Chapter Ten

Amending the Native Title Act

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This is the third time I have been privileged to address the Society, and on every occasion the goal posts have been moving. If you haven't read the morning paper, your native title news is apt to be out of date. We now have *Mabo* , *Wik* , the *Native Title Act* (" *NTA* "), and a prospect of amendments to that complex law which defines neither native title nor the natives who may enjoy it.

How did we arrive at this point? By sleight of language, a vital tool of social engineers. There is a precedent in the Gilbert and Sullivan repertoire. In *Iolanthe* all the fairies are bound by a law that if they marry a mortal the penalty is death. But there comes a time when Queen Iolanthe and all her subjects yearn to marry mortals, despite the fact that they are members of Parliament. Plainly the law must change. Judicial legislation is not yet fashionable, but the Lord Chancellor, the judge of all the judges, rather fancies a fairy himself, and his decision does not take six months or more:

> "Allow *me* , as an old Equity draftsman, to make a suggestion. The subtleties of the legal mind are equal to the emergency ... The insertion of a single word will do it. Let it stand that every fairy shall die who *doesn't* marry a mortal, and there you are out of your difficulty at once."

The Lord Chancellor's word-conjuring skills have a grander sweep these days. The essence of *Mabo* lies in changing "Crown title" to "potential Crown title", [1] and *Wik* works by saying that a pastoral lease is not a lease. [2]

Ever since *Mabo* was criticized as a judicial legislation, contrary to the separation of powers which the High Court otherwise enforces, there has been a refrain that judicial law-making has always been with us. But surely it's a matter of degree. The current defence of judicial activism sounds rather like a police court barrister's defence of a man who drove at 120 kph past a hospital: "Why, if Your Worship pleases, everyone uses cars these days. Speed is an irrelevant detail".

In November last Mr Stone asked me to consider mooted amendments to the *Native Title Act* . Four weeks later, on Christmas eve the High Court, by a majority of 4 to 3, gave us the *Wik* decision. [3] By that time many citizens were at the beach or in a final frenzy of Christmas shopping. (According to a colleague with friends at Court, it was "known" three months before the decision came down that it would arrive on Christmas eve.)

Last year's amendments are now back in the melting-pot and a new draft is promised by Easter. [4] At the time of writing I can only glean from last year's parliamentary papers and this year's press items some proposals which are likely to reappear. If I could predict their prospects of success I would not be paying my own fare to Canberra.

Last year's proposals were based on the hope that Mr Keating was right when he assured us in 1993 that pastoral leases extinguish native title. But that promise, and Mr Keating, are gone.

At the Society's Adelaide Conference last June I was less optimistic than Mr Keating. I suggested -- a trifle bravely, perhaps, when there were learned opinions to the contrary -- that the

High Court would not stunt the growth of its child, but would strike some obscure compromise. While asking whether it was "time for the Streaker's Defence?", I predicted that the majority in *Wik* would be slimmer than in *Mabo* . And so it came to pass. Just one more repentant judicial legislator and *Wik* would not be with us. The *Wik* majority was led by a former Northern Territory land rights Commissioner, while the minority was headed by a principal assistant at the birth of *Mabo* . Chief Justice Brennan may now be contemplating an old lesson: It is easier to start a revolution than to stop it. The Mason legacy is not without its embarrassments. Another ex-Commissioner of the Northern Territory tribunal is now hearing the Yorta Yorta claim to choice portions of New South Wales and Victoria. [5] Land claims under the 1976 Northern Territory Act (which is not based on common law) seldom if ever fail. It was designed by a barrister (soon to be a Federal Court judge) who lost an early land rights case in 1971. [6] The identity of his junior in that case is interesting.

Validation of Post-1994 Grants

Wik poses two main questions: (1) What to do about Crown concessions granted over pastoral leases since 1993; and (2) how will the High Court's vision of co-existing pastoral leases and native titles turn out in reality?

Several State governments issued post-1993 mining leases and licences over pastoral properties without following the rituals of the *NTA* . They did so in reliance on Mr Keating's promises and on legal advice that native title could not survive the grant of a pastoral lease. But now it transpires that government grants and actions by grantees which are not strictly within the terms of the relevant lease may be invalid "future acts" (in *NTA* jargon) if there is a native title in the area. Pastoralists who have sought to alleviate hard times by catering for tourists could find themselves liable to compensate yet-to-be-discovered holders of yet-to-be-defined native titles. In Queensland alone hundreds of mining titles may be affected. [7]

The simplest solution, in legal terms, is to amend the *NTA* to enable the Commonwealth and the States to validate titles issued in good faith between 1 January, 1994 and December, 1996 -- when the *Wik* dispensation was revealed -- and face the compensation bills if and when they arrive (a risk which native title enthusiasts may be exaggerating). The existing NTA validated numerous titles which *Mabo* put in doubt, and between 1994 and 1996 the well-funded Aboriginal corporations did not issue a single court challenge to Crown grants which relied on the Keating version.

Western Australia has adopted the alternative of re-issuing Crown leases and approvals after complying with the "negotiation" sections of the *NTA* [8] and the Northern Territory is doing likewise. [9] The catch is that, if native title hopefuls claim the "right to negotiate", delays of a year or much more may ensue. However, it is reported that many mining titles in the West are re-emerging without native title complications. The Queensland Mining Council is less optimistic.

A third possibility -- in areas where native title claims are unlikely -- is to use the non-claimant procedures which now exist. [10] If there are no objections, the mining title can be confirmed two months later, subject to compensation if Aboriginal rights subsequently appear.

Narrowing the Floodgates: New entry Rules

As the *NTA* stands, anyone can lodge a native title claim purporting to be an Aborigine who represents a kindred group large or small. Provided that some not very demanding procedures are followed, the applicant is entitled [11] to have the claim registered. (In deference to the High Court's *Brandy* decision, [12] future applications will go to the Federal Court instead of the Native Title Tribunal.)

