Chapter Six

The *Native Title Act* at Work

Chris Humphry

The *Native Title Act* A Response to *Mabo*

The *Native Title Act* was the Federal Parliament's response to the decision of the High Court in *Mabo v Queensland (No. 2)*.(1) The preamble to the Act records that since colonisation Aboriginal people and Torres Strait Islanders have been progressively dispossessed of their lands, largely without compensation and that the *Native Title Act* is intended to rectify past injustices.

Accordingly, the expressed objects of the *Native Title Act* are to:

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

(2) establish a process and standards for future dealings affecting native title;

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

(4) provide for the validation of previous actions, such as title grants, which may be invalid because of their effect upon native title (section 3).

The *Native Title Act* establishes various processes. Two are central to the operation of the Act:

***** applications for the determination of native title or for compensation for impairment or extinguishment of native title (part 3, division 1);

***** applications relating to the grant of mining and exploration titles, and the compulsory acquisition of land for non-government purposes which affect native title (referred to as "right to negotiate applications") (part 3, division 2).

Workability

The *Native Title Act* attempts to find a balance between native title interests in land and the interests of the community as a whole in the use and development of land and resources. However, the Act is claimed to be unworkable by State and Territory governments, Aboriginal groups and industry alike.

The Western Australian Government, in particular, argued from the outset that the Act would impact mostly in Western Australia, because of the large areas of land open to claim and the high level of mining and resources activity in that State. Indeed, one of the bases of the Western Australian constitutional challenge to the *Native Title Act* (2)was that the impact upon land and resources management would impair the capacity of Western Australia to function as an entity within the federation, contrary to the principle described in *Melbourne Corporation v Commonwealth*.(3)

Three aspects are central to government concerns.

First, the inflexibility of the way in which the *Native Title Act* regulates all actions, particularly government land dealings, which may affect native title (these are called "future acts"). Native title holders are given the same rights and protection as if they held freehold title to the land. Generally an action can only be undertaken on land in respect of which any form of native title rights exist, whether they are exclusive rights to land or some lesser form of co-existent rights, if the action could also be undertaken on freehold land.

Furthermore, in the case of proposals to grant mining titles or to compulsorily acquire land for non-government purposes, native title holders are given a special right to negotiate in relation to the proposals and, if agreement cannot be reached, to have the National Native Title Tribunal or a State arbitral body decide whether the proposals should proceed.

Secondly, in order to provide interim protection pending determination of a native title claim, once a claim is lodged and registered with the Tribunal the claimants are given the same rights as if they had proved their claim, irrespective of the ultimate outcome of the claim. The registration of a claim operates as a form of statutory injunction.

In view of the pivotal link between registration of claims and future act rights, the *Native Title Act* provides an acceptance process which was intended to screen unjustified claims. However, the process is largely ineffective for this purpose.

Thirdly, while most public attention has focussed on land management issues, it is becoming increasingly apparent that the resolution of native title claims will involve significant practical difficulties. These include questions of proof and extinguishment of native title. However, the potential impact of claims upon the public and private rights of the wider community within claim areas has emerged as a major issue, and is drawing large numbers of public and private parties into the claims process.

Before examining the workings of the *Native Title Act*, particularly in the Western Australian context, it is helpful to review the common law principles upon which the Act operates.

The Common Law

Native Title

In *Mabo No. 2* the High Court decided that the common law of Australia recognises and protects a form of native title which reflects the entitlements of Aboriginal people and Torres Strait Islanders to their traditional lands in accordance with their traditional laws and customs.

Native title is recognised by, but is not derived from, the common law. The content and nature of native title are determined according to the traditional laws and customs of Aboriginal people, which must themselves be the subject of proof.(4) The incidence and content of native title will vary from place to place and group to group.

In order to prove the existence of native title it must be shown that:

(1) the applicants and their ancestors have been an organised and identifiable community since the time of British sovereignty;(5)

(2) membership of the community depends upon biological descent and mutual recognition of a person's membership by that person and by those in authority;(6)

(3) there is a continuing connection with the claimed land in accordance with the traditional laws and customs of the community which can be traced to the time of British sovereignty;(7)

(4) the community continues to substantially observe traditionally based laws and customs from which entitlements to land are derived;(8)

(5) the connection with land involves a level of use and occupancy.(9)

Extinguishment of Native Title

In *Mabo No. 2* the High Court also held that native title could be extinguished, particularly by legislative and executive actions inconsistent with the continued right to enjoy native title.

