

Native Title: A Simple Guide

A Paper for those who wish to understand *Mabo*, the *Native Title Act*, *Wik* and the Ten Point Plan

(Revised Edition incorporating the Senate's amendments)

Jeff Kildea
5th Floor Wentworth Chambers
180 Phillip Street
SYDNEY N.S.W. 2000
DX 384 SYDNEY
TEL: (02) 9233 3883
FAX: (02) 9232 8995
Email: jfkildea@ozemail.com.au
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Introduction

In July 1998 the Parliament passed the *Native Title Amendment Act 1998*. This brought to an end many months of bitter and divisive debate in the Australian community concerning the vexed question of native title. Before 1992, native title was not an issue in Australian politics. Prior to that the talk had been about land rights. Most governments at State and federal level had passed land rights legislation of one form or another. However, in June 1992 the High Court handed down judgment in a case called *Mabo*¹ which shook the foundations of Australia's land law and opened up a major political debate. In 1996 the High Court handed down another judgment—*Wik*.² Even more so than *Mabo*, *Wik* thrust the Australian community into a highly charged political debate, one which is only now beginning to subside.

My objective in this paper is to provide you, the reader, with some basic information to enable you to understand why, over the past few years, Australia legally and politically has undergone such trauma concerning the issue of native title. I will explain what the High Court decided in *Mabo* and how the Commonwealth Parliament responded with the *Native Title Act 1993* (NTA). I will then go on to explain the High Court's decision in *Wik* and look at the government's response to *Wik* in the *Native Title Amendment Act 1998*.

What is Native Title

To understand what native title is about, and why native title has become part of our law, two key concepts need to be grasped:

- Native title is not a new idea invented by the High Court in *Mabo*; and

¹ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

² *Wik Peoples v Queensland* (1996) 187 CLR 1.

- *Mabo* did not give benefits to the Aborigines; it recognised rights which had existed for thousands of years.

Those two concepts define the difference between land rights and native title. In the case of land rights, governments pass legislation to give to indigenous Australians certain rights to obtain land as a means of compensating them for the lands which were taken from them when the Australian colonies were established. Native title, on the other hand, is a principle of our common law which recognises that indigenous people did not necessarily lose their land when the colonies were established.

The recognition of native title has been part of English law for hundreds of years. It was based on the fundamental principle that the inhabitants of a territory with prior possession of land had a right to retain that land against newcomers including the English settlers of that territory. In all parts of the British Empire where the British settled, bar one, the laws and customs of the indigenous people relating to land ownership and management (ie. “native title”) were given recognition by the common law: in North America, New Zealand and Africa—but not in Australia.

And why was this so? Well, quite frankly, it was because when the British first occupied Australia they did not believe that the indigenous peoples had any laws and customs concerning land that required recognition. Influenced by the reports of William Dampier, the English pirate cum explorer who visited these shores in 1699, and Captain Cook and others who came here in 1770, it was generally thought in England at the time of the First Fleet that the natives of New Holland, as the continent was then called, were in small numbers, that they wandered around without having any fixed territory, and that they were such a primitive people that they had no recognisable system of laws and customs.

As a result, native title, which in 1788 was well known to English law was not recognised in Australia.

You have no doubt heard of the term “terra nullius”. It is Latin and literally means “land of no one”, ie. nobody’s land, land without an owner. This was an important concept in the system of International Law which was in force in the late Eighteenth Century. As the European powers—the Portuguese, the Dutch, the English, the French and the Spanish—built their empires with daring feats of sea navigation by such explorers as Vasco Da Gama, Francis Drake, Christopher Columbus, it had become essential, so as to avoid conflict among these powers, for them to agree on a set of rules to determine which of them had authority over newly discovered territories. This is the concept of “sovereignty”, ie. who has the ultimate authority in a particular country.

(Sovereignty is an important concept to which I will return later. At this stage it is important for you to recognise the distinction between sovereignty of a country and ownership of the land. In Australia, for example, the Queen in Parliament is sovereign—ie. the person with ultimate authority to make laws which govern my conduct³; but I own my house and until such time as the sovereign passes a valid law to the contrary, I am entitled under the law to possession of my house to the exclusion of everyone else—even the Queen.)

The doctrine of terra nullius meant that the European power which discovered a new uninhabited territory was entitled to claim that land as part of its empire. Sometimes, newly discovered lands were not literally uninhabited, but were occupied by people whom the Europeans called “savages” or “primitive” people. This proved no barrier to European expansion. The terra nullius doctrine was simply extended to cover the situation where the people living there, in the opinion of the Europeans, were uncivilised. The British adapted the

³ Modern constitutional theory may say that in Australia sovereignty lies in the people.

international law concept of terra nullius to govern the situation in “settled” colonies, which is how the law regarded Australia.

Accordingly, when the First Fleet arrived in 1788 and Captain Phillip raised the flag at Sydney Cove, the British claimed not only that the Crown obtained sovereignty over New South Wales (then the whole of the eastern half of the continent) but also ownership of the land as well. After all it was nobody’s land (“terra nullius”). In other parts of the British Empire, where the inhabitants were not regarded as uncivilised, the Crown claimed sovereignty but not ownership of the land. For the Crown to get ownership of inhabited land peacefully it had to enter into a treaty with the natives to acquire the land it wanted. Of course, in many cases those treaties were broken. But at least the British were prepared to recognise and treat with the natives in those colonies. They did not do so here because they regarded the natives as uncivilised—ie. they had no system of laws and customs concerning land.

Two hundred years of anthropology and historical study of Australian Aborigines have clearly demonstrated that far from lacking a system of laws and customs, the indigenous peoples of this land had, over tens of thousands of years, developed complex forms of social organisation, including laws relating to ownership and management of land. However, because of the ignorance of the British in 1788, they wrongly believed that the indigenous peoples did not have a system of land law deserving of recognition by the common law. By the middle of the Nineteenth Century, however, many in England (including members of the British government) and in Australia had formed a different view. But by then the demand for more and more land to accommodate the squatters’ expansion into the bush meant that nothing was done about changing the approach which the law had adopted, namely that Australia in 1788 was terra nullius. This approach was confirmed in 1889 by the Privy

Council which in *Cooper v. Stuart*⁴ held that Australia in 1788 was “a tract of territory practically unoccupied without settled inhabitants”. Up until 1992 that remained the law.

