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**Australian Agricultural & Resource Economics Society  
43rd Annual Conference  
Christchurch, New Zealand**

**January 20-22, 1999**

**Native Title and Associated Resource Use Issues: Australia<sup>1</sup>**

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**ABSTRACT**

This paper will briefly describe the history and intent of the NTA 1993; survey outcomes flowing from its implementation, especially in reference to economic implications of agreements between parties; and consider future prospects, particularly by reference to the amended legislation which came into force on 30 September 1998. The use of case studies will illustrate a highly varied range of positive outcomes, which might be seen as revealing a new willingness on the part of Australian society generally to engage positively with Aboriginal people and Torres Strait Islanders on a scale not envisaged prior to the High Court's *Mabo* decision in 1992. The paper considers the participation of the broader community and the acknowledgment of existing rights and interests, and includes reference to the issues of willingness and good faith on behalf of parties and government.

It will be argued that the NTA 1993 is driving a process of reconciliation through the forging of new relationships, understanding and respect; awakening the country to opportunities for partnerships between Indigenous and non-Indigenous Australians; and generally providing a force for economic recovery and independence from social welfare among Indigenous communities. Among other matters, the amended legislation promotes new opportunities for dealing with land and resource management issues in regional or area settings. Such Indigenous Land Use Agreements (ILUAs) have the potential to become broadly-used instruments for ensuring that native title and resource development become more closely related in terms of long-run regional partnerships deriving from an agreements culture, rather than being viewed as onerous matters to be dealt with - or avoided - according to the letter of the law. Reference will be made to an emerging literature on native title and resource management.

**AUTHOR**

The author has a BSc with joint majors in Botany and Zoology, a Diploma of Education, and is completing an MSc in Natural Resource Management at the University of Western Australia. He has a background in science teaching within TAFE in Victoria; has coordinated management plans for national parks including joint management with Aboriginal people for the Department of Conservation and Land Management in Western Australia; worked in Queensland on the implementation of the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991*; and joined the National Native Title Tribunal as a Senior Case Manager in July 1994. Since May 1995 the author has been a member of the Tribunal's executive management group, and has coordinated the Tribunal's Future Act Unit, which is responsible for the management of future act applications in Western Australia (over 98% of the national future act workload), dealing primarily with proposed grants of mining and exploration titles. Allan has a particular interest in improving the participation of Indigenous Australians in mining and related ventures, and in the primary role which Indigenous People can play in the care and management of biodiversity, especially through the role of joint management regimes in national parks and other high-value conservation reserves.

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<sup>1</sup> The views expressed in this paper are those of the author and are not to be regarded as reflecting any view of the National Native Title Tribunal

## **1. PREAMBLE**

### **1.1 The Death of *Terra Nullius***

Since June of 1992 Australia has been exposed to the possibility that native title exists over much of the country's land and water. The destruction by the High Court of the convenient legal fiction that the country was unoccupied at the time of European settlement - *terra nullius*, or "land belonging to no-one" - reaffirmed what Indigenous inhabitants of Australia had always known, and cast before a population largely inured from the day to day struggles and realities of life in Aboriginal and Torres Strait Islander cultures, a new truth about the ownership of land, water, and resources generally. Since in 1975 the Commonwealth Parliament had passed the *Racial Discrimination Act* (RDA), a question arose as to whether the activities of governments in granting various titles over land and waters without taking account of Indigenous interests in those areas, between the passing of that legislation on 29 October 1975 and the date of the *Mabo* decision, 3 June 1992, might have been racially discriminatory. Faced with the failure of federal governments over time to create national land rights legislation, the Keating Labor government drafted, in consultation with Indigenous groups and likely affected parties including mining, farming and pastoral interests, legislation to provide a way of dealing with native title; to provide a mechanism for dealing with proposed developments where native title might be adversely affected ("future acts"); and to validate the so-called "past acts" which might otherwise have been invalid due to the operation of the RDA.

### **1.2 The Birth of the NTA 1993**

The *Native Title Act 1993* (NTA) began its operations on 1 January 1994, following a difficult gestation, which with the benefit of hindsight presaged the complexities, confusion, political gamesmanship, legal challenges, and sheer effort which have characterised the five year period of the NTA's operations in Australia. The "game" has been played out without the benefit of historical treaties or other binding instruments between Indigenous and non-Indigenous Australians, and since the NTA has no close equivalents elsewhere in the world, the working through of issues has had to rely on the evolution of practice largely without recourse to precedents established internationally, though clearly we have kept an eye on the history and development of native title in New Zealand and Canada in particular. In similar fashion to these two countries, the introduction and effective layering over the vast majority of land and sea within the jurisdictional limits of Australian governments of Torrens and related titles, took place without due regard to whatever pre-existing property rights might have existed prior to colonisation, in this case just over two hundred years ago (a blink in the eye of Indigenous Australian history).

### **1.3 The Wik Decision**

As a prime example of the changing law, the High Court's *Wik* decision of 23 December 1996 shone a light on the coexistence possibilities residual in pastoral leasehold land, even where express reservations for Aboriginal access had not been provided. The decision made clear that native title could coexist together with any rights encapsulated by the particular terms of the lease; that the exposure of native title rights and interest would need to be looked at on a case-by-case basis; and that in the event of conflict, the rights of the pastoralist would prevail. This decision set up

reverberations which are still being felt: the amended NTA was referred to in its slow passage through Parliament as the “*Wik* Bill”; proposed amendments were - and still are in some quarters - referred to as the “*Wik* amendments”; the very word, “*Wik*”, stirs emotions, both for what it offers native title holders and for how it appears to threaten still the rights of pastoral lessees to get on with managing their lease.

#### **1.4 Coping With a Changed World**

The challenge of native title in Australia is to deliver a fair and equitable recognition of the rights “uncovered” in the *Mabo* decision and expressed in terms of their application in the NTA. Given the extensive overlapping of non-Indigenous titles which basically have to be peeled back to discover what expression native title might take as it is determined to exist, and that such rights in land as exist in non-Indigenous titles bestow a strong sense (if not actual) of proprietorship on the “owners” of the title, it is not perhaps surprising that many Australians have found and continue to find native title perplexing in the extreme, and for many, as a nuisance which gets in the way of “proper” resource development. Garth Nettheim notes that many non-Indigenous Australians are slow to adjust to Indigenous Australians having property rights which attract the protection of Australian law, but that an enforced return to the comfortable pre-*Mabo* or pre-*Wik* days is not a serious option<sup>2</sup>.

