

INDIGENOUS LAND RIGHTS AND NATIVE TITLE IN QUEENSLAND A Decade in Review

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In June 1991, the Queensland Legislative Assembly passed the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991*. Each Act acknowledged that Indigenous people had occupied, used and enjoyed land in Queensland before European settlement; that groups of Indigenous people had maintained various links to areas of land; and that (before the special measures contained in this legislation) their interests and responsibilities in relation to land had not been adequately and appropriately recognised by the law. The legislation created procedures for the transfer, or the claim and grant, of areas of land to groups of Indigenous people, and set out the rights which flowed from such grants.

Approximately a year later, on 3 June 1991, the High Court delivered its judgment in *Mabo v Queensland (No 2)*. The court held that the common law of this country recognised the entitlements of Indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.

The Queensland legislation, the *Mabo (No 2)* decision and the subsequent *Native Title Act 1993* (Cth) created new ways of thinking about dealing with the rights and interests of Indigenous people in relation to areas of land and waters in Queensland.

This paper explores the 1991 state legislation, discusses the development of native title law, and compares the land rights and native title regimes in Queensland. It further highlights aspects of international law which have had a bearing on the development of legislation with respect to Indigenous land issues.

Introduction

The Past Decade

Just over ten years ago — on 12 June 1991 — the royal assent was given to the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* of Queensland. Both pieces of legislation were debated by the Legislative

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Assembly in the week that the High Court of Australia was hearing argument in the case of *Mabo v Queensland (No 2)*.¹ One year after that debate, on 3 June 1992, the High Court delivered its judgment in that case.

The 1991 legislation was not the first in Queensland to deal with the use and management of land by Aborigines and Torres Strait Islanders. Those Acts had been preceded by legislation such as the *Aborigines Protection and Restriction of the Sale of Opium Act 1897* and, more recently, the *Local Government (Aboriginal Lands) Act 1978* (Qld), *Community Services (Aborigines) Act 1984* (Qld), *Community Services (Torres Strait) Act 1984* (Qld), *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld) and the *Land Act 1994* (Qld) (and earlier *Land Acts* under which deeds of grant in trust were granted), some of which continues to operate.²

The 1991 legislation was the first, however, to create a process for claims to land to be heard and determined. That legislation and the High Court's decision in the *Mabo case*, together with subsequent legal developments, have created new ways of thinking about and dealing with the rights and interests of Indigenous people in areas of land and waters in Queensland.

Main Topics

This paper has three broad components:

- a discussion of the 1991 state legislation;
- a discussion of the development of native title law — both in the common law and statutes; and
- a comparison of the land rights and native title regimes in Queensland.

I note some of these legal developments in chronological order, compare them thematically and discuss some of their practical consequences in Queensland.

Given the particular interest of members of the International Law Association, the paper highlights aspects of international law which have had a bearing on the development of the law of Australia and the ongoing review of Australian legislation in relation to Indigenous land issues. It concludes with an international perspective on what are often characterised as essentially domestic issues.

Before considering the main topics of this paper, it is appropriate to note briefly the legal context in which the 1991 state legislation was developed.

Common Law

In 1991, the generally accepted legal position was that Australia was *terra nullius* when the Crown assumed sovereignty over land in Australia and, at the times when the Crown progressively obtained sovereignty in different parts of

¹ This fact was noted by Dawson J in *Mabo v Queensland (No 2)* (1999) 175 CLR 1 at 171, 173.

² For a summary of the current laws see *Halsbury's Laws of Australia*, volume 1 'Aborigines and Torres Strait Islanders', pp 2671–2721 and AIATSIS (2000), pp 137–214.

the country,³ all land became the property of the Crown.⁴ In his landmark 1971 decision in the *Gove Land Rights case*, Justice Blackburn held that the doctrine of communal native title did not form, and had never formed, part of the law of any part of Australia.⁵

Constitutional Context

Australia has a federal system of government and a written Constitution in which the legislative powers of the federal parliament are enumerated. Most of those legislative powers are concurrent powers with the states, and so may be exercised by the federal parliament or one or more of the state parliaments. The main powers upon which the federal parliament can rely to make laws for Aborigines and Torres Strait Islanders are:

- the corporation power (s 51(xx));
- the 'race' power (s 51(xxvi));
- the external affairs power (s 51(xxix));
- the power to acquire property on just terms (s 51(xxxi));
- the territory power (s 122);
- the power to grant financial assistance to a state (s 96); and
- the power to appropriate Commonwealth revenue for the purposes of the Commonwealth (s 81).

The two legislative heads of power of most relevance to this paper are the 'race' power and the external affairs power.

The 'Race' Power

Until it was altered in 1967, section 51 (xxvi) of the Australian Constitution gave the federal parliament power to make laws with respect to:

the people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws. (emphasis added)

At a constitutional referendum in 1967, the words 'other than the aboriginal race in any State' were removed with the approval of 91 per cent of the electors voting (and a majority in each of the states), the largest majority in the

³ For the dates when sovereignty was assumed in different parts of Australia see McLelland (1971); Neate (1997), pp 254-57.

⁴ *Milirrpum v Nabalco Pty Ltd (Gove Land Rights Case)* (1971) 17 FLR 141 at 245, citing *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404; *Randwick Corporation v Rutledge* (1959) 102 CLR 54.

⁵ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 267.

history of federal constitutional referendums.⁶ As a result of the alteration, it is now 'competent for the Parliament to make special laws with respect to the people of the Aboriginal race'.⁷ Federal legislation since 1967 has, in most cases, defined 'Aboriginal' (used as a noun or an adjective) to mean a person who is a member of the Aboriginal race of Australia.⁸

The scope of the race power, and whether the Constitution should contain a power to legislate on the basis of race,⁹ has been the subject of debate in recent years. Judges of the High Court have expressed different views about whether the power can only be used to support beneficial legislation¹⁰ or whether, since the 1967 amendment, it can still be used for the benefit or detriment of members of a particular race.¹¹

The External Affairs Power

The federal parliament's power to make laws with respect to external affairs has been relied on to enact legislation giving effect to various international conventions.

The *Racial Discrimination Act 1975* (Cth) is expressed to 'make provision for giving effect to' the International Convention on the Elimination of all Forms of Racial Discrimination (which came into force on 2 January 1969),¹² the text of which is set out as a Schedule to the Act. The Act, which gives approval to ratification by Australia of the Convention,¹³ binds the Crown in right of the Commonwealth, of each of the states and the Northern Territory (but does not render the Crown liable to be prosecuted for an

⁶ The Australian Constitution can only be amended if a proposed alteration is passed by the federal parliament *and* it is approved by a majority of voters voting *and* is approved by a majority of voters in a majority of the states: *Constitution*, s 128.

⁷ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 186, per Gibbs CJ.

⁸ For example, *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 3(1), *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 3(1), *Native Title Act 1993* (Cth), s 253.

⁹ See, for example *Constitutional Commission* (1988), pp 707–20.

¹⁰ For example, *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 386–423, per Kirby J.

¹¹ For example, *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 359–70, per Gaudron J; 381–83, per Gummow and Hayne JJ. See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 186, per Gibbs CJ; 209, per Stephen J; 244, per Wilson J; contra 242, per Murphy J, who said that the provision is 'for the benefit of' and does not enable laws intended to affect adversely the people of any race. See also *Commonwealth v Tasmania (Tasmanian Dam case)* (1983) 158 CLR 1 at 110, per Gibbs CJ; 242, per Brennan J; 272–73, per Deane J.

¹² *Racial Discrimination Act 1975* (Cth), preamble.

¹³ *Racial Discrimination Act 1975* (Cth), s 7.

offence).¹⁴ It was expressly enacted in reliance on the external affairs power and the 'race' power.¹⁵

For the purposes of this paper, sections 8–10 of the *Racial Discrimination Act* are of direct interest. Section 9(1) states:

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

The human rights and fundamental freedoms referred to include any right of a kind referred to in Article 5 of the Convention.¹⁶ Article 5(d) lists:

- (v) The right to own property alone as well as in association with others;
- (vi) The right to inherit.

Section 10(1) of the Act states:

If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

Again, the human rights and fundamental freedoms referred to include any right of a kind referred to in Article 5 of the Convention.¹⁷ As noted above, Article 5(d) lists:

- (v) The right to own property alone as well as in association with others;
- (vi) The right to inherit.

Section 8(1) of the Act provides that, subject to an exception, Part II of the Act, 'Prohibition of racial discrimination' (which includes sections 9 and 10), 'does not apply to, or in relation to the application of, special measures to

¹⁴ *Racial Discrimination Act 1975* (Cth), s 6, see also s 6A Operation of State and Territory laws.

¹⁵ *Racial Discrimination Act 1975* (Cth), preamble.

¹⁶ *Racial Discrimination Act 1975* (Cth), s 9(2).

¹⁷ *Racial Discrimination Act 1975* (Cth), s 10(2).

which paragraph 4 of Article 1 of the Convention applies'. Article 1.4 of the Convention states:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

In *Koowarta v Bjelke-Petersen*,¹⁸ the *Racial Discrimination Act 1975* (Cth) was held to be a valid exercise of the external affairs power (but not of the 'race' power).

The implications of the *Racial Discrimination Act* for land rights legislation were considered first in *Gerhardy v Brown*,¹⁹ when the High Court analysed provisions of the *Pitjantjatjara Land Rights Act 1981* (SA). After detailed examinations of the operations of those statutes and the relevant provisions of the Convention, the court held that the *Pitjantjatjara Land Rights Act* was a 'special measure' within the meaning of section 8(1) of the *Racial Discrimination Act* and Article 1(4) of the Convention, and did not, at least at that time, come within the proviso to Article 1(4).

In the subsequent case of *Pareroutja v Tickner*, Lockhart J wrote about the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in the following terms:

The *Land Rights Act* is essentially discriminatory in its nature; it confers rights and privileges upon Aboriginal Australians which are discriminatory as against non-Aboriginal Australians. That discrimination is the essence of the Act; it is the foundation on which it is structured.²⁰

He continued:

It is plain that the *Land Rights Act* answers the description for the purposes of Article 1(4) of a measure taken for the sole purpose of securing adequate advancement of Aboriginal Australians, requiring their protection in order to ensure that they equally enjoy and exercise

¹⁸ (1982) 153 CLR 168.

¹⁹ (1985) 57 ALR 472.

²⁰ (1993) 117 ALR 206 at 220 citing see *Gerhardy v Brown* (1985) 57 ALR 472, per Brennan J at CLR 132.

human rights and fundamental freedoms with non-Aboriginal Australians.²¹

To date, the *Racial Discrimination Act* is the main Act of benefit to Aborigines to be enacted under the external affairs power.²² If an international convention on the rights of Indigenous people is prepared, the Commonwealth could become a party to it and give effect to any obligations under the convention by way of a federal law enacted under the external affairs power.²³

Concurrent Operation of Federal and State Laws and the Effect of Inconsistency

Subject to the relatively few constraints imposed by the Australian Constitution, the parliament of each state has plenary power to make laws for the peace, order and good government of that state. Consequently, state laws can be passed in respect of such matters as the grant of land to Aborigines and Torres Strait Islanders, the protection of sites and objects which are significant to Indigenous people and other aspects of the Indigenous cultural heritage. Each state parliament has legislated on one or more of these matters.

In constitutional terms, the parliaments of the Commonwealth and the states can legislate independently of each other on issues involving Indigenous Australians. At a political level, however, there is a good deal of interchange concerning what legislation is appropriate and which level of government is best suited or politically most able to enact it.

Federal and state laws with respect to Aborigines and Torres Strait Islanders may operate concurrently and to full effect, so long as they are not inconsistent with each other. Section 109 of the Australian Constitution provides:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

The significance of this provision for Aborigines and Islanders was demonstrated in two native title cases. In *Mabo v Queensland (No 1)*,²⁴ a

²¹ (1993) 117 ALR 206 at 222.

²² See *Mabo v Queensland* (1988) 83 ALR 14.

²³ See also ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989) and the Draft Declaration on the Rights of Indigenous Peoples. On the international aspects of Aboriginal issues, see Woodward (1974), p 2; Woodward (1985); Nettheim (1984); Nettheim (1987); Bennett (1979); Hocking (1988); Australian Law Reform Commission (1986), Ch 10; Whitlam (1997), Ch 8; Pritchard (1998); Nettheim (2001). Other recent discussions are in the *Aboriginal Law Bulletin*, the *Indigenous Law Bulletin* and the *Australian Indigenous Law Reporter*. See, for example, Iorns (1993); Simpson (1993); Pritchard and Heindow-Dolman (1998); Marks (2000).

²⁴ (1988) 83 ALR 14.

majority of the High Court held that the *Queensland Coast Islands Declaratory Act 1985* (Qld) (which purported retrospectively to abolish all such rights and interests as the Murray Islanders may have owned and enjoyed in relation to the Murray Islands) was inconsistent with section 10(1) of the *Racial Discrimination Act 1975* (Cth). In *Western Australia v Commonwealth (The Native Title Act case)*,²⁵ the High Court held that the *Land (Titles and Traditional Usage) Act 1993* (WA) was inconsistent with section 10(1) of the *Racial Discrimination Act 1975* (Cth) and was invalid to the extent of the inconsistency because of section 109 of the Constitution.

The Aboriginal Land Act 1991 (Qld) and the Torres Strait Islander Land Act 1991 (Qld)

Legislative Policy and the Legal Context

As noted earlier, the Aboriginal Land Bill and Torres Strait Islander Land Bill were introduced into the Queensland parliament exactly one year before the High Court handed down its decision in *Mabo v Queensland (No 2)*.²⁶ The background to the legislation and an account of the negotiations leading to it can be found in Frank Brennan's book, *Land Rights Queensland Style*.²⁷

The preamble to the *Aboriginal Land Act* sets out the social, historical and legal context of the Act, and the policy objectives of it. The preamble refers to the prior occupation, use and enjoyment of land in Queensland by Aboriginal people in accordance with Aboriginal tradition. It recognises the spiritual, social, historical, cultural and economic importance of land to Aboriginal people and recites that many Aboriginal people were dispossessed and dispersed after European settlement.