What the High Court did in *Mabo* in 1992 was to admit the error and to say that, in the face of the historical facts and modern attitudes to human rights, the common law of Australia, in good conscience, could no longer refuse to recognise the native title of the indigenous inhabitants of Australia. In effect, the judges said that knowing what we know now, it would be unjust for the common law of Australia to maintain the fiction that Australia in 1788 was terra nullius.

So *Mabo* did not invent native title, it merely applied to Australia that part of the common law which had applied elsewhere in the British Empire for hundreds of years. And *Mabo* did not **give** benefits to the Aborigines in the form of rights that they did not have before; rather it belatedly **recognised** rights to ownership of land which the Aborigines had possessed for thousands of years before 1788. It is the failure of many non-Aboriginal Australians—through ignorance or wilful intent—to accept that the indigenous people in 1788 possessed, and thereafter never surrendered, rights of ownership to the land which renders those non-Aboriginal Australians incapable of coming to terms with the concept of native title as espoused by the High Court in *Mabo*.

The Mabo Case

Background

This case concerned the Murray Islands in Torres Strait which had been annexed by the Colony of Queensland in 1879. In 1982 Eddie Mabo and two other members of the Meriam people who occupied the Murray Islands brought an action against the State of Queensland

⁴ (1889) 14 App Cas 286

and the Commonwealth of Australia in the High Court claiming that the Crown's sovereignty over the islands was subject to the rights of the Meriam people based upon local custom and traditional native title.

What the High Court Decided

The High Court by a majority of six to one agreed. In its reasons for the decision the Court stated a number of broad principles which apply not only to the Murray Islands in the Torres Strait but also to mainland Australia. In summary those principles are as follows:

- 1. Although the British Crown acquired sovereignty, it did not acquire beneficial or full ownership of the land. However, sovereignty conferred on the Crown authority to take beneficial ownership of the land if it chose to do so. But, if it did not choose to do so, the land continued to belong to the indigenous people according to their laws and customs.**

When the First Fleet arrived in Sydney Cove, the Crown in some cases did choose to take beneficial ownership of land. For example, when the Governor established his residence, Government House, that was an act by the Crown whereby it asserted ownership of the land on which the residence was built. In those early days there would have been many such examples: barracks for the soldiers, stockades for the convicts and so on. The High Court in *Mabo* said that by asserting full ownership in that way the native title of the local Aborigines would have been extinguished. Other examples of acts of the Crown which *Mabo* says may extinguish native title are legislation (ie. Acts of Parliament) and grants of freehold. In the first thirty or forty years of the colony the Crown made many grants of freehold to soldiers and free settlers. According to *Mabo*, native title in any land granted to those people was extinguished. However, what *Mabo* makes clear is that the Crown did not automatically become the owner of all the land in

the colony merely because it acquired sovereignty. It had to do some other act by which it unequivocally indicated that it intended to claim full ownership of the land.

Until it did that the Crown only had a nominal title to the land called “radical” (ie. root) title. Radical title is a theoretical legal concept (what is called a “legal fiction”) to give effect to the land law system which we inherited from England. This system had evolved from feudal times when the King was considered the owner of all of the land in the kingdom and everyone else held their title from the King.

Before *Mabo* the law held that Aboriginal tribes thousands of kilometres from Sydney Cove, which might not have had contact with white men for two or three generations after 1788, automatically lost ownership of their lands in 1788, simply by the Crown’s assertion of sovereignty. Following *Mabo* the law now says that the Aborigines did not lose ownership of their land until the Crown did some act which clearly indicated that the Crown intended to take over ownership of the land. Australia is a vast continent and despite 200 years of European occupation, there are still many parts of the country where the Crown has not yet done an act asserting full ownership in such a way as to extinguish the native title of the indigenous people.

- 2. Where native title continues to exist, the laws and customs of the indigenous people who have connection with the land determine the rights which the native title confers—ie. whether it is to reside on the land, to hunt and fish or to hold ceremonies etc.—and who may exercise those rights.**

Native title is generally a communal rather than an individual title. The laws and customs of the various Aboriginal peoples differs, just like laws differ between the States of Australia or between countries. Also, as with the laws and customs of all living communities, the laws and customs of Aboriginal peoples are not static. They change

over time to meet the challenges of the day. Given the significant impact of white contact, it is not surprising that the laws and customs of Aboriginal peoples have undergone substantial change over the years. From this it follows that it is not necessary for the continued existence of native title that the relevant Aboriginal group has maintained a tribal existence of the kind they lived in 1788.

3. Native title to particular land is extinguished if the tribe or group having native title loses its connection with the land.

The existence of native title depends on a continuing connection with the land. If the connection is broken then the native title is said to be extinguished. The connection must have existed and been maintained since the time the Crown first asserted sovereignty—in the case of New South Wales, 1788. Therefore, those claiming native title to land must show:

- that they are descended from the Aborigines whose land it was in 1788; and
- that over the generations a traditional connection has been maintained with the land.

That does not mean that there has to have been a continuing **physical** connection—after all many Aborigines were forcibly removed from their land and prevented from returning to it, but their descendants may have continued to live in the district and continued to maintain a connection with the land in many ways other than physical occupation.

4. Native title over any parcel of land may be surrendered to the Crown but the rights and privileges conferred by native title are otherwise inalienable (ie. non-transferable).

If an Aboriginal community has native title to land, it cannot sell it or mortgage it or lease it in the same way that land owners can with ordinary title. The Aboriginal community may, however, transfer or surrender its native title to the Crown. The restriction on dealing with native title land may not be a problem where the land is of particular spiritual significance and is to be held in perpetuity for spiritual purposes. However, where particular land does not have such significance, and an Aboriginal community wishes to develop the land for commercial purposes, it may be important to be able to deal with it in the same way that land subject to ordinary title can be dealt with. One way that it could do that is to surrender the native title to the Crown in return for a grant of freehold over that land or for monetary compensation which would enable the Aboriginal community to purchase other land.