#### **1.5 Resource Use Impacts**

The resource industries perhaps most affected by the ongoing implementation of the NTA, or at least those which are heard loudest - often with genuine grievance - are mining and exploration, pastoral (and farming more generally), fishing/marine resources, and conservation or other reserve management (the central issue here being that of use and protection of biodiversity), and while this paper will address each of these in turn, much of the focus will be on mining and pastoralism. It is clear that a disjunction exists between the formal representation by peak bodies and the behaviour of the “ordinary punter”, or member of such bodies (or related if not a member, to a particular industry). This paper will refer to some of the issues raised by resource parties and by government in seeking especially to have major reforms made to the legislation, but will not dwell on these. Rather, the focus will be on positive outcomes which reinforce a developing view that a conjunction of good will, good faith, focused effort, compromise and patience are increasingly able to be identified as crucial to positive outcomes evolving from native title generally.

Much of the political effort has been directed toward achieving amendments to the NTA, especially in regard to the right to negotiate and the closely-related issue of overlapping claims. These are matters which have clearly affected resource management throughout the country, especially in the Goldfields of Western Australia but also some other areas where a conjunction of high mineral prospectivity and multiple claimants has highlighted the inherent complexity of the legislation and simultaneously, the difficulties faced by native title claimants in establishing membership of claimant groups, that is, who has the right to negotiate and to access the relevant benefits.

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<sup>2</sup> Nettheim, G, *Wik: on Invasions, Legal Fictions, Myths and Rational Responses*, in UNSW Law Journal Forum, Vol 3 No 2, *Wik: The Aftermath and Implications*, June 1997

## 2. INTRODUCTION

The NTA was enacted on 1 January 1994, and the National Native Title Tribunal (the Tribunal) started life on the same day. The President, Registrar, the founding members and a few case managers constituted the Tribunal by July 1994, since which time it has grown to a national organisation of about 260 staff, with the Principal Registry based in Perth, regional offices in Adelaide, Darwin, Melbourne, Sydney and Brisbane, and sub-regional offices in Cairns and Kalgoorlie. Thus the Tribunal is well-placed to deliver mediation, arbitration and information services at a regional and local level.

What has characterised the growth of the Tribunal and the workload which drives it is rapid and relentless change. This has been somewhat more politicised recently<sup>3</sup>, though there have been complexities, ambiguities, and uncertainties rampant throughout that entire but short history. Nonetheless, what has also characterised this period - and what has proven difficult to get out to Australian society generally - is that the Tribunal and its highly diverse stakeholder groups are resilient, creative, and robust in not merely coping with such change, but apparently thriving on it. The outgoing President of the Tribunal, Justice Robert French, has noted recently that governments had failed in their duty to educate the public and said politics had complicated the native title process<sup>4</sup>. Justice French said many of the Tribunal's problems in dealing with native title claims was due to a lack of understanding and the job of educating people had fallen to the Tribunal's officers.

### 2.1 Educating the Public on Native Title

The President called on State and Federal Governments to take a greater role in educating the public about native title, and on schools to teach students about native title and the legal system, noting that governments' failure to educate the public was not due to malevolence, but to an absence of a systematic implementation program. He concluded that the huge job of public education and information had not really been taken up by governments of whatever political colour from the outset, and noted that native title is an issue of historical importance to Australia, because it involves an adjustment we have never had to make before.

Following this, Justice French expanded during an interview with ABC Radio National on the specific role he saw for government:

Well, I think that there could be some more comprehensive education program and indeed, if this process is going to be with us for a generation or more, working through in various forms and various classes of agreements that may be made and so forth, so I think it's not too late to start with educating school children about the basic concept of native title and the historical background to it. In addition to that, you can, of course, support educational activities by organisations such as the Australian Local Government Association which has been very proactive in this area and the various industry associations that have to have the immense task of communicating to their constituents and members some basic understanding of the processes.

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<sup>3</sup> The amended NTA 1993 began on 30 September 1998, but was surrounded for much of the past 18 months or so prior to commencement date by intense, bitter and divisive debate

<sup>4</sup> *The Age*, 24 December 1998, p6

Now, I think government can assist with those things to ensure that a reasonably coherent and consistent account of what native title means for Australia is getting out into the community<sup>5</sup>.

## **2.2 Resource Development and Native Title**

Issues associated with resource management, and whether or not native title was impairing economic development opportunities, have received special emphasis from the mining and pastoral industry peak bodies, and also from federal and state/territory governments. This dialogue has paralleled the broad community debate over native title in general. Independently of the political debate, largely contrived as it was to leverage particular amendments to the legislation, parties to native title claims throughout Australia have sought to progress outcomes, limited in extent though many of these might have been.

Around the country local agreements of various kinds have been and are being reached. Such agreements might relate to protocols for dealing with future local landuse matters, statements of mutual recognition, agreements over exploration or mining projects, business partnerships, and so on. Examples of various agreements will be referred to below.

Native title claimants can be expected to demonstrate a continuing connection through time to the area being claimed. *Whether or not native title is determined to exist, agreements can be reached in respect of all or part of the area in relation to particular proposed activities.* Many of the agreements being reached throughout the length and breadth of the country are of this kind, arising from either the setting provided through mediation of a claim, or through negotiations arising in respect of proposed mining or exploration ventures.

## **2.3 History and intent of the NTA<sup>6</sup>**

### **2.3.1 Native Title Act 1993**

On 3 June 1992, the High Court of Australia delivered its historic judgement in the case of *Mabo v. the State of Queensland (No. 2) (1992) 175 CLR1*, declaring that the common law of Australia recognised native title. The judgement altered some of the basic premises of Australia's legal system and its society, specifically the legal fiction of *terra nullius*.

The concept that Indigenous property rights pre-exist and survive the establishment of sovereignty in colonised lands has existed in British common law for well over two centuries. It applies in places where Indigenous people live according to their own system of laws that address property and other rights. Other former British colonies, such as New Zealand, Canada and the United States of America, have long recognised that two land tenure systems exist in their countries, that is, the system introduced on colonisation (from which freehold and leasehold titles arise); and the pre-existing Indigenous system (from which Indigenous property rights derive).

In Australia, Indigenous property rights were not recognised until the *Mabo* decision overturned the concept (*terra nullius*) on which Australia's whole land tenure system

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<sup>5</sup> ABC Radio National, Francis Leach, 30th December 1998

<sup>6</sup> This section is drawn from the Tribunal's publication, Native Title - Questions and Answers, 1997

had been based. The High Court recognised that Indigenous peoples' rights to native title had survived and that in accordance with the *Racial Discrimination Act 1975*, their native title must be treated equally before the law with other titles that flow from the Crown. The High Court said that native title could no longer be denied or removed for reasons that were unjust - such as on the basis of race.