The preamble to the Act expressly alludes to the state of the common law in 1991 and the implications of the *Racial Discrimination Act* when it states that the parliament is satisfied that:

- (a) Aboriginal interests and responsibilities in relation to land' have not been adequately and appropriately recognised by the law; and
- (b) special measures need to be enacted for the purpose of securing adequate advancement of 'the interests and responsibilities' of Aboriginal people in Queensland.

The preamble goes on to recite the express intention of the parliament to make provision in this Act for 'the adequate and appropriate recognition of the interests and responsibilities of Aboriginal people in relation to land' and thereby to 'foster the capacity for self-development, and the self-reliance and

²⁵ (1994–1995) 128 ALR 1.

²⁶ (1992) 175 CLR 1.

²⁷ Brennan (1992).

cultural integrity, of the Aboriginal people of Queensland'. The preamble to the *Torres Strait Islander Land Act* is in substantially the same terms.

Main Provisions

What Land Can Be Claimed or Transferred?

The *Aboriginal Land Act* and the *Torres Strait Islander Land Act* each provide for specific parcels of land to be claimed and granted. The parcels must be in categories of land, described as 'available Crown land' and include some transferred land.²⁸ It includes areas of national park land but does not include, for example, freehold land or leased land, tidal land (unless the tidal land is declared to be available for claim), city or town land, a road or a stock route. Specific parcels of land become 'claimable land' when they are declared by regulation to be claimable land for this Act, or when it is Aboriginal land that is transferred land.²⁹

Transferable land under the *Aboriginal Land Act* and the *Torres Strait Islander Land Act* comprises Deed of Grant in Trust (DOGIT) land, Aboriginal reserve land, Aurukun Shire lease land, Mornington Island Shire lease land, Torres Strait Islander reserve land, and available Crown land declared by regulation to be transferable land.³⁰

On What Basis is Land Claimed?

A group of Aboriginal people can make a claim to claimable land on any one (or more) of three grounds:

- traditional affiliation;
- historical association; or
- economic or cultural viability.³¹

A claim on the ground of *traditional affiliation* is established if the Land Tribunal hearing the claim is satisfied that the members of the claimant group have a common connection with the land 'based on spiritual *and* other associations with, rights in relation to, and responsibilities for, the land under Aboriginal tradition.'³² Aboriginal tradition is the:

body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular group of Aboriginal people, and

²⁸ *Aboriginal Land Act 1991* (Qld), ss 17–25; *Torres Strait Islander Land Act 1991* (Qld), ss 14–23.

²⁹ *Aboriginal Land Act 1991* (Qld), s 18; *Torres Strait Islander Land Act 1991* (Qld), s 15.

³⁰ *Aboriginal Land Act 1991* (Qld), ss 12–16; *Torres Strait Islander Land Act 1991* (Qld), ss 11–13.

³¹ *Aboriginal Land Act 1991* (Qld), s 46

³² *Aboriginal Land Act 1991* (Qld), s 53(1), emphasis added.

includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships.³³

The claimants must constitute a 'group' and their associations, rights and responsibilities are in relation to the land rather than sites on the land. The statutory definition has been the subject of detailed analysis by the Land Tribunal in reports on claims made under the *Aboriginal Land Act*.³⁴ It is apparent from the Act, and from those reports, that the current features of traditional Aboriginal links to land vary from group to group in Queensland.

A claim by a group of Aboriginal people for an area of claimable land on the ground of *historical association* is established if the Land Tribunal is satisfied that the group has an association with the land based on them *or* their ancestors having, for a substantial period, lived on *or* used:

- the land; *or*
- land in the district *or* region in which the land is located.

The claim may be established whether or not all or a majority of the members of the group have themselves lived on or used such land.³⁵

A claim by a group of Aboriginal people for an area of claimable land on the ground of *economic or cultural viability* is established if the Land Tribunal is satisfied that granting the claim would assist in restoring, maintaining or enhancing the capacity for self-development, and the self-reliance and cultural integrity, of the group. In determining the claim, the Tribunal must have regard to the proposal made in the claim for the use of the land.³⁶

A claim by a group of Aboriginal people for an area of claimable land may be established:

³³ *Aboriginal Land Act 1991* (Qld), s 9. The definition is substantially the same as the definition of 'Aboriginal tradition' in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 3.

³⁴ These reports are published and may be purchased from the Queensland Department of Natural Resources. The Land Tribunal's reports are titled: *Aboriginal Land Claims to Cape Melville National Park, Flinders Group National Park, Clack Island National Park and Nearby Islands*, May 1994; *Aboriginal Land Claim to Simpson Desert National Park*, December 1994; *Aboriginal Land Claims to Vacant Crown Land in the Vicinity of Birthday Mountain*, February 1995; *Aboriginal Land Claim to Available Crown Land Near Helenvale: Wunbuwarra — Banana Creek*, November 1995; *Aboriginal Land Claim to Lakefield National Park*, April 1996; *Aboriginal Land Claim to Cliff Islands National Park*, April 1996; *Aboriginal Land Claim to Iron Range National Park*, June 1999; *Aboriginal Land Claim to Ten Islands Near Cape Grenville*, February 1998; *Aboriginal Land Claims to Mungkan Kandju National Park and Unallocated State Land Near Lochinvar Pastoral Holding*, May 2001. The Land Tribunal's annual reports also provide information about the tribunal's practices and procedures, and key issues that arise.

³⁵ *Aboriginal Land Act 1991* (Qld), s 54.

³⁶ *Aboriginal Land Act 1991* (Qld), s 55.

- for a part only of the land;³⁷
- on more than one ground.³⁸

If claims by two or more groups of Aboriginal people for the same area of claimable land are established on the same ground, the Land Tribunal must recommend to the minister that the land be granted jointly to the groups. The legislation ranks the grounds of claim in order to resolve any disputes about competing claims to an area. If more than one claim is established, and each of the competing claims is established on one or more grounds:

- if one or more of the claims is established on the ground of *traditional affiliation* — a recommendation must not be made in favour of any other group on the ground of *historical association* or on the ground of *economic or cultural viability*; and
- if one or more of the claims is established on the ground of *historical association* — a recommendation must not be made in favour of any other group on the ground of *economic or cultural viability*.³⁹

The *Torres Strait Islander Land Act* is substantially the same in form and content as the *Aboriginal Land Act*.⁴⁰ There are, however, some significant differences. The Act provides a scheme by which Torres Strait Islanders (either individually or as groups) may claim land on the ground of 'customary affiliation'. A claim on that ground is established if the Land Tribunal is satisfied that the claimant has a connection, or the members of the claimant group have a common connection, with the land 'based on spiritual or other associations with, rights in relation to, and responsibilities for, the area of land under Island custom'.⁴¹ Island custom, known in the Torres Strait as *Ailan Kastom*, is:

³⁷ *Aboriginal Land Act 1991* (Qld), s 56.

³⁸ *Aboriginal Land Act 1991* (Qld), s 57.

³⁹ *Aboriginal Land Act 1991* (Qld), s 61.

⁴⁰ *Torres Strait Islander Land Act 1991* (Qld), ss 8, 43, 50–54, 58.

⁴¹ *Torres Strait Islander Land Act 1991* (Qld), s 50(1), emphasis added. By comparison, the test of traditional affiliation under the *Aboriginal Land Act* refers to common connections based on spiritual and other associations. The test of customary affiliation in the *Torres Strait Islander Land Act* as originally enacted included the conjunctive. The test was amended by section 49 of the *Aboriginal and Torres Strait Islander Land (Consequential Amendments) Act 1991* (Qld) with 'or' replacing 'and'. The minister explained the reason for the change:

'The *Torres Strait Islander Land Act* will also be amended to ensure that the basis upon which land is claimed in the Torres Strait appropriately reflects islander relationship with land. I am advised that the principles of traditional affiliation with land in accordance with Torres Strait Islander custom may not necessarily include a notion of spiritual association with land. This, of course differs from Aboriginal relations with land. Consequently, the definition of traditional [sic] affiliation will permit but not require a claimant to demonstrate a spiritual relationship with the land.'

the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships.⁴²

The *Torres Strait Islander Land Act* also repealed the *Queensland Coast Islands Declaratory Act 1985*, which the High Court had held to be invalid or inoperative, in *Mabo (No 1)*.⁴³

What is the Claim Process?

A group of Aboriginal people, or Torres Strait Islanders, may claim a specified area of land nominating the relevant ground (or grounds) of claim. After their claim is notified and other parties are identified, a hearing is held to ascertain whether the claimants have established their claim by satisfying the relevant statutory criteria. Where the Land Tribunal (constituted by one or three members with relevant qualifications)⁴⁴ is satisfied that the claim has been established on the ground of traditional affiliation, customary affiliation, historical association or economic or cultural viability, the Tribunal must report to the relevant minister recommending the grant of the land and advising the minister about various related matters, including the detriment to others if the land is granted. The Tribunal must also notify each party to the proceedings in writing about the outcome.⁴⁵ The minister must then decide whether the land should be granted and, if so, set in train the process for grant.⁴⁶

What Form of Title is Granted?

Where a claim succeeds on the ground of traditional affiliation, customary affiliation, or historical association, title in fee simple (freehold title) is granted.⁴⁷ Freehold title is the strongest and most secure form of title under our legal system. Most freehold title granted to Aborigines or Islanders is, in effect, inalienable, because the legislation imposes stringent conditions on dealing with interests in the land and often prevents sale or mortgage of the land.

Hon AM Warner, Minister for Family Services and Aboriginal and Islander Affairs, Legislative Assembly, *Debates*, 23 October 1991, 1975.

⁴² *Torres Strait Islander Land Act 1991* (Qld), s 8.

⁴³ *Torres Strait Islander Land Act 1991* (Qld), s 1.03; see also *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 173, per Dawson J.

⁴⁴ *Aboriginal Land Act 1991* (Qld), ss 89–103; *Torres Strait Islander Land Act 1991* (Qld), ss 86–100.

⁴⁵ *Aboriginal Land Act 1991* (Qld), ss 60, 62; *Torres Strait Islander Land Act 1991* (Qld), ss 57, 59.

⁴⁶ *Aboriginal Land Act 1991* (Qld), ss 63–75; *Torres Strait Islander Land Act 1991* (Qld), ss 60–72.

⁴⁷ *Aboriginal Land Act 1991* (Qld), ss 3, 10, 27, 30, 60, 63, 66, 69; *Torres Strait Islander Land Act 1991* (Qld) ss 3, 9, 25, 28, 60, 63, 66.

Leasehold interests are granted following a successful claim on the ground of economic or cultural viability.⁴⁸

What are the Reservations from the Title?

A deed of grant or lease made under the *Torres Strait Islander Land Act* or the *Aboriginal Land Act* must contain a reservation to the Crown of all minerals and all petroleum on and below the surface of the land.⁴⁹ Other reservations from particular grants include, for example, forest products and quarry material.⁵⁰

Who Holds the Title?

The title holders are trusts, all of whose members are Aborigines or Islanders.⁵¹ Title is held in trust for the relevant Aborigines or Islanders.⁵² Aborigines and Islanders may acquire leasehold interests from the grantees of the land in accordance with the relevant Act.⁵³

What Restrictions Apply to Dealings with the Title?

As a general rule, title to Aboriginal and Torres Strait Islander land is inalienable — that is, in most cases it cannot be sold or mortgaged.⁵⁴ The policy behind that rule has a number of components. Much of the land has been granted on the basis that the groups of relevant Aborigines have spiritual links with the land that stretch back to time before time (sometimes called the 'Dreamtime') and which include responsibilities to maintain the land in spiritual as well as economic terms. Land which cannot be alienated in those traditional terms should not be alienated for economic gain. Similar arguments are made in relation to land that has been granted because of a group's long historical association with the land. Where land is granted to or for the benefit of a group or community, the land should not be disposed of for the benefit of current members of that group. It should be maintained for the benefit of future members of the group.

It should be noted that:

⁴⁸ *Aboriginal Land Act 1991* (Qld) ss 3, 10, 60, 64, 66, 70; *Torres Strait Islander Land Act 1991* (Qld), ss 3, 9, 57, 61, 63, 67.

⁴⁹ *Aboriginal Land Act 1991* (Qld), ss 42, 80; *Torres Strait Islander Land Act 1991* (Qld), ss 39, 77.

⁵⁰ *Aboriginal Land Act 1991* (Qld), ss 3, 43, 81; *Torres Strait Islander Land Act 1991* (Qld), ss 3, 40, 78.

⁵¹ *Aboriginal Land Act 1991* (Qld), ss 27, 28, 60, 63–65, 137A; *Torres Strait Islander Land Act 1991* (Qld), ss 25, 26, 57, 60–62, 134A.

⁵² *Aboriginal Land Rights Northern Territory Act 1976* (Cth), ss 4; *Aboriginal Land Act 1991* (Qld), ss 63, 64, cf s 27; *Torres Strait Islander Land Act 1991* (Qld), ss 60, 61; cf s 25.

⁵³ *Aboriginal Land Act 1991* (Qld), ss 39, 76; *Torres Strait Islander Land Act 1991* (Qld), ss 36, 73.

⁵⁴ *Aboriginal Land Act 1991* (Qld), ss 39, 40, 76, 77; *Torres Strait Islander Land Act 1991* (Qld), ss 36, 37, 73, 74.

- transferred land is held by the grantees for the benefit of Aboriginal people (or Torres Strait Islanders) and their ancestors and descendants; and
- granted land is held by the grantees for the benefit of a particular group of Aboriginal people (or a particular individual Torres Strait Islander or particular group of Torres Strait Islanders) and their ancestors and descendants.

The restrictions on alienation extend beyond those which prevent disposal of the freehold title. Leases and other interests in respect of Aboriginal land can only be granted in limited circumstances and, in some cases, to restricted classes of persons.⁵⁵ There are restrictions or prohibitions on resumption by the Crown.⁵⁶

Special Provisions in Relation to National Parks and Mining

Where national park land is successfully claimed, the grant of title to the land:

- is subject to the condition that the grantees lease the national park land, in perpetuity, to the State for the purposes of the management of the land under the *Nature Conservation Act 1992* (Qld);
- is subject to conditions prescribed under a regulation for national park land;
- cannot be made until there a plan of management for the land has been prepared for the land by the relevant minister, in cooperation with the board of management for the land (on which the relevant Aboriginal people or Torres Strait Islanders are to be represented).⁵⁷

Specific provision is made for the *Mineral Resources Act 1989* (Qld) to apply to transferable land, Aboriginal land or Torres Strait Islander land that is or was transferred land and certain other categories of land as if that land were a reserve within the meaning of that Act.⁵⁸ In most instances, where the state receives an amount by way of a royalty under the *Mineral Resources Act 1989* (Qld) or the *Petroleum Act 1923* (Qld) in relation to Aboriginal land or Torres Strait Islander land, the grantees of the land are entitled to receive from the state the prescribed percentage of the royalty amount. The grantees are to apply the amount received for the benefit of the people for whose benefit they

⁵⁵ *Aboriginal Land Act 1991* (Qld), ss 39, 40, 76, 77; *Torres Strait Islander Land Act 1991* (Qld), ss 36, 37, 73, 74.