Immediately upon registration, the claimants gain a *de facto* injunction against any dealings with the subject land while they exercise a "right to negotiate", which the *NTA* (not *Mabo*) confers upon them. If negotiations fail to produce an agreement within 6 months (4 months in the case of a mineral exploration licence), the Native Title Tribunal may be asked to arbitrate. The Tribunal must "take all reasonable steps" to reach its decision within a further 6 or 4 months, as the case may be. [13] There may be multiple and conflicting claims over the same tract of land. Thus, with little effort or expense, native title claimants acquire a bargaining counter to play against Crown lessees or developers. The latter may then be induced by fear of legal expenses or costly delays to pay the claimants to go away -- hoping that no others will subsequently appear. While compensation ordered by the Tribunal has certain limits, [14] and is held in trust pending proof of the title claim, [15] "negotiated" compensation can be pocketed forthwith and may include a share of income or profits. There can be a valid contract to settle a legal claim, however dubious or unsound it may be. [16] Father Frank Brennan, a noted admirer of native title, would actually extend the "right to negotiate". Pending proof of a claim, he would allow the claimants to have access to any part of a subject pastoral lease, other than an area within one kilometre of a homestead. [17] Such access would extend to hunting, fishing, camping, visiting sites and conducting ceremonies. This comes close to treating a mere claim as already established. How would the claimants react if the claim eventually failed? How would the pastoralist control entry by people who were not members of the claimant group? Would the grazier or the State be entitled to compensation for land-use by people not really entitled to use it?

So potent is the "right to negotiate" that it tends to be forgotten that those who hold it are not yet holders of native title and may never be. However, native title brokers and compliant journalists influence public opinion by regularly referring to native title hopefuls as "traditional owners". This is often accompanied by fanciful underestimates of the claimants' adherence to non-traditional customs, lifestyles, or amenities, even in remote areas.

Critics of the *NTA* complain that it is far too easy to gain the potentially oppressive "right to negotiate" and that it imposes intolerable delays. If there are several claimants, the process of negotiation is likely to be delayed, complicated and rendered more expensive by internecine warfare -- the Century Zinc imbroglio is a classic example. An inherent weakness of the system is that, after tortuous negotiations and generous compensation, someone else may emerge and claim to be the one true holder of native title.

The first priority of the reformers is to make it more difficult to register a claim and thus gain a "right to negotiate". A new s.190A would try to strike a better balance of rights, so that governments and developers do not have to waste time and money negotiating with people who lack a properly researched and genuinely arguable claim. There appears to be some support for such a change among Aboriginal bureaucrats who are embarrassed by blatant `ambit claims'.

According to the 1996 scheme, the new tests for registration would be these:

- The Registrar would have to be satisfied that there is a *prima facie* case;
- Applicants would have to particularise the rights claimed, with facts showing a continuing connection with the area, and that all persons joined in the application have a common interest;
- Applicants would be obliged to make additional title searches at the Registrar's discretion; and
- The Registrar could not register a claim if he had knowledge -- from any source -- of any incompatible title [18] in the area claimed. (This would overcome a ruling in the *Waanyi Case* [19] that only claimants may offer evidence at the registration stage.)

An applicant refused registration would have a right of appeal to a Federal Court judge.

I am not confident that these changes would make a great deal of difference in practice. According to the amendments proposed last year, an unregistered claim would still be able to proceed, albeit without a "right to negotiate". But the very existence of a claim would tend to discourage the seeking or granting of the approval in question. Besides, a career as court clerk or registrar is unlikely to attract an over-supply of decisive and independent spirits. I doubt whether the average registrar would be keen to accept the responsibility of refusing registration (and the attendant abuse) in any but the most frivolous case. This amendment should be re-drafted to give any party who may be affected by a native title claim a right to appeal against a decision to *grant* registration if it seems that the Registrar has been too permissive.

The opponents of change are promoting "negotiations" as a panacea. Aboriginal and Torres Strait Islander Commission (ATSIC) officials and Aboriginal politicians are desperate to secure

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1. By abolishing the rule that the British Crown became notional owner of the "waste lands" of Australia at the time of settlement, and substituting a retrospective rule that settlement merely gave the Crown the *opportunity* to become the owner. According to the retrospective rule, the Crown has to take further steps to become owner (free from native title). Oblivious to native title, past governments sometimes (probably often) omitted to take those steps. If so, then after the High Court spoke in June, 1992 it was too late.

2. Because it doesn't confer mineral rights, and there are various conditions, including limited third-party rights to enter. But even freeholds do not include mineral rights, and many undoubted leases limit activities to a particular occupation (e.g. a florist's shop).

3. *Wik Peoples & Ors v. Queensland* (1996) 141 ALR 129.

4. *Sydney Morning Herald*, 15 February, 1997 : `*Whingeing Black' Jibe Over Wik* .

5. Howard Olney, judge of the Federal Court since 1988 and Northern Territory Aboriginal Land Commissioner 1988Ä1991: *Australian Lawyer* , July, 1994, p.10 (announcing his appointment as a part time member of the Native Title Tribunal).

6. *Milirrpum v. Nabalco Limited* (1971) 17 FLR 141.

7. *Courier Mail* , 3 January 1997 : *Wik Win Threatens 800 Mining Leases* . At the time of writing a 6 weeks'"freeze" of Queensland mining title applications seemed to be entering a partial thaw, subject to the possibility that the government would require indemnities against claims for "native" compensation in certain areas where native title claims are likely to arise.

8. *Courier Mail* , 18 January, 1997 : *State Facing Huge Native Title Settlements* .

9. *The Australian* , 20 February,1997 : *NT to Protect Mine Rights on Pastoral Leases* .

10. *Native Title Act* 1993 (" *NTA* "), ss.24,67,253.

11. *North Ganalanja Aboriginal Corporation (on behalf of the Waanyi People) v. Queensland* (1996) 135 ALR 225.

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

13. *NTA* , ss. 35Ä36.

14. *NTA* , s.51.

1. *NTA* , s.52.

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. *Hercules Motors Pty Ltd v. Schubert* (1953) 53 SR (NSW) 301.

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. *The Australian* , 28 February, 1997 : *How to Share the Land, Not Divide It* .

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. i.e. freehold, or residential or commercial leases from the Crown.

. (1996) 135 ALR 225.

a belated settlement of claims over the Century Zinc mine in far north Queensland. Six months of official negotiations, and years of prior discussions, might then be forgotten while "voluntary (sic) agreements" rescue an ailing *NTA* . (Does that tautologous buzz-phrase imply that non-voluntary agreements are on the cards?)

