous people to have their traditional title recognised and, through recognition of their title, to achieve its protection.[179]

178 See the discussion in this chapter of alternative State and Territory regimes, particularly pursuant to s.43A.

179 See the discussion in this chapter under 'recognition'.

Conclusion

6.224 However, as discussed below, the issue for the CERD Committee was not the 'winding back' or reduction in the protection of native title under the common law, and/or under the original Act *per se*, but rather the absence of Indigenous consent.[180]

PART 5 – THE AMENDED NATIVE TITLE ACT AND EQUALITY

6.225 The Government of the day intended that the original Native Title Act would comply with Australia's international obligations under the CERD, and the CERD Committee accepted that the original Act met Australia's obligations under the Convention.

6.226 The preamble to the original Act has been retained in the amended Act and therefore records the intention that the amended Act will comply with Australia's international obligations, including its CERD obligations.

6.227 However, in decision 2(54) the CERD Committee noted the discriminatory provisions inserted by the amendments and expressed the view that they appear to 'wind back' the protection offered to native title by the original Act.[181] The CERD Committee concluded that the amended Act:

> cannot be considered to be a special measure within the meaning of Articles 1(4) and 2(2) of the Convention and raises concerns about the State Party's compliance with Articles 2 and 5 of the Convention.

6.228 As noted in Chapter 3, the standard of equality required by the CERD is that of substantive equality, which incorporates both formal equality and, where necessary, beneficial differential treatment aimed at addressing disadvantage and protecting minorities. In using the term 'special measure' the CERD Committee was referring to whether the amended NTA could be considered a substantive equality measure designed to address the disadvantage suffered by Indigenous Australians in the enjoyment of their fundamental rights, and offering current and future protection of those rights.

6.229 The CERD Committee also noted the 'lack of effective participation, of Indigenous people in the formulation of the amendments' and raised a concern that Australia may not have complied with its obligations under Article 5(c) of the Convention.[182]

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180 See also Chapter 7.

181 In particular, the provisions dealing with validation of intermediate period past acts, confirmation of extinguishment, primary production upgrades and right to negotiate (restrictions on the right of Indigenous people to negotiate over non-Indigenous land uses on their land).

182 Article 5(c) is reproduced in Chapter 3.

The Requirement of Equality/Non-discrimination

6.230 In its submission to this inquiry the Government has disagreed with the CERD Committee's conclusions that the amended NTA cannot be considered a 'special measure' and may not comply with the obligations imposed by Articles 2 and 5 of the Convention. The Government has argued that the CERD Committee, in coming to this conclusion:

- failed to recognise that the amended Act struck an equitable balance between the protection of Indigenous and non-Indigenous interests;
- did not take into account that the Government had a margin of appreciation in the implementation of its obligations under the CERD; and
- took the wrong approach in assessing the amended Act in not taking into account the countervailing beneficial measures in the Act.[183]

6.231 The first two arguments above have already been dealt with in Chapter 3. The third argument is dealt with below.

6.232 The Government has criticised the approach of the CERD Committee, claiming that it has not looked at the amended Act as a whole but rather has focused on some elements of the amended Act in isolation:

> In particular the Government believes that the Committee has not given sufficient weight, or indeed any weight, to the aspects of the native title legislation that are clearly beneficial to indigenous Australians. The Committee's approach appears premised on an assumption that either:
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> - there were *no* measures in the amended Native Title Act or any other action by the Australian Government that were beneficial to the native title holders that could 'counter balance' the 'discriminatory' provisions included; or
> - there were not *enough* measures that were perceived as positive to indigenous people to 'counter balance' the 'discriminatory' provisions in the *Native Title Amendment Act 1998*.[184]

6.233 However, in advancing this argument the Government has demonstrated a misunderstanding of both the CERD Committee's decision and its own obligations under the Convention.

6.234 The CERD Committee was concerned that the *Native Title Amendment Act 1998* introduced into the NTA provisions which were mainly discriminatory. Ms Gay McDougall, the Country Rapporteur, noted that 'the majority of provisions in

183 Attorney General's Department, Submission 24, Part I, pp 20-21.

184 Attorney General's Department, Submission 24, Part I, p 20. See also pp 22-27 which sets out measures which recognise the special features of native title, and the measures in the amended Act designed to address the special features of native title.

the Amendment Act focus on the extinguishment and impairment of native title'.[185] The discriminatory nature of these provisions is discussed earlier in this chapter.