⁵⁶ *Aboriginal Land Act 1991* (Qld), ss 41, 78; *Torres Strait Islander Land Act 1991* (Qld), ss 38, 75.

⁵⁷ *Aboriginal Land Act 1991* (Qld), s 83; *Torres Strait Islander Land Act 1991* (Qld), s 80.

⁵⁸ *Aboriginal Land Act 1991* (Qld), s 87, see also ss 131–32; *Torres Strait Islander Land Act 1991* (Qld), s 84; see also ss 128–29.

hold the land, particularly those that are affected by the activities to which the royalty amount relates.⁵⁹

Native Title

The Developing Common Law: Mabo v Queensland (No 2) Onwards

Common Law Recognition of Native Title

The development of common law recognition of native title in Australia commenced with the decision of the High Court of Australia in *Mabo v Queensland (No 2)*, when, by a majority of six to one, the court held that:

the common law of this country recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlements of the Indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.⁶⁰

The decision in *Mabo (No 2)* made a fundamental change in the way Indigenous people's interests in land were to be dealt with by the general law of Australia. The law now recognised that, in some parts of Australia, Indigenous Australians have legally recognisable and enforceable rights of a type which their ancestors held when the Crown assumed sovereignty over the land and waters and the people, and which have passed from generation to generation to the present. The Crown could not grant those rights. The people already had, and have, them.

As with other legal doctrines, the common law in relation to native title has developed and will continue to develop on a case-by-case basis. In *Western Australia v The Commonwealth*,⁶¹ the High Court recognised that there would be changes in the common law of native title and stated in particular that:

[The] common law relating to native title is ... substantive law the content of which is declared from time to time by the courts. *Mabo (No 2)* is a dramatic example of how the declaration of the common law relating to native title can change when a new judicial examination is made of the basic legal principles which underlie a proposition earlier accepted.⁶²

⁵⁹ *Aboriginal Land Act 1991* (Qld), s 88 and *Aboriginal Land Regulation 1991* (Qld), ss 55–56; *Torres Strait Islander Land Act 1991* (Qld), s 85 and *Torres Strait Islander Land Regulation 1991* (Qld), ss 55–56.

⁶⁰ (1992) 175 CLR 1 at 15.

⁶¹ *Western Australia v Commonwealth* (1994–1995) 183 CLR 373.

⁶² (1995) 183 CLR at 486 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ. The development of the common law of native title was analysed by Gummow J in *Wik Peoples v Queensland* (1996) 141 ALR 129 at 228–32. In *Thorpe v Commonwealth of Australia (No 3)*, (1997) 71 ALJR 767 at 775, Kirby J observed that the decisions of the High Court in *Mabo (No 2)* and *Wik*

That general analysis provides a caution to using the relatively few judgments to date as providing an exhaustive statement about what the common law will recognise as native title. The leading decisions of the High Court⁶³ and the Federal Court⁶⁴ from *Mabo (No 2)* onwards have, however, established various propositions.

Although native title is recognised by the judgments and statutes of the general law of Australia, its source is in the traditional laws and customs of the group of people who have a connection with a particular area of land or waters:

Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law. There is, therefore, an intersection of traditional laws and customs with the common law. The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title.⁶⁵

Because native title rights and interests come from traditional laws and customs, the content of those rights and interests will not necessarily equate to other forms of property under the general law. Courts have described native title as *sui generis*, or unique. For the same reason, native title rights and interests may vary from place to place and group to group around Australia. Justice Gummow, for example, has stated:

Native title is not treated by the common law as a unitary concept. The heterogeneous laws and customs of Australia's Indigenous peoples, the Aboriginals and Torres Strait Islanders, provide its content. It is the relationship between a community of Indigenous people and the land, defined by reference to that community's traditional laws and customs,

demonstrated that 'sometimes Australian law (including as it affects Aboriginal Australians) is not precisely what might earlier have been expected or predicted. Australian law at this time is in the process of a measure of re-adjustment, arising out of the appreciation, both by the parliaments and the courts of this country, of injustices which statute and common law earlier occasioned to Australia's Indigenous peoples'.

⁶³ *Western Australia v Commonwealth* (1995) 183 CLR 373; *Wik Peoples v Queensland* (1996) 141 ALR 129; *Fejo v Northern Territory* (1998) 156 ALR 721; *Yanner v Eaton* (1999) 166 ALR 258.

⁶⁴ For example, *Mineralogy Pty Ltd v National Native Title Tribunal* (1997) 150 ALR 467; *Members of the Yorta Yorta Aboriginal Community v Victoria*, unreported decision dated 18 December 1998; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 180 ALR 655; *Fourmile v Selpam* (1998) 152 ALR 294; *Yarmirr v Northern Territory* (1998) 156 ALR 370; *Commonwealth of Australia v Yarmirr* (1999) 168 ALR 426; *Hayes v Northern Territory* (1999) 97 FCR 32; *Ward v Western Australia* (1998) 159 ALR 483; *Western Australia v Ward* (2000) 99 FCR 316.

⁶⁵ *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 para 46 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

which is the bridgehead to the common law. As a corollary, native title does not exhibit the uniformity of rights and interests of an estate in land at common law and 'ingrained habits of thought and understanding' must be adjusted to reflect the diverse rights and interests which arise under the rubric of 'native title'.⁶⁶

Native title is different from statutory land rights titles. Under statutory land rights schemes, groups of Indigenous Australians are granted a fee simple title or a lease by the Crown. Native title is the recognition of something which groups of Indigenous Australians already have.⁶⁷ Native title laws exist to identify, recognise and protect what already exists. The Crown grants nothing, as native title is not the Crown's to grant.

Although it has survived more than two centuries of introduced common law and statutes, native title has been described as 'fragile'. It can be extinguished by a range of valid acts of the Crown. Consequently, the law will not recognise native title rights and interests in areas where, as a matter of law, native title has been extinguished — irrespective of whether Indigenous Australians retain traditional links to and use of those areas.

In some areas, native title might survive in a limited form where there are other overlapping, non-exclusive legal interests which do not extinguish native title. The High Court and the parliaments have recognised that there are tenures which give title holders certain legal rights which prevail over native title rights where there is an inconsistency between the two. Where there is no inconsistency, the native title rights and interests survive.⁶⁸

The Influence of International Law

It is apparent from reading the reasons for judgment of each Justice of the High Court in *Mabo (No 2)* that, although the judges sought to use conventional legal reasoning to answer the issues raised by the case, they were well aware of historical and social factors at play in Australia and overseas, and those factors helped to shape their thinking. The significance or not of some factors other than decisions of common law courts to the development of this area of law can be seen in passages from the judgment of Justice Brennan, who noted that developments in international law had followed changes in thinking which were consistent with 'the contemporary values of the Australian people'. He wrote:

If the international law notion that inhabited land may be classified as *terra nullius* no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be 'so

⁶⁶ *Yanner v Eaton* (1999) 166 ALR 258 at 278, paragraph 72 per Gummow J.

⁶⁷ There is some debate about when native title comes into existence. See, for example, the discussion in Mantziaris and Martin (2000).

⁶⁸ See principally *Wik Peoples v Queensland* (1996) 141 ALR 129. See also definitions in the *Native Title Act 1993* (Cth) of 'non-exclusive agricultural lease' (s 247B), 'non-exclusive pastoral lease' (s 248B) and 'non-extinguishment principle' (s 238).

low in the scale of social organisation' that it is 'idle to impute to such people some shadow of the rights known to our law'⁶⁹ can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.

The fiction by which the rights and interests of Indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.

...

Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the Indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.

...

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the Indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.⁷⁰

The influence — or, at least, potential influence — of international law on the development of Australian common law is not confined to native title. Justice Kirby, in particular, has referred in a number of his High Court judgments to the potential significance of international law as a legitimate and important influence on the development of the common law. He has noted that the interrelationship of national and international law, including in relation to fundamental rights, is undergoing evolution.⁷¹

There are circumstances in which the operation of international law will limit the extent to which domestic Australian law will recognise native title. In the *Croker Island case*, Justice Olney noted that the proceedings differed from those in *Mabo (No 2)* in that they related to 'waters in respect of which Australia's sovereign rights are qualified by its international obligations.'⁷² In

⁶⁹ *Re Southern Rhodesia* [1919] AC 233 at 233–34.

⁷⁰ (1992) 175 CLR 1 at 41–42.

⁷¹ See, for example, *Newcrest Mining (WA) Ltd v Commonwealth and BHP Minerals Ltd* (1997) 147 ALR 42 at 147–48; *R v East, ex parte Nguyen* (1998) 159 ALR 108 at 128; *Pearce v R* (1998) 194 CLR 610 at 637; *Kartinyeri v Commonwealth* (1998) 152 ALR 540 at 599; *AMS v AIF, AIF v AMS* (1999) 163 ALR 501 at 545–46.

⁷² *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 591.

particular, His Honour concluded that Australia's obligations under international law of the sea treaties precluded the possibility of recognition of an exclusive possession or occupation, or of a right to control access by others to the area.⁷³ His Honour's reasoning on this issue was left undisturbed on appeal to a Full Court of the Federal Court.⁷⁴

The Influence of Legal Developments in Other Countries

The common law of Australia has developed not only by reference to international law standards, but also by reference to the decisions of courts in other countries. In *Mabo (No 2)* and subsequent cases, parties have sought to support various submissions by reference to judgments of overseas courts.

The High Court has shown that, where a native title issue arises in circumstances which the court considers have peculiarly Australian features, it will acknowledge but not be persuaded by decisions of superior courts in other jurisdictions where different circumstances apply. In *Fejo v Northern Territory*,⁷⁵ the court decided that a valid grant of unqualified freehold title extinguished completely and for all time the native title rights and interests of Indigenous Australians in respect of that land.⁷⁶ Six of the justices wrote, in relation to decisions from courts in the United States, Canada and New Zealand:

Although reference was made to a number of decisions in other common law jurisdictions about the effect of later grants of title to land on pre-existing native title rights, we doubt that much direct assistance is to be had from these sources. It is clear that it is recognised in other common law countries that there can be grants of interests in land that are inconsistent with the continued existence of native title;⁷⁷ the question in each case is whether the later grant has had that effect.⁷⁸ In some cases the answer that has been given in other jurisdictions may have been affected by the existence of treaty or other like obligations.

⁷³ *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 592, per Beaumont and von Doussa JJ.

⁷⁴ *Commonwealth of Australia v Yarmirr* (1999) 168 ALR 426 at paras 223, 228, 229, per Beaumont and von Doussa JJ.

⁷⁵ (1998) 195 CLR 96.

⁷⁶ *Fejo v Northern Territory* (1998) 195 CLR 96 at paras 43, 45, 55–58, per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; paras 95, 105–8, 112 per Kirby J.

⁷⁷ See, for example, in the United States, *Missouri, Kansas & Texas Railway Co v Roberts* 152 US 114 at 117–18 (1894); in Canada, *Hamlet of Baker Lake v Minister of Indian Affairs* (1979) 107 DLR (3d) 513 at 549; in New Zealand, *Te Teira Te Paea v Te Roera Tureha* (1902) AC 56 at 65; *Manu Kapua v Para Haimona* [1913] AC 761 at 766–67; *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 at 365–66; in Nigeria, *Sakariyawo Oshodi v Moriamo Dakolo* [1930] AC 667 at 670.

⁷⁸ See for example, *Buttz v Northern Pacific Railroad* 119 US 55 (1886); *R v Sparrow* [1990] 1 SCR 1075; *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470.

Those considerations do not arise here. In this case, the answer depends only upon the effect of a grant of unqualified freehold title to the land.⁷⁹

In a similar vein, Justice Kirby wrote:

It is clear law in this country, whatever may be the position elsewhere, that native title may be extinguished by the valid exercise of the sovereign power to grant inconsistent interests in land to third parties.⁸⁰

His Honour noted that native title originates in the traditions and customs of the Indigenous peoples of Australia. It is from them, and not from the common law, that it takes its content. Putting that proposition in an international context he wrote:

This is so in all territories over which, in earlier times, the Crown claimed sovereignty. But care must be exercised in the use of judicial authorities of other former colonies and territories of the Crown because of the peculiarities which exist in each of them arising out of historical and constitutional developments, the organisation of the Indigenous peoples concerned and applicable geographical or social considerations.⁸¹ In the United States of America, for example, the law governing the rights of Indigenous peoples to land was affected by the early recognition of a measure of sovereignty of, and the provision of a special constitutional status to treaties with, the Indian tribes.⁸² The position in Canada⁸³ and New Zealand⁸⁴ has followed a different course again, affected respectively by the supervening amendment to the

⁷⁹ (1998) 195 CLR 96 at para 54.

⁸⁰ *Fejo v Northern Territory* (1998) 195 CLR 96 at para 95. See also paras 95–100 citing *Mabo (No 2)* (1992) 175 CLR 1 at 68–69, per Brennan J; 89–90, 94, 110, per Deane and Gaudron JJ; 196–97, per Toohey J; *Western Australia v The Commonwealth* (1994–1995) 183 CLR 373 at 422, 439; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 176, per Gummow J.

⁸¹ *Mabo (No 2)* (1992) 175 CLR 1 at 108; cf *Coe v Commonwealth of Australia* (1979) 53 ALJR 403 at 408; 24 ALR 118 at 129.

⁸² See, for example, Art 1, s 8 ['To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes']. See *Johnson v McIntosh* 8 Wheat 543 (1823); *United States v Sante Fe Pacific Railroad Co* 314 US 339 (1941); Berman (1978), p 637.