The action must demonstrate a clear and plain intention to extinguish native title, although it is not necessary to expressly identify the extinguishing effect of the action provided the intention is clear. In fact, extinguishment will invariably occur by necessary implication.

The High Court identified two ways in which native title may be extinguished by executive action. These are:

(1) A Crown grant vesting in the grantee an interest in the land which is inconsistent with the continued right to enjoy native title in respect of the same land;(10) and

(2) A valid appropriation or reservation and use of land by the Crown for a public purpose; reservation without actual use for the public purpose may not be sufficient action to extinguish native title.(11)

The grant of interests which include a right of exclusive possession, such as freehold or leasehold titles (other than titles granted to or for the benefit of Aboriginal communities),(12) and the construction of public works or use of land for public purposes which are inconsistent with native title will generally extinguish native title. The grant of lesser interests (such as a mineral exploration licence) and the reservation of land for purposes not inconsistent with continued native title may not extinguish native title.

Pastoral Leases

A contentious issue is whether the grant of a pastoral lease extinguishes native title. The question was not considered directly in *Mabo No. 2*, and as pastoral leases occupy approximately 42 per cent of Australia the issue has become a major controversy and cause of uncertainty. Successive federal Governments have refused to legislate to resolve the uncertainty, preferring to leave the matter to the courts.

Pastoral leases in Australia have been granted subject to varying terms and conditions amongst the different States and Territories. In Western Australia, South Australia and the Northern Territory pastoral leases have generally been granted subject to a reservation in favour of access by Aboriginal people for sustenance purposes. In Western Australia this reservation was omitted in relation to pastoral leases granted between 30 December, 1932 and 21 January, 1935.

In Queensland and New South Wales pastoral leases have generally been issued without a reservation in favour of Aboriginal access. There are virtually no pastoral leases in Victoria and Tasmania.

In *Mabo No. 2* the High Court considered the effect of a lease granted for 20 years over the whole of the Murray Islands for the purpose of establishing a sardine factory. The lease was subject to a condition that the lessee would not interfere with the Meriam people's use of their gardens and plantations on the land, nor with their fishing on adjacent reefs. Justice Brennan(13) (with whom Mason CJ and McHugh J agreed) and Justice Dawson(14) concluded that, assuming the lease was valid, it had extinguished native title in respect to the subject land. The reservation in favour of the Meriam people did not affect the extinguishing nature of the lease. On the other hand, Deane and Gaudron JJ considered that the reservation in favour of the Meriam people prevented any otherwise extinguishing effect upon native title.(15)

Native title claimants argue that a pastoral lease should not be characterised as a true lease. Pastoral leases often extend over vast areas of land and contain a variety of reservations not

normally found in a lease. Furthermore, there is a history of Aboriginal people continuing to occupy or access pastoral lands long after pastoral leases were granted. Accordingly it is argued that the grant of a pastoral lease should not be regarded as evidencing an intention to extinguish native title.

This issue was first considered by Justice French, sitting as President of the National Native Title Tribunal in *Waanyi No. 2*,(16) who decided that a Queensland pastoral lease issued without a reservation in favour of Aboriginal access extinguished native title. This decision was confirmed on appeal by a 2:1 majority of the full Federal Court in *North Ganalanja Aboriginal Corporation v Queensland.(17)* Justice Drummond of the Federal Court reached the same conclusion on 29 January, 1996 in *Wik Peoples v Queensland*.(18)

The High Court overturned the *North Ganalanja* decision on 8 February, 1996.(19) Although the decision concerned a procedural matter, it was based on the finding that it was fairly arguable that a pastoral lease without a reservation in favour of Aboriginal access did not extinguish native title. However, the Court declined to decide the pastoral lease question in those proceedings. An appeal against the *Wik* decision is listed for hearing by the High Court on 11 June, 1996 when it is expected that the question will be dealt with.

In both the *North Ganalanja* and *Wik* decisions, the Federal Court considered pastoral leases which did not contain a reservation in favour of access by Aboriginal people. Even if the High Court upholds Justice Drummond's view of the extinguishing effect of pastoral leases in *Wik*, different considerations may apply in Western Australia, South Australia and the Northern Territory because of the pastoral lease access reservations operating in those jurisdictions.