The NTA was created to recognise and protect Aboriginal and Torres Strait Islander peoples' native title rights and interests. The amended NTA continues to provide ways to determine native title and protect the existing rights of native title holders, governments, industry and the general public. The amended NTA also continues to provide mechanisms to negotiate/consult over, future public works and economic activity on land or waters where Indigenous people may have native title rights and interests. The NTA extends to each external territory, to the coastal sea of Australia and of each external territory, and to any waters over which Australia asserts sovereign rights.

### 2.3.2 Native title

Native title is defined in s223(1) of the NTA as "the communal, group or individual rights and interests of Aboriginal people or Torres Strait Islanders in relation to land or waters where:

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

Australia's recognition of native title in common law since 1992 is consistent with earlier recognition of Indigenous peoples' rights in New Zealand, Canada, the United States of America and elsewhere.

### 2.3.3 National Native Title Tribunal

The National Native Title Tribunal is a Commonwealth Government body established on 1 January 1994 under the NTA to provide administrative processes to deal with native title applications. The Tribunal is not a court and does not decide whether or not native title exists. The Tribunal's functions include dealing with applications, inquiries and determinations in relation to native title; mediating in relation to Federal Court proceedings; providing assistance including in relation to requests for mediation; and conducting research. The Tribunal must carry out its functions in a fair, just, economical, informal and prompt way, and in carrying out those functions, may<sup>7</sup> take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders (but not so as to prejudice unduly any party to any proceedings that may be involved).

## 2.4 Mediation

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<sup>7</sup> Previously (before amendments) "must" take account

If a primary role for the Tribunal can be identified, it is in mediation, this role possessing statutory force and being reflected in the Tribunal's vision and mission statements<sup>8</sup>:

**Vision**            *The Tribunal is to be a principal provider of native title mediation services; and an authoritative source of information about the native title process*

**Mission**        *To promote just agreements, informed discourse and fair outcomes about native title through mediation, arbitration and community information.*

The purpose of mediation is to obtain agreements among Aboriginal and Torres Strait Islander people, governments, industry and others whose rights or interests may co-exist with native title rights and interests, in relation to recognition of native title, resolution of future acts, assistance with Indigenous Land Use Agreements, mediating pastoral access, and so on. The Tribunal also acts as an arbitral body to determine disputes over proposed mining, mineral exploration or compulsory acquisition of land by Governments for transfer to third parties, where a state or territory government has not introduced its own regime for such dealings.

Native title agreements will vary according to the needs and interests of the native title applicants and the other parties involved. Agreements may range from broad arrangements on a regional level to details of daily practices, such as closure of station gates and fire control. As the group Rural Landholders for Coexistence points out<sup>9</sup>, agreements may be of various kinds, including access, heritage protection, use of labour, provision of services, and land acquisition, and indeed, "parties are free to negotiate on almost any issue that affects them".

## **2.5 Agreements Support the Mediation Process**

While progress in reaching determinations of native title has not been as expeditious as some might have expected, it is important that gains in the broad community arena stemming from claims made under the NTA are acknowledged. There are many forces operating to inhibit rapid progress, including: lack of clarity by claimants and/or their representatives on the actual area (or areas within the overall external boundary) being claimed; complexities arising from previous and past tenure; existing interests; conflicting current and/or historical Indigenous interests; the attitude of the government(s) concerned; resource constraints; whether or not claimants are represented; strategic behaviour; and so on. It is increasingly the case that parties to an application for native title incline toward reaching agreement over some part of the claim area and in relation to particular matters, recognising that the process of

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<sup>8</sup> National Native Title Tribunal, Three Year Business Plan - 1997-2000, October 1997

<sup>9</sup> Rural Landholders for Co-Existence, Talking Common Ground - Negotiating Agreements with Aboriginal People, November 1998



working through mediation can be slow and complex. Such agreements are reached before, and indeed without the need for, any determination of native title<sup>10</sup>.

If mediation cannot produce an agreement within a reasonable period of time, the Tribunal will refer disputed matters to the Federal Court for a decision by trial. Litigation can be long, costly, and result in unpredictable outcomes that may leave communities divided. Even where the Federal Court determines that native title does exist, native title holders and other parties may still have to negotiate how their rights and interests interact. For example, Justice Lee in the Federal Court (Perth)<sup>11</sup> finding that native title existed over an area of land and waters in the East Kimberley of Western Australia and adjacent parts of the Northern Territory, ordered that:

There be liberty to apply as to costs and *to refer to the National Native Title Tribunal for mediation issues arising out of the relationship between native title rights and interests and other interest in relation to the “determination area”* (emph added).

## **2.6 Intertwining of Two Systems of Law**

The founding President of the Tribunal, Justice Robert French, whose term expired 31 December 1998, has noted recently<sup>12</sup> that when a court makes a decision that native title exists, what is happening is that one system of law recognises another, but that recognition is limited. Any native title recognised is subject to the laws of the Commonwealth, and State and Territory governments, including bush fires laws, health and building by-laws, fauna and flora protection laws, statutory instruments such as town planning schemes and management schemes in national parks, and further, that native title is subject to the rights created by those laws.

Thus parties to a determination of native title can negotiate a coexistence regime following a decision, or alternatively, simultaneously negotiate an agreed recognition of native title and at the same time agreement(s) about the management of coexisting rights. Justice French notes that “in the end, negotiated agreements of this kind are the only way to forge lasting arrangements which recognise the native title rights of Indigenous people where they exist and protect the validly granted rights and interests of other parties”.