Implicit in the present promotion of "voluntary agreements" is an admission that the Act, and the judge-made law behind it, are too complex and vague to work in any other way. But if compromise were so sure a path to justice, we could dispense with the *NTA* and many other laws as well. In reality, free and fair settlements are often unattainable even when the relevant law is very much clearer than the *Mabo-Wik* regime. The vaguer a law, the more difficult it is to settle a claim based on it. The President of the National Native Title Tribunal (NNTT) argues that there have always been property disputes. What he omits to say is that the property laws which are not race-based are very much more accessible and precise than the innuendos of native title.

In one form or another, a stricter entry test is likely to pass the Parliament. Senior members of the Opposition seem to agree that the present rules need tightening. They cherish a hope that a requirement to show a "continuing association with the land" at the outset will confine successful claims to remote areas and small numbers. [1] We shall see; the High Court was *very* vague about "connection" in *Mabo* , and federal judges could play all manner of variations on this theme in due course.

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The very concept of the "right to negotiate" should be reconsidered. Abolition of it would not be `discriminatory', because it is a privilege not enjoyed by any other property owner. It makes claimants more equal than other citizens with *established* property rights. As against parties who will suffer heavy losses through delay, it gives undue strength to the bargaining power of people whose competing rights, if they have any, are a windfall. Resistance to a claim is costly, the native title bargaining counter is not. Doubtful as the claim may be, it can so jeopardise a costly or urgent project that a settlement far in excess of its likely value may be exacted. The slower the *NTA* process -- and to date it has been glacially slow -- the greater the pressure to settle.

However, "negotiations" offer careers to "mediators" attached to the Native Title Tribunal; indeed, their fashionable ministrations are the main rationale for its existence. A mediation *ipso facto* suggests that a claim has "something in it", and that no claimant will go empty-handed away. But there is not always something to be said on each side, and mediation may bring delay and expense instead of sweetness and light. This will be recognised if a new s.86A is inserted. It would allow the Court to dispense with mediation if it is likely to be useless considering the number of parties involved, the time it would take, or the extent of non-native titles in the area.

The *Wik* decision has made native title and the right to negotiate much more pervasive. While *Mabo* brought native title to Australia from an islet near New Guinea, *Wik* greatly increases

the area of our continent which is open to native title claims. The Queensland Government estimates that the area of its State open to claims and mandatory "negotiations" has been increased from 8 per cent to more than 70 per cent. [2] Most of the State's mineral resources are under pastoral leases. Only freehold is now immune from native title claims. (The logic of this is doubtful; freehold is not absolute ownership. Minerals in freehold land usually belong to the Crown, which may authorise a third party to prospect on the property and to mine it.)

Just One Negotiation?

A revised list of amendments could include a proposal of the Queensland Mining Council. [3] The Council's suggestion is that native title claimants be put to an election: negotiate before an exploration licence issues, or when a mining lease is applied for, but not twice. While a larger payoff would be expected after a profitable deposit has been discovered, there is many a slip 'twixt prospecting and production. Sensible claimants might settle for less while the miner still has money and an interest in the area.

"Representative Bodies" as Gatekeepers

The plethora of native title claims, many of them overlapping and conflicting, has led to suggestions that land councils or Aboriginal legal aid bureaux be commissioned to examine, select and prosecute native title claims in designated areas. (The curious financial arrangements of some legal aid agencies suggest that they be accredited very cautiously, if at all.)

Understandably, this idea appeals not only to land council oligarchs, but also to politicians seeking compromise solutions to the seemingly intractable problems which *Mabo-Wik* presents. As things stand, governments and Crown lessees are obliged to "negotiate" many dubious claims, often amid a babel of internecine quarrelling, in an effort to get developments off the ground.

The Century Zinc saga is a prime example. When years of informal talks and six months of official negotiations ended last month, only 6 of 12 rival claimants had accepted a munificent offer. [4] Aboriginal supporters of the mine say what Century would hardly have dared to express -- that they were being "held to ransom" by dissidents [5] and that the *NTA* was "making fools" of them. [6] The Century example will stand even if ATSIC manages to refurbish a major political embarrassment as a showpiece "voluntary agreement".

There are several versions of the "representative" scheme. One version would give a certified broker the authority to approve and promote one of several competing claims. The broker would have virtual power of life or death over pending claims, and subsequent claims in the same area would be barred. Milder versions of the scheme are not markedly different from the present position, in which "representative bodies" select certain claims for financial assistance, leaving others to fend for themselves.

Aboriginal bureaucrats are excited by the more potent version of the plan. [7] But their less influential colleagues doubt that "representative bodies" are so free from malpractice or nepotism that they should have their power enhanced in this way. A Joint Parliamentary Committee reported against the monopoly idea after hearing evidence from Aborigines who feared that claims might be improperly stifled, and pointed to favouritism or malpractice in past allocations of legal aid. [8] The Aborigines who fear a major increase in their masters' power are supported by the mining industry, despite its desire for greater certainty and fewer competing claims in native title affairs. [9]

It is submitted that the government should think long and hard, and try other measures, before it confers such extraordinary powers on Aboriginal bureaucrats and their lawyers. Who would

select the title brokers, and what would the selection criteria be? Facile references to a single "aboriginal community" ignore great differences in education, lifestyle and regional interests, not to mention ample evidence that some "representative bodies" are not at all representative.

It is reasonable to suspect that, if one Aboriginal organisation were the sole title broker in a region, there could be abuses of power at the expense of Aborigines, land holders, or applicants for Crown concessions. The public interest would suffer if monopolist "representatives" were bought off without due regard to taxpayers or to the long term management of Australian land. The alternative of several accredited brokers in a given area would simply exacerbate the problem of competing claims.

There is also a danger that a claim approved by a powerful, government-approved "representative" might be seen by courts, tribunals, "mediators" and claimants' witnesses as more or less proved already. Furthermore, the approval of some claims and non-approval of others would involve a judgment upon their relative merits. The High Court's rather precious (albeit selective) notions of the separation of powers could see the scheme condemned as an improper exercise of federal judicial authority.