Native Title Claims Under the *Native Title Act*

Acceptance of Claims

The *Native Title Act* provides that persons claiming to hold native title may lodge an application for determination of native title with the Native Title Registrar (sections 13, 61 and 62). If the application complies with the procedural requirements of section 62, the Registrar must accept the application unless the Registrar is of the opinion that the application is frivolous or vexatious or *prima facie* cannot be made out. In that event the application is referred to a presidential member of the Tribunal. If the presidential member agrees with the Registrar, the claimant is to be given an opportunity to make submissions. The presidential member must then, depending on the opinion formed, direct the Registrar to either accept or reject the claim (section 63).

Parties

Following acceptance, notice of the application must be given to any Commonwealth, State or Territorial Minister concerned with an area covered by the application, to any person holding a registered proprietary interest in the area and to the public (section 66). Any person notified may apply to become a party "in relation to the application", as can any other person whose "interests may be affected by a determination" (section 68).

Tribunal Determination of Unopposed or Agreed Claims

The Tribunal is required to hold an inquiry into any "unopposed application", which includes unopposed or agreed native title determination applications (section 139). The Registrar must lodge the determination with the Federal Court (section 166), which upon registration has the same effect as if it were an order of the Federal Court (section 167(1)).

If an application is unopposed, the Tribunal may make a determination consistent with the terms sought by the applicant, provided that the Tribunal is satisfied that the applicant "has made out a *prima facie* case" (section 70(1)(a)) and the Tribunal considers "the determination to be just and equitable in all the circumstances" (section 70(1)(b)). If the parties to an application reach

agreement, the Tribunal must make a determination if it is satisfied that the terms of the agreement are "within the powers of the Tribunal and would be appropriate in the circumstances" (section 71).

As a result of the decision of the High Court in *Brandy v Human Rights and Equal Opportunity Commission*,(20) the constitutional power of the Tribunal to make determinations either rejecting or approving native title claims is in doubt. Under the amendments to the *Native Title Act* recently proposed by the federal Government, claims will be lodged with and ultimately determined by the Federal Court, but in the interim the Court will refer claims to the Tribunal for mediation.

Mediation and Referral to Federal Court

If the parties cannot agree, the President of the Tribunal must direct the holding of a conference among the parties to attempt to resolve the matter (section 72). If the parties then fail to agree, "the Registrar must lodge the application to the Federal Court for decision" (section 74).

Compensation

The *Native Title Act* also makes provision for native title holders to claim compensation for any loss, discrimination, impairment or other effect of any action upon their native title rights and interests (part 2, division 5). The procedure for making a compensation claim is the same as for a native title claim.

***Native Title Act* and Future Acts**

Future Acts

The *Native Title Act* provides a comprehensive regime for regulating future dealings which affect native title in relation to land and water. The regime operates only in respect of acts which "affect" native title. Central to the scheme are the concepts of an "act" and a "future act".

In essence, a future act is:

* the passing of legislation on or after 1 July, 1993; or

* the doing of any other act on or after 1 January, 1994;

which affects or is affected by native title (section 233).

An act "affects" native title if it extinguishes native title rights and interests or if it is otherwise wholly inconsistent with their continued existence, enjoyment or exercise (section 226 (definition of "act") and section 227 (acts which "affect" native title)). If an act or action does not "affect" native title, it is not a "future act" and the *Native Title Act* has no operation, unless the land is subject to a registered native title claim.

Permissible and Impermissible Future Acts

A future act is either a "permissible future act" or an "impermissible future act". In relation to onshore areas (the area within the territorial limits of the States) an action is a "permissible future act" if it treats native title holders the same way as it treats ordinary (freehold) title holders (section 235). This is sometimes referred to as the "freehold equivalent test". Government actions such as the grant of a title may generally be taken in relation to native title land if they could also be taken in relation to freehold land. If not, the grant or act is an "impermissible future act" which will generally be invalid to the extent it affects native title (section 22), although there are exceptions (section 24 (non-claimant applications) and section 25 (options to renew)).

Procedural requirements

Even if the grant could be made in relation to freehold land (ie the grant is a permissible future act), it will only be valid if the procedures provided under the *Native Title Act* are complied with (section 23(2)). In relation to onshore areas these procedures fall into two categories:

(1) mining (including petroleum) titles and compulsory acquisitions for non-government purposes (for example, if Crown land which is subject to native title is compulsorily acquired in order to grant a title for a development) (part 2, division 3, sections 26-44); and

(2) other forms of title or interests in land (section 23(6)).