⁸³ *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3rd) 145; *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470; *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193; *R v White and Bob* (1964) 50 DLR (2d) 613; *Francis v The Queen* (1956) 3 DLR (2d) 641; cf Cumming and Mickenberg (1972); Slattery (1987). See also now Canadian Constitution, s 35.

⁸⁴ *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321; *Manu Kapua v Para Haimona* [1913] AC 761 (PC); *Inspector of Fisheries v Ihaia Weepu* [1956] NZLR 920; *In re the Ninety-Mile Beach* [1963] NZLR 461; *Faulkner v Tauranga District Council* [1996] 1 NZLR 357.

Constitution⁸⁵ and the re-interpretation of the legal relationship between the general population and the Indigenous peoples.⁸⁶

Having noted how other former territories of the Crown, such as those in West Africa, had dealt with native title, he concluded:⁸⁷

The ways in which each of the former colonies and territories of the Crown addressed the reconciliation between native title and the legal doctrine of tenure sustaining estates in land varied so markedly from one former territory to the other and were affected so profoundly by local considerations (legal and otherwise) that it is virtually impossible to derive applicable common themes of legal principle. Still less can a common principle be detected which affords guidance for the law of this country. Australia is a late entrant to the field following the change of understanding in the common law as it was previously conceived, evidenced in this Court's decision in *Mabo [No 2]*⁸⁸ and cases since.⁸⁹

He noted⁹⁰ that the appellants had invoked the authority of United States, Canadian and New Zealand courts, but reiterated that 'care must be observed in the use of overseas authority in this context because of the differing historical, constitutional and other circumstances and the peculiarity of the way in which recognition of native title came belatedly to be accepted ... as part of Australian law'.⁹¹

There are other indications that Australian courts will not necessarily adopt all of the reasoning or conclusions of overseas courts. In his judgment on the native title case involving the sea and sea-bed around Croker Island, Justice Olney considered the definition of 'native title' and 'native title rights and interests' in section 223 of the *Native Title Act 1993*, including the expressions 'traditional law' and 'traditional custom'. His Honour noted:

The question of what is a traditional law or traditional custom has excited some interest in cases in overseas jurisdictions but the law in Australia is readily capable of understanding without reference to external authority. The general thrust of the majority judgments in *Mabo (No 2)* indicates that the traditional laws and traditional customs of Aboriginal peoples and Torres Strait Islanders are the laws and customs which have their origins in the culture and social organisation of the relevant group as it existed prior to the advent of non-Aboriginal interference with that culture and social organisation ... It is the

⁸⁵ See, for example, Canadian Constitution, s 35.

⁸⁶ *Fejo v Northern Territory* (1998) 195 CLR 96 at para 101.

⁸⁷ *Fejo v Northern Territory* (1998) 195 CLR 96 at para 103.

⁸⁸ (1992) 175 CLR 1 at 25, 40, 57.

⁸⁹ *Western Australia v Commonwealth* (1994–1995) 183 CLR 373 at 427, 431–32; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 177, 184, 205–7.

⁹⁰ *Fejo v Northern Territory* (1998) 195 CLR 96 at para 110.

⁹¹ *Fejo v Northern Territory* (1998) 195 CLR 96 at para 111.

traditional basis of the currently acknowledged and observed laws and customs which attracts recognition of native title. The task of the Court is to identify those laws and customs which regulated the lives of the forebears of the present members of the applicants prior to European settlement which are currently acknowledged and observed. I do not find any assistance to be derived from Canadian authorities which speak of rights which are 'integral to the distinctive culture' of the claimant group. In Australia, Parliament has provided a definition which says all that needs to be said and is readily capable of being understood and applied.⁹²

That statement was made in light of detailed submissions from the parties about the relevance of Canadian decisions to the case, and indicates independent thinking by an Australian court. A subsequent, more detailed, discussion of what is 'traditional' in this context by a Full Federal Court in the *Yorta Yorta case*⁹³ did, however, include references to Canadian judgments.

The Native Title Act 1993 (Cth)

Legislative Policy and the Legal Context

The *Native Title Act 1993* (Cth) was enacted in response to the High Court's decision in *Mabo v Queensland (No 2)*. The protracted parliamentary debate about the Act, and the 1998 amendments to it,⁹⁴ attracted considerable public interest and comment. A challenge was made to the constitutional validity of the Act. In rejecting the challenge, the High Court clearly decided that the 'race' power in the Constitution could be relied on by the federal parliament to support native title legislation.⁹⁵ It held that the *Native Title Act* was 'special' in that 'it confers uniquely on the Aboriginal and Torres Strait Islander holders of native title (the 'people of any race') a benefit protective of their native title'. Whether it was 'necessary' to enact that law was a matter for the parliament.⁹⁶ The power supports a law which protects native title from extinguishment or impairment and which requires compensation to be paid where native title is extinguished.⁹⁷

International law also had a bearing on the enactment of the *Native Title Act*. The Preamble to the *Native Title Act* recites, among other things, that:

⁹² *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 568. See also *Western Australia v Ward* (2000) 99 FCR 316 at 345–46, per Beaumont and von Doussa JJ.

⁹³ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 180 ALR 655.

⁹⁴ *Native Title Amendment Act 1998* (Cth).

⁹⁵ *Western Australia v Commonwealth* (1994–1995) 183 CLR 373.

⁹⁶ (1994–1995) 183 CLR 373 at 462, per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

⁹⁷ (1994–1995) 183 CLR 373 at 468–69, 475–76, 478, 481–82, per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

The Australian Government has acted to protect the rights of all of its citizens, and in particular its Indigenous peoples, by recognising the international standards for the protection of universal human rights and fundamental freedoms through:

- (a) the ratification of the International Convention on the Elimination of All Forms of Racial Discrimination and other standard-setting instruments such as the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights; and
- (b) the acceptance of the Universal Declaration of Human Rights; and
- (c) the enactment of legislation such as the *Racial Discrimination Act 1975* and the *Human Rights and Equal Opportunity Commission Act 1986*.

...

The law, together with initiatives announced at the time of its introduction and others agreed on by the Parliament from time to time, is intended, for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the *Racial Discrimination Act 1975*, to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders, and is intended to further advance the process of reconciliation among all Australians.⁹⁸

In *North Galanja Aboriginal Corporation v Queensland*, the High Court stated:

It was inevitable that the recognition of native title by the common law and its protection by the *Racial Discrimination Act* would generate novel legal problems relating to the title to land claimed by Aborigines in accordance with traditional laws and customs. The Act addressed some of these problems.⁹⁹

In the earlier case of *Western Australia v Commonwealth* (the *Native Title Act case*), the High Court described aspects of the relationship between the *Native Title Act* and the *Racial Discrimination Act* when the court wrote:

the *Native Title Act* affords protection to the holders of native title who heretofore have been protected by (and who may continue to be protected under) the *Racial Discrimination Act*, the regime established by the *Native Title Act* being more specific and more complex than the regime established by the *Racial Discrimination Act* ... Thus the *Racial Discrimination Act* protects native title holders against discriminatory extinction or impairment of native title. The *Native Title Act*, on the other hand, protects native title holders against any extinction or

⁹⁸ See observations by O'Loughlin J about the beneficial character of the *Native Title Act 1993* in light of that statement in the preamble: *Northern Territory v Lane* (1995) 138 ALR 544 at 548.

⁹⁹ (1996) 135 ALR 225 at 253.

impairment of native title subject to the specific and detailed exceptions which that Act prescribes or permits.¹⁰⁰

Section 7 of the *Native Title Act* sets out the relationship between that Act and the *Racial Discrimination Act*. Section 7 originally stated:

- (1) Nothing in this Act affects the operation of the *Racial Discrimination Act 1975*.
- (2) Subsection (1) does not affect the validation of past acts by or in accordance with this Act.¹⁰¹

The effect of that section was considered in detail by the High Court in the *Native Title Act case*. The court stated, among other things:

But if there were any discrepancy in the operation of the two Acts, the *Native Title Act* can be regarded either as a special measure under s 8 of the *Racial Discrimination Act* or as a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the *Racial Discrimination Act* or the International Convention on the Elimination of All Forms of Discrimination. And further, even if the *Native Title Act* contains provisions inconsistent with the *Racial Discrimination Act*, both Acts emanate from the same legislature and must be construed so as to avoid absurdity and to give to each of the provisions a scope for operation. The general provisions of the *Racial Discrimination Act* must yield to the specific provisions of the *Native Title Act* in order to allow those provisions a scope for operation. But it is only to that extent that, having regard to s 7(1), the *Native Title Act* could be construed as affecting the operation of the *Racial Discrimination Act*.¹⁰²

Section 7 was amended in 1998 to provide:

- (1) This Act is intended to be read and construed subject to the provisions of the *Racial Discrimination Act 1975*.
- (2) Subsection (1) means only that:
 - (a) the provisions of the *Racial Discrimination Act 1975* apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and
 - (b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the *Racial Discrimination Act 1975* if that construction would remove the ambiguity.

¹⁰⁰ (1994–1995) 183 CLR 373 at 462–463; 128 ALR 1 at 45.

¹⁰¹ The term ‘past act’ was defined in ss 228–32 of the *Native Title Act 1993* (Cth).

¹⁰² (1994–1995) 183 CLR 373 at 483–84; 128 ALR 1 at 62.

- (3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.¹⁰³

The Act, as amended, is long and detailed.¹⁰⁴ For present purposes it is only possible to outline the scheme of the Act and discuss some of its features.

The preamble to the Act 'sets out considerations taken into account' by the federal parliament in enacting it. The policy considerations recited in the preamble include:

- the protection of the rights of Indigenous peoples;
- the need to provide a special procedure for the just and proper ascertainment of native title rights and interests;
- the importance of ensuring that native title holders are able to enjoy fully their rights and interests, and the need to significantly supplement those rights;
- the requirement for certainty and enforceability of acts that were potentially made invalid because of the existence of native title;
- the importance of providing certainty to the broader Australian community that future acts that affect native title may be done validly.

The main objects of the Act are:

- to provide for the recognition and protection of native title;
- to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings;
- to establish a mechanism for determining claims to native title;
- to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.¹⁰⁵

Section 223 of the *Native Title Act 1993* states, in part:

Native Title

Common law rights and interests

223(1) The expression 'native title' or 'native title rights and interests' means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

¹⁰³ The terms 'past act' and 'intermediate period act' are defined in ss 228–32 and 232A–E respectively the *Native Title Act 1993* (Cth).

¹⁰⁴ The Act has 253 sections and various schedules. The official print is 477 pages long.

¹⁰⁵ *Native Title Act 1993* (Cth), s 3.

- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

- (2) Without limiting subsection (1), 'rights and interests' in that subsection includes hunting, gathering, or fishing, rights and interests.

State and territory legislation either adopts that definition¹⁰⁶ or contains a definition in substantially the same terms.¹⁰⁷

What Land Can Be Claimed?

In summary, native title applications can be made in relation to areas of land and water where native title has not been extinguished. In some areas, native title may survive unimpaired by legal acts or historical and social changes. In other areas, native title may continue in a less extensive form than previously, together with but subject to some other non-exclusive form of validly granted interest in land such as a pastoral lease.¹⁰⁸

Broadly speaking, there are two ways by which native title may be lost, with the consequence that a native title application may not be made or will not succeed:

- the Crown has extinguished native title by some valid act (such as legislation or the grant of a private fee simple title);
- a group has lost its links to the land in respect of which its forebears held native title and no other group has taken over the native title by a traditionally sanctioned process.

The susceptibility of native title to extinguishment was discussed by each of the Justices who formed the majority of the court in *Mabo (No 2)*. In the lead judgment, Justice Brennan considered the matter in some detail. He started with the proposition that sovereignty carries the power to create and to extinguish private rights and interests in land within the sovereign's territory. Consequently, on a change of sovereignty, rights and interests in land that may

¹⁰⁶ See *Native Title (New South Wales) Act 1994* (NSW), s 5; *Land Titles Validation Act 1994* (Vic), s 4; *Native Title (Queensland) Act 1993* (Qld), s 5, but see separate definition of 'native title' in *Acts Interpretation Act 1954* (Qld), s 36; *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA), s 4; *Native Title (Tasmania) Act 1994* (Tas), s 3, *Native Title Act 1994* (ACT), s 5, *Validation (Native Title) Act 1994* (NT), s 3.

¹⁰⁷ See *Native Title (South Australia) Act 1994* (SA), s 4; also compare *Acts Interpretation Act 1954* (Qld), s 36.

¹⁰⁸ See *Wik Peoples v Queensland* (1996) 141 ALR 129. See also references to non-exclusive possession agricultural lease, non-exclusive possession pastoral lease, and the non-extinguishment principle in *Native Title Act 1993* (Cth), ss 247B, 248B, 238.

have been indefeasible under the old regime become liable to 'extinction' by exercise of the new sovereign power.¹⁰⁹

Judgments of the High Court to date show that native title may be extinguished by various acts of the Crown,¹¹⁰ in particular by:

- statute;¹¹¹
- a valid Crown grant of an estate inconsistent with the continued right to enjoy native title;¹¹² or
- the Crown's appropriation and use of land inconsistently with the continued enjoyment of native title.¹¹³

The High Court in *Fejo v Northern Territory*¹¹⁴ made it clear that, at law, extinguishment is both complete and permanent. Consistently with that approach, the *Native Title Act* was amended on 30 September 1998 to provide:

237A Extinguish

The word extinguish, in relation to native title, means permanently extinguish the native title. To avoid any doubt, this means that after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect.

The Act also lists various forms of tenure which, the parliament asserts, have extinguished native title.¹¹⁵ States and territories have enacted legislation

¹⁰⁹ (1992) 175 CLR 1 at 63, also at 110–11, per Deane and Gaudron JJ, 193, per Toohey J. See also *Wik Peoples v Queensland* (1996) 141 ALR 129 at 182, per Toohey J; *Fejo v Northern Territory of Australia* (1998) 156 ALR 721 at 756–57, 759 per Kirby J.

¹¹⁰ *Wik Peoples v Queensland* (1996) 141 ALR 129 at 157 per Brennan CJ, citing *Western Australia v Commonwealth* (1995) 183 CLR 373 at 452.