## **2.7 Partnerships in Land Management**

While such matters might appear to have no direct relationship with the working through of native title claims, there is obviously a connection to prospects of agreeing on, for example, joint management of conservation reserves in the mediation of a native title claim which includes national park or other conservation reserve. In broad terms, the range of possible clauses in an agreement of this kind can be exemplified by reference to a sanitised draft agreement in the agreements database of the

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<sup>10</sup> Note that the original NTA provided for the establishment of an Indigenous Land Fund, maintained on an establishment budget with annual interest being dedicated to the purchase and management of land for those Indigenous persons unable to claim/prove their native title

<sup>11</sup> *Ward v State of Western Australia* (Unreported Federal Court, WAG6001 of 1995, Lee J, 24 November 1998)

<sup>12</sup> French, Justice RS, *October 1 - A New Dawn or More of the Same*, 41st Annual Pastoral Conference, September 1998, Karratha WA

Tribunal's homepage<sup>13</sup>, where the following principles apply to an imagined area of diverse tenure and economic activity:

- disposition of interests within parts of and across the region
- access to lands and water including:-
  - \* access and use of crown land and pastoral leases by native title holders
  - \* public access to waters and public places including recreational boating and diving
  - \* exclusive use of particular areas for native title holders
  - \* international law requirements, for example, right of innocent passage
- culture and heritage including protection of important sites and continuation of traditional activities
- offshore co-management including:-
  - \* co-management structure - legislative considerations and decision making processes
  - \* fish and fisheries (including aquaculture) - recreational and commercial, existing and future rights
  - \* conservation and protection of the environment - ecologically sustainable use and multiple-use marine protected areas
  - \* enforcement and appointment of traditional rangers/inspectors (training and resourcing)
  - \* tourist operations
  - \* compliance with international conventions
- land co-management including:-
  - \* co-management structure for crown land including national parks
  - \* conservation and exploitation of natural resources
  - \* coastal development
  - \* land rehabilitation
- financial arrangements including resource revenue sharing
- implementation plan
- exploration, mining/petroleum/natural gas extraction - interaction and participation rights.

## **2.8 Future Act Regime - the Right to Negotiate**

The future act regime established under the NTA provides a mechanism for the future grant of interests where native title might be affected. A “right-to-negotiate” is triggered where a government advertises its intention to grant, for example, a mining lease<sup>14</sup>, and the registered native title party/parties negotiate with the grantee party (the mining company seeking the tenement) and the state/territory government in order to seek agreement in relation to the proposed mining project. If parties reach agreement then a copy is lodged with the Tribunal and the state grants the relevant tenement. Where parties cannot reach agreement the Tribunal can be requested to assist in mediating between the parties to assist in reaching an agreement. Whatever the state of negotiations once 6 months has passed, any party can lodge an application for the

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<sup>13</sup> [www.nntt.gov.au](http://www.nntt.gov.au)

<sup>14</sup> A right to negotiate also exists where a government proposes to compulsorily acquire native title rights and interests in land (for example, where land is acquired for urban subdivision with the purpose of transferring that land to a third party, the developer), though the amended NTA excludes areas within town/city boundaries from the right to negotiate, substituting instead a lesser consultation process (essentially restricted to Aboriginal heritage protection)

Tribunal to make a determination in respect of the proposed “future act”. There is no power of veto vesting in any party to the negotiations.

#### 2.8.1 Expedited procedure

A “fast-tracking” process exists for the grant of exploration tenements, in recognition that exploration is less likely than mining to make an adverse impact on the environment; on sites of particular significance; or on the community life of native title holders. Registered native title claimants can lodge an objection to the proposed grant of an exploration tenement where this has been advertised by government as attracting the “expedited procedure”. If the objection is upheld, the objectors gain the right to negotiate in respect of the proposed grant, and can negotiate that any grant be made subject to agreed conditions. Conversely, where the objection is not upheld, the tenement is granted. While it is the case that the vast majority of applications for exploration tenements in Western Australia since the Department of Minerals and Energy began using the future act regime in May 1995 have been granted without attracting an objection, there has been a substantial increase in the rate of objection over the past year or so.

This is considerably offset though by a corresponding increase in the rate of agreements being reached, with the result in many cases that the objection is subsequently withdrawn. It is important to note that native title claimants are not actually objecting to the proposed grant, that is, they are not trying to prevent the exploration from proceeding, but are rather attempting to gain a right to negotiate in respect of the proposed activity. Agreements reached in this manner are usually of a relatively low-key cultural heritage clearance /environmental protection/access nature.

A significant proportion of the mining industry is seeking to negotiate with native title holders rather than proceed through a complex and possibly lengthy process. In this context regional agreements have a role to play in clearing future acts for grant while simultaneously seeking to involve Indigenous people in particular projects and in local or regional planning<sup>15</sup>.

### 3. AN EMERGING AGREEMENT CULTURE

#### 3.1 National Audit of Agreements

The first national audit of native title agreements<sup>16</sup> since the introduction of native title laws nearly five years ago reveals that more than 1,200 agreements have been struck between different Indigenous groups, miners, pastoralists, industry bodies and governments, despite the continuing controversy over and organised resistance to the NTA.

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<sup>15</sup> This introduction and various parts of this paper borrow substantially from a paper written by the author in 1998 - Allan Padgett, *Native Title - Review and Analysis of the Current State of Play*, Doing Business with Aboriginal Communities in WA Conference, Perth, Western Australia, 30-31 July 1998 (unpublished)

<sup>16</sup> NNTT, PR98/49, 11 September 1998

Justice French has noted that while some of the agreements<sup>17</sup> were small in scale and many related to the grant of mining leases, nonetheless all were building blocks toward a better relationship between Indigenous and non-Indigenous Australians. He said the figures showed that while there had been years of contentious debate about the legislative framework for native title, many groups and individuals were focussing on the practical business of making agreements:

Native title is a property right recognised in common law. It is here to stay. As the Tribunal's audit of agreements shows, there are many people who recognise this fact and are attempting to negotiate properly with Indigenous Australians. Native title, rather than being perceived as a threat, should be looked upon as an opportunity to address the fundamental relationship between Indigenous and non-Indigenous Australians as that is the only path to the certainty and mutual recognition of rights that all parties seek.

At the end of September 1998 there were 1,244 agreements throughout Australia with 91% of all agreements in Western Australia. Of the total number of agreements, 246 (20%) were native title determination application related agreements (including non-native title outcomes); and 998 (80%) were agreements relating to the grant of mining leases and fast tracked exploration leases, mainly in Western Australia<sup>18</sup>. Of the 246 native title determination application related agreements:

- 70% were in Western Australia
- 84% involved the National Native Title Tribunal in mediation
- 60% of the agreements were confidential
- 50% were agreements to amend native title applications to remove particular tenure types, or reduce parties or the number of claimants.

Of the 998 future act related agreements most were confidential s34 agreements (usually related to the granting of mining leases) or agreements associated with fast tracking procedures for exploration licences which were struck between miners and native title parties in Western Australia, often without direct Tribunal assistance<sup>19</sup>.