Mining Titles and Compulsory Acquisitions -

Right to Negotiate Procedure

In the mining and acquisition category, the *Native Title Act* provides for the "Government party" to give notice of the proposal to registered native title holders and claimants, to representative Aboriginal bodies (such as Aboriginal legal services and land councils), the proposed grantee and to the 'arbitral body" (section 29). The arbitral body is the National Native Title Tribunal unless the State or Territory has established a recognised body (sections 27, 251). If a native title claim is lodged with the Tribunal in response to the notice, the proposal becomes subject to negotiation, mediation and ultimately a determination by the Tribunal (sections 31-38).

For the purpose of making a determination the Tribunal must hold an inquiry (section 139). The Tribunal must consider the effect of the proposed action on the native title parties and their interests, environmental issues, the economic significance of the proposal and the public interest (section 39).

The Tribunal may approve a proposed grant (with or without conditions) or refuse to approve the proposal even though native title has not been proved to exist. If this "right to negotiate procedure" is not followed, the grant will be wholly or partly invalid if it affects native title (sections 22 and 28).

Expedited Procedure

An expedited procedure is available in the case of low impact titles. Where the State considers that the proposed act in relation to which notice is given under section 29 does not interfere with the community life of, or with sites of particular significance to, the native title holders, or involve major disturbance to the land, the State can include in the notice issued under section 29 a statement that the act attracts the expedited procedure (sections 32, 237).

If no objection to that statement is made by a registered native title claimant within two months of the date of the notice, the State may validly do the act without undertaking the right to negotiate procedures. If an objection is received, the Tribunal must determine whether the expedited procedure applies. If it is determined that the expedited procedure does apply, the State may do the act without reference to the right to negotiate procedures. If the Tribunal determines that the act does not attract the expedited procedures, the proposal becomes subject to right to negotiate procedures (section 32).

Non-mining Proposals

In the case of other onshore actions which may affect native title, section 23(6) of the *Native Title Act* requires that the same procedural rights be given to native title holders as would be given to the holder of a freehold title. Accordingly, if a public utility wishes to construct a facility on land under native title claim, it may only do so if it could also construct the facility on freehold land and if it follows the same notification and objection procedures with the native title holders or claimants as are required in relation to freehold land.

Future Acts where Native Title has not been Proved

The essential premise to the operation of the *Native Title Act* is that the proposed action is a "future act". That is, the action will affect native title. If native title does not exist in a particular

area, the *Native Title Act* has no operation in relation to any actions (whether government or private) in respect to that area.

The practical difficulty is that, as the whereabouts and content of native title are unknown, to ensure the validity of a proposed action (which would be a "future act" if native title in fact exists and is affected by the action) a government must either comply with the procedural requirements of the *Native Title Act* or undertake a non-claimant application which is unopposed (section 24(1)).

In *North Ganalanja Aboriginal Corporation v Queensland(21)* the High Court held that if land is subject to a native title claim which has been accepted by the Tribunal, the procedural requirements of the *Native Title Act* must be complied with irrespective of whether the native title claim ultimately succeeds. The Court decided that these procedural rights are intended to maintain the *status quo* pending the outcome of the native title claim.

A notable feature of the future act procedure is that it operates the same way irrespective of whether the native title claim involves exclusive rights or co-existent rights with another interest such as a pastoral lease.

Compensation

In making a determination the Tribunal may require the Government or grantee party to pay compensation. If a native title determination has not been made, the compensation must be paid into trust pending that determination (sections 41(3), 52).

Native Title Claims Experience

Land Tenure

The likely existence of native title can be related to current and historical land tenure. If it is assumed that freehold and Crown leasehold titles have extinguished native title, there are few areas in Victoria, which is mostly freehold, where native title is likely to exist. Large parts of New South Wales and Queensland are also freehold.

The fact that pastoral leases occupy 42 per cent of Australia emphasises the significance of the pastoral lease question. However, the determination of this question could separate Western Australia, South Australia and the Northern Territory, where pastoral leases generally provide for Aboriginal access, from Queensland and New South Wales, where generally there is no access provision.

The majority of vacant Crown land is in Western Australia, while the most extensive areas of reserves occur in Western Australia and South Australia.

Native Title Claims

The location of native title claims throughout Australia can be best understood from the maps maintained by the Land Claims Mapping Unit of the Western Australian Department of Land Administration.

The great majority of land under claim is in Western Australia and South Australia. More than half of all native title claims have been made in Western Australia. Depending upon the outcome of the pastoral lease question, between 59 per cent and 93 per cent of the State may be open to claim. The land presently claimed covers approximately 45 per cent of the State and is predominantly vacant Crown land, reserve land (particularly Aboriginal reserves) and pastoral land. There is a concentration of claims in the Eastern Goldfields (where there are many overlapping claims) and around Broome. The Pilbara is also attracting claims, as are Perth and its environs.