6.235 The CERD Committee is not concerned *per se* with the inclusion of discriminatory provisions in the amended Act. As noted in Chapter 4, the CERD Committee appears to accept that groups can 'contract out' of the protection afforded them by the Convention. The CERD Committee concluded that the original Act was compatible with the CERD, notwithstanding the validation and confirmation of extinguishment provisions which discriminated against native title holders. The key to the CERD Committee's acceptance of the original Act was the fact that it had been agreed to by Indigenous representatives. The Country Rapporteur in her report to the Committee said that:

> Significantly, the original 1993 Act was the subject of extensive negotiations with indigenous groups and attracted support from key members of some of those groups.
>
> Indigenous groups have made it clear that they would not have supported the discriminatory provisions of the Act relating to the past, had the Act not been balanced by the beneficial provisions of the freehold standard and, the right to negotiate in the future.[186]

6.236 The insertion of these discriminatory provisions into the NTA upset the 'delicate balance' between the rights of Indigenous and non-Indigenous title holders which was achieved in the original Act through agreement with Indigenous representatives. The Country Rapporteur observed that:

> it appears that the central goals and compromises that formed the basis of the original Act now bear little relationship to the amended Native Title Act.[187]

6.237 Even if a measure imposing differential treatment on certain racial groups or individuals is intended to be wholly beneficial, the consent of those whose rights are affected is critical to ensuring that the principle of equality is not offended.[188] Where a measure includes some differential treatment which is discriminatory, the consent of those affected is even more important.

6.238 Thus, the fact that the NTAA was comprised of provisions which were mainly discriminatory made it all the more important that the consent of Indigenous people to the amendments was secured. In other words, it was imperative that Indigenous consent was secured to the further extinguishing of Indigenous title, and also to the

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185 Unofficial transcript of the report to the CERD Committee by the Country Rapporteur, at: http://www.faira.org.au/cerd/racial-discrimination.html.

186 Report to the CERD Committee by the Country Rapporteur. See also Chapter 4.

187 Report to the CERD Committee by the Country Rapporteur.

188 See Chapters 3 and 4.

'winding back' of beneficial provisions such as the right to negotiate which they had won as part of an agreement in 1993 in exchange for the extinguishment of their title at that time. Moreover, in the absence of Indigenous consent to the amendments, the assessment that the amended Act is, on balance, beneficial to Indigenous people is made only by the Government.[189]

6.239 The Government claims that it did attempt to secure the consent of Indigenous people and other interest holders to the amendments. The following evidence was given to the CERD Committee by Mr Robert Orr from the Attorney-General's Department:

> As I said at the beginning on Friday, the Government attempted to obtain a consensus with regard to the Act but despite a lengthy process, that consensus was not possible and in the end Parliament had to make the laws which it judged were appropriate. In this case, much of the Native Title Amendment Act is concerned with balancing rights, balancing rights of Native Title holders with pastoral lessees and others. As I also said on Friday there was no consent to these provisions neither from Indigenous People nor from pastoralists and miners.[190]

6.240 There are two points which must be made in response to the Government's claims that it attempted to obtain agreement to the amendments of Indigenous representatives and the representatives of non-Indigenous interest groups. The first is that the consent of the representatives of non-Indigenous interest groups to the amendments is not relevant, because the amendments did not involve the extinguishment or impairment of non-Indigenous title in favour of Indigenous title. In fact, the amendments, and the Government proposals preceding them, involved the converse situation: the extinguishment and impairment of Indigenous title for the benefit of both non-Indigenous title holders and prospective non-Indigenous title holders.[191]

6.241 The second point to make is that it is most likely that a result which had the support of Indigenous representatives was possible. In evidence to the Parliamentary Joint Committee Mr John Basten QC said that:

> I perhaps have one benefit in that I have been privy to a lot of their [Indigenous] discussions about this legislation. I would not have thought that it would have been difficult in 1998 to have achieved legislation which would have had their consent. I genuinely believe that.[192]

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189 This is a point made in Chapter 4. Note also the reasoning of Brennan J in *Gerhardy v Brown*, quoted in Chapter 3.