### **3.2 Survey of outcomes flowing from implementation of the NTA, especially in reference to economic implications of agreements between parties**

While many agreements have been reached between parties it is primarily those which arise from the right to negotiate which include provisions for cash payments, royalty equivalents, employment and training, community development, heritage clearance surveys, and so on, and which might be seen to provide the primary focus for economic returns to native title holders<sup>20</sup>. It is important to note however that

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<sup>17</sup> For the purposes of the audit, agreements were defined as an outcome reached with the active participation of two or more parties, with or without the Tribunal as mediator. Agreements could include reconciliation agreements, memoranda of understanding, process agreements or statutory title agreements

<sup>18</sup> Due to the WA government's use of the future act regime, coupled with the intensity of mining development in that state

<sup>19</sup> Sample/template agreements are available on the Tribunal's home page at [www.nntt.gov.au](http://www.nntt.gov.au). The main point to observe is that "new" agreements can be modelled on existing agreements, which provide a template where as much or as little as is necessary can be borrowed from the existing clauses, in order to meet the particular requirements of the parties elsewhere, in another regional or local setting

<sup>20</sup> "Native title holders" are referred to throughout this paper as common law holders, ie. includes registered native title claimants as well as determined holders

agreements arising from various stages of the mediation process are also beginning to encompass opportunities for economic engagement, whether direct or indirect. These include equity and/or partnerships in businesses, “cultural” tourism, and participation in local government planning schemes. The case studies which follow will illustrate resource management and economic implications of agreements reached through the mediation and future act processes, and also in relation to the outcomes of decisions and determinations of the Tribunal and the Federal Court.

### **3.3 Future act agreements - mining and exploration**

#### **3.3.1 Effective Communication**

Robert de Crespigny<sup>21</sup>, Chairman of Normandy Mining, writing for the *Australian Financial Review*, notes that while most mining activities occur on land under native title claim or on pastoral leasehold, the industry has negotiated directly with Indigenous communities, therefore avoiding litigation. De Crespigny states that “Effective communication at all levels has led to a recognition of Indigenous customary practices, respect for community values, culture and heritage..(and) has created economic benefits for Aboriginal communities while enabling mining companies to continue with their businesses”. He goes on to acknowledge that “Mutual recognition, communication and a focus on the needs of the local community at the ground level reaps benefits for all parties at all levels”, and more importantly in generalising, toward his conclusion, that “With a commitment of communication and an investment of time and effort, especially from leaders, this pattern of working together to address basic issues, thereby building up trust to deal with complex legal and political issues, can be adopted nationally and across a range of issues”.

#### **3.3.2 Queensland Mining Code of Conduct**

Indigenous representatives and the Queensland Mining Council<sup>22</sup> have agreed to negotiate an historic code of conduct for mineral exploration on Indigenous land in Queensland, and expect that a final agreement will be ratified by the end of 1999. It is envisaged that the code of conduct will meet the requirements of the *Mineral Resources Act* (Queensland) and provide guidance for exploration companies operating on Indigenous land. The draft code covers four key issues:

- management of the socio-economic impact of exploration on affected communities
- cultural heritage and protection
- environmental protection and management
- process issues on procedures for negotiation and consultation.

It will be the first such agreement to provide a framework for mining companies to do business in Queensland in a way that protects both the culture and the environment of Indigenous communities. At the same time, it will help provide easier access to Indigenous land, clearly of significance to the minerals and exploration industry. The initiative was based on comprehensive and thorough consultation on exploration issues, with Indigenous people, land councils and representative bodies agreeing on the formation of a broadly representative Indigenous Negotiating Team. This team will have a mandate to negotiate on behalf of the Indigenous people of Queensland.

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<sup>21</sup> *Australian Financial Review*, 29 September 1997, p43

<sup>22</sup> News Release, ATSIC/Queensland Mining Council, 25 September 1997

### 3.3.3 Century Zinc Agreement

The Century Zinc agreement reached in May 1997 between native title parties, the company and the State of Queensland illustrates the role which government can play in attracting investment in resource development to regional Australia<sup>23</sup>. The Bill to give effect to Queensland's obligations under the Century agreement was introduced into Parliament early in 1997, following lengthy negotiations between the State and Century Zinc, a period of mediation by the Tribunal<sup>24</sup>, and a preliminary conference regarding the application for a determination under s35 of the NTA. The final agreement includes:

- \$600,000 for land claims<sup>25</sup> on Lawn Hill National Park
- \$1.8m over three years for a social impact study
- \$5.76m for Government initiatives
- \$500,000 for an Aboriginal womens' business centre
- \$1m over two years for training
- \$3m toward development of an outstation at Gregory
- \$15m to upgrade 41km of the Wills Development Road
- \$500,000 for upgrading of the Gregory River Bridge
- \$180,000 for an Aboriginal mens' business association
- \$70,000 for an outstation resource centre
- \$250,000 towards programs based on sport
- \$100,000 over two years for a Gulf Aboriginal Development Corporation
- \$40,000 compensation for native title
- \$200,000 for a multiple landuse strategic plan
- \$1m over two years for education
- \$60,000 for agreement expenses
- \$230,000 for developments at Normanton proposed by the Gkuthaarn and Kukatj people
- transfer of land at Kurumba to the Gkuthaarn and Kukatj people
- support for a tourist centre related to the fossil deposits at Riversleigh.

An initial grant of \$1m per year is intended to facilitate business developments including mining, canteen, trucking/barging contracts, and possibly tourism ventures in the Lawn Hill National Park and the adjacent Riversleigh "megafauna" fossil deposits<sup>26</sup>. Part of this capital has been expended during 1998 in the employment of a consultant to assist claimants in the preparation of a business plan.

### 3.3.4 Yandicoogina Land Use Agreement

Hamersley Iron and the Gumala Aboriginal Corporation reached a mining and exploration Land Use Agreement in early 1997, which paves the way for a \$500 million Yandicoogina iron ore mine in the Pilbara region of Western Australia<sup>27</sup>. The agreement, covering some 26,000km<sup>2</sup>, culminated twelve months consultation and

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<sup>23</sup> *North West Star*, 21 August 1997

<sup>24</sup> While the mediation failed to have parties reach agreement, it nonetheless provided a substantive basis for the agreement (including an agreed negotiating protocol) which was reached shortly after an application by the company to the Tribunal for a determination of whether or not the tenements should be granted (and if so on what conditions) was lodged, and the relevant inquiry begun

<sup>25</sup> Through *Aboriginal Land Act 1991 (Qld)*

<sup>26</sup> Kauffman, P, Wik, Mining and Aborigines, Allen & Unwin, St Leonards NSW, 1998

<sup>27</sup> Gumala Aboriginal Corporation, Hamersley Iron Pty Ltd, Media Statement, 26 March 1997

eight months of formal negotiations between the parties, and includes a benefits package linked to the success of the project. The value of the benefits will be influenced by commercial factors which will determine the extent of mining operations within the mining lease area and the life of the mine, and if successful, the scale of benefits in the form of lasting community development, training, employment and business development could exceed \$60m over 20 years. The Aboriginal parties represented by Gumala, agree to:

- support the project, including the grant of all requisite titles and approvals
- support future project title requirements
- the grant of exploration titles
- regional site clearance procedures
- the benefits satisfying any compensation entitlements with respect to the Yandicoogina project
- participate in an ongoing Monitoring and Liaison Committee.