Large areas of pastoral and reserve land have been claimed in South Australia. There are few claims in the Northern Territory, where more than 50 per cent of land is held under titles issued

under the *Aboriginal Land Rights (Northern Territory) Act.* Most of the claims in Queensland and New South Wales cover relatively small areas of land, although since the *North Ganalanja* decision two large claims have been made to Queensland pastoral areas. Victoria has few claims, although they include extensive areas of freehold land.

Acceptance of Native Title Claims

The native title claims acceptance procedure was intended to be a screening mechanism against unjustified claims, presumably because of the significant rights conferred upon registered native title claimants by the future act procedures. Justice French in the *Waanyi* Tribunal decision(22) said that while the process favours the acceptance of applications, it is intended to preclude ambit claims which would waste the time and resources of the Tribunal and "undermine the spirit of the legislation and discredit the processes of the Tribunal". A number of factors have combined, however, to make the acceptance process largely ineffective:

(1) although the identification of extinguishing land tenure is an obvious way of screening claims, there is no requirement for claimants or the Registrar to undertake land tenure searches as part of the acceptance process;

(2) while the Registrar's stated practice is to obtain current land tenure searches, the increasing number of claims, many involving areas of tenure complexity, has increased the cost and complexity of tenure searches;

(3) the decisions of Justice Olney, sitting as a tribunal member in *Associated Goldfields NL and Alkane Exploration Ltd*,(23) and the Federal Court in *Northern Territory v Lane,(24)* that the right to negotiate operated upon registration of a claim, and that registration should occur upon lodgment - not upon acceptance, as was the then practice of the Registrar and the apparent intention of the legislation;(25) and

(4) the decision of the High Court in *North Ganalanja Aboriginal Corporation v Queensland(26)* that, as the acceptance procedure is *ex parte,* the Registrar should not receive material or submissions from third parties, and "fairly arguable" claims should be accepted.

The present practice of the Registrar is to accept claims within 14 days of lodgment, provided freehold land is excluded from the claim and any claim to leasehold land is limited to rights which are consistent with the rights of the lessees. Of the 188 claims to complete the acceptance procedure to 30 May, 1996, only 6 were rejected.

The status of native title claims throughout Australia under the *Native Title Act* is as follows.

Native Title Claims - 30 May, 1996

Lodged	263*
Accepted	188
Acceptance pending	58
Rejected	6
Referred to Federal Court	4
Withdrawn	7
Determined	0

* 159 in W.A.

Multiple claims

There are various examples of multiple native title claims lodged in relation to the same land, especially in the Eastern Goldfields of Western Australia. The most extreme case is in the Laverton area, where 9 claims have a degree of overlap.

In some cases, multiple claims may reflect disputes concerning traditional ownership, but they are more likely to reflect the complexities of Aboriginal culture and land tenure and the dislocation of Aboriginal people caused by non-Aboriginal settlement.

Aboriginal land tenure is communal in nature. Local exogamous descent groups or clans are usually regarded as the primary land holding entity. They have particular rights and obligations in respect of specific tracts of country. Groups of clans make up language groups or tribes which share access, hunting and ceremonies across a broad range of country associated with the language group. With the impact of non-Aboriginal settlement, clans and clan estates have become increasingly difficult to identify.

Most claims in Western Australia are oriented towards language group or tribal areas. These claims are usually made by small numbers of people and are representative in character. The overlapping claims are often made by members of the same language group asserting essentially the same or similar representative claims. The issues amongst the claimants are likely to relate to rights and obligations within the group, rather than reflect any dispute about traditional association, in a general sense, with the land.

Indeed in May, 1996 the Goldfields Land Council called for the many overlapping claims in the Eastern Goldfields to be combined on the basis that the claimants are all members of the same traditional group.

It is difficult to resolve these issues under the claims acceptance procedure, as it may not be able to be said that any of the claims cannot *prima facie* be made out. They may all succeed, either on a co-existence basis or because they are individual assertions of the same communal or representative claim.

Parties to claims

The Tribunal is required to give direct notification of native title claims to persons holding registered proprietary interests in the claim area (section 66(2)(a)(v)). Again, in areas of tenure complexity this is a difficult and time consuming requirement.