¹¹¹ See, for example, *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 64, 67, per Brennan J, 110–11, per Deane and Gaudron JJ, 196, per Toohey J.

¹¹² See, for example, *Wik Peoples v Queensland* (1996) 187 CLR 1 at 85; 141 ALR 129 at 152, per Brennan CJ, 193, 209, 218, per Gaudron J citing *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 68, 69, per Brennan J, 110, per Deane and Gaudron JJ, 195–96, per Toohey J.

¹¹³ *Wik Peoples v Queensland* (1996) 141 ALR 129 at 152, per Brennan J; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 69–70; *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 180 ALR 91.

¹¹⁴ (1998) 156 ALR 271.

¹¹⁵ *Native Title Act 1993* (Cth) ss 23A, 23B, 23C, 23E, 249C, Sch 1.

to the same effect.¹¹⁶ The Act provides, however, that in certain circumstances any extinguishment of native title rights and interests may be disregarded.¹¹⁷ Justice Brennan also stated in *Mabo (No 2)*:

when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.¹¹⁸

The Yorta Yorta people's claim in relation to land along the Murray River in New South Wales and Victoria failed before the trial judge for those reasons. In his judgment, Olney J concluded:

The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs. The foundation of the claim to native title in relation to the land previously occupied by those ancestors having disappeared, the native title rights and interests previously enjoyed are not capable of revival. This conclusion effectively resolves the application for a determination of native title.¹¹⁹

Earlier in the judgment, His Honour stated that there is no warrant in the *Native Title Act* 'for the Court to play the role of social engineer, righting the wrongs of past centuries and dispensing justice according to contemporary notions of political correctness rather than according to law'.¹²⁰ That decision was considered in detail by a Full Federal Court¹²¹ and was upheld by a majority of that court.¹²²

In a subsequent case, *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland*, Justice French drew a distinction between extinguishment of the subject matter of native title and extinguishment in the sense of non-recognition of native title. He expressed the distinction in these terms:

¹¹⁶ See *Native Title (New South Wales) Act 1994* (NSW), Part 4; *Land Titles Validation Act 1994* (Vic), Part 2; *Native Title (Queensland) Act 1993* (Qld), Part 4; *Titles Validation Act 1995* (WA), Part 2; *Native Title (South Australia) Act 1994* (SA), Part 6; *Native Title (Tasmania) Act 1994* (Tas), Part 2; *Northern Territory (Confirmation of Titles to Land) Act 1993* (NT), s 6; *Validation (Native Title) Act 1994* (NT), Parts 2, 3 and 4; *Native Title Act 1994* (ACT), Part 2.

¹¹⁷ *Native Title Act 1993* (Cth), ss 47–47B, see also s 223(3)–(4).

¹¹⁸ (1992) 175 CLR 1 at 60.

¹¹⁹ *Members of the Yorta Yorta Aboriginal Community v Victoria*, No VG6001 of 1995, unreported decision dated 18 December 1998, para 129.

¹²⁰ *Members of the Yorta Yorta Aboriginal Community v Victoria*, No VG6001 of 1995, unreported decision dated 18 December 1998, para 17.

¹²¹ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 180 ALR 655.

¹²² Branson and Katz JJ; Black CJ, dissenting.

The common law of native title comprises rules for the recognition, by the Australian legal system, of rights and interests in land arising under the traditional laws and customs of Indigenous groups ... Extinguishment of native title by legislative or executive or other action is a metaphor for limits upon the extent to which recognition will be accorded by the common law. So where extinguishment of native title is said to have occurred, the common law will not recognise it notwithstanding the subsistence of rights and interests in land according to the traditional law and custom of the relevant Indigenous group ... Extinguishment in the sense of non-recognition is, of course, to be distinguished from the case in which the subject matter of recognition, that is to say the traditional law and custom and the connection to land or waters which it defines, has been abandoned or is no longer the subject of observance by any living persons.¹²³

On What Basis is Land Claimed?

A native title determination application may be made by persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed in relation to the area.¹²⁴

What is the Claim Process?

The process was substantially revised by amendments to the *Native Title Act* which commenced to operate on 30 September 1998. The main steps in the process are, in summary, as follows:

- A native title determination application is filed in the Federal Court and is checked for compliance with the procedural requirements.¹²⁵
- The application is referred to the National Native Title Tribunal, and the relevant state or territory government and Aboriginal/Torres Strait Islander representative bodies are provided with a copy of the application.¹²⁶
- The registration test is applied to the application,¹²⁷ which is then publicly advertised and specified persons and bodies and other potential parties are notified.¹²⁸
- Applications by people who want to be made parties are sent to and determined by the Federal Court.¹²⁹

¹²³ [2001] FCA 414 at para 45.

¹²⁴ *Native Title Act 1993* (Cth), s 61.

¹²⁵ *Native Title Act 1993* (Cth), ss 61, 61A, 62.

¹²⁶ *Native Title Act 1993* (Cth), ss 63, 66.

¹²⁷ *Native Title Act 1993* (Cth), ss 190A–C.

¹²⁸ *Native Title Act 1993* (Cth), s 66.

¹²⁹ *Native Title Act 1993* (Cth), ss 84, 84A.

- In most cases, the court refers the native title application to the tribunal for mediation.
- Mediation is conducted in accordance with the scheme set out in the Act under the supervision of the court.¹³⁰

The purpose of mediation is to assist the parties to reach agreement on some or all of the following matters:

- (a) whether native title exists or existed in relation to the area of land or waters covered by the application;
- (b) if native title exists or existed in relation to the area of land or waters covered by the application:
 - (i) who holds or held native title;
 - (ii) the nature, extent and manner of exercise of the native title rights and interests in relation to the area;
 - (iii) the nature and extent of any other interests in relation to the area;
 - (iv) the relationship between the rights and interests in subparagraphs (ii) and (iii) (taking into account the effects of this Act);
 - (v) to the extent that the area is not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease, whether the native title rights and interests confer or conferred possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others.¹³¹

If the parties agree on those matters, the agreement is referred to the Federal Court, which may make a determination of native title in or consistent with the terms of the agreement.¹³² If the parties do not agree, the tribunal makes a mediation report to the court and the court may have a trial. At any time, the court may refer the whole or part of the proceeding to the tribunal for mediation. The court then decides whether native title exists and may make a determination in the approved form.¹³³

A determination of native title is made in respect of the matters listed for mediation.¹³⁴ In other words, a determination that native title exists in relation to a particular area of land or waters is a determination of:

- (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
- (b) the nature and extent of the native title rights and interests in relation to the determination area; and

¹³⁰ *Native Title Act 1993* (Cth), ss 86B, 136A–G.

¹³¹ *Native Title Act 1993* (Cth), s 86A(1).

¹³² *Native Title Act 1993* (Cth), ss 136G(1), 81, 87, 94A.

¹³³ *Native Title Act 1993* (Cth), ss 136G, 81, 86B(5), 94A.

¹³⁴ *Native Title Act 1993* (Cth), ss 94A, 225.

- (c) the nature and extent of any other interests in relation to the determination area; and
- (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
- (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease, whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.¹³⁵

What Form of Title is Granted?

No title is granted. The fundamental difference between native title regimes and statutory land rights schemes is that, under statutory land rights schemes, groups of Indigenous Australians are granted a fee simple title or lease by the Crown. Native title laws exist to identify what continuing rights Indigenous Australians already have. A successful resolution of a native title application is a declaration of native title, a recognition of what already exists. The Crown grants nothing, as native title is not the Crown's to grant.

What are the Reservations from Native Title?

Because no title is issued, there can be no reservations from it. Rather, a determination of native title will identify not only the nature and extent of the native title interests in relation to the determination area, but also the nature and extent of any other interests in relation to the area, and will describe the relationship between the two sets of rights and interests.¹³⁶

Who Holds Native Title?

If a prescribed body corporate is registered on the National Native Title Register as holding the native title rights and interests on trust, that body is the native title holder in relation to that native title.¹³⁷ In any other case, the person or persons who hold native title is or are the native title holder.¹³⁸ Such a person can be described as the common law holder.¹³⁹

What Restrictions Apply to Dealings with Native Title?

Three general points can be made about dealings with native title. First, the High Court in *Mabo (No 2)* stated that, generally speaking, native title is inalienable, at least outside the local scheme of customary law. According to Justice Brennan:

¹³⁵ *Native Title Act 1993* (Cth), s 225. The determination may deal with the matters in paragraphs (c) and (d) by referring to a particular kind or particular kinds of non-native title interests.

¹³⁶ *Native Title Act 1993* (Cth), s 225.

¹³⁷ *Native Title Act 1993* (Cth), ss 55–60AA, 193, 224(a). See Mantziaris and Martin (2000).

¹³⁸ *Native Title Act 1993* (Cth), s 224(b).

¹³⁹ *Native Title Act 1993* (Cth), ss 56, 253.

Native title, though recognised by the common law, is not an institution of the common law and is not alienable by the common law. Its alienability is dependent on the laws from which it is derived.¹⁴⁰

Justices Deane and Gaudron accepted as 'firmly established' the rule that, as a consequence of the right of pre-emption of the Sovereign, 'alienation outside the native system' is precluded otherwise than by surrender to the Crown but 'changes to entitlement and enjoyment within the local native system' are not precluded.¹⁴¹ Justice Toohey noted that, although it may be debatable whether traditional title may be inalienable, the general inalienability of title constituted a means of protecting Aboriginal people from exploitation by settlers.¹⁴²

Second, the *Native Title Act 1993* states:

This Act recognises and protects native title. It provides that native title cannot be extinguished contrary to this Act.¹⁴³

Native title is recognised, and protected, in accordance with this Act.¹⁴⁴

Native title is not able to be extinguished contrary to this Act.¹⁴⁵

The *Native Title Act* contains detailed provisions for the payment of compensation for certain acts which extinguish or impair native title rights and interests.¹⁴⁶

The *Native Title Act* acknowledges the potential effect of the *Racial Discrimination Act* on the liability for compensation when it states:

45 RDA compensation to be determined under this Act

- (1) If the *Racial Discrimination Act 1975* has the effect that compensation is payable to native title holders in respect of an act that validly affects native title to any extent, the compensation, in so far as it relates to the effect on native title, is to be determined in accordance with section 50 as if the entitlement arose under this Act.

Recovery of compensation

- (2) If the act took place before 1 January 1994¹⁴⁷ and is attributable to the Commonwealth, a State or a Territory, the native title holders may recover the compensation from the Commonwealth, the State or the Territory, as the case requires.

¹⁴⁰ *Mabo v Queensland (No 2)* (1992) 107 ALR 1 at 42.

¹⁴¹ *Mabo v Queensland (No 2)* (1992) 107 ALR 1 at 66.

¹⁴² *Mabo v Queensland (No 2)* (1992) 107 ALR 1 at 151.

¹⁴³ *Native Title Act 1993* (Cth), s 4(1).

¹⁴⁴ *Native Title Act 1993* (Cth), s 10.

¹⁴⁵ *Native Title Act 1993* (Cth), s 11(1).

¹⁴⁶ For discussions of the compensation provisions and some unresolved issues, see NNTT (1999).

¹⁴⁷ The *Native Title Act* commenced to operate on 1 January 1994.

The courts have stated repeatedly that, if native title was extinguished before the *Racial Discrimination Act 1975* commenced operation (on 31 October 1975), it cannot be revived, nor can it be recognised and protected under the *Native Title Act*.¹⁴⁸ As noted earlier, however, the *Native Title Act* provides that in certain circumstances any extinguishment of native title rights and interests may be disregarded.¹⁴⁹

Third, the *Native Title Act* sets out the circumstances in which action may be taken which affects but does not extinguish native title, and provides for the surrender of native title to the Crown.

Special Provisions in Relation to National Parks and Mining

The *Native Title Act 1993* makes relatively few references to national parks, including provision in relation to:

- the effect of the creation of a national park for the purpose of preserving the natural environment of the area;¹⁵⁰
- the creation of a national park management plan for land reserved as a national park before 23 December 1996;¹⁵¹
- alternative state provisions over areas containing a national park.¹⁵²

Potentially, the most significant provision is section 211, which allows the exercise and enjoyment of certain native title rights (such as hunting, fishing and gathering) in specified circumstances even where that activity is prohibited or restricted other than in accordance with a permit or licence or other instrument under a state law. The practical effect of that section is considered later in this paper.

The *Native Title Act* makes extensive provision for exploration and mining (and a range of other future acts) on land where native title has been determined to exist or may exist. It sets out procedures to be followed and provides that, to the extent that a future act affects native title, it will be valid if covered by relevant provisions of the Act, and invalid if not.¹⁵³ The 'right to negotiate' provisions (which apply to such things as certain conferrals of mining rights) form a significant part of the scheme. A large body of case law has developed from decisions of the National Native Title Tribunal (in its role

¹⁴⁸ *Western Australia v Commonwealth* (1995) 183 CLR 373 at 452–54; *Wik Peoples v Queensland* (1996) 141 ALR 129 at 219, per Gummow J; *Yanner v Eaton* (1999) 166 ALR 258 at 269, per Gleeson CJ, Gaudron, Kirby and Hayne JJ, 280 per Gummow J, 301 per Callinan J; *Western Australia v Ward* (2000) 170 ALR 159 at 182, para 77, at 285, para 504, per Beaumont and von Doussa JJ; *Anderson v Wilson* (2000) 171 ALR 705 at 768, para 278, per Beaumont J.

¹⁴⁹ *Native Title Act 1993* (Cth), ss 47–47B, see also s 223(3)–(4).

¹⁵⁰ *Native Title Act 1993* (Cth), s 23B(9A).

¹⁵¹ *Native Title Act 1993* (Cth), s 24JA.

¹⁵² *Native Title Act 1993* (Cth), s 43A.

¹⁵³ *Native Title Act 1993* (Cth), ss 24AA(2), 24OA, 25(4).

as an arbitral body) and the Federal Court.¹⁵⁴ The *Native Title Act* also provides that states and territories may make their own laws as alternatives to the 'right to negotiate' provisions. The alternative provisions recently enacted in Queensland are referred to later in this paper.

Native Title Legislation in Queensland

The Relationship Between the Native Title Act 1993 (Cth) and Queensland Laws

The *Native Title Act* binds the Crown in right of the Commonwealth, each of the states, the Australian Capital Territory and the Northern Territory.¹⁵⁵ It provides, however:

8 Effect of this Act on State or Territory laws

This Act is not intended to affect the operation of any law of a State or a Territory that is capable of operating concurrently with this Act.