190 Unofficial transcript of Australia's hearing before the CERD Committee, 18 March 1999 (Mr Orr), at: http://www.faira.org.au/cerd/minutes-1323-cerd-meeting3.html.
See also Attorney-General's Department, Submission 24, Part I, p 31.

191 As regards the Government proposals preceding the drafting of the amendments, see the Ten Point Plan.

192 Mr John Basten QC, *Official Committee Hansard*, 23 February 2000, pp 115-116.

6.242 It is significant that both Government and Indigenous representatives agreed that amendments to the original NTA were needed to the increase the threshold test for registration of applications, and to address the implications of the *Brandy* decision. There was, in other words, potential for Government and Indigenous representatives at least to agree to the provisions in the NTAA dealing with the registration test and the *Brandy* amendments. However, even on these matters – and with the registration/threshold test in particular – the Government failed to secure the consent of Indigenous representatives to the relevant provisions in the NTAA, suggesting that the Government's fundamental approach to Indigenous people over the amendments may not have been entirely conducive to reaching an agreement with them.

Negotiation and Consent

6.243 As discussed in Chapter 3, the informed consent of those affected by differential treatment on the basis of race is critical to ensuring that such distinctions do not offend the principle of equality. Informed consent is also important in ensuring that Indigenous people enjoy effective participation in the conduct of public affairs, especially in regard to issues which affect their fundamental rights.[193]

6.244 The Government has argued that:

> There is no international obligation on Australia which requires the government to consult with indigenous people in a special fashion or gain their 'informed consent' to particular exercises of legislative power.[194]

6.245 However, notwithstanding its arguments, the Government has said that:

> The Prime Minister indicated on a number of occasions that he was committed to trying to achieve a consensus on the Government's response to the *Wik* decision. To that end both he and the Parliamentary Secretary held extensive discussions with ATSIC leaders and representatives of representative bodies and other indigenous groups, over the proposed amendments.[195]

6.246 In fact, the Native Title Amendment Bill 1997 was introduced into Parliament on 4 September 1997. The parliamentary consideration of the Bill led to an impasse between the House of Representatives, controlled by the Government, and the Senate, in which the combined non-Government parties who opposed the passage of the Bill had a majority of one at the time. Senator Brian Harradine, an Independent, held the balance of power in the Senate. The Senate eventually passed the Bill on 8 July 1998,

193 See the relevant discussion in Chapters 3 and 4.

194 Attorney-General's Department, Submission 24, Part I, p 29.

195 Attorney-General's Department, Submission 24, Part I, p 31. See generally pp 28-34.

when Senator Harradine voted with the Government members in the Senate to pass the legislation.[196]

6.247 The National Indigenous Working Group (NIWG), which was comprised of representatives of Indigenous representative bodies throughout Australia, and which, with ATSIC, had been involved in negotiations over the original NTA, confirmed that it had:

> not been consulted in relation to the contents of the current Bill, particularly in regard to the agreement negotiated between the Prime Minister and Senator Harradine, and that we have not given consent to the Bill in any form which might be construed as sanction to its passage into Australian law.[197]

6.248 The then Special Minister of State and Parliamentary Secretary to the Prime Minister, Senator Minchin, suggested that consultation with the NIWG over the agreement with Senator Harradine was not possible because the matter was a 'parliamentary dispute':

> The statement has been made that they [the NIWG] were not consulted…
>
> But what we were dealing with just recently was a situation where Senator Harradine approached the Government seeking discussions to resolve the dispute between the House of Representatives and the Senate. This was a parliamentary dispute between the Senate and the House of Representatives which the Government, on behalf of the House of Representatives, and Senator Harradine had to discuss in some detail. That was what we sought to resolve.[198]

6.249 Further, Senator Minchin suggested that the negotiations between the Government and Senator Harradine, which secured the passing of the Bill, amounted to 'responding to the interests of Aboriginal Australians':

> Senator Harradine … sought to put propositions to the Government quite forcefully which were clearly on behalf of indigenous Australians. He sought to have the Government accommodate propositions within the legislation which responded to the interests of Aboriginal Australians. To the extent that we have amended the legislation to accommodate Senator Harradine, those accommodations involve responding to the interests of Aboriginal Australians, as represented by Senator Harradine.