What Flowed from the Decision

Even though *Mabo* concerned islands in the Torres Strait, it opened the way for Aboriginal peoples on the mainland to make claims in respect of their traditional land. But, as with Eddie Mabo's claim, that way was not an easy one. In order for Aboriginal people to establish all the factors required to prove that native title continues to exist, extensive research must be undertaken covering such disciplines as history, anthropology, linguistics and genealogy. As well the chain of title and prior use of the land must be ascertained back to 1788 to see whether or not there has been an extinguishing act by the Crown—ie. where the Crown has asserted full ownership of the land.

Having gathered all of that evidence, the native title claimants must prove all of those matters in a court of law. Cases of this complexity could run for ages, both in their preparation and conduct—Mabo's case took more than ten years from start to finish. Though subsequent cases may not take that long, they would still be lengthy and very expensive to run because lawyers

and expert witnesses would be engaged in court for weeks on end. Further, because native title law is novel and *Mabo* only gave broad statements of the principles governing it, the courts would have to work out the detailed principles on a case by case approach. Thus many of the cases would have to go on appeal to a higher court for those issues to be debated and ruled on. The cost of such an exercise for most Aboriginal communities would be prohibitive. Therefore their rights might remain unrecognised despite what *Mabo* said.

Another consequence of *Mabo* was that if native title existed in relation to a particular parcel of land, the Aborigines, in effect, had a right to veto any future dealings with that land which might extinguish or impair their native title. Therefore, while the long process of deciding whether native title existed was taking its course through the courts, anyone wishing to deal with the land—not only the Aboriginal claimants, but also persons wishing access to it for purposes such as mining, or persons wishing to develop it for public purposes, including residential subdivisions by Landcom or local councils, would have to wait to see the outcome. If native title were established then the native title holders could at their discretion veto that development on their land.

That was the position after *Mabo*. It was clearly in the interests of both Aborigines and non-Aborigines that ways be worked out to have claims processed quickly and with minimum cost; preferably by conciliation and agreement rather than litigation. It was also in the interest of the wider community for procedures be put in place to enable land to be made available for future development. That was the purpose of the NTA.

The Native Title Act 1993

The High Court's decision was not universally welcomed. Even today, five years on, many people are uncomfortable with the whole idea of native title. This is so especially for those who grew up with a view of Australian history which praised the achievements of the

explorers and the pioneers while ignoring the Aborigines and their prior ownership of the land and the devastation which the invasion of their land brought to them. Terra nullius is not only a legal doctrine, it is also a state of mind deeply rooted in the dominant culture. However, the government of the day accepted the decision and set about a process of dealing with the problems which *Mabo* posed.

In what was a remarkable process of consultation and negotiation, representatives of Aboriginal and non-Aboriginal interests spent months working out a compromise with which they could all live. The result was the NTA.

In summary the NTA has the following features:

1. Recognition and protection of native title rights.

The NTA prescribes that native title cannot be extinguished except in the manner set out in the Act itself. In other words, the NTA removes the methods of extinguishment of native title as identified in *Mabo*, and which are referred to above, and replaces them with specific procedures which governments must follow before native title may be extinguished or otherwise affected.

2. A mechanism regulating future activities affecting native title.

This is the so called “Future Act” and “Right to Negotiate” process. The Aborigines agreed to compromise their right to veto development on their land. In return they retained rights to compensation and in some cases, such as mining and resumption of native title rights, a right to negotiate. The advantage which the Aborigines gained in this compromise is that the right to negotiate (RTN) begins when a claim is accepted by the National Native Title Tribunal (NNTT). They do not have to prove their claim to native title first. By contrast, the right of veto could only be exercised after they had

satisfied a court with evidence that they could in due course substantiate their claim to native title.

The NTA provides a process by which the RTN is to be exercised. Firstly, it provides a mechanism for negotiation and mediation. If the parties reach agreement then their agreement can be registered with the NNTT. If the process of negotiation and mediation fails to achieve an agreement, then the dispute can be referred to the NNTT for arbitration. If the NNTT decides that the future act may proceed, it can impose conditions and can award compensation to the Aborigines. If the NNTT decides that the future act may not proceed then the relevant Commonwealth minister can override the NNTT's decision in the national or the State's interest. In summary, under the RTN regime, Aborigines have an opportunity to oppose—but not to veto—certain future acts. Also, the RTN has strict time limits (six months for negotiation and mediation, six months for arbitration) so that the process cannot drag on endlessly.

3. A mechanism by which native title rights can be established and compensation determined.

Instead of the legal nightmare which proving native title at common law involves, the NTA provides a mechanism for making claims and having those claims dealt with, with minimal legal formality. Although the formality has been reduced, the matters to be proved still remain the same. However, the NTA provides for assistance to native title claimants by the NNTT and by representative bodies set up under the NTA. The representative bodies provide to the Aboriginal communities the funding and technical expertise necessary to prepare a native title claim. The NNTT provides mediation services and some technical assistance.

4. Validation of past acts which may be invalid because of the existence of native title.

Mabo held that the *Racial Discrimination Act* (RDA), which came into force in 1975, made it unlawful for governments to do any acts which, under native title law, extinguished native title (eg. granting freehold title over land). Before *Mabo*, governments did not know of this effect because native title had not yet been recognised. The decision meant that for almost twenty years governments had been doing various acts in relation to land which after *Mabo* were considered unlawful and invalid. Clearly, in the interests of unsuspecting land holders something needed to be done to remedy that situation. Therefore, as part of the compromise, the Aboriginal people agreed that any such acts after the RDA and before the NTA would be validated and native title on that land extinguished. (Compensation is payable by the relevant government for the value of any native title which was extinguished as a result.) This was a concession made by the indigenous people in the national interest.

5. Establishment of an indigenous land fund for those indigenous people who will not benefit from native title because of prior extinguishment.