Consequently, state laws have had to be brought in line with the federal law to avoid inconsistency with that Act.

References to the *Native Title Act* are made in various Queensland statutes, including the *Aboriginal Land Act 1991*, *Century Zinc Project Act 1997*, *Environmental Protection Act 1994*, *Fossicking Act 1994*, *Land Act 1994*, *Land and Resources Tribunal Act 1999*, *Mineral Resources Act 1989*, *Native Title (Queensland) Act 1993*, *Native Title (Queensland) State Provisions Amendment Act (No 2) 1998*, *Native Title (Queensland) State Provisions Amendment Act 1999*, *Native Title Resolution Act 2000*, *Offshore Minerals Act 1998*, *State Development and Public Works Organisation Act 1971*, *Sugar Industry Act 1997* and the *Torres Strait Islander Land Act 1991*, as well as the Fisheries (East Coast Trawl) Management Plan 1999, Fisheries Regulation 1995 and the Wet Tropics Management Plan 1998.

More significantly, 'native title' is referred to in all of the Queensland statutes just mentioned as well as the *Acts Interpretation Act 1954* and the *Nature Conservation Act 1992*.

The interrelationship of the Commonwealth and state legislation can be seen from the following examples drawn from Queensland legislation.

Section 13A of the *Acts Interpretation Act* states:

- (1) An Act enacted after the commencement of this section affects native title only so far as the Act expressly provides.
- (2) For the purposes of subsection (1), an Act affects native title if it extinguishes the native title rights and interests or it is

¹⁵⁴ For a thematic summary of the cases showing the development of the law, see NNTT(1999), updated versions of which are on the National Native Title Tribunal's website at www.nntt.gov.au.

¹⁵⁵ *Native Title Act 1993* (Cth), s 5.

otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.¹⁵⁶

The *Land Act 1994* provides:

Object

The object of this part is to emphasise that land administered under this Act must be dealt with in a way not inconsistent with the *Native Title Act 1993* (Cwlth) and the *Native Title (Queensland) Act 1993*.

Interaction with native title legislation

- 28(1) Any action taken under this Act must be taken in a way not inconsistent with the *Native Title Act 1993* (Cwlth) and the *Native Title (Queensland) Act 1993*.
- (2) To remove any doubt, it is declared that if native title exists over land, the land may still be dealt with under this Act.
 - (3) However, subsection (2) is subject to subsection (1).

The *Nature Conservation Act 1992* provides:

70F. (3) To remove any doubt, it is declared that the dedication of the land as a forest reserve or any designation of land in the forest reserve as a proposed protected area does not extinguish or affect native title or native title rights and interests in relation to the land.

Property in cultural and natural resources

- 61(1) All cultural and natural resources of a national park (scientific), national park, national park (recovery), conservation park or resources reserve are the property of the State.
- (2) However, if land in a protected area mentioned in subsection (1) was included in a forest reserve immediately before the dedication of the protected area, subsection (1) does not extinguish or affect native title or native title rights and interests in relation to the land.

The *Offshore Minerals Act 1998* provides:

Effect of grant of tenure or special purpose consent on native title

- 43(1) The grant of a tenure or special purpose consent does not extinguish native title in the tenure or consent area.
- (2) While a tenure or special purpose consent is in force over an area, native title in the area is subject to the rights conferred by the tenure or consent.
 - (3) If compensation is payable under the *Native Title Act 1993* (Cwlth), section 23(4) in relation to the grant of a tenure or special purpose consent, the person who applied for the grant must, for section 23(5)(b) of that Act, pay the compensation.

¹⁵⁶ Compare the definition of 'affect' in *Native Title Act 1993* (Cth), s 227.

The interrelationship of State and Commonwealth laws is well illustrated by section 78B of the *State Development and Public Works Organisation Act 1971*, which states:

Relationship with native title legislation

78B(1) For the taking of land under section 78(2) and the payment of compensation for the land taken:

- (a) the process mentioned in section 78(2C) must be carried out in a way that is consistent with the *Native Title (Queensland) Act 1993* and the *Native Title Act 1993* (Cwlth); and
- (b) if the *Native Title (Queensland) Act 1993* or the *Native Title Act 1993* (Cwlth) states a process in relation to the taking or payment that is in addition to the process stated in the *Acquisition of Land Act 1967*, the additional process also applies to the taking or payment; and
- (c) the Land and Resources Tribunal is the independent body for the *Native Title Act 1993* (Cwlth), section 24MD(6B).

It is also interesting to note that the definition of 'native title' in the *Acts Interpretation Act 1954* is slightly different from that in section 223 of the *Native Title Act 1993*. The *Acts Interpretation Act 1954* states in section 36:

'native title' means the communal, group or individual rights and interests of Aboriginal people or Torres Strait Islanders in land or waters if:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal people or Torres Strait Islanders; and
- (b) the Aboriginal people or Torres Strait Islanders, by the laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

Examples of rights and interests

Hunting, gathering and fishing rights and interests.

The practical significance, if any, of the different definitions has yet to be considered.

Queensland Native Title Laws

The *Native Title Act* has always contemplated a role for suitable state and territory bodies to perform functions given to the National Native Title Tribunal so long as the relevant legislation creating or conferring functions on such bodies met standards or criteria set out in the *Native Title Act*.¹⁵⁷

¹⁵⁷ The range of potential roles for the states and territories was highlighted in Prime Minister Keating's second reading speech on the Native Title Bill 1993 (Australia, House of Representatives *Debates* 1993, pp 2878-79) and in Attorney-General Williams' second reading speeches on the Native Title Amendment Bill 1997 (Australia, House of Representatives *Debates* 1997, pp 7891, 7893) and the Native

The Queensland government in 1993 showed considerable enthusiasm for enacting state native title legislation. The *Native Title (Queensland) Act 1993* (Qld) was prepared alongside the Commonwealth legislation, and attached to the Queensland legislation was the Native Title Bill 1993 as passed by the House of Representatives, but not by the Senate. The Queensland Legislative Assembly passed the state law and it was assented to on 17 December 1993, one week before the federal parliament had passed the *Native Title Act* and that Act received the royal assent. The federal Bill was extensively amended in the Senate and hence the *Native Title Act* was significantly different from the Bill attached to the Queensland legislation. Consequential amendments were made to the Queensland legislation in 1994.¹⁵⁸

The intended scope of the *Native Title (Queensland) Act 1993* can be gleaned from the headings of the Parts of the Act.

1. Preliminary
2. Validation and its effects
3. Confirmation of certain rights
4. Queensland Native Title Tribunal and Registrar
5. Recognised and Arbitral Bodies
6. Holding of native title
7. Applications about native title
8. Inquiries and determinations by the Tribunal
9. Provisions about the Tribunal
10. Native Title Register
11. Miscellaneous
12. Interim Provisions
13. Amendment of Acts

But after the 1994 amendments, Parts 4–10, as well as Part 12 and some other provisions, had not commenced operation.

The *Native Title (Queensland) Act* was further amended in 1995, 1997, 1998 (twice), 1999 (twice) and 2000 (as part of the alternative provisions package referred to below). The Act, as amended, is only a remnant of what was proposed. Parts 5–10 and 12–14 were repealed. Its current Parts are:

1. Preliminary
2. Validation and its effects
3. Confirmation of certain rights
4. Confirmation of total or partial extinguishment of native title by particular previous acts
11. Miscellaneous

The Queensland Native Title Tribunal was never established and, apart from matters dealt with under the alternative state provisions (discussed below), most substantial native title matters — including the mediation and determination of claimant applications and the negotiation and registration of

Title Amendment Bill 1997 (No 2) (Australia, House of Representatives *Debates* 1998, p 785).

¹⁵⁸ *Native Title (Queensland) Amendment Act 1994* (Qld).

Indigenous land use agreements — are dealt with under the *Native Title Act*. The *Native Title Act* now:

- provides for the creation of ‘recognised State/Territory bodies’ and ‘equivalent bodies’ under the laws of states and territories;¹⁵⁹ and
- contains detailed provisions enabling a law of a state to provide for alternative provisions to the right to negotiate provisions of the *Native Title Act* in relation to some or all of those acts that are attributable to the state.¹⁶⁰

Alternative Provisions

These have effect instead of the relevant *Native Title Act* provisions, but only if the relevant Commonwealth minister (currently the Attorney-General) determines in writing that they comply with the requirements of the *Native Title Act* and that determination remains in force.

Section 43 of the *Native Title Act* allows a state or territory to have alternative legislation to the Act’s right to negotiate provisions, in relation to some or all of the acts that are attributable to that state or territory. Before the alternative provisions take effect, the Attorney-General must determine that they comply with the criteria set out in the *Native Title Act*. While the determination is in force, the alternative provisions have effect instead of the right to negotiate provisions of the *Native Title Act*.¹⁶¹

The alternative provisions must, in summary:

- contain appropriate procedures for notifying registered native title bodies corporate, representative bodies, registered native title claimants and potential native title claimants about the relevant proposed future act;
- require negotiation in good faith among the persons concerned;
- provide for mediation to assist in settling any dispute regarding the act;
- give registered native title bodies corporate and registered native title claimants the right to object against the act, and make appropriate provisions in relation to them;
- make appropriate provisions about the membership of the body determining the objection;
- make appropriate provisions about the matters that the body must take into account in determining the objection;
- provide that any decision of the body determining the objection may only be overruled on grounds of state or territory interest or of national interest;

¹⁵⁹ *Native Title Act 1993* (Cth), Part 12A.

¹⁶⁰ *Native Title Act 1993* (Cth), ss 43 and 43A.

¹⁶¹ *Native Title Act 1993* (Cth), s 43(1), (2).

- make appropriate provision for compensation for the act.¹⁶²

If the alternative provisions involve the hearing and determination of the objection to a proposed act by a person or body other than the National Native Title Tribunal or a recognised state/territory body, the law must provide for a member of the tribunal or the recognised state/territory body (if any) to participate in that determination.¹⁶³

Section 43A of the *Native Title Act* allows the states and territories to legislate for alternative provisions to replace the right to negotiate over future acts proposed to be carried out on:

- areas of freehold or lease land over which all native title rights and interests have not been extinguished — such as pastoral lease land;¹⁶⁴
- areas reserved in whole or part to be used for public purposes — such as an area containing a national park;¹⁶⁵ and
- areas that are wholly within a town or city.¹⁶⁶

Before those alternative provisions take effect, the Attorney-General must determine that the state or territory alternative provisions comply with criteria set out in the *Native Title Act*.¹⁶⁷ The alternative provisions will be deemed to comply with the Act if, in the opinion of the Commonwealth minister, they, in summary:

- contain appropriate procedures for notifying relevant registered native title claimants, registered native title bodies corporate and representative Aboriginal/Torres Strait Islander bodies about the relevant proposed act;
- provide a right to object to a proposed act insofar as it affects registered native title rights and interests;
- provide a right to be consulted about minimising the act's impact on registered native title rights and interests;
- provide for objections to be heard by an independent person or body;
- allow for judicial review of the decision to do the act; and
- provide that the determination must be complied with unless it is in the interests of the state or territory not to comply with it, and specified procedures have been followed.¹⁶⁸

The Commonwealth minister must also be satisfied that the alternative provisions:

¹⁶² *Native Title Act 1993* (Cth), s 43(2).

¹⁶³ *Native Title Act 1993* (Cth), s 43(2)(h).

¹⁶⁴ *Native Title Act 1993* (Cth), s 43A(2)(a).

¹⁶⁵ *Native Title Act 1993* (Cth), s 43A(2)(b).

¹⁶⁶ *Native Title Act 1993* (Cth), ss 43A(2)(c), 251C.

¹⁶⁷ *Native Title Act 1993* (Cth), s 43A(1)(b).

¹⁶⁸ *Native Title Act 1993* (Cth), s 43A(4).

- provide for compensation for the effect of the act on native title to be payable and for any dispute about compensation to be determined by an independent person or body;¹⁶⁹ and
- provide for the preservation or protection of areas or sites that may be of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions.¹⁷⁰

The Commonwealth minister's determinations under sections 43 and 43A are 'disallowable instruments',¹⁷¹ and hence the determinations are subject to scrutiny and disallowance by either House of federal parliament.¹⁷² If either House passes a resolution disallowing any determination, the determination ceases to have effect.¹⁷³

There is no provision for further scrutiny by the federal parliament of any amended alternative provisions. However, if future amendments of any alternative provisions mean that those provisions no longer comply with the requirements of the *Native Title Act*, the Attorney-General may revoke the original determination.¹⁷⁴

Section 26A of the *Native Title Act* allows the Attorney-General to determine that an act (or class of acts) — principally the right to explore, prospect or fossick which are unlikely to have a significant impact on the land or waters concerned — is an 'approved exploration etc act'. Certain conditions must be satisfied before such a determination is made. The right to negotiate provisions do not apply to such an act.¹⁷⁵

Section 26B allows the Attorney-General to determine that each act in a class of acts done by a state is an approved gold or tin mining act. Again, certain conditions must be satisfied before the determination is made. Once made, the right to negotiate provisions do not apply to such an act.¹⁷⁶

On 21 July 1999, the Queensland parliament passed legislation that provided modified procedures for alluvial gold and tin mining (section 26B provisions) and mining and high impact exploration on pastoral leases (section 43A provisions). The legislation also provided for alternative provisions covering mining and high-impact exploration on all tenures (section 43 provisions) and low impact exploration (section 26A provisions). Having called for and considered submissions in relation to the legislation, the Commonwealth Attorney-General made a total of thirteen determinations in June 2000.

On 30 August 2000, the Senate considered a motion by the Australian Democrats to disallow all thirteen determinations. After a debate lasting more

¹⁶⁹ *Native Title Act 1993* (Cth), s 43A(6).

¹⁷⁰ *Native Title Act 1993* (Cth), s 43A(7).

¹⁷¹ *Native Title Act 1993* (Cth), s 214.

¹⁷² *Acts Interpretation Act 1901* (Cth), s 46A(1)(a)(i).

¹⁷³ *Acts Interpretation Act 1901* (Cth), s 48(4).