In any event there would have to be a right of appeal from title-brokers' decisions. With public funds available, it would be naive to expect that appeals would be few and far between. On appeal, the quest for simplicity would revert to litigious complexity while the *prima facie* merits of competing claims were compared; several might be allowed to proceed after all. If the appeal involved more than a superficial examination of rival claims, it would become a full-blown, multi-partite inquiry into the existence and nature of native title in the area in question. The last state of man, litigiously speaking, would then be no better than the first.

It would be prudent to shelve any "approved broker" scheme until tighter threshold tests are tried. If they are fairly tried, and if non-claimants are given a right of appeal against registrars' decisions to grant registration, they may be an adequate filter. Then there would be no need to test the murky waters of compulsory "representation".

However, the best of all filters would be a clear signal from the courts that claimants' legends and their anthropologists' opinions will be rigorously examined in the light of any personal or ideological biases and the lessons of the Hindmarsh Island affair.

A Time Limit for Native Title Claims

This has been a serious question ever since *Mabo* appeared. Most actions at law have to be commenced within 3 or 6 years. "Limitation Acts" do not require people to finalise claims but merely to *initiate* them within the set time. It is almost five years since *Mabo* , and native title claims now cover much of Australia. It is difficult to think of any reasonable argument against a "sunset clause". In 1993 the mining industry suggested five more years; [10] State governments now suggest that one more year would be fair. [11]

However, the protagonists of native title insist that no time limit at all should be imposed. There have been extravagant appeals to the *Racial Discrimination Act* (*RDA*), [12] and an ex-Attorney-General, now a native title consultant, has invoked the equally familiar threat of "international embarrassment". [13] But everyone else is subject to limitation laws, and it has never been seriously suggested that they amount to unjust expropriation.

An alternative would be to take parcels of land one by one, advertise widely and prominently for claims, and if none is received within a certain time, deem the area to be immune from any future claim. If claims *are* lodged, let the determination of them be the end of the matter. Thus "clearances" could gradually move across Australia.

Legal Aid to Oppose Claims

Ever since *Mabo* appeared it has been a glaring anomaly that many claimants, without close scrutiny of their claims, are financed by Aboriginal organisations using ample funds, while other parties often pay their own way through the legal and bureaucratic maze. Not all respondents are wealthy companies or governments able to transfer the costs of the native title movement to the general public. A Queensland grazier protests :

> "Mrs McDonald said they would have no choice but to proceed to court. But even if the Gunggari failed to prove their claim, [the family] would probably be forced to sell the property to pay the court costs. If they somehow managed to hang on, they would then have to go through the whole process again with the Bidjara claim, with no guarantee other claims would not also be lodged. `We feel we are in an insane situation, and we cannot believe our country has put us in this position, where even if we established that the ... [existing] claims are not legitimate, ... we lose through impossible legal costs'". [14]

It is proposed to amend s.183 to ensure that non-claimants as well as claimants can rely upon legal aid, not only for court appearances but also for lengthy "mediations" under the auspices of the NNTT. Surely this can escape a righteous Senate veto.

Other Possibilities

(a) A Clearer Concept of "Connection"

So vague is the High Court's grand design [15] that it is futile to seek a definition of native title. [16] But there are subsidiary notions which should be clarified as soon as possible. For example, what amounts to a sufficient "connection" between Aboriginal claimants and the land affected by their claims? It would be naive to think that the High Court has locked itself into a test of "continuing physical occupation". On the contrary, it has left itself -- and the Federal Court -- a great deal of room for manoeuvre in this area. [17] If continuous physical occupation is required, how substantial must it be? Can a few members of the claimant group act as "land sitters" for absent friends? Would claims of "spiritual" or nostalgic remembrance be enough?

(b) The Measure of Compensation

When a would-be amender of the *NTA* is not charged with racism or threatened with "international embarrassment", he is warned that virtually any move he makes will expose the nation to astronomical compensation for rights yet to be proved and defined.

But almost five years after *Mabo* , no one has the foggiest idea how many species of native title there are, or what they are worth. "Land rights" began as a spiritual value, but the quasi-religious approach yields increasingly to the language of finance.

"Compensation", like "connection", remains wide open to judicial interpretation. Native title (whatever it is) no doubt falls within the wide meaning of "property" in the "just terms" clause of the Constitution, [18] and we may assume that in this instance the High Court will apply that guarantee more generously than when Tasmania sought in vain for "just terms" in the Franklin Dam affair. [19] Justice Mason then declared that "it is not enough [to activate the just terms clause] that the [Commonwealth] adversely affects *or terminates* a pre-existing right". [20]

Now an extinguishment of native title by the Commonwealth would simply terminate a right so far as the Commonwealth is concerned. The *States'* title to their Crown lands would be improved, but not the title of the Commonwealth (save in Commonwealth territories). So perhaps the "just terms" clause would not apply? However, the High Court has said elsewhere that if Commonwealth action vests property in someone else, that is an "acquisition" which involves "just terms". [21] In the *Tasmanian Dam Case* , [22] Justice Murphy said that the Commonwealth only "acquires" something when the Commonwealth is the beneficiary, but I

doubt whether the opinion of that keen judicial legislator would appeal to his successors on this occasion.

However, there are High Court precedents -- to the extent that precedents matter now -- which offer some solace to taxpayers, the potential payers of compensation. It has been said that the "just terms" clause does not always demand full compensation, because the Constitution does not require "a disregard of the interests of the public or of the Commonwealth". [23] Plainly, Australian citizens -- 98 per cent of whom can never aspire to native title -- have a considerable interest in the compensation issue. If the compensation bill is nearly so large as native title enthusiasts threaten, will the High Court find it politic to strike a balance between payment in full and what the country can reasonably afford?

However, if some members of the NNTT have their way, it will be possible for claimants to switch to and fro between spiritual and commercial values as opportunism suggests. In one Western Australian case [24] three members of the Tribunal opined:

> "There is no foundation for the proposition that a valuation based upon the assumption of fee simple acquisition of an area of land is the maximum sum which could ever be [awarded for native title] ... It is possible to envisage that the assumed freehold value of a small area of vacant Crown land in a remote location could be much less than [proper] compensation ....".