Any person whose interests may be affected may become a party to the claim (section 68(2)). Parties are entitled to participate in the mediation process. The native title rights claimed are usually broadly described and have the potential of enveloping all land, mining and petroleum and any lesser interests within the claim area. Only freehold title land may be clearly excluded. As a consequence, there are large numbers of parties to many of the claims.

The Maduwongga native title claim in the Eastern Goldfield provides perhaps the most extreme example of these complexities.

Maduwongga - WC94/3

Lodged 19.04.94
Accepted 12.10.95
Public notification 02.11.95
No. of interest holders notified 1711
Closing date for parties 26.04.96
No. of parties 709

Mediation

The Tribunal is required to attempt to mediate each claim amongst the parties (section 72). If the application is unopposed or agreement is reached, the Tribunal may make a determination that

native title exists to the claimed land (sections 70, 71). However, this power is subject to the doubts raised by *Brandy v Human Rights and Equal Opportunity Commission*.(27)

- In any event, mediated outcomes have been impeded by uncertainty about the pastoral lease question, land tenure complexities, issues concerning the effect of claims on interests held by other persons and the large numbers of parties to claims.

Litigation - Miriuwung Gajerrong claim - Ord River

When a native title claim is referred to the Federal Court, the parties become respondents to the litigation (section 84). In Western Australia only the Miriuwung Gajerrong claim (WC94/8) on the Ord River has been referred to the Federal Court. There are in excess of 200 respondents to the claim, 180 of whom are miners, pastoralists, farmers, business people, tour operators, fishing licensees, and community and recreational clubs and organisations. The concerns of the respondents relate to potential conflicts between native title rights and rights held under a variety of interests, licences and authorities, and the effect of the claim upon public use of reserves, Crown land and the waters of Lake Argyle and the Ord River. The remainder of the parties are government agencies holding interests within the claim area.

The Miriuwung Gajerrong claim illustrates the complexities of determining the extinguishing effect of land tenure. The claim area and the adjoining Miriuwung Gajerrong No. 2 claim (WC94/6) are the subject of five current pastoral leases. However, pastoral leases in Western Australia are issued for limited terms, and 161 pastoral leases of varying areas and terms have existed within the claim area. Most contained Aboriginal access reservations although some have not. The extinguishing effect of all these pastoral leases must be examined.

In addition, the claim is centred on the land resumed by the State in the 1960s for the Ord River Irrigation Scheme. The extinguishing effect of the development of this project, including the creation of a multitude of public reserves related to the project, must be examined.

The trial is scheduled to commence at the end of the year and is likely to take several months to complete. The State made application to the Federal Court to have the extinguishing effect of pastoral leases decided as a preliminary question. In December, 1995 Justice Lee refused the application, holding that questions of extinguishment can only be decided against the factual background of determined native title rights. The full Federal Court refused an appeal against this decision.

Uncertainty about the Miriuwung Gajerrong claim has caused concern and division within the Ord River community. So long as native title claims have the potential to affect existing interests and the use of public areas within claim areas, adequate resources should be directed to public information programmes and to providing legal assistance for respondents as well as for claimants.

The situation could be ameliorated if claimants were required to give detailed definition to their claims. This should include a precise description of the land claimed, including a description of the categories of excluded land. Claimants should be required either to confirm that the claim will not affect any existing interests, or, if it is claimed that any interest will be affected, to state the basis of that claim so that the claim may be tested at an early stage.

The claims experience in Western Australia has demonstrated that reconciling native title interests with the rights and interests of the wider community is likely to raise extremely complex issues. These must be worked through with patient and detailed consultation over time, even in relatively straightforward claims. Litigation may be the appropriate method of deciding, in a general sense, whether native title exists in a particular area, but it is not the best means of reconciling the claim with wide-spread competing interests.

An alternative approach was suggested by Mason C J in *Coe v Commonwealth*.(28) His honour commented that in areas of tenure complexity, the "[j]udicious selection of test cases would be a more appropriate procedure" than immediately pursuing a broad area claim which affects many interest holders.

Future Act Procedures in Operation

Mostly in Western Australia

The future act procedural requirements of the *Native Title Act* apply to any action which may affect native title rights. However, most attention has focussed on the right to negotiate procedures under part 2, division 3 of the Act. To date these procedures have occurred almost exclusively in Western Australia.

This is for two reasons. First is the importance of the Western Australian mining industry and the consequent high level of mining title administration, especially on pastoral and Crown land. Following *Western Australia v Commonwealth*,(29) the Western Australian Government recognised that to ensure the validity of titles granted, mining grants and rural land development must be carried out in accordance with the *Native Title Act* procedures, except in the most obvious areas of extinguishment. This exception is generally limited to land which has been the subject of freehold title.