Many Aboriginal communities will not be able to claim native title over their traditional lands because over the past 200 years acts have been done by governments which have extinguished their native title. The NTA creates a fund which is to provide such communities with money to purchase lands from existing owners.

The NTA was the result of a compromise whereby the indigenous people made significant concessions in terms of their substantive rights in return for procedural rights such as: the statutory procedures for extinguishment of native title; simplified mechanisms for proving native title; and the RTN process.

The Wik Case

Background

One question which *Mabo* left unanswered was whether, at common law, the grant of a lease extinguished native title. It was generally agreed that the grant of a freehold title would do so, but the judges could not agree whether leases would also. Three of the six judges in the majority expressed the view that the grant of a lease would extinguish native title but the other three raised doubts as to whether that could be said to be so in all cases. Because it did not need to be decided in *Mabo*, the question was left to be decided in another case.

The issue is important because most of Australia's land title is not freehold but one form or other of Crown lease. It is generally thought that certain types of Crown leases, such as the residential and business leases in the ACT, extinguished native title. The main point of contention was whether pastoral leases did so. Pastoral leases are a type of Crown lease used in Australia since the 1840s. It was a new form of land title adapted to the unique conditions of outback Australia. In general terms, a pastoral lease gives the leaseholder the right to graze cattle or sheep. Such leases usually cover large areas of land in fairly arid parts of Australia so that the amount of activity on any particular part of the land is fairly minimal. Many considered that because the activities on the land were not such as to interfere with the rights of Aborigines to enjoy their native title, it was unlikely that the grant of such leases was inconsistent with the continued existence of native title. Others, including the Commonwealth government's own legal advisers, considered that such leases did extinguish native title. They argued: (1) at common law a lease confers exclusive possession on the tenant; (2) the tenant's right to exclusive possession is necessarily inconsistent with Aboriginal people's native title right to possession of the same land; and (3) since the Crown's sovereignty could extinguish native title by granting inconsistent rights, the grant of a lease extinguished native title.

The NTA did not dispose of the issue because the various parties to the negotiations which resulted in the legislation could not agree. There was a case that had already started in Queensland involving a claim for native title which would raise the question fairly and squarely for the High Court to determine. The indigenous interests wanted the High Court to decide the issue. As part of the negotiated settlement, therefore, the decision was left to the High Court. That case is now well known to all Australians by its common name, *Wik*. Some non-indigenous stakeholders claim that in 1993 there was an “agreement” or an “understanding” that native title was extinguished by the grant of a pastoral lease. It is true that many people (including some Aboriginal spokespersons) believed that to be the case, but there was no such agreement or understanding to which the indigenous people were a party. In *Wik*, the Wik and Thayorre peoples of northern Queensland had claimed native title over lands which in the past had been the subject of pastoral leases. It was argued by those opposed to the claims that the granting of the pastoral leases had extinguished native title.

What the High Court Decided

The High Court has been vigorously attacked by many people for “judicial activism” and going beyond its role in the decision it reached. Ironically, what makes the *Wik* decision unsatisfactory from a legal point of view is that the High Court determined the case that was strictly before it, and steadfastly did not go outside its role of deciding that particular case. The Court was asked to decide a number of questions that had been referred to it by the judge who was hearing the native title claim. He wanted legal guidance on some issues before proceeding to hear the claim. The High Court answered those questions and none of the many other questions to which lawyers want to know the answers.

The principle question which was answered was, in effect, “Did the granting of the pastoral leases under consideration in that case **necessarily** extinguish **all** native title rights and

interests that might otherwise exist?" The High Court, by a majority of four to three, answered in the negative. The main principles which emerge from the various judgments are as follows:

1. That the pastoral leases under consideration in the case did not confer exclusive possession on the pastoralist

The Court said that the pastoral leases were not really leases but were a bundle of statutory rights conferred on the pastoralists by the *Land Act* to permit them to graze cattle and sheep on Crown land. Unless the lease itself, or the statute under which it had been granted, conferred exclusive possession, merely calling the bundle of statutory rights a "lease" did not confer exclusive possession.

2. That the leases therefore did not necessarily extinguish all native title rights and interests.

3. Whether there was any extinguishment or impairment of native title can only be determined by considering the nature of the native title rights and interests which the Aborigines can establish in relation to the land

Because the judge hearing the native title claim had not yet determined whether there was any native title, let alone what rights and interests it involved, the High Court could do no more than state general propositions.

4. Where native title rights and interests can coexist with the statutory rights of the pastoralist then they survive, but, to the extent of any inconsistency the rights of the pastoralist prevail.

What happens where the native title rights and interests cannot co-exist with the rights of the pastoralist under the lease was not clearly decided. It may be that those native title rights are extinguished or it may be that they are unenforceable during the term of

the lease. That is one of the issues which the High Court left to be decided in another case.

What Flowed from the Decision

Within a very short time (one suspects even before the decision had been read) conservative politicians and various lobby groups were commenting on the decision with some of the most irresponsible statements that national leaders could possibly make about an issue of such importance for the nation. They also attacked the High Court with a ferocity which has prompted some High Court judges to plead with the politicians to temper their criticisms lest they endanger the standing of the Court itself in the community.

In reaching its decision the Court examined the legislation under which the leases were granted and gave an interpretation of that legislation. Courts do that sort of thing every day of the week. That is their proper role. It held that neither the legislation nor the leases granted under the legislation showed a clear intention that the Crown was seeking to extinguish native title. It is one of the touchstones of our democracy that if the Crown is going to deprive people of their property, it must do so in clear and unequivocal terms. The Court held that in this particular case the legislation did not express such a clear intention. It is remarkable that so many conservative people have criticised the High Court for upholding a principle which protects the right to ownership of private property.

In support of their interpretation of the legislation, the judges in the majority traced the history of land law in Australia and found that the legislation granting pastoral leases was not intended to deprive Aborigines of their land but was designed to provide a means by which the rapid expansion of the pastoral industry could be regulated and controlled while giving to the squatters some degree of security from claim jumping by their fellow squatters. Many may disagree with the results of the Court's historical analysis and statutory interpretation but

it is the role of the Court to make such decisions and they did so in well reasoned decisions for all to see, read and criticise.