Hamersley commitments include:

- payments over the life of the project to independent public benevolent trusts established for the specific purposes of enhancing business development, education and training, community development and infrastructure needs, protection of culture, and the long-term welfare of the Bunjima, Niapaili and Innawonga communities. A requirement is that a portion of the funds be invested to address the needs of future generations
- providing opportunities for Gumala to participate in pastoral station operations
- implementing pastoral and operator training arrangements
- preserving Aboriginal access to non-operation areas of the mining lease
- promoting employment for suitably qualified Bunjima, Niapaili and Innawonga people
- assisting with contracting opportunities
- establishing environmental protection measures
- providing in-kind assistance for community development
- implementing heritage protection measures, including site-clearance procedures for mineral exploration
- participating in an ongoing Monitoring and Liaison Committee.

The agreement has relatively standard *force majeure*, assignment and arbitration provisions. It provides for a five-yearly review and its implementation is conditional on Board approval for the project.

### 3.3.5 Striker Resources

The Striker Resources<sup>28</sup> diamond exploration deal over some 6,500 square kilometres in the Kimberley provides for compensation to the native title claimants at four stages of the development:

- at the exploration stage, a percentage of on-ground costs would be paid
- at the mine construction stage, 1.5% of capital costs will be handed over to Balanggara
- when the mine is operating, Balanggara will get part of quarterly sales proceeds
- annual land rents will be calculated on the area disturbed.

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<sup>28</sup> *The West Australian*, 21 August 1997

The company has agreed to maintain roads in the area, and develop an environmental management plan. Benefits to the community include jobs, training, business opportunities, compensation payments and community infrastructure. Both parties emphasised that the agreement culminated several years of close relationship.

### 3.3.6 Agreements - Basic Rules

The project-based agreements emerging from negotiations between Aboriginal people and resource developers illustrate that agreements can be reached that can be employed in getting projects off the ground. At the same time, the particular needs and aspirations of local Indigenous people are being satisfied. Agreements over proposed mining and exploration projects form a readily identifiable sub-class of the agreements reached to date. Ciarin O'Faircheallaigh from Griffith University has significant experience in negotiating agreements between Indigenous people and mining companies, and observes that negotiation of mineral development agreements constitutes only one possible response to mining projects which affect their land or their communities, though it is an increasingly prevalent response and likely to become even more widespread as Indigenous Australians reassert ownership over land, and the political climate makes it less and less acceptable for developers to ignore Indigenous interests. There are also signs that agreements will increasingly be negotiated in relation to other types of development, such as tourism<sup>29</sup>. He cautions that while negotiation of mineral development agreements can yield significant benefits to Indigenous communities, if positive outcomes are to eventuate the resource developers must develop appropriate processes and structures to identify community aspirations and concerns; obtain and apply relevant information and resources; and recruit and direct appropriate technical expertise. They must also ensure that agreements which in theory offer benefits (or allow significant costs to be avoided) are actually put into practice over extended periods of time.

It is clear that a substantial shift in attitude and practice is in force, notwithstanding inherent complexities in the process. There are many companies, large and small, who realise that negotiation with native title holders is the way to have tenement(s) granted, in order to get exploration under way, or mines into production. This can lead to a range of outcomes which can be seen on the basis of just over three and a half year's experience to be a standard response at the level of parameters, though individual details vary both in kind and in quantum.

### 3.3.7 Replicability of Agreements

The list of benefits from these examples illustrates the complexity and diversity of the matters that can be dealt with in local area and regional development agreements. Clearly agreements can relate to a broad range of matters and be of various complexity with diverse outcomes. It would appear on the basis of experience to date, that while much of the substance and character of an agreement is proportional to the scale of a project and the geographic, cultural, social, economic, political and other complexities of the area under consideration, it is in the end the amount and kind of effort put in to the process by parties which delivers agreements of this kind, and

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<sup>29</sup> O'Faircheallaigh, C, *Negotiations Between Mining Companies and Aboriginal Communities: Process and Structure*, Centre for Aboriginal Economic Policy Research, 1995



which will ultimately be responsible for the endurance and broad community acceptance of such agreements.

#### **4. MEDIATION AGREEMENTS**

The following four agreements have arisen from mediation of native title claims, and while only two of the four involve a formal recognition of native title (by determination of the Federal Court), each serves to illustrate how apparently contrary interests can come together in seeking to progress a joint and complementary outcome, where parties decide that such an approach is preferable to adverse behaviour and possible litigation.

##### **4.1 Rubibi - Broome Shire Council Agreement**

In Broome in 1996 a group of Aboriginal people representing some eleven native title claims in and around the township negotiated collectively under the name “The Rubibi Working Group” to make an interim native title agreement which included the following elements:

- the development of a planning strategy to be embodied in the town plan of Broome which would identify areas of land:-
  - \* of special cultural significance to Aboriginal people
  - \* to be the subject of joint management arrangements
  - \* subject to continuing development pressures in respect of which Aboriginal interests require specific recognition and protection
- the formulation of mechanisms for inclusion in the planning strategy to provide for recognition and protection of Aboriginal interests in decisions made under the Town Plan and for joint management
- arrangements under which coastal reserves in the Broome area would be the subject of joint management arrangements with the reserves vested in Rubibi, the Shire, or jointly in Rubibi, the Shire and/or the Western Australian Department of Conservation and Land Management
- joint management agreements which would include as their objects the:-
  - \* protection and enhancement of Aboriginal traditions and values in relation to the land
  - \* recognition of Rubibi Peoples’ status as traditional owners of the land
  - \* protection and enhancement of the coastal environment
  - \* public access to and use of coastal areas in ways that are compatible with those objects<sup>30</sup>.

Work is currently underway to develop a model management plan for a portion of fragile, yet intensively used, coastal area. The intent is to use the model to develop management plans for other reserve areas of the Shire. Both parties have used considerable resources in promoting this model to other local government authorities.