¹⁷⁴ *Native Title Act 1993* (Cth), ss 43(3), 43A(9). See Beesley (1999); Neate (2001a).

¹⁷⁵ *Native Title Act 1993* (Cth), ss 26(2)(b), 26A.

¹⁷⁶ *Native Title Act 1993* (Cth), ss 26(2)(c), 26B.

than three hours, the Senate voted 34 to 31 to disallow the six determinations made under section 26B and section 43A of the Act. The motions to disallow the seven determinations made under section 43 and section 26A failed by a vote of 56 to ten.

Amendments were then made to Queensland legislation to make it consistent with the scheme approved by the Senate. The provisions in the Queensland scheme are found in amendments to the *Mineral Resources Act 1989* and the *Land and Resources Tribunal Act 1999*, which commenced operation on 18 September 2000.

Comparing the Land Rights and Native Title Regimes in Queensland

Outcomes to Date

Aboriginal Land Act and Torres Strait Islander Land Act

The schemes created by the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* commenced operation on 21 December 1991. Thus they preceded the native title era by a matter of months, and the commencement of the *Native Title Act 1993* by about two years.

A total of 79 parcels of transferable land have been transferred under the *Aboriginal Land Act* and six parcels of transferable land have been transferred under the *Torres Strait Islander Land Act*.

As noted earlier, areas of land could only be claimed under the state laws if they were declared to be 'claimable land'. The first declarations were made on 12 December 1991. Subsequent declarations were made in May, June and November 1992, March 1994 and June and November 1995, either by order in council or (following amendments of the legislation in 1994) by regulation. To date, 55 parcels of land have been declared to be 'claimable land' and a further 31 parcels of transferred land have been left available for claim. Most of the areas of declared claimable land are on or near Cape York Peninsula. The main exceptions are Lawn Hill National Park (north of Mt Isa) and the Simpson Desert National Park (in the southwest of the state, adjoining the borders of Queensland with the Northern Territory and South Australia). No areas of land in the Torres Strait have been declared to be claimable land.

Claims have been made to 33 of the parcels of claimable land. In the absence of any declarations of claimable land under the *Torres Strait Islander Land Act 1991*, all claims have been made under the *Aboriginal Land Act 1991*.

Land claim hearings have been held in respect of 23 areas, and reports have been written in respect of all but one of those areas.

In every case, the Land Tribunal has found that the claim has been established (on either the ground of traditional affiliation or historical association, or on both grounds) and, in each case where the state government has made a decision on the recommendation, governments have accepted those recommendations.

Few grants of land, however, have been made. Fee simple titles were granted in respect of one parcel of unallocated state land near Birthday Mountain on 25 November 1997 and to nine islands on 21 September 2000.

Most of the claims have been to areas of national park land, including the largest national parks in the state. No grants of national park land have been made, apparently because of threshold issues between the claimants and the state about the statutorily mandated leaseback arrangements.

There are thus a range of issues about the composition of boards of management, the contents of plans of management and the leaseback arrangements which have not yet been addressed.¹⁷⁷

Although to date little of the land claimed and recommended for grant has been granted, the processes leading to a possible grant may have themselves conferred some benefit on the claimants and the broader community. For example:

- claimants have had opportunities to explain to the broader community, in a public and formal way, the nature and extent of their links to each other and to the claimed land;¹⁷⁸
- procedures have been developed to take evidence on or near the claimed land¹⁷⁹ which allow the most direct and extensive evidence to be given;
- procedures have been developed to allow culturally sensitive evidence to be given subject to restrictions on access to and use of that information¹⁸⁰, and extensive reasons have been given for rulings to impose or not impose such restrictions;
- reports on land claims have made publicly available a range of information about the history, social organisation, and Aboriginal traditions of various groups in Queensland;

¹⁷⁷ For a discussion of the practical and policy issues, see Land Tribunal (2001), paras 1146–1225.

¹⁷⁸ A similar observation was made by Merkel J of the Federal Court of Australia in the course of his judgment in a native title case when he stated:

‘There has been much misunderstanding and disinformation in the Australian community about native title. Although the evidence in the present case did not produce any new or startling revelations about traditional Aboriginal society, in telling *their* story the Rubibi applicants have articulated a cogent, rational and historically sound exposition of why a fair and just legal system does not refuse to recognise the unextinguished native title that they have established has existed since prior to European settlement of Australia. In a small but significant way that exposition has the capacity to better enable the Australian community to understand why the common law and the Australian parliament have recognised and protected the native title held by Indigenous persons in Australia.’ *Rubibi Community v Western Australia* [2001] FCA 607 at [98].

¹⁷⁹ See *Aboriginal Land Act 1991* (Qld), s 104.

¹⁸⁰ See *Aboriginal Land Act 1991* (Qld), ss 110, 111.

- the claim process has provided an opportunity for some claimant families who had been long separated from each other to be reunited and for social links to be reinforced; and
- the claim process has provided an environment in which traditional knowledge about land can be passed on by knowledgeable elders to appropriate members of the groups, thus maintaining and strengthening links to land at times and in ways that would not otherwise have occurred.¹⁸¹

Native Title Act

By contrast, as at 10 August 2001 there were 203 active claimant applications under the *Native Title Act* to areas of land or waters in Queensland. They constituted 34 per cent of the 590 claimant applications throughout Australia — more than any other state or territory. The places where most of the other applications exist are the Northern Territory (136) and Western Australia (127).

To date, 26 determinations of native title have been made in respect of 28 claimant applications. Queensland is also the place where most determinations of native title have been made. The first determination of native title was the High Court's decision in *Mabo (No 2)*. Since then, there have been eighteen determinations of native title under the *Native Title Act* in Queensland, all of them by consent. Most of the consent determinations (fourteen) have been to islands in the Torres Strait, the others being in far north Queensland — at Hopevale, near Cairns, on western Cape York (part of the Wik people's application area) and near Herberton. Some matters are part-heard, or are listed for trial, but indications to date are that many matters will be resolved by agreement of the parties rather than by the Federal Court.

Choosing Which Regime to Invoke

Native title is different from statutory land rights titles. Under statutory land rights schemes, groups of Indigenous Australians are granted a fee simple title or a lease by the Crown. By contrast, native title laws exist to identify, recognise and protect what already exists. The Crown grants nothing, as native title is not the Crown's to grant.

It is sometimes the case that Aboriginal people can choose whether to proceed under the *Aboriginal Land Act 1991* or the *Native Title Act 1993* in respect of areas of land in Queensland. Which is the preferable course of action? There is no clear or universal answer. There are, however, various factors to be taken into account.

Aboriginal Land Claims

In making land claims under the *Aboriginal Land Act 1991*, claimants know:

- what they have to prove to establish their claim;
- how to establish their claim; and

¹⁸¹ See, for example, Land Tribunal (2001), paras 930–931, 942.

- what they will get if their claim succeeds.

The legislation sets out the criteria which have to be established for a claim to succeed on one or more grounds. In other words, there is a statutory checklist. The historical depth of the evidence necessary to prove traditional affiliation or historical connection to the claimed land may — but need not be — as great as that apparently required to demonstrate native title.¹⁸²

The procedural and substantive aspects of claims are now fairly well settled, and can readily be ascertained from the legislation, the Land Tribunal's Practice Directions and published land claim reports and annual reports. Claimants and their advisers would know (or could readily find out) what is required by way of a claim book, the procedures to be followed before and during a tribunal hearing, the content and forms of evidence that the tribunal will accept, and the interpretation of the statutory criteria that differently constituted Land Tribunals have adopted.¹⁸³

The form of freehold title or lease that would be granted if a claim succeeded, and the special conditions which would apply to such an estate or interest in land, are set out in the *Aboriginal Land Act* and, in the case of national park land, the *Nature Conservation Act 1992* (Qld). Where land was subject to native title interests immediately before becoming Aboriginal land, then those interests continue in force after the grant.¹⁸⁴ Thus any native title rights and interests continue after the grant, irrespective of whether the grantees are the native title holders.

It is usual for claims to be made under the *Aboriginal Land Act* on the basis that the claims are without prejudice to any native title rights that the claimants might have in relation to the land. The Land Tribunal has noted such assertions and has expressly made no determination or comment as to whether native title exists in relation to claimed land. Rather, the Land Tribunal has observed that claims made under the *Aboriginal Land Act*, even those made solely on the ground of traditional affiliation, are not native title claims. They are claims made pursuant to a statutory scheme in respect of land which has been declared to be claimable land. The Land Tribunal has to decide, by reference to statutory criteria, whether each claim has been established. It is not the function of the tribunal to determine whether particular Aboriginal people have or do not have native title. Claimants who succeed in proving a claim on the ground of traditional affiliation under the Act may also be able to establish that they have native title to the land, but the fact that the statutory claim is established may not be sufficient to prove native title. In any case, the

¹⁸² Native title needs to be established as at the relevant date(s) on which the Crown assumed sovereignty in the relevant part(s) of Australia. For a discussion of some of the practical issues facing courts and parties, see *Mason v Tritton* (1994) 34 NSWLR 572 at 584, 586, 588–89, per Kirby J. See also Neate (1997).

¹⁸³ For an overview, see Land Tribunal (2001), Ch 2 and references to previous reports.

¹⁸⁴ *Aboriginal Land Act 1991* (Qld), s 71; *Torres Strait Islander Land Act 1991* (Qld), s 68.

legal issues and means by which they are resolved are separate from one another.¹⁸⁵

Native Title Applications

Applicants under the *Native Title Act 1993* have less certainty about:

- what they have to prove to establish their claim;
- how to establish their claim; and
- what they will get if their claim succeeds.

The statutory definition of native title right and interests quoted earlier combines references to the traditional laws and customs of the group and reference to what the common law recognises native title rights and interests to be.¹⁸⁶ There is no statutory checklist of the type commonly found in land rights legislation.

The range of possible procedural steps involved in the resolution of an application are set out in the *Native Title Act*, but not all of them may be followed in a particular application. Which steps are taken will be influenced by whether the parties to the proceeding can reach agreement in respect of some or all of the issues and, if they can, when such agreement is made. Along the way, the applicants may need to produce a connection report outlining the nature and extent of their connection to the area for the purpose of mediating with the state¹⁸⁷ (and, possibly, other parties). Depending on whether and when agreement is reached, the matter:

- may not go to mediation; or
- may be mediated by the National Native Title Tribunal; or
- may be mediated and litigated; or
- may be sent straight to trial without mediation; or
- may be sent back to the National Native Title Tribunal for mediation after a trial has commenced.¹⁸⁸

If a native title claimant application succeeds, there will be a judicial determination of native title in the form outlined earlier. In summary, it will be a determination of:

- who holds the common or group rights comprising the native title;
- the nature and extent of the native title rights and interests in relation to the determination area;

¹⁸⁵ See Land Tribunal (2001), para 1065 and references to previous reports.

¹⁸⁶ *Native Title Act 1993* (Cth), s 223(1). For a discussion of the different views of the meaning of s 223(1)(c) of the *Native Title Act 1993* (Cth) see *Yorta Yorta Aboriginal Community v Victoria* (2001) 180 ALR 655 at 683–85, per Branson and Katz JJ.

¹⁸⁷ See *Native Title Services* (1999).

¹⁸⁸ See *Native Title Act 1993* (Cth), ss 86B, 86C.

- the nature and extent of any other interests in relation to the determination area;
- the relationship between the various types of rights and interests; and
- in certain circumstances, whether the native title rights and interests confer possession, occupation, use and enjoyment of the land or waters on the native title holders to the exclusion of all others.¹⁸⁹

That list suggests — and the determinations made to date demonstrate — that the contents of such determinations will vary from place to place and group to group. The resolution of some applications by consent of the parties is also contingent on a range of other agreements being reached, including Indigenous land use agreements.¹⁹⁰

Symbolic Considerations

When comparing the alternative schemes that may operate in respect of some areas of land in Queensland, it should be remembered that Indigenous Australians might also assess the respective merits of each scheme by reference to symbolic factors.

A land claim will be successfully resolved if the state grants a free simple title (or a lease) to the relevant group. A native title application will be successfully resolved if there is a determination that members of the group have native title rights and interests that they have inherited from their forebears. The state grants nothing. Rather, the general law recognises pre-existing rights.

In summary, in those (relatively few) areas where people have a choice about which way to proceed, there will be legal, procedural and symbolic factors to take into account when making that decision.

Claims to Neighbouring Areas or the Same Land Under Both Regimes

Some areas of claimable land may not be susceptible to a native title claimant application because previous grants of title have extinguished native title. If a tenure history shows, for example, an earlier grant of fee simple title then, on the basis of the High Court's decision in *Fejo* and relevant provisions of the *Native Title Act 1993*, native title has been extinguished. The fact that the land is currently unallocated state land or national park land would not mean that native title has revived.¹⁹¹

To date, most of the claimable land in Queensland has only been subject to *Aboriginal Land Act* claims. A report in favour of a group of claimants to an area of claimable land may be of some use to the parties in negotiations about neighbouring areas of land, particularly if the same people have lodged a native title claimant application over the other areas and the findings of fact in the Land Tribunal's report are relevant.

¹⁸⁹ *Native Title Act 1993* (Cth), s 225.

¹⁹⁰ See Neate (2001b).

¹⁹¹ See also *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 180 ALR 91.

If such a native title application is not resolved by agreement, the Federal Court is empowered:

- to receive into evidence the transcript of evidence in any other proceedings before a body such as the Land Tribunal, and draw any conclusions of fact from that transcript that it thinks proper;
- to adopt any recommendation, finding, decision or judgment of any such a body.¹⁹²

There are instances — as yet unresolved — where applications have been made by Aboriginal people under the *Aboriginal Land Act* and the *Native Title Act* in respect of the same area. The clearest example is Lawn Hill National Park. The native title application (a consolidation of various applications by the Waanyi people) is still in mediation before the National Native Title Tribunal. The Aboriginal land claim(s) have yet to be heard by the Land Tribunal. If both sets of proceedings go through to completion, it remains to be seen whether:

- either or both sets of proceedings will be successful; and
- if both sets of proceedings are successful, the group in respect of whom title is granted under the *Aboriginal Land Act* is the same group as the native title holders identified in the determination of native title.