Secondly, all other States and Territories have to date largely found it unnecessary to participate in the right to negotiate procedure. It seems they have either taken the view that native title does not exist on the land proposed to be granted, or issued titles on condition that they are subject to any native title rights which may exist, or they have delayed the grants.

Mining in Western Australia

Western Australia is recognised as one of the world's leading mining provinces. It is a major producer of minerals and petroleum both on a national and international basis. As a consequence, the volume of mining title administration in the State is greater than all the other States and Territories combined. Information provided by the Western Australian Department of Minerals and Energy shows that during the 1992-93 financial year in Western Australia:

- mining tenement applications were made - 64 per cent of all mining applications in Australia;
- mining tenements were granted - 67 per cent of all mining titles granted in Australia; and
- mining tenements were in force (covering 274,000 square kilometres or 12 per cent of the State) - 51 per cent of all mining titles in force in Australia and 29 per cent of the area of Australia subject to mining titles.

In terms of impact on land, 95 per cent of the area held under mining tenements in Western Australia is the subject of exploration or prospecting licences. Although mining leases comprise 39 per cent of mining titles in number, they make up only 5 per cent in area. However, relatively few mining leases result in operating mines. It is estimated that the total area of land disturbed by mining operations and used for ancillary infrastructure (such as roads and railways) is only 510 square kilometres or 0.02 per cent of the land in the State.

The potential impact of the *Native Title Act* upon the administration of the mining titles in Western Australia is demonstrated by the distribution of mining tenements amongst different categories of land tenure (estimated by the Department of Minerals and Energy for 1994-95):

Western Australia - Mining Tenements and Land Tenure

Tenure	Number	Tenements Area ('000 sq.kms)	Percentage of land held under mining tenement

			Vacant	Crown
Land	4,900	93.7	24.6%	
Reserves	900	17.6		4.6%
Pastoral leases	12,850	260.6		68.4%
Private land	500	9.1		2.4%

Expedited Procedure in Western Australia

In April, 1995 the Western Australian Government commenced issuing notices under section 29 of the *Native Title Act* in relation to the grant of exploration and prospecting licences under the *Mining Act* 1978 (WA). As these licences are regarded as low impact titles, the notifications contained a statement that the grants attracted the expedited procedure. The first objections were heard by the Tribunal in September, 1995.

To May, 1996, in excess of 90 per cent of exploration/ prospecting licences were processed without native title objections. The following table summarises the position:

Western Australia - Expedited Objections - 24 May, 1996

Exploration/prospecting licence s.29 notifications	3504
Notification period completed	2759
No objections	2608
Objections lodged	151
Determined in favour of grant	49
Determined against grant	3
Withdrawn	39

The impact of the *Native Title Act* on exploration titles has been relatively minor, being largely limited to the State and some grantees and native title parties being required to participate in Tribunal inquiries.

Right to Negotiate Procedure in Western Australia

The situation is very different with respect to mining leases, the production title available under the *Mining Act* 1978 (WA). In April, 1995 the State also commenced issuing section 29 notices in relation to the grant of mining leases. As mining leases are production titles, these notices did not contain an expedited procedure statement. Where native title claims exist or are made within the two month notification period, the mining leases must be dealt with under the right to negotiate procedure.

Few agreements have been reached under the 4-6 month right to negotiate period. Multiple native title claims are obviously a significant impediment to achieving agreement. The problem is particularly acute in the Eastern Goldfields, where there are numerous overlapping claims and in excess of 2,000 mining titles are issued each year.

A native title claim must nominate a registered native title claimant. Any agreement under the right to negotiate procedure concerning mining or land development must be made with the registered native title claimant on behalf of the claimant group. In the case of multiple claims, the agreement of each registered claimant must separately be obtained. In the absence of agreement, all claimant groups are entitled to participate in the Tribunal proceedings in relation to the matter.

Following the expiration of the notification and negotiation period, the initial right to negotiate applications in relation to mining leases were lodged by the State with the Tribunal at the end of

December, 1995. The first two Tribunal hearings occurred in April and May, 1996 and decisions are pending. The position concerning right to negotiate applications is as follows:

Western Australia - Right to Negotiate (Mining Lease)
Applications - 24 May, 1996

Mining lease notifications	1269
Notification Period completed	1056
Subject to negotiation	734
Mining lease future act applications	229
Withdrawn	12
Mining agreed	25
Determined	0

Mining title applications continue to be made in Western Australia at a rate of approximately 5,000 per annum. Since April, 1995 the rate of grant of mining titles has fallen significantly and the area of land held under mining tenement has declined by approximately 8 per cent.