##### **4.2 Dunghutti Agreement**

A ground-breaking agreement involving local government and with Tribunal assistance occurred in New South Wales with an agreement between the State and the

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<sup>30</sup> French, Justice RS, *Native Title and Environmental Law - The Coming Conjunction*, National Environmental Law Association State Conference, 17 November 1998, Perth

Dunghutti People reached in October 1996. The vacant Crown land subject to the Dunghutti native title claim at Crescent Head, on the north coast of New South Wales, had been earmarked by the State for residential development. Following negotiations, the State recognised the Dunghutti as native title holders to the area in the first agreement of its type under the NTA. Land subject to the claim was acquired by the Government and compensation paid to the Dunghutti People (150% freehold equivalent). The agreement ensures the protection of the rights of other parties as it involves the extinguishment of native title in exchange for other benefits to the Dunghutti People.

#### **4.3 Western (Sunset) Yalanji People - Consent Determination of Native Title**

Australia's third agreement to formally recognise native title (the first over a pastoral property) was reached in September 1998, and reflects the inherent opportunity provided in the *Wik* decision (refer p2) to recognise coexistence of native title and pastoral rights. The agreement includes a legally binding landuse and access agreement which will serve as a model for other pastoralists around Australia wanting to negotiate the resolution of native title applications. The Queensland Government's support for the terms of the agreement was a critical ingredient in achieving the consent determination<sup>31</sup>.

The Western (Sunset) Yalanji native title application covered the 25,000ha Karma Waters Station north west of Cairns in Far North Queensland, held by the Pedersens under an occupation licence and which they sought to upgrade to a more secure form of tenure. The Tribunal mediated the application over several months until it was referred to the Federal Court on 23 October 1996 after a breakdown in negotiations. Prior to the full hearing of the matter in the Federal Court, the Pedersens and the Western (Sunset) Yalanji People resumed direct negotiations which resulted in the agreement being reached.

The Western Yalanji People consented to an upgrade by the Queensland Government of the Pedersen's occupation license to a lease. The agreement includes rules for the exercise of the native title holders access to the pastoral lease in a way that is consistent with the terms of the lease.

##### **4.3.1 Economic Implications of the *Wik* Case**

Pastoralists' perceptions of their rights under their leases may have changed as a result of the *Wik* decision, but they retain the same legal interest as was their legal entitlement prior to the decision. Accordingly, there is no legal impact on either the value of the pastoral lease, or the value of the security which the pastoral lease may provide for borrowing money<sup>32</sup>.

Moreover, financial institutions base their valuations of pastoral leases for security for a loan on its capacity to carry stock (and hence its ability to generate income), the equipment owned by the pastoralist and improvements (houses, fences, dams, yards, and so on). All of these are unaffected by the *Wik* decision. Typically, a pastoralist

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<sup>31</sup> NNTT, PR98/51, 28 September 1998

<sup>32</sup> A Plain English Guide to the *Wik* Case, Native Title and Land Rights Branch, ATSIC, January 1997, ATSIC Homepage ([www.atsic.gov.au](http://www.atsic.gov.au))

would use the livestock on the land as security for a loan (a stock mortgage). Again, these arrangements are unaffected by the *Wik* decision.

There are also no compensation obligations on pastoralists flowing from the *Wik* decision. Pastoralists are entitled, in the exercise of their rights to use the land for pastoral purposes, and to progressively develop areas of the pastoral property for use for pastoral purposes by building fences, cultivating pastures, creating dams or building houses for workers, according to the terms of the particular lease. If these acts have the effect of extinguishing or impairing the exercise of coexisting native title rights, those acts are validated by the NTA because they are authorised by statute law. Any compensation payable because of that extinguishment or impairment would be payable by the Government which made that law<sup>33</sup>.

Wensing and Sheehan<sup>34</sup> state, in a short analysis of whether there has been any impact on property prices, that whilst the impact of the *Wik* decision has inevitably been somewhat overstated in the press and by various stakeholders, it is important that banks and other lenders do not rely on these overstatements and become unwilling to lend on the security of leasehold land. They state that the *Wik* decision has clearly signalled the existence of native title (whatever that may be) on leasehold land, however it is likely that few cases will exist where Indigenous interests will secure titles at the expense of existing leases. It is likely that the majority of native title holders, if successful, will probably hold something akin to a *profit a prendre*. Wensing and Sheehan conclude that it is important that lenders (and their valuers and advisers) recognise that little has changed and almost certainly the property rights of pastoral leases are no less secure today than prior to *Wik*.

#### **4.4 Stradbroke Island - Quandamooka People/Redlands Shire: Native Title Process Agreement**

The native title process agreement between Redlands Shire Council on the shores of Brisbane's Moreton Bay, and Quandamooka Land Council, reached on 14 August 1997, illustrates how an agreement between native title holders and local government might work in practical terms, particularly in relation to the insertion of Indigenous interests into planning, environmental and resource management decision-making.

The agreement recognises that the Quandamooka people are the traditional owners of North Stradbroke Island, have inherent rights to their lands and waters, and have custodial obligations for the area. The basis of the agreement is that both parties accept the other's rights, interests and custodial obligations over the claim area, and seek to ensure that the North Stradbroke Island environment is preserved for current and future generations. The study combines native title with other land use and planning issues in order to achieve a balance and best outcome for all parties<sup>35</sup>.

As a consequence of the Agreement a number of processes were agreed to, including:

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<sup>33</sup> Ibid

<sup>34</sup> Wensing, E, and Sheehan, J, *Native Title – Implications for Land Management*, The Australia Institute, Discussion Paper No. 11, April 1997

<sup>35</sup> Redlands Shire Council and Quandamooka Land Council Aboriginal Corporation, Media Release, 14 August 1997

- a joint detailed planning and management study for the Island
- the joint appointment of a secretariat and establishment of a steering committee
- the development and negotiation of a strategic plan and management framework agreement
- the development and negotiation of an agreement on native title.

The Agreement pays particular attention to:

- access
- capital works and infrastructure
- cross cultural training
- cultural resource management
- development approval procedures
- environmental assessment
- employment
- intellectual and cultural property protection
- land and natural resource management
- law enforcement
- public health
- reserves management
- service delivery
- tourism management
- water management
- zoning.

This type of local area agreement can simultaneously serve to reconcile Indigenous and non-Indigenous Australia, and provide a sustainable base for decision-making into the future which takes account of Indigenous knowledge and management systems and their role in modern landuse and resource management practices.