The Need for Reform

Even before *Wik* the need for reform of the NTA had become apparent.⁵ After *Wik* the government came under increasing pressure to amend the NTA. The reasons for reform included the following:

- 1. Practice had shown a number of deficiencies in the operation and administration of the NTA.**
- 2. The decision of the High Court in *Brandy*⁶ had cast doubt on the ability of the NNTT to make determinations of native title and compensation.**

The NTA envisaged that the NNTT would perform most of the functions concerning the determination of native title. Some matters would be referred to the Federal Court, but in the main, the Federal Court was an adjunct to the process. *Brandy* cast doubt on the power of the NNTT to perform many of the functions allocated to it. A different approach to the respective roles of the Federal Court and the NNTT was therefore needed.

- 3. The decision of the High Court in *Waanyi*⁷ had meant that native title claimants could get the benefit of statutory rights, such as RTN, without having to demonstrate that they were likely to succeed in their native title claim.**

⁵ Labor had introduced amending legislation in 1995 before it went out of office and in 1996, before *Wik*, the Coalition government introduced its own amending legislation.

⁶ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. This case decided that the process by which decisions of HREOC, which is not a court, were to take effect upon registration with the Federal Court, as though they were orders of the Federal Court, was invalid. By analogy, the same outcome would occur in relation to the NNTT.

⁷ *North Ganalanja Aboriginal Corporation v State of Queensland* (1996) 185 CLR 595

RTN conferred substantial procedural rights on native title claimants. No one could reasonably object if those claimants were likely to succeed in their native title claim. However, without an effective filter, claimants with no likelihood of success were also able to obtain the benefit of RTN.

4. As a consequence of *Wik*, the rights of third parties had to be taken into account.

If native title were to be confined to vacant Crown land, then for the most part the only interests to be considered were those of the native title holders and the Crown, and, in cases where Crown land was to be the subject of mining, mining companies. Even though *Wik* had held that the rights of pastoralists prevailed over the rights of native title holders, it could take many years and many court cases to work out what that principle meant in practical terms on the ground. For example, under most State legislation pastoralists could apply to the relevant State authority for permission to diversify their activities. Prior to *Wik* such applications were often routinely granted. However, after *Wik*, some State governments took the view that until such time as it was determined whether or not native title existed they would no longer grant such applications.

5. A further consequence of *Wik* was the potential increase in administrative burden on the NNTT

Under the mistaken view, held by the Keating government and others, that native title did not survive the grant of a pastoral lease, the land area potentially available for native title claim constituted about 36% of the Australian land mass. After *Wik*, the land area potentially available for native title claim increased to about 78%. As a consequence the NNTT's workload would inevitably increase—particularly in dealing with mining applications and RTN. In order to cope with the increased workload, more resources would be needed. However, the NNTT is a federal body funded by the Commonwealth

government. The States, who are responsible for processing mining applications, have little or no influence in ensuring that appropriate resources will be allocated to meet the increased demands on the NNTT.

The Government's Response

As a result of the extreme statements made by some conservative politicians and industry leaders, many Australians, especially farmers, believed that the *Wik* decision meant that they may lose their farms. Even city people began to fear for their suburban backyards. In this climate of fear and misunderstanding, the government came under increasing pressure to introduce legislation to extinguish native title on pastoral leases. The government resisted that pressure, largely because of the massive compensation bill that the taxpayers would be left to pay. However, in order to appease demands for drastic action, the government came up with the Ten Point Plan which it announced in May 1997. Although it stopped short of the “bucketfuls of extinguishment” that some spoke of, the Ten Point Plan did include a number of provisions which either extinguished native title in particular circumstances or which significantly cut back statutory rights which native title holders had obtained as part of the NTA compromise in 1993.

The indigenous people and their supporters were outraged by the government's plan to cut back on the rights of native title holders. Representatives of the indigenous people had earlier formed the National Indigenous Working Group (NIWG) to put forward the point of view of native title holders. Over the next few months community support for the indigenous people grew and a number of non-indigenous support groups were formed. Meetings of support were held across the country, even in blue ribbon Liberal Party electorates. In rural Australia it was often a different story with calls being made for the government to take a more drastic

approach to native title. Very soon it became apparent that the Australian people were divided like they had not been since the days of the Vietnam war.

The Parliamentary Battle

The *Native Title Amendment Bill 1997* (NTAB) was introduced into the House of Representatives in September 1997. It passed through the lower house. The arena for debate was always going to be the Senate where the government did not have the numbers. In fact the balance of power in the Senate lay with Senator Brian Harradine from Tasmania. When the Bill was introduced into the Senate in November, Senator Harradine announced that he was prepared to let the Bill pass so long as it was amended to remove its more objectionable elements. Many of these elements were seen by the government as vital to its Ten Point Plan. Therefore, it became apparent that unless the government was prepared to compromise, the Bill would be defeated. And so it was.

The Senate passed some 217 amendments of which the government objected to 92.⁸ The Prime Minister in addressing the House of Representatives on 6 December 1997 identified four major areas of disagreement between the government and the Senate:

- Sunset clause

The government wanted all claims for determination of native title under the NTA to be made within six years. The Senate rejected that approach on the basis that after 200 years of dispossession, it was unreasonable to expect the indigenous people to be in a position to lodge their claims within six years.

- Registration test

⁸ Of the 217 amendments passed by the Senate, 100 were amendments, mostly of a technical nature, moved by the government in order to fine tune its legislation.

The NTAB provided that claims would be processed through the Federal Court rather than the NNTT.⁹ However, claims which passed a threshold test would be registered by the NNTT. The main advantage of registration would be that native title claimants would have the benefit of RTN even before the Federal Court had determined whether or not they had native title. It was generally agreed that there should be a threshold test which ensured that only those claims which were likely to succeed would become registered. However, the Senate considered that the government's threshold test was too restrictive. In particular it failed to acknowledge the disadvantage suffered by children of the "stolen generations" and victims of the "locked gates" practices.