Soon afterwards another panel of tribunalists declared:

> "With regard to compensation .... an analogy can be drawn with personal injuries litigation where .... Aboriginal people can be compensated for such things as being unable to complete initiation rites, inability to gain and enjoy full tribal rights, loss of ceremonial function, inability to partake in matters of spiritual and tribal significance ....". [25]

It is possible, then, that native title compensation could be commercial when that seems suitable, and "spiritual" or "psychological" on other occasions. The question whether the Tribunal's lateral thinking appeals to the High Court awaits another time, another long delay and untold legal costs. But watch this space. Perhaps lawyers who have been seeking guidance in conventional "land and valuation" cases should reach for something more imaginative -- or ask the Parliament to make the *NTA* much more explicit where compensation is concerned. In this new legal province there are no firm answers. There are merely options which the High Court may select, aware that the politics of native title and the *RDA* will inhibit any attempt to alter its decrees.

(c) Section 21 "Deals" and the Public Interest

Section 21 of the *NTA* quietly and briefly says that native title holders may trade in their rights for "any consideration .... [including] the grant of a freehold estate in any land or any other interests in relation to land .... that [they] may choose to accept."

There are no adequate safeguards to prevent a government which is unduly favourable to native title interests from handing out property far more valuable than the native title which is surrendered. The same might happen if a government were anxious to free some politically attractive development from interminable "negotiations". Appropriate safeguards should be inserted.

One of the amendments proposed last year does consider the national interest -- in a different respect. A new s.84A would entitle the Commonwealth to be party to any native title case in the Federal Court, with normal rights of appeal. This should be difficult to oppose. Decisions made today may allocate vast natural resources in perpetuity to a very small percentage of the

population. If the "communities" mustered for the claim eventually disappear, redistribution could be expensive and politically fraught. The fact that it now suits a government, a lessee or a developer to make a "voluntary agreement" will not always result in a land management decision that is in the long term interests of Australia. Serious thought should be given *now* to the possibility of a growing disproportion between native title benefits and the needs and expectations of other Australians in future.

(d) Equitable Distribution of Native Title Benefits

Native title is communal title. As the caravan moves on, and whether or not "representative bodies" gain greater powers, the trustees for more or less well defined tribes, clans, or "peoples" will accumulate large holdings of land or money. The property held may be far more valuable than legal aid and other funds which have been squandered or have mysteriously disappeared. Who will make the appropriate decisions, and how will the moneys be invested? Will one group's fund always be kept strictly separate from another's? Will it be forbidden to lend one group's money to another group under the tutelage of the same organisation? No thought seems to have been given to how these accumulations of property should be handled if the notional beneficiaries disperse or disappear.

At present the *NTA* has remarkably little to say about ensuring that the benefits of native title are honestly and fairly administered to all who are meant to enjoy them. Disputes and redistributions should not be left to the complex, slow and expensive processes of the law of trusts and courts of equity. Adequate trust-accounting rules should be in place before delicate problems arise. The fiduciary duties of native title brokers should be spelt out in the Act, and some relatively simple means of resolving beneficiary-trustee conflicts provided. An Ombudsman for native title beneficiaries may be worth considering.

(e) Judicial Arrangements and Judicial Detachment

Some of the suggestions in this section relate to laws other than the *NTA* , or simply to matters of judicial administration and decorum.

The *Wik* decision has inspired various suggestions for reform of the High Court. Some are fanciful and ill-advised. A few are perfectly reasonable. There seems to be widespread support for the proposition that consultation with the States about future appointments to the Court should be more realistic and effective. One team in the federal competition should not be able to choose all the referees, especially now that the referees usually officiate on the Commonwealth's home ground. The new Federal Court, bereft of a truly general jurisdiction, should not become the official waiting-room for High Court hopefuls -- a trend that is clearly discernible. More care should be taken to ensure that High Court judges have extensive and well-rounded experience in State Supreme Courts of civil and criminal jurisdiction.

The High Court is a peculiar institution, in that it is a constitutional umpire and an ordinary court of appeal. Constitutional courts in the United States, Germany and other countries do not have this dual role. Perhaps the time has come to divide the High Court into a constitutional arbiter on one hand, and a normal court of appeal on the other. This may help to prevent the broad-brush techniques of constitutional interpretation from spilling over and making ordinary law more volatile than it ought to be. Let us remember that *Mabo* and *Wik* are purportedly based on common law and ordinary legislation. Grandiose as they are, they are *not* constitutional decisions.

The High Court's workload was the reason given for making all appeals to it subject to special leave. The Court can now pick and choose the laws it wishes to revise. In reproving the Deputy Prime Minister for his recent criticism of the Court, Chief Justice Brennan referred to

its workload again. The High Court could shed some of the burden by leaving pure matters of State law to the Supreme Courts. It could cease tinkering with Criminal Codes, and points of evidence and procedure which are further and further removed from its members' experience -- tinkerings which too often oblige trial judges to issue impossibly complex instructions to bemused juries.

The Federal Court, just 20 years of age, has a patchwork civil jurisdiction, extended by the *NTA* . It conducts no criminal trials. Aside from some common law jurisdiction which it has "interpreted away" from the State courts,it applies various Commonwealth Acts, some of them expressed in the sweeping post-1970 legislative style. Some members of the Federal Court appear to be immune from, or indifferent to the accepted restraints on public political statements by members of the judiciary. Broad-brush legislation such as the *Trade Practices Act* [26] breeds wide judicial discretion and encourages judicial activism. Judicial review for error of law is not supposed to be an appeal on the merits, but in the Federal Court (and not least in immigration cases) it is often impossible to discern the difference. The Federal Court's decision in the *Teoh* deportation case - endorsed by the High Court [27] - is so manifestly naive and silly that there is bipartisan support for its legislative extinction.

For the time being, parties to native title cases must take the Federal Court as they find it. But these cases should be allocated to as many different judges as possible, and should not be confined to a select few. Service as a land rights Commissioner is not a necessary (or perhaps a desirable) preparation for hearing native title cases at common law.