An Interim Assessment

In practical terms, the native title regime has assumed greater significance than the land claim process for the resolution of Indigenous peoples' assertions of traditional rights to land in Queensland. The explanation is simple enough. The only land that can be claimed under the statutory land rights scheme are areas of land within certain categories that have been declared to be 'claimable land'. The government controls what areas of land are available for claim. Despite the potential for declarations across the state, and for reasons best known to successive Queensland governments, such declarations have been confined almost entirely to land in the Cape York area. Because native title applications can be made to a broader range of categories of land, and because 'claimable land' is located in the traditional areas of only some groups of Aboriginal people, many groups have no choice but to proceed under the *Native Title Act* if they wish to obtain legal recognition of their traditional rights and interests.

The potential operation of the *Aboriginal Land Act* and the *Torres Strait Islander Land Act*, however, has not been exhausted. More land could be made claimable or could be granted, either independently of the native title process or as part of a package to settle some native title proceedings.

¹⁹² *Native Title Act 1993* (Cth), s 86. On the possible use of restricted evidence before the tribunal, see Federal Court Rules O 78 r 36.

When Both Laws Apply: Some Outstanding Issues

As noted earlier, the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* were enacted before the decision of the High Court in *Mabo (No 2)* and before the *Native Title Act 1993* commenced operation. Although aspects of the state legislation have been amended in light of native title laws, the state schemes are understandably different from native title laws.

Four early issues arising from the concurrent operation of a land rights regime and native title laws over the same areas of land are:

- Does the grant of a fee simple title under a land right law extinguish native title?
- Whose rights prevail where there is a conflict between the beneficiaries of a land rights claim and native title holders?
- Which mining regime applies to the land?
- What law governs the management of national park land?

Other issues may include how (if at all) land holding bodies under state laws relate to native title corporations.¹⁹³

Freehold Title

As a general rule, the grant of freehold title to land extinguishes native title. What if the freehold has been granted to Aborigines or Torres Strait Islanders under land rights legislation?

In *Pareroutja v Tickner*,¹⁹⁴ the Full Federal Court considered the effect of a grant under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The court held that 'when grants of land to which there is native title are made to Land Trusts under the *Land Rights Act*, the native title is not extinguished; and such grants are not inconsistent with the continued existence of native title to the land'.¹⁹⁵ Although an application to the High Court for special leave to appeal was refused, in delivering the court's decision on that application, Chief Justice Mason stated 'we are not to be taken as necessarily agreeing with the conclusions of the Full Court that the grant of an estate in fee simple to a Land Trust under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) is consistent with the preservation of native title to the land the subject of that grant'.

In Queensland, the legislation was amended to provide that, if land is subject to native title interests immediately before being granted under the *Aboriginal Land Act 1991* or the *Torres Strait Islander Land Act 1991*, the native title interests continue in force.¹⁹⁶

¹⁹³ See some discussion in Mantziaris and Martin (2000).

¹⁹⁴ (1993) 42 FCR 32; 117 ALR 206.

¹⁹⁵ (1993) 42 FCR 32 at 40, 41–43; 117 ALR 206 at 214, 215–18.

¹⁹⁶ *Aboriginal Act 1991* (Qld), ss 33, 71; *Torres Strait Islander Land Act 1991* (Qld), ss 31, 68. The *Aboriginal Land Act 1991* defines 'interest' in relation to land to mean, among other things, 'a right, power or privilege over, or in relation to, the land' (s 3) and 'native title interests' are the communal, group or individual 'rights

Whose Rights Prevail?

Where native title rights survive the grant of title or a lease, there may be issues about whether the rights conferred on the beneficial owners of the land are consistent with the rights held by native title holders. If the beneficial owners of land under a statutory land rights scheme are the same as the native title holders, there may be few if any practical issues. If, however, land is granted for the benefit of people who are not native title holders or who are in a differently constituted group from the native title holders, issues may emerge if decisions made under the statute conflict with the exercise of native title rights and interests.

Mining Laws

As noted earlier, the *Aboriginal Land Act* and the *Torres Strait Islander Land Act* provide for the *Mineral Resources Act 1989* (Qld) to apply to transferable land, Aboriginal land or Torres Strait Islander land that is or was transferred land and certain other categories of land as if that land were a reserve within the meaning of that Act.¹⁹⁷ The *Mineral Resources Act* also has extensive provisions, many of them inserted in 2000, regarding exploration and mining on land where native title exists.

That Act and others, including the *Land and Resources Tribunal Act 1999* (Qld), were amended so that the alternative state provisions to the *Native Title Act* could apply in Queensland from 18 September 2000. The Land and Resources Tribunal was established to administer key provisions of that scheme¹⁹⁸ — although, in relation to certain native title matters, that Tribunal operates closely with (and must include a member of) the National Native Title Tribunal.¹⁹⁹

National Park Management

As noted earlier, the *Aboriginal Land Act* and *Torres Strait Islander Land Act* provide, together with the *Nature Conservation Act 1992*, for some national parks to be claimed and granted on conditions involving a perpetual leaseback to the state, and a plan of management and a board of management on which the relevant Indigenous people will be represented.

Significant practical issues may arise where grants of national park land are to be made, and lease back and plan of management negotiations are undertaken in relation to land where native title rights might continue to exist. The matter was considered in a recent report by the Land Tribunal on land claims to the Mungkan Kandju National Park northwest of Coen in far north Queensland.²⁰⁰ The tribunal noted a history of use by the claimants of natural

and interests' of Aboriginal people in land or waters if (among other things) the 'rights and interests are possessed under Aboriginal tradition' (s 5).

¹⁹⁷ *Aboriginal Land 1991* (Qld), s 87; see also ss 131–32; *Torres Strait Islander Land Act 1991* (Qld), s 84; see also ss 128–29.

¹⁹⁸ See Schweikert (1999).

¹⁹⁹ See *Native Title Act 1993* (Cth), s 43, *Land and Resources Tribunal Act 1999* (Qld), ss 39–45. See also NNTT (2001).

²⁰⁰ Land Tribunal (2001), paras 1181–89.

resources in the area. In addition to hunting and fishing, claimants spoke about the use of vines, grass, resins and trees for traditional purposes, such as making spears, didgeridoos, woomeras and shelters, and about cutting trees for sugarbag. The Tribunal was shown trees on the claim area that had been used as sources of wood for various implements. There was a clear desire by the claimants to hunt and fish and use various natural resources of the land and watercourses.

Hunting and fishing are regulated by the *Nature Conservation Act 1992* (Qld) and the *Nature Conservation Regulation 1994* (Qld). The Act provides that a person must not take, use, keep or interfere with a natural resource of a protected area other than under, for example, a licence, permit or other authority issued or given under a regulation.²⁰¹ The Regulation provides, among other things, that the chief executive may grant an Aboriginal tradition authority which may authorise an individual to take, use, keep or interfere with a natural resources of a protected area under Aboriginal tradition.²⁰²

Where native title exists, however, section 211 of the *Native Title Act* will be relevant. That section provides:

211 Preservation of certain native title rights and interests

Requirements for removal of prohibition etc. on native title holders

(1) Subsection (2) applies if:

- (a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3)); and
- (b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and
- (ba) the law does not provide that such a licence, permit or other instrument is only to be granted or issued for research, environmental protection, public health or public safety purposes; and
- (c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.

Removal of prohibition etc. on native title holders

- (2) If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:
- (a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and
 - (b) in exercise or enjoyment of their native title rights and interests.

²⁰¹ *Nature Conservation Act 1992* (Qld), s 62.

²⁰² *Nature Conservation Regulation 1994* (Qld), ss 28–30.

Note: In carrying on the class of activity, or gaining the access, the native title holders are subject to laws of general application.

Definition of class of activity

- (3) Each of the following is a separate class of activity:
- (a) hunting;
 - (b) fishing;
 - (c) gathering;
 - (d) a cultural or spiritual activity;
 - (e) any other kind of activity prescribed for the purpose of this paragraph.

The effect of that section has been judicially considered, primarily by the High Court in *Yanner v Eaton*.²⁰³ That case concerned the operation of the *Fauna Conservation Act 1974* (Qld) which was repealed by the *Nature Conservation Act 1992* (Qld). For present purposes, it is sufficient to note that the majority of the court held that the *Fauna Conservation Act* did not extinguish certain native title rights and interests. Accordingly, by operation of section 211(2) of the *Native Title Act* and section 109 of the Australian Constitution, the *Fauna Conservation Act* did not prohibit or restrict a native title holder from hunting or fishing for the crocodiles he took for the purpose of satisfying personal, domestic or non-commercial communal needs.²⁰⁴

In those claimable national parks where native title exists, the statutory land rights scheme needs to be administered in light of section 211 of the *Native Title Act* as interpreted by the High Court in *Yanner v Eaton* and as amended in 1998.²⁰⁵

Conclusion: An International Perspective on a Domestic Issue

Most of this paper has focused on domestic legal issues in relation to the recognition and protection of Indigenous Australians' traditional rights and interests in land or waters. The Australian Constitution, federal and state legislation, and the common law are essentially domestic in character. International law and international legal developments, however, are significant.

First, as noted earlier, the initial common law recognition of native title in the *Mabo (No 2)* case was influenced by developments in international law as well as the state of the domestic law in other countries where Aboriginal title had been recognised.

²⁰³ (1999) 201 CLR 351; 166 ALR 258.

²⁰⁴ (1999) 201 CLR 351; 166 ALR 258 at para 40, per Gleeson CJ, Gaudron, Kirby and Hayne JJ. For a discussion of these issues before the decision in *Yanner v Eaton*, see Berry (1995).

²⁰⁵ For example, s 211 does not override laws that completely prohibit certain activities, or that regulate activities by licence, permit or other instrument only for research, environmental protection, public health or public safety purposes: s 211(1)(ba).

Second, the enactment in domestic law of the *Racial Discrimination Act 1975* (Cth) was dependent on, and an exercise of, the federal parliament's power to make laws with respect to external affairs. The domestic legislation gives effect to the International Convention on the Elimination of All Forms of Racial Discrimination. That convention and the *Racial Discrimination Act* have been considered in judicial decisions about land rights and native title legislation.

Third, in more recent years, reference to the International Convention on the Elimination of All Forms of Racial Discrimination has been made as the basis of critically assessing the adequacy of the 1998 amendments to the *Native Title Act*. Australia is obliged to provide reports every two years under the Convention to the Committee on the Elimination of Racial Discrimination (CERD). In recent years, CERD has been critical of, and has raised concerns about, some of the 1998 amendments to the *Native Title Act*.²⁰⁶ In its decisions 2(54) (March 1999) and 2(55) (August 1999), CERD stated that 'the amended Act appears to create legal certainty for governments and third parties at the expense of Indigenous title', and noted four areas in which the *Native Title Amendment Act 1998* (Cth) 'discriminates against Indigenous title-holders':

- the 'validation provisions';
- the 'confirmation of extinguishment' provisions;
- the primary production upgrade provisions; and
- restrictions concerning the right of Indigenous title holders to negotiate non-Indigenous land uses.²⁰⁷

Having considered reports and submissions by the Australian Government, the Committee expressed 'concern ... at the unsatisfactory response' to those decisions and at 'the continuing risk of further impairment of the rights of Australia's Indigenous communities'.

The issue was also the subject of a special inquiry and report by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund,²⁰⁸ and is analysed in reports by the Aboriginal and Torres Strait Islander Social Justice Commissioner.²⁰⁹ It is not the purpose of this paper to enter into this debate. It is important to acknowledge, however,

²⁰⁶ For the text of some relevant documents, including from the Australian government, see CERD (1999); CERD (2000); Hoffman (2000).

²⁰⁷ For a brief discussion of these matters, see McIntyre (1999); see also Nettheim (2001).

²⁰⁸ See Joint Committee on Native Title and ATSLF (2000). For the provisions under which the committee was established and conferring its duties, see *Native Title Act 1993* (Cth), ss 204–7.

²⁰⁹ See most recently *Native Title Report 2000*, HREOC. The commissioner is required by s 209 of the *Native Title Act 1993* (Cth) to report annually to the federal Attorney-General on the operation of the Act and the effect of the Act on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders.

that the debate is occurring, and that Australia's performance — at a federal and state or territory level — is examined within formal international processes.

Fourth, other international instruments could influence Australian law.²¹⁰ If the nation states of the international community adopt an international Declaration on the Rights of Indigenous Peoples, and if the Australian Parliament were to legislate consistently with that instrument, such legislation may affect the development of Australian law on Indigenous land issues.

Finally, Australian leaders have been aware for decades that the way in which this nation deals with Indigenous issues (including land issues) is a matter of international interest and one on which other nations can and do judge Australia.²¹¹ In the 1972 federal election campaign, for example, ALP leader and future prime minister Gough Whitlam said that his government would 'legislate to give Aborigines land rights because all of us as Australians are diminished while the Aborigines are denied their rightful place in this nation'. He continued:

Let us never forget this: Australia's real test as far as the rest of the world, and particularly our region, is concerned is the role we create for our own Aborigines. In this sense, and it is a very real sense, the Aborigines are our true link with our region. More than any foreign aid program, more than any international obligation which we meet or forfeit, more than any part we may play in any treaty or agreement or alliance, Australia's treatment of her Aboriginal people will be the thing upon which the rest of the world will judge Australia and Australians — not just now, but in the greater perspective of history ... The Aborigines are a responsibility we cannot escape, cannot share, cannot shuffle off; the world will not let us forget that.²¹²

A decade after the *Aboriginal Land Act* and the *Torres Strait Islander Land Act* commenced operation, and more than seven years after the *Native Title Act* commenced, Queensland is the centre of much activity directed at resolving various traditional claims to areas of land and waters and associated use and access issues. Some land claims and native title applications have been determined, in part or in whole. Much remains to be done.

The issues raised by each application affect more than the claimant group and other parties to the proceedings. There is a wider community interest in their resolution. Formally and informally, the eyes of the international community are on us. The challenges are great and varied. Meeting them requires more than technical knowledge or forensic legal skills. Such knowledge and skills, together with goodwill, a capacity to think and relate biculturally, practical common sense and a generosity of spirit, can help all involved to achieve just and enduring outcomes.

²¹⁰ For example, International Labor Organisation Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989).

²¹¹ See, for example, Keating (2000); also Knightley (2000), p 315.

²¹² Quoted in Whitlam (1997), p 187.

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