- Relationship between the NTA and the RDA

The Senate passed an amendment which said that the NTA had to be read and construed subject to the RDA. The government argued that this would create uncertainty. The Senate was of the view that it was important to ensure that the NTA operated and was interpreted in a non-discriminatory way.

- Right to negotiate on pastoral leases

This was the major issue between the government and the Senate. As a fundamental element of the Ten Point Plan, the government proposed to allow State governments in effect to abolish RTN on pastoral leases. This measure was strongly supported by the mining industry which did not want to have to negotiate with native title holders and claimants over 78% of the continent. If the NTAB passed, they would only have to negotiate in respect of the 36% which comprised vacant Crown land. The government was also supported by the pastoralists who believed it was unfair that indigenous people had

⁹ This was in line with the decision of the High Court in *Brandy* and had the support of the Senate.

more rights in dealing with mining companies than they did. The Senate rejected the government's amendment.

The Senate's rejection of the NTAB was only the first round in what would ultimately be a three round bout. Under the *Constitution*, if the Senate were to reject the NTAB again after three months had elapsed, the government would be able to dissolve both houses of Parliament and have a general election (a double dissolution). After that election, if the Senate again rejected the Bill, the government could require that both houses sit together to consider the Bill (a joint sitting). Because the House of Representatives has about twice as many members as the Senate, it is likely that a government's legislation will be passed at a joint sitting.¹⁰ Of course, the government must first win the general election and be returned with a large enough majority in the House of Representatives to ensure that it will have the numbers at the joint sitting.

In April, the government again introduced the NTAB into the Senate. In the intervening period, there had been considerable discussions between lawyers for the government, the ALP, the NIWG and Senator Harradine. As a result, a number of the minor areas of disagreement between the government and the Senate had been resolved. However, the major issues—including the PM's four sticking points—remained outstanding. On the issue of RTN on pastoral leases, lawyers for the indigenous had formulated a compromise proposal to be administered by the States that would preserve substantive rights of negotiation on pastoral leases, but which would not be the federally administered RTN which the government and its supporters were so opposed to. Lawyers for the ALP and Senator Harradine were later included in discussions about the alternative RTN.

¹⁰ In 1974 the Whitlam government had a double dissolution which was followed by a joint sitting. It was able to have its legislation passed at the joint sitting.

While the Senate was debating the NTAB, it became apparent that because of internal divisions within the NIWG, the indigenous representatives would not publicly endorse the alternative RTN. As a result, and following discussions with representatives of the NIWG, the ALP and Senator Harradine, the Senator agreed to propose the compromise to the government. On the afternoon of 8 April 1998, the Prime Minister indicated to Senator Harradine that he would be prepared to accept the compromise if the State governments agreed to it. A few hours later, the Prime Minister informed the Senator that Western Australia and Queensland would not agree. Therefore, there would be no compromise. Later that night the Senate again refused to pass the NTAB in the form that the government wanted. A double dissolution appeared to be the only way to break the impasse.

The Final Showdown

On 14 June 1998 the country woke to the news that the One Nation party had secured 23% of the vote in the Queensland elections of the day before and that it was likely that Labor would form a government with the support of one or more independents. The Coalition vote had evaporated with the advent of the new party. If the Queensland result were translated into the federal sphere, the Coalition parties were likely to lose government. So it was, that Pauline Hanson and her anti-Aboriginal politics were to provide the lever necessary to persuade the government that the compromise offered by Senator Harradine in April was preferable to a double dissolution which the Coalition might lose.

Nevertheless, the government continued to make public utterances that it would not compromise on the Ten Point Plan and that if a bitter raced-based election campaign was to be avoided the Senate would have to accept the government's Bill. Senator Harradine, who was very concerned about the damage a raced-based election would have on Australia, was more interested in serious negotiation than public grandstanding. Therefore, he gave his now

famous media conference in which he said, “I blinked”. The next day, negotiations with the government began.

Most media commentators interpreted Senator Harradine’s statement to mean that he was going to sell out the indigenous people whom he had previously supported and to agree to pass the government’s Bill. Many indigenous people and their supporters also believed this. But, by the end of the week, it began to emerge that it was the government, and not the Senator, which was making concessions and that the government was now prepared to agree to amendments to the Bill which it had rejected back in April. It took the government a few more days to persuade the miners, the pastoralists and the State governments that the compromise was necessary in order to save the Coalition from defeat at a double dissolution election. On 1 July 1998 the details of the compromise were finalised and announced.

During the following week the NTAB, as amended in accordance with the negotiations between the government and Senator Harradine, passed through the Parliament. The longest Senate debate in the history of the federal Parliament was over.¹¹

There has been much criticism of the government and Senator Harradine arising from the fact that the indigenous people were not included in the negotiations during the last week of June. However, Senator Harradine had spoken with indigenous representatives during that week and had assured them that he would not depart from the position which he had adopted in April—a position which had been arrived at in consultation with the NIWG during the Senate debates in December and April and in discussions in the months in between. The argument in June was essentially between Senator Harradine and the government, and in that argument the Senator stuck to his April position. True it is that the Prime Minister briefed all stakeholders, except the indigenous, concerning the negotiations, but it was not within Senator Harradine’s

¹¹ In the July debate, the Senate passed a further 185 amendments to the Bill. The Senate debates in December, April and July occupied a total of 106 hours.

power to dictate to the Prime Minister to whom he should speak. When the form of the amendments was finally determined, the first people that Senator Harradine briefed were members of the NIWG.

In terms of the Prime Minister's four sticking points the result was as follows:

- **Sunset Clause**

There would be no sunset clause.

- **Registration Test**

The government's registration test has been softened to enable children of the "stolen generation" and victims of "locked gates" practices to have their native title claims registered.

- **Relationship between the NTA and the RDA**

The Senate's amendment which required the NTA to be read and construed subject to the RDA would be retained.

- **Right to negotiate on pastoral leases**

Under the compromise, RTN on pastoral leases was preserved. The States could, however, introduce their own procedures to manage mining and some compulsory acquisitions on pastoral lease lands on which native title existed. Those procedures would have to meet strict Federal criteria giving native title holders and claimants substantive rights of negotiation.