By the same token, service in (or for) an Aboriginal legal aid office should be less important than it now seems to be in making appointments to the core or to the fringes of native title tribunals. Single-purpose tribunals which owe their existence and their future to a particular cause tend to develop (if they do not already possess) an identification with that cause. Some modern tribunals are precisely for the promotion of particular and sometimes divisive causes. If they often said "No" to their applicants they would forfeit business, lose the respect of their courtiers, and eventually their *raison d'être* . Regular courts -- particularly courts of truly general jurisdiction -- do not so naturally attract people with one particular legal bee in their bonnet, or who tend to think that particular classes of litigants should normally succeed.

It has been noticeable since 1994 that the President of the Native Title Tribunal (judicial title notwithstanding) makes frequent media appearances and statements not confined to the more apolitical aspects of the *NTA* . Recently he lectured us to the effect that any attempt to legislate against the *Wik* decision would make us objects of international contempt. [28] And on the day after that decision was announced he warned pastoral lessees that their only choice now is to "negotiate or litigate". [29]

It is fair to add that when a decision of the President displeased native title activists, one of them railed against the Tribunal, in which (he said) there was "no justice", and against a decision which "stinks of racism and corruption." [30] It is very doubtful whether any non-Aboriginal publicist would be permitted to make such remarks with impunity.

Others connected with the Tribunal are less restrained. In a paper presented to this Society in Adelaide last year I quoted some emotively partisan and entirely gratuitous comments on Australian history in the NNTT by a member of the Tribunal. [31] Recently he was at it again: "Lawyers Tip World Backlash if Wik Reversed". [32]

Mr Wootten is one of that growing band of ex-judges who do not continue in office until retiring age, but perform a lateral arabesque when something more interesting turns up. He is another Tribunal functionary who does not shun the limelight. He has advised the Prime

Minister to take lessons on Aboriginal culture, and not even to think about extinguishing native title on pastoral leases:

> "Such a staggering expropriation could only be supported by someone who either was ignorant both of Aboriginal traditions and of the traditions of our Western rule of law .... or was a monster." [33]

When the populace of an outback town resisted Mr Wootten's proposals to dedicate their swimming hole to the Rainbow Serpent, he berated them as "racially hostile" and "environmentally blind", and described submissions which they made to him by legal right as "crude, shallow and self-serving." [34] The new Minister declined to act on Mr Wootten's report.

The staff of tribunals, as well as judges, are well advised to practise judicial restraint, whatever their private enthusiasms may be. The Government should bear this in mind when it is time for appointments or re-appointments to the institutions concerned.

An amendment to the *NTA* to end the Tribunal's inappropriate dual role as claims facilitator and claims mediator should be given high priority.

(f) Reception and Assessment of Evidence

In theory, *Mabo* created native title. In reality it will be created by "voluntary agreements", or by judges' acceptance of evidence from claimants and their supporting "experts". But while forests are being felled to publish native title theory and counter-theory, the evidence problem is either ignored or taken for granted, Hindmarsh Island nowithstanding.

No amendment so far proposed considers the difficulties inherent in obtaining truthful and reliable evidence in support of native title claims, and the extreme difficulty of obtaining evidence to resist them. [35] The evidentiary advantages so strongly favour claimants that there is no justification for retaining a rule [36] that the Federal Court need not observe the rules of evidence in native title cases, and may act upon a motley of findings and opinions, including those of "any other person or body." [37] Courts dealing with minor offences or claims for a few thousand dollars must observe the rules of evidence, but those rules can be disregarded when large slices of Australia are in issue!

In the end, the nature and extent of the new race-based property law will depend on the sort of evidence which is deemed good enough to affect titles which were clear and incontestable until *Mabo* arrived in June, 1992. Claimants' anecdotal evidence will be supported by opinions of anthropologists or other social "scientists" whose finances and careers commonly depend on the goodwill of Aboriginal claimants or their sponsors. The "experts" may have close and lengthy associations with claimants, and a sense of solidarity with them.

Are such "sciences" a sufficiently reliable basis for radical changes to our long-established land title and land management systems? If so, can the scientific impartiality of many of their practitioners be relied upon? Is there a danger that their cultural relativism will become moral relativism in the course of testimony? Social "sciences" are notoriously more prone to personal, political or ideological factors than empirical disciplines : "Research and ye shall find". It will rarely be a good "career move" for an "expert" on Aboriginal affairs to testify against a native title claim. If he is not predisposed to support the cause, he must be aware that jobs, peer-group approval and access to research materials depend on treating discretion as the better part of valour. In 1994 I quoted some observations of a senior journalist, Mr P P McGuinness, on this point. [38] I noted that no public rebuttal of his comments, effectual or ineffectual, had appeared in eighteen months. The time-lapse now approaches five years.

It is interesting to note that the very name "Wik" appears to be a recent anthropological discovery. A community development officer who worked in "Wik territory" between 1976

and 1984 does not recall the people calling themselves by that name a decade or two ago. A brave anthropologist who wrote his PhD thesis there says that, as recently as 1993, when their *Mabo* -style claim was launched, many of the claimants wondered what their lawyers and experts meant by 'Wik people". [39] Let us hope that these commentators are protected in their future careers -- or better, that they do not need protection.

Everyone who is worried about "ambit claims" and conflicting applications should realise that the best, if not the only remedy lies in close, unsentimental scrutiny of claimants' evidence by rigorous and manifestly "uncommitted" members of the judiciary, taking into the account the ease with which claims may be made and the technical and political difficulties in rebutting them.

Without legislative support and careful choice of personnel, courts and tribunals may not display that judicial scepticism with which novel and ambitious claims are properly greeted. Expert witnesses, like juries, are a wonderful responsibility-shifting device at the best of times, especially when a case is a "hot potato". It will certainly be more comfortable to accept the pro-title "experts" than to reject them, and that will be easy if they almost always testify on the claimants' side.

What about *Wik?*

In Adelaide last year I suggested that the *Wik* case (then awaiting judgment) would end in some compromise which would compound the *Mabo* confusion. *Wik* is not merely legislation passed by the thinnest of majorities; it is retrospective legislation. The leases are subject to new and inscrutable limitations. The result was accomplished by expecting governments of one hundred or more years ago to use language perfectly suited to deal with revelations made by the High Court in 1992 and on the eve of Christmas 1996. With the benefit of hindsight, it is not very clever to pick holes in documents written many years before native title was ever heard of.