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196 Attorney General's Department, Submission 24, Part I, p 32. See generally Submission 24 at Part I, p 33. A second Independent, Senator Mal Colston, also voted with the Government to pass the legislation. He had voted with the Government members of the Senate consistently so that it was Senator Harradine, who had initially voted to defeat the Bill, whose vote was crucial to securing its passage through the Senate.

197 *Senate Hansard*, 7 July 1998, p 5180.

198 *Senate Hansard*, 7 July 1998, p 5183.

> I understand the grievance that is felt [by Indigenous representatives] apparently because this phase did not involve formal consultation, but it could not, as Senator Harradine has made clear. These were very difficult negotiations with Senator Harradine on a number of matters. As I say, Senator Harradine was putting propositions all of which involved representations on behalf of Aboriginal people, and all the amendments that we put forward involved accommodating those particular interests.[199]

6.250 Senator Minchin was of the opinion that the NIWG could not claim to represent the Indigenous people of Australia:

> With due respect to the National Indigenous Working group and its operation, the fact is that it has no right to claim that it speaks for all indigenous people in Australia. It is quite an extraordinary claim for it to make. It is not elected by the indigenous people. It does not speak on behalf of all indigenous people.[200]

6.251 However, Senator Minchin appeared to be of the opinion that the non-Indigenous, Tasmanian, Senator Harradine, could rightfully and adequately represent Indigenous interests throughout Australia in negotiations with the Government over the Bill.

6.252 Thus, the passage of the Bill was finally secured by an agreement between Senator Harradine and the Government, from which Indigenous representatives were excluded. This was a direct contrast to the process of drafting the original Act in 1993. The contrast was noted by Mr Peter Yu in response to a question from a member of the Parliamentary Joint Committee:

> **Mr MELHAM:** Do you believe that in 1993 you had an opportunity with the Government to at least shape the response that eventually went to the Parliament, as compared to the 1997 and 1998 consultations?
>
> **Mr Yu:** 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 out point of view and for the Government to forcefully put its point of view.
>
> …
>
> [as regards the 1998 amendments] We developed a yellow paper which was put to the Government from the National Indigenous Working Group in 1998 which we thought was fair and reasonable and took into consideration the views and legal position of ordinary Australians who would be impacted by the legislation. Unfortunately, at the end of the day, the Indigenous

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199 *Senate Hansard*, 7 July 1998, p 5183.

200 *Senate Hansard*, 7 July 1998, p 5183. It should be noted that that ATSIC was also a party to the statement made by the NIWG, to which Senator Minchin was referring. ATSIC representatives are elected by Indigenous people in regional council wards throughout Australia.

> interests were excluded. I can recall that we wrote a couple of letters to the Prime Minister inviting him to talk to us in the Kimberleys or to get out in the bush, sit down and meet with us, in order to get a perspective and understanding outside the glare of the media. I do not think we ever got a response to those letters. Yet he went to Longreach and a few other places in Queensland quite readily. I think that, in itself, is indicative of the fact that we were not afforded the same opportunities as other to put our point of view.[201]

6.253 The context in which the consultations with Indigenous people over the amendments took place is important, and the attitude of the respective Prime Ministers, as national leaders, necessarily shaped the context of negotiations in 1993 and 1997-98.

6.254 In 1993 the Prime Minister, Mr Keating, identified the Government's response to the *Mabo (No 2)* decision as an important step in the larger project of national reconciliation. He saw the decision as an 'historic decision' and sought to make it 'an historic turning point, the basis of a new relationship between Indigenous and non-Aboriginal Australians'.[202]

6.255 In May 1997, four months prior to the introduction of the Native Title Amendment Bill into Parliament, and during the stage of consultations over the possible amendments, Prime Minister John Howard addressed a meeting of non-Indigenous pastoralists at Longreach in Queensland, on the Government's Ten Point Plan for amendment of the NTA:

> I welcome very much the opportunity for the first time to talk directly and frankly and openly to a large number of my fellow Australians who I know are deeply concerned, deeply worried and feel that their situation has been made needlessly vulnerable by a highly impractical court decision. … I have always had an immense affection for the outback and for the bush. I say that at the outset because in all of my political life no charge I would reject more emphatically, and no charge would offend me more, than the suggestion that what I have done and what I have believed in has not taken proper account of the concerns of the Australian bush. And I want … to explain to you that the plan the Federal Government has will deliver the security, and the guarantees to which the pastoralists of Australia are entitled, without at the same time producing many of the disadvantages, the instability, the expense and the years of Constitutional challenge which would result of the simplistic alternative of blanket extinguishment were adopted.