What is new in the amended Native Title Act

There are a number of differences between the original NTA ("the old Act") and the amended NTA ("the new Act"). Some of the major features of the new Act are:

1. Validation of Intermediate Period Acts

When the NTA was introduced in 1993 it contained provisions which made sure that grants in relation to land between 1975 (when the RDA commenced) and 1994 (when the NTA commenced) would be valid, even though under *Mabo* they may have been invalid. The new Act also contains a validation provision in respect of grants in relation to land which were made between 1994 (when the NTA commenced) and 1996 (when *Wik* was decided). This was because some State governments, most notoriously Queensland under both Wayne Goss and Rob Borbidge, ignored the requirements of the NTA when making such grants. Because innocent third parties were often the recipients of these grants, both the Labor Party and the Coalition very early agreed that it was expedient to validate these grants. Although compensation is payable to native title holders if native title is extinguished or affected by the validations, it is a national scandal that the indigenous people should be the ones to suffer for the misdeeds of State governments.

2. Confirmation of Past Extinguishment

Another feature of the new Act is the inclusion of provisions which confirm that grants of certain interests in land, which the government considers resulted in native title being extinguished, did in fact extinguish native title. Many of the specified grants would, in the opinion of most lawyers, have extinguished native title. However, there are a number of grants listed in the new Act over which there is some controversy. Some lawyers take the view that it does not matter much because the particular provisions of the new Act only operate to confirm past extinguishment and do not themselves effect extinguishment. Others, however, argue to the contrary. This is an argument which may have to be resolved ultimately in the Courts.

3. Revised claims process

Under the new Act applications for determination of native title are to be made to the Federal Court and not the NNTT. Applications must be endorsed by the native title holders on whose behalf the claim is made (“the native title claim group”). No longer can individuals lodge their own claims without the backing of the native title claim group. This should eliminate the scandal of multiple and overlapping claims in respect of the same land.

The Federal Court will give a copy of the application to the NNTT. If the application contains sufficient information to indicate that the claim is likely to succeed, the NNTT will register the claim, thereby entitling the claim group to the benefit of RTN. Many lawyers consider that these provisions hold the key to ensuring that native title will work more efficiently in the future. By ridding the system of bogus claims and claims that have no prospect of success, the NNTT will be better able to deal with its work load. Also, if the community, including miners and pastoralists, is satisfied that only genuine native title claimants qualify for RTN, then there will be greater community support for native title as a legitimate means of advancing indigenous rights.

4. More complex procedures concerning future acts

In the post-*Wik* environment where native title holders and third parties, including pastoral leaseholders, may share the same land, the new Act has adopted a more sophisticated approach concerning future acts than did the old Act. This relates to the following broad areas:

a. Diversification of primary production activities¹²

To provide certainty as to the type of activities which pastoralists may undertake on lease land, the new Act provides that the lessee may engage in a range of activities falling within the definition of “primary production” as set out in the Act. Many of those activities are beyond what might have been permitted under the lease. However, the activities must be such as could have been permitted under existing State legislation. Where the area of the property exceeds 5,000 ha, the new activity must not have the effect that a majority of the property is used for purposes other than pastoral purposes. Also, the provision cannot be used to convert a non-exclusive lease into an exclusive lease or a freehold estate.

b. Off-farm activities¹³

Governments may issue permits to lessees (and owners of freehold estates) to undertake:

(i) grazing; and

(ii) activities related to accessing or taking water

that are directly connected to primary production on adjoining or nearby land, so long as such acts do not stop any native title holders from having reasonable access to their land. Further, if there is a determination that native title exists in relation to an area of land and the native title rights and interests includes a right of exclusive possession, then off-farm activities inconsistent with the native title cannot be permitted.

¹² See ss 24GA-GC.

¹³ See s 24GD.

c. Granting rights to remove natural resources¹⁴

Governments may grant licences to third parties to enter lease land for the purpose of taking some of the natural resources (eg. timber, gravel, river sand) so long as the activity does not amount to mining. Native title holders and claimants must be notified of the proposed permit and given an opportunity to comment on the act.

d. Other future acts

Other changes to the future act processes concern acts relating to the management of water (eg. the granting of irrigation licences and fishing licences) and airspace,¹⁵ acts involving reservations (eg. reservations of land for a national park or a school),¹⁶ and acts involving the provision of facilities for the public (eg. wharfs, roads, power lines).¹⁷

Although these measures provide greater certainty to pastoralists and, in effect, allow them to carry on their farming activities in the manner to which they have become accustomed, and make it easier for governments to regulate various other activities, the right of native title holders to object to these activities has been eroded compared with the old Act. However, decision makers will be required to take into account the effect of the proposed act on native title when considering whether or not to issue the particular licence or permit. Also, native title will not be extinguished by these acts, and, in so far as native title is affected, compensation will be payable to the native title holders.

¹⁴ See s 24GE.

¹⁵ See s 24HA.

¹⁶ See s 24JA.

¹⁷ See s 24KA.

5. Changes to Right to Negotiate

RTN under the old Act relates to future acts which consist of the granting of certain mining interests and the compulsory acquisition of native title rights and interests for the benefit of third parties. This basic position has been maintained under the new Act. However, some activities which would have attracted RTN under the old Act have been specifically excluded. These include:

- compulsory acquisitions for privately built infrastructure;¹⁸
- with the approval of the Commonwealth Minister, the creation or variation of certain mining rights allowing some kinds of low impact or small scale mining;¹⁹
- acts within a town or city;²⁰
- acts to the extent that they relate to the intertidal zone²¹

There has also been some changes in relation to acts covered by agreements with native title holders and to the renewal of some existing and future mining interests.²²

The other major change in relation to RTN concerns the ability of States to put in place an alternative to RTN in respect of pastoral lease land and some other classes of land.²³

Although there was criticism of this aspect when the compromise was announced, a close reading of s 43A, which confers this power on the States, indicates that native title

¹⁸ See s 26(1)(c)(iii). Native title holders and claimants do, however, have substantial rights of negotiation as set out in s 24MD(6B).