The extension of the "target area" to pastoral leases is enormous, and the bargaining power of those who claim to speak for less than 2 per cent of Australians is commensurately increased. It is estimated that 40-50 per cent of Australia is now open to claims, mainly in Western Australia, Queensland and the Northern Territory. [40]

Last year it was proposed to insert new sections 25(1) to 25(1F) in the *NTA* to allow pre-1994 pastoral leases to be renewed on different terms. Before *Wik* this may not have caused much controversy. But it would now be subject to the "right to negotiate" if a native title claim arose.

It was also proposed to extend sub-section 235(7) to mining leases. (As it stands, that provision declares the renewal or extension of commercial, agricultural, *pastoral* or residential leases to be "permissible future acts".) When this change was put forward it was thought that native title could not affect pastoral leases. But now an extension of a mining concession which straddles a pastoral lease may give rise to a "right to negotiate" after all.

One of the more remarkable defences of the *Wik* decision is that it has not created much uncertainty. There is, I suppose, no uncertainty if one can unerringly predict meanings which the High Court may attach to "native title", "native title owners", "measure of compensation for native title", "continuing connection with the land", and the arcane relationship which *Wik* creates between pastoral leases and native title.

However, we are told that *Wik* is not a puzzle because it states that rights conferred by pastoral leases prevail over inconsistent native title. Quite so, but that doesn't take us very far. It merely asserts an abstract relationship between two unknowns -- the true extent of thousands of pastoral leases on the one hand, and innumerable native titles of unknown content on the other.

It is not very helpful to be told, in algebraic fashion, that "X" prevails over "Y" until the substance of both "X" and "Y" are known. It is one thing for native title enthusiasts to say: "Yes, there *is* uncertainty, but it is a price of `reconciliation' which we must pay." It is harder to take them seriously when they claim that *Wik* is not a riddle inside an enigma.

There is ample room for argument about the rights given by any particular pastoral lease; it will not be reduced by the availability of public money to fuel the debate. Those leases come in many details, [41] and most of them, being pre- *Mabo* , naturally do not speak with the precision that is necessary now.

The leases are only one side of the equation; the other is more problematical. Will there be a native title claim? If so, what will it amount to? If one is proved, to what extent will it be consistent with the lease? Who are the people with whom the lessee must co-exist? Will there be any other claimants? What disputes might there be about the co-existent rights in practice? How, and at whose expense, will they be resolved? What will happen if native title holders bring strangers to the land? Will the natives pay a share of rent, rates and repairs? Who will be legally responsible for accidents on the property? And if all this is *just too hard* , how much should the lessee pay to be rid of the co-tenants? The President of the United Graziers' Association puts it this way:

> "What I object to is that on a very broad basis we're looking at an arrangement where there's no control over who have access, when they have access, and where they have that access. You could have a scenario now where a group from Musgrave Park [42] could come to my place and go fishing." [43]

The *naiveté* and impractibility of the *Wik* decree surpass even *Teoh* . [44]

What is to be done? The modest amendments proposed last year pale into insignificance now. The radical proposal is that the *NTA* be amended to extinguish native title over pastoral leases, not just in the Preamble and in an ex-Prime Minister's speech, [45] but in the operative parts as well. It seems unlikely that the Government would brave the political passions and the righteousness, real and contrived, which this would provoke. The argument that in the "1993 deal" Aboriginal politicians accepted extinguishment by pastoral leases would not subdue the clamour.

A less radical step would be to define some of the essential concepts which *Mabo* and the *NTA* now leave up in the air. If it seems too courageous to define "native title" or "Aborigine", [46] an attempt might be made to define "connection with the land" and some common forms of access to Crown lands by Aborigines in modern times. The results could be less arcane than current definitions of "category A (etc) past acts", "low impact future acts" and "impermissible future acts". [47] At the same time the States could amend their *Land Acts* so as to enable pastoral leases and licences to cope with the Age of *Mabo* .

No doubt such amendments would be opposed as restrictions upon native title. The drums of discrimination, compensation, human rights and international embarrassment would resume their insistent beat. But if the amendments fail in the Senate, the Government at least can say that it did what it could to make native title manageable. If they somehow pass the Senate, the Parliament will be inviting the High Court to accept reasonable efforts to translate native title from the Court's airy generalities to the real world, or to bear full responsibility for the consequences. How can it be confidently asserted that definitions take something away when no one knows what native title amounts to?

Let us not under-estimate the difficulties -- legal, political and emotional -- which any significant amendments will encounter. There will be "ambit" threats of crippling

compensation, charges of racism, vows to disrupt the Olympics, threats to spend public money on High Court challenges or attacks on Australia in nebulous "international communities". The *RDA* will be held up as a Mosaic tablet which will bear no alteration. Indeed, the politics of the *RDA* may be a more powerful deterrent than wild `guesstimates' about compensation. A leading land-rights activist has already declared that he who dares amend the *RDA* must be in favour of racial discrimination.

The political strength of the *RDA* resides as much in its tendentious title as in the vague declarations and denunciations in its operative parts. (Imagine, if you will, a *Belief in Democracy Act* and picture the trials of any government trying to amend it, irrespective of what it had come to mean in practice, or how it was being exploited.) It was in the 1970s that the formerly prosaic but precise art of legislative draftsmanship began to yield to pious declamations in the style of the United Nations Charter. The unintended or undisclosed consequences of such decrees are incalculable, and their effects on judicial institutions are highly questionable.

The High Court stands ready to revisit *Wik* and *Mabo* . It knows the difficulties which governments face if they do more than tinker with minor details of the *NTA* . The Court's astute use of the *RDA* has given "native title" constitutional status in all but name. But by no means is it the only form of assistance to Aborigines. It was not the first form of "land rights", and it may be the least beneficial.

The Prime Minister does not believe that "voluntary agreements" can solve all the difficulties. He accepts that some legislation will be needed, and that the real question is "how extensive" it need be. [48] It will be fascinating to see whether his Government can eschew extinguishment and yet make changes of real significance.