6.256 The Prime Minister reminded his audience that:

> the present Native Title Act was the product of the combined votes of the Australian Labor Party, the Australian Democrats and Independents in the

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

202 See the discussion in Chapter 4.

> Senate. Every man and woman who was a member of the Liberal Party and the National Party in 1993 voted against the Native Title Act. And all of the claims, the ridiculous ambit claims that have now been put over your properties are the result of legislation that was opposed tooth and nail by all of my colleagues.

6.257 He identified for them their concerns, chief among them the right to negotiate:

> Because under the guarantees that will be contained in this legislation the right to negotiate, that stupid property right that was given to native title claimants alone, unlike other title holders in Australia, that native title right will be completely abolished and removed for all time in relation to the activities of pastoralists carrying on not only strictly defined pastoral activities, but also the full extent of primary production activities which you can possibly imagine and which are contained in the definition of the Taxation Act and as we all know unfortunately, definitions on the Taxation Act are very widely couched indeed.[203]

6.258 He confirmed for them their fears that the issue of native title threatened their very survival:

> Ladies and gentlemen, can I say to you this is a very difficult issue. It is an issue which goes to the heart of your right to survive in a very difficult physical and economic and social environment. … Can I assure you that I am happy to spend as much time as you can and I can today to listen to your questions, to answer them as openly as I can, and then afterwards to meet as many of you as I can to listen to what you have to say.

6.259 The Prime Minister put to pastoralists the relative merits of the Government's Ten Point Plan in dealing with this 'difficult issue', over the alternative option of 'blanket extinguishment' of native title:

> The alternative is attractive on the surface, I understand that. The alternative of blanket extinguishment is attractive on the surface. But there are three weaknesses in that approach. The first is not necessarily the most important, the first is that the potential compensation bill for the nation would be much greater. The second is that there is a strong possibility of a Constitutional challenge to such legislation and if that legislation of blanket extinguishment were found to be unconstitutional, then it would necessitate the carriage of a referendum of the Australian people in order to overturn that particular finding because it would be a finding of unconstitutionality

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203 This statement by the Prime Minister was misleading, as the right to negotiate under the original Act did not affect pastoralists. Pastoralists were already able to conduct on their land the full range of activities authorised by the terms of their leases. Also, the right to negotiate only applied where governments wanted to acquire native title compulsorily, or to grant interests which involved a right to mine. This means that pastoralists could have varied their leases to extend the range of activities authorised by the lease without the right to negotiate applying. The only restriction on pastoralists extending their rights under their leases was that they required (and still do require) the permission of the relevant State Government.

> under the Federal Constitution. And thirdly, and most importantly, I believe that the prospects of securing passage of the [Ten Point Plan] that I have put forward, through the Senate, and the prospects of [inaudible] a sense of security and a sense of stability within a relatively short space of time are much greater than in relation to the blanket extinguishment option which would certainly be rejected by the Senate and would then inevitably require, if it were to be carried, its re-presentation and then passage of an ultimate double dissolution and joint sitting of the Federal Parliament following another election. Now ladies and gentlemen, well can I say to you that the way to go is to get what you want quickly, to get what you want without the risks involved in the alternative way. … I mean the great virtue of what I'm arguing for ladies and gentlemen is that it does deliver the guarantees that I outlined, it does give you security, it does give you stability, but it doesn't have the disabilities and the downsides which are inherent in the alternative proposal. It is a proposal that delivers on our commitment to give security and stability to pastoral leaseholders and it is in my view an outcome that will be seen by the entire Australian community as a fair and just solution to a very very difficult national problem.