¹⁹ See ss 26A-26C. This includes low impact exploration, prospecting, fossicking, small scale opal and gem mining in existing opal and gem mining areas, and alluvial mining for gold or tin.

²⁰ Where the act consists of the compulsory acquisition of native title, native title holders and claimants have substantial rights of negotiation as set out in s 24MD(6B). Where the act consists of mining, RTN continues to apply until such time as an alternative State scheme is approved under s 43A (see below).

²¹ This is the area on the seaward side of the highwater mark.

²² The new system of Indigenous Land Use Agreements is discussed below. The renewals exclusion is covered by s 26D.

holders and claimants will continue to have substantial rights of negotiation. For the State's alternative scheme to qualify under s 43A it must have the following features:

- native title holders and claimants will have the right to be notified of proposed mining;
- they will have a right to object to the mining proposal in so far as it affects their native title rights and interests;
- mining companies and State governments will be required to consult with native title holders and claimants about ways of minimising the impact of the mining on their native title rights and interests;
- there must be provision for mediation;
- in the event that an agreement cannot be reached, the objection will be heard by an independent person or body;
- the determination of that independent person or body must be complied with unless it is overruled in the interests of the State after the Minister for indigenous affairs has been consulted and those consultations have been taken into account;
- should mining go ahead then compensation will be provided for the effect of mining on native title rights and interests and the amount of that compensation must be determined by an independent person or body.

Before the State scheme can become effective it must be approved by the Commonwealth Minister. Also, the Senate may, if it chooses to do so, disallow the proposed State scheme.

²³ See s 43A which relates to land that is or was covered by a freehold estate or by a lease over which all native title rights and interests have not been extinguished, an area that is or was covered by a reservation for a public purpose and is or was in use for that or a similar public purpose, and an area that is wholly within a city or town.

6. Greater Emphasis on Agreements

Under the old Act it was possible for native title holders to enter into agreements with the government concerning the doing of future acts on land which is or may be subject to native title. The relevant provisions were not very detailed and there was doubt as to whether they would bind people in the future. The new Act has replaced those provisions with a very detailed scheme dealing with Indigenous Land Use Agreements (ILUAs). Many believe that ILUAs will be the way forward in terms of ensuring both that economic development can proceed on land which is or may be subject to native title and that native title rights and interests will be adequately protected. The new provisions have widespread support amongst both the indigenous and non-indigenous sections of the community.

7. Amendments relating to representative Aboriginal/Torres Strait Islander bodies

The old Act contained provisions for representative bodies to assist native title claimants in the preparation and presentation of their claims. The new Act contains more detailed provisions which the government says are designed to improve the standard of service which these bodies provide.

Overall Assessment

These are but a few of the changes brought about by the amending Act. There are many more—too many to detail in a general paper such as this.²⁴ Although it has to be acknowledged that generally the rights of indigenous people under the NTA (as they existed immediately after *Wik*) have been eroded by the amending Act, that view should be tempered by the following considerations. Firstly, the NTA was passed on the basis of a mistaken view as to what land was capable of being subject to native title. One has to ask whether the

²⁴ The old Act was 127 pages while the NTAB comprised 364 pages.

Keating government would have enacted the NTA in its 1993 form had *Wik* been decided before that legislation was passed. Secondly, the original NTAB introduced by the Coalition government in September 1997 has been substantially amended—there have been over 300 amendments to the Bill. Many of its more objectionable features were removed by the Senate in December 1997 and April and July 1998.²⁵ Thirdly, there are some features which are positive gains for native title holders and claimants, including the section affirming the RDA and the provisions dealing with ILUAs and the claims and registration process.

Conclusion

When the High Court first handed down its decision in *Mabo* there were many in the community who were bitterly opposed to native title. These included the federal Coalition, most State governments, the mining industry and many pastoralists. After the compromise which resulted in the original NTA, some of these groups at best gave grudging assent—most, however, continued to be opposed. The divisions widened after *Wik*. The debate which ensued split the community in ways not seen since the Vietnam war. Therefore, it is remarkable, after such division and bitterness that, with the passing of the amending legislation, a consensus in favour of native title has been achieved amongst all of those groups who were previously opposed. With the decision of the Labor Party not to raise the issue of native title in the forthcoming election campaign, the consensus in support of the new Act has widened to encompass all of the mainstream of Australian politics. It is to be hoped that in time the indigenous people will also be prepared to give the new Act their assent, even if not their positive consent.

Despite its shortcomings, the new Act does provide the basis for a settlement of the vexed issue of native title for a few years at least. If it can be given a chance to work, and if the

²⁵ This is a fact not generally appreciated by many supporters of the indigenous people. As a result, some of their arguments and rhetoric have remained unchanged from those which they had advanced in mid 1997.

problems and shortcomings can be looked at with objectivity, so that necessary amendments can be made without the sort of political rancour that followed *Wik*, there is a chance that native title could within a short time become an accepted part of our land law and be an effective means of advancing the aspirations of the indigenous peoples of Australia.

About the Author

Jeff Kildea is a barrister who practises in native title law. Jeff was one of the counsel for the Dunghutti people of the Macleay Valley, in the Kempsey district, who in October 1996 became the first indigenous people on mainland Australia to have their native title recognised by the Crown and who in April 1997 obtained the first determination of native title by the Federal Court under the Native Title Act. He has also acted for a number of indigenous communities seeking to establish their native title and in negotiations with governments and mining companies. In 1997 and 1998 he was one of the legal advisers to Senator Brian Harradine. Jeff has had a long interest and involvement in Aboriginal affairs and the land rights movement. He was a member of the Catholic Commission for Justice Peace from 1981 to 1987. He has also served on the Board of Uniya—the Jesuit Social Justice Centre. He is currently a member of the Human Rights Council of Australia. All these organisations have been active in supporting Aboriginal rights. He has a Bachelor of Arts and Master of Laws from Sydney University and a Master of Arts and a Doctor of Philosophy in History from the University of New South Wales.