Endnotes :

1 . *The Australian* , 12 February, 1997 : *Aborigines to Take Hard Line in Talks* .
2 . *Courier Mail* , 22 February, 1997 : *Negotiating a Minefield* .
3 . *Ibid.*
4 . *Courier Mail* , 15 February,1997 : *Death of a Deal* .
5 . *The Australian* , 22Ä23 February, 1997 : *Pro-Mine Blacks `Held to Ransom'* .
6 . *The Australian* , 26 February, 1997 : *Elders Backing Mine Want PM to Act* .
7 . *The Australian* , 22 April, 1996 : *Aborigines Seek Title Safeguards.*
8 . *Courier Mail* , 14 February, 1997 : *Why Wik is a Challenge for All.*
9 . *The Australian Financial Review* , 24 December, 1996 : *Ruling Puts Coalition in a Tough Spot.*
10 . *Courier Mail* , 3 June, 1993 : *Miners Want Mabo Limit.*
11 . *Sydney Morning Herald* , 21 January, 1997 : *What the States Want* .
12 . *Courier Mail* , 18 January, 1997 : *Poll Gives Thumbs Down to Wik Ruling.*
13 . *Courier Mail* , 20 January, 1997 : *Sunset Clause Will End Rights: Lavarch.*
14 . *The Australian* , 1Ä2 February, 1997 : *Spirit of the Land Touches Graziers.*

15. See J R Forbes, *Mabo and the Miners*, in Stephenson and Ratnapala (eds), *Mabo: A Judicial Revolution*, University of Queensland Press (1993), 206 at 213Ä215.

16. "All stakeholders agree that one of the major problems .... is that there is no clear-cut definition of native title": *Courier Mail* , 18 January, 1997 : *Heart of the Matter* . The *NTA* makes no attempt to define it.

17. See for example the analysis of *Mabo* hints in J R Forbes, *Mabo and the Miners* , *loc.cit.* .

18. Commonwealth Constitution, s.51(xxxi); *Clunies Ross v. Commonwealth* (1984) 155 CLR 193 at 201Ä202; *Minister of Army v. Dalziel* (1994) 68 CLR 261.

19. *Tasmanian Dam Case* (1983) 158 CLR 1.

20. *Ibid.* , at 145. Emphasis added.

21. *Trade Practices Commission v. Tooth & Co Ltd* (1979) 142 CLR 397 at 407Ä8, 423, 452; *P J Magennis Pty Ltd v. Commonwealth* (1949) 80 CLR 382.

22. *Op.cit.* , at 181.

23. *Grace Bros Pty Ltd v. Commonwealth* (1946) 72 CLR 269 at 291; *Nelungaloo v. Commonwealth* (1948) 75 CLR 495 at 541Ä42.

24. *Re Minister for Mining and Energy of Western Australia Future Act Application, Appln WF 96/1Ä11*. Native Title Service [100,046] at page 52,074.

25. *Re Minister for Mining and Energy of Western Australia Future Act Application, Appln WF 96/3 and WF96/12*. Native Title Service [100,048] NNTT (Sumner O'Neil and Neate, Members), Perth, 17 July, 1996.

26. As a distinguished State judge of appeal remarked to the writer, parts of the *Trade Practices Act* , on which a great deal of Federal Court jurisdiction has been constructed (and vigorously expanded), are so wide as to resemble terms of reference for a Royal Commission, rather than rules suitable for judicial reasoning.

27. *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 69 ALJR 423. A convicted drug-dealer and his infant children were found to have "legitimate expectations" based on an international treaty of which they had never heard, which had never been translated into domestic law, and which even the criminal's lawyers had not thought of before they reached the appeal courts. Thus mere treaties become part of domestic law via the judges, and official decisions can only be secure if they take account of hundreds of international arrangements.

28. *Courier Mail* , 8 February, 1997 : *Justice Warns Nation Risks Condemnation* .

29. *The Australian* , 24 December, 1996 : *Historic Victory for Native Title* . On 23 January, 1997 the Queensland Premier was moved to refer to the learned tribunalist as "an apologist for the failed native title regime".

30. *Courier Mail* , 15 February, 1995. The decision in question related to the extinction of native title in the *Waanyi Case* . The decision was upheld in the Federal Court but was overturned in the High Court.

31. Quoted in this writer's *Revisiting Mabo : Time for the Streaker's Defence?* in *Upholding the Australian Constitution* , Proceedings of The Samuel Griffith Society, Volume 7 (1996) 111 at 118.

32. *The Australian* , 1Ä2 March, 1997.

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3 . *The Australian* , 4 February, 1997 : Letter from Hal Wootten, NNTT, Sydney.
3
3 . *Courier Mail* , 20 July, 1996 : *Town Hits Back Over Racist Tag* .
4
. See J R Forbes, *Proving Native Title* , in *Upholding the Australian Constitution* , Proceedings
3 of The Samuel Griffith Society, Volume 4 (1994), 31; *Mabo and the Miners* , *op.cit.* , at 212ff;
5 *Mabo and the Miners ÄÄ Ad Infinitum?* , in M A Stephenson (ed), *Mabo: The Native Title Legislation* , University of Queensland Press (1995) 49 at 56ff.
3 . *NTA* , s. 82(3).
6
3 . *NTA* , s. 86.
7
3 . J R Forbes, *Proving Native Title* , *op.cit.* , at 52Ä53. The original article, entitled *Strict Assay*
8 *Is Needed on This Mother Lode* , appeared in *The Australian* , 8 December, 1992.
3 . *The Australian* , 28Ä29 December, 1996 : *Title Fight* .
9
4 . *The Australian* , 7 January, 1997 : *Judgment Adds to Delay and Expense* .
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4 . About 70 in Queensland alone, as noted in the *Wik* case.
1
4 . A site of some significance beside a high school in inner-city South Brisbane.
2
4 . *Courier Mail* , 29 January, 1997 : *Borbidge Calls for End to Wik Impasse* (Mr Larry Acton).
3
4 . See note 46 and related text.
4
4 . *Commonwealth Parliamentary Debates (Representatives)* , 16 November, 1993, p.2880 (Mr
5 Keating).
4 . As it stands, the *NTA* (s.10) takes the meaning of "native title" for granted and the definition
6 of "aborigine" (s.253) is perfectly circular.
4 . *NTA* , ss.229Ä232, 234, 235.
7
. *Courier Mail* , 3 March, 1997 : *PM Plans `Some Legislation' to Solve Wik Impasse.*