6.260 In his speech the Prime Minister outlined the inconveniences associated with opting for a law which effected the blanket extinguishment of native title. Such a law would have been difficult to enact, and may have been the subject of a constitutional challenge. The Ten Point Plan could achieve the same result without the 'downsides'.

6.261 However, the Prime Minister neglected to mention the most important reason of all why blanket extinguishment was an option that should never even have been considered. Such a course of action would set a precedent in Australia for the expropriation by government of the interests of one group in society for the convenience of another. Ironically for the pastoralists of Longreach, as for all Australians, it is just such a precedent – and not native title – that could imperil their certainty and security in the future.

6.262 Arguably, such a precedent has already been set. As the Prime Minister explained to the people of Longreach, his Government's Ten Point Plan would achieve for them the same result as blanket extinguishment, without the 'risks'. The provisions in the amended Act, in particular those allowing primary production upgrades and confirmation of extinguishment, enable the expansion of the interests of non-Indigenous interest holders at the expense of Indigenous interests.

6.263 The Native Title Amendment Bill 1998 was passed by the Senate on 8 July 1998 on the combined votes of the Government members of the Senate and Senators Colston and Harradine.

6.264 On 7 July 1998 a statement from the National Indigenous Working Group (which included ATSIC) was read into Hansard by Senators from The Australian Labor Party, The Greens (Western Australia) and The Australian Democrats who opposed the passing of the Bill:

We, the members of the National Indigenous Working Group, reject entirely the Native Title Amendment Bill as currently presented before the Australian Parliament. We confirm that we have not been consulted in relation to the contents of the current Bill, particularly in regard to the agreement negotiated between the Prime Minister and Senator Harradine, and that we have not given consent to the Bill in any form which might be construed as sanction to its passage into Australian law.

We have endeavoured to contribute during the past two years to the public deliberations of Native Title entitlements in Australian law.

Our participation has not been given the legitimacy by the Australian Government that we expected, and we remain disadvantaged and aggrieved by the failure of the Australian Government to properly integrate our expert counsel into the law making procedures of government.

We are of the opinion that the Bill will amend the *Native Title Act 1993* to the effect that the Native Title Act can no longer be regarded as a fair law or a law which is of benefit to the Aboriginal an Torres Strait Islander Peoples.

…

We are absolutely of the view that the Native Title Act, once it is amended, will no longer reflect the negotiated outcomes of 1993, when Aboriginal and Torres Strait Islander people did participate in the construction of the statute, and ultimately agreed to the implementation of that law.

The agreement was founded upon basic principles which are no longer maintained.

…

We remain concerned that the Australian Government has ignored its commitment to implement a ‘social justice package’ for the Aboriginal and Torres Strait Islander peoples as a compensatory measure.

We are also concerned that existing and relevant measures for the benefit of Aboriginal and Torres Strait Islander peoples such as ATSIC, heritage protection laws, the Indigenous Land Corporation, the Aboriginal and Torres Strait Islander Social Justice Commissioner and the Council for Aboriginal Reconciliation are being seriously eroded and impaired.

…

We are offended by the extremely partisan approach of the current Australian Government which has caused the Aboriginal and Torres Strait Islander Peoples to be political victims, subjected to racial vilification by some Australian institutions and citizens.

…

We consider that the Prime Minister holds an obligation through his high office to personally advocate the principles of freedom and equality for the

> Aboriginal and Torres Strait Islander Peoples, and to personally campaign for the elimination of ignorance and misunderstanding between peoples.

6.265 The statement reaffirmed Indigenous commitment to the national objective of reconciliation:

> We are determined that the future generations of Australian society are raised and educated in a spirit of tolerance and understanding which will ensure that the measures of justice important to the reconciliation between our peoples can be appreciated and embraced.

and concluded:

> The National Indigenous Working group on Native Title absolutely opposes the Native Title Amendment Bill, calls upon all parliamentarians to cast their vote against this legislation, and invites the Australian Government to open up immediate negotiations with the Aboriginal and Torres Strait Islander Peoples for coexistence between the Indigenous Peoples and all Australians.[204]

204 For the full text of the statement see *Senate Hansard*, 7 July 1998, pp 5179-5182 (Senators Bolkus, Margetts and Lees).