The rate at which mining titles are granted may increase after the initial backlog of titles is processed under the *Native Title Act*, but up to 12 months may generally be added to the time required to obtain a mining lease.

Tribunal Inquiries

The Tribunal has established procedures for inquiries in relation to right to negotiate applications.

Following the lodgment of an application, a directions hearing is convened, when the parties are ordered to exchange a variety of documentary material including contentions, submissions and outlines of evidence. The parties are the Government party, the proposed grantees and all registered native title claimants. Subsequently a listing hearing is held followed by the inquiry hearing which may take between several hours and several days. A recent expedited objection hearing concerning three petroleum exploration licences lasted 7 days. Evidence may be given orally or by affidavit. Cross examination is generally limited.

All of the hearings in Western Australia occur in Perth, but many also involve hearings at the location of the proposed title grant. The State and the native title parties are almost always represented by counsel. The grantees are sometimes represented by counsel, sometimes represent themselves and sometimes do not attend.

Some Comment

The Western Australian Government's concerns about the disproportionate impact of the *Native Title Act* upon Western Australia have largely been realised, both in terms of claims and land and resources management. It is a measure of the relative impact of the Act that outside Western Australia there has been only one right to negotiate application (subsequently discontinued) and no expedited objections.

The Federal Government issued a discussion paper on 22 May, 1996 which acknowledged the procedural shortcomings of the Act and proposed a variety of amendments to improve its workability. However, there are no easy solutions. The social, political and legal issues raised by native title are immensely complex. Finding a generally acceptable balance between native title interests and the interests of the community as a whole will be a lengthy and evolutionary process. It is unlikely that a workable legislative framework will be developed until knowledge and understanding of the issues has reached a much higher level. In the meantime both the claims and right to negotiate procedures need extensive revision.

Although the claims procedure is accessible for claimants, the scale and complexity of native title claims was not foreseen, particularly land tenure issues and the potential impact upon other interest holders and the wider community. A more consensual and inclusive approach to reconciling these interests is required.

A much more flexible future act procedure needs to be developed to accommodate differences in underlying land tenure and variations in the content of native title, particularly where native title rights are not exclusive. Where native title has been claimed but not yet proved, there should be more emphasis upon substantiation of the claimed rights and the actual impact of the future act on the claimants. Procedures are required to rationalise the interaction of future act procedures and multiple claims.

Finally, it is difficult to overstate the importance of the pastoral lease question, both to Aboriginal people and to the operation of the Act.

Endnotes

1 (1992) 175 CLR 1 (*Mabo No. 2*).
2 *Western Australia v. Commonwealth* (1995) 183 CLR 373.
3 (1947) 79 CLR 31.
4 *Mabo No. 2, op.cit.*; Brennan J at 58, Deane and Gaudron JJ at 110.
5. *Ibid*; Brennan J at 61.
6. *Ibid*; Brennan J at 70.
7. *Ibid*.
8 *Ibid*; Brennan J at 61.
9. *Ibid*; Brennan J at 59; Deane and Gaudron JJ at 90, 110; Toohey J at 188.
10 *Ibid*; Brennan J at 68, 69 and 72Ä3; Deane and Gaudron JJ at 110; Dawson J at 158.
11. *Ibid*; Brennan J at 68Ä70; Deane and Gaudron JJ at 89Ä90 and 94; Dawson J at 158.
12 *Pareroultja v. Tickner* (1993) 117 ALR 206.
13 (1992) 175 CLR 1 at 71Ä2.
14 *Ibid*., at 158.
15. *Ibid*., at 117.
16. (1995) 129 ALR 118.
17 (1995) 132 ALR 565.
18 (1996) 134 ALR 637.
19 (1996) 135 ALR 225.
20 (1995) 183 CLR 245.
21 (1996) 135 ALR 225.
22 (1994) 129 ALR 100 at 112.
23. 6 February, 1995.
24 Unreported, 24 August, 1995.
25 Cf. sections 66(1)(b) and 190(1)(a) of the *Native Title Act*; but see the flowchart produced in the then AttorneyÄGeneral's commentary to the Act.
26 *Op.cit*.
27. (1995) 183 CLR 245.
28 (1995) 68 ALJR 110 at 119.
29 (1995) 183 CLR 373.