## **5. CONSIDERATION OF FUTURE PROSPECTS, PARTICULARLY BY REFERENCE TO THE AMENDED LEGISLATION WHICH CAME INTO FORCE ON 30 SEPTEMBER 1998**

### **5.1 Amended NTA in Relation to Land Management & Development**

The amended NTA contains among other revised or new provisions a raft of provisions which reflect a combination of opportunities identified in the early days of operation of the NTA (Indigenous Land Use Agreements in particular), and others which have emerged from the year and a half or so of political manoeuvring following the *Wik* decision. Many of the following points relate to the right to negotiate, and could be said generally to enhance the mining industry's position in gaining quicker access to titles (perhaps at the expense of the Indigenous negotiating position):

- provision of Indigenous Land Use Agreements. Resource development and land management issues as they affect native title are able to be bound by regional agreements. Proposed future grants (eg. mining leases) are able to be made if agreed within the terms of an ILUA
- likely effect of registration test - easier for mining companies to negotiate following reduction of overlapping claims

- scheduled interests where native title is extinguished, therefore no right to negotiate applies
- exceptions to right to negotiate can apply, but Commonwealth Minister has to approve (including where approved exploration, gold/tin mining, opal/gem mining)
- no right to negotiate over certain tenures (consultation procedure applies):-
  - \* current & historical leasehold (not mining leases)
  - \* Crown reserves in use for public purposes
  - \* within boundaries of towns/cities
- right to negotiate replaced by (lesser) consultation procedure where:-
  - \* compulsory acquisition for third parties within town/city boundaries
  - \* compulsory acquisition for third parties for infrastructure
  - \* mining infrastructure (eg. road, railway, bridge, jetty, port, landing strip, airport, electricity generation, transmission or distribution facility, dam, channel, tower, and similar to above that Commonwealth Minister declares)
- compulsory acquisition where native title rights and interests are acquired by government (eg. for public works - school, hospital, etc). Extinguishment and just terms compensation apply (if passes the freehold test)
- project acts can be treated as a single act for purpose of negotiation (does not apply to expedited procedure)
- extensions/renewals of licences/permits able to be granted without referral to NTA processes (providing interest no greater) - for earlier valid acts
- conjunctive agreements possible where agreement reached for exploration/prospecting activity included statement that later act (eg. grant of mining lease) could be done, subject to agreed conditions being met before later grant is made
- exclusion as a class of acts - “low impact” exploration able to be excluded from the right to negotiate provisions
- applicant for mining/exploration/prospecting title can request parallel submission to NTA processes (if subject to). Previously, for example, Western Australian Department of Minerals and Energy dealt with *Mining Act* compliance *before* considering if native title might be affected
- “fast tracking” (expedited procedure) amended to refer to “act is not likely to interfere ..directly with the carrying on of the community or social activities of the persons who are the holders..of native title..”. Also, “not likely” to interfere with areas or sites of particular significance, and “not likely” to involve major disturbance. Previously, “does not”
- emphasis in negotiations on taking into account existing non-native title rights & interests, and existing use of land or waters concerned, also practical effect of exercise of those rights and interests
- in any inquiry into whether a tenement should be granted, the relevant Minister may intervene and request the arbitral body to make a determination within the time specified (but not earlier than the 6 months minimum statutory period)
- criteria for making a determination in relation to whether a tenement should be granted do not include reference to effect of the proposed act on the natural environment, nor any assessment made by any court, tribunal or the Crown/statutory authority
- in assessing the likely effect of a proposed act on native title rights & interests, only registered rights & interests can be taken into account
- state can implement new provisions for dealing with future acts over “alternative provision areas”, chiefly non-exclusive pastoral leases and national parks - “consultation process” (requires Commonwealth approval)
- right to negotiate can apply only to vacant crown land & Aboriginal land if alternative provisions adopted

- primary production activity including cultivation, taking fish, forest operations, horticulture, aquaculture and farm tourism allowed on non-exclusive pastoral or agricultural leases. Activities prevail over any native title rights & interest but do not extinguish native title
- legislation or grants of interests made in relation to management or regulation of water and airspace are valid, and non-extinguishment principle applies. Same procedural rights as “ordinary” (freehold) title holders (unless over pastoral lease, then same procedural rights as pastoral lease holders)
- conferral of access rights to non-exclusive agricultural and pastoral leases on registered native title claimants, where the person(s) or descendant(s) must have had regular physical access to the area. Such access rights apply only to so-called “traditional activities”, which are defined as hunting, fishing or camping; performing rites or other ceremonies; or visiting sites of significance; and are subject to prevailing pastoral lease rights or other non native title rights or interests. The manner of exercise of such rights can be the subject of an agreement between the parties, and the Tribunal or its state/territory equivalent can be requested to provide assistance in negotiating such agreement.

## 5.2 Indigenous Land Use Agreements

### 5.2.1 Utility of ILUAs

The amendments to the NTA include a substantial section on reaching area or local agreements, by way of Indigenous Land Use Agreements, or in the vernacular, “ILUAs”. Such agreements are designed to optimise the range and number of opportunities for Indigenous people to enter into landuse and other agreements, including the authorisation of future acts (mining and exploration in particular) which may affect native title on their country. Such agreements do not depend for their authority or legitimacy on a determination of native title, so might be thought of as outside the native title process although the setting for their development clearly derives from the NTA.

Under s21 of the NTA prior to the 1998 amendments there was provision for native title holders to authorise governments to do things (future acts) which would have an effect upon their native title. Such authorisation could be given as part of an agreement with governments and other parties. The difficulty with s21 agreements was that, absent a determination of who were the native title holders by a court, the identification of the authorising group as the Indigenous owners of the land or waters in question was an exercise in risk management<sup>36</sup>. Registered Indigenous Land Use Agreements under Division 3 of the amended NTA provide for certainty in relation to the validity of future acts done by agreement even where no native title determination has been made in the area concerned.

ILUAs offer new and flexible ways to allow the lawful use and practical management of land or waters in places where native title may exist, and provide an opportunity to foster a culture of negotiation to deal with development and native title issues around the country<sup>37</sup>. ILUAs can be used to fast-track future uses of land and water in ways

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<sup>36</sup> French, Justice RS, *Native Title and Environmental Law - The Coming Conjunction*, National Environmental Law Association State Conference, 17 November 1998, Perth

<sup>37</sup> NNTT, PR98/70, 16 November 1998

that address Indigenous cultural concerns, while leaving unresolved issues to be determined by other processes under the NTA, or complementary State or Territory laws. The new NTA strengthens the contractual basis of agreements through a process of registration with the Tribunal, or equivalent state or territory body.

### 5.2.2 Pathway to Agreement Process

Diane Smith, until recently a part time member of the Tribunal, has researched the opportunities, challenges and policy implications of the amended NTA, in particular the provisions for ILUAs. Smith argues that the provisions for ILUAs offer a significant opportunity to address the diverse land-use concerns of Indigenous Australians, resource developers, government and other stakeholders<sup>38</sup>. They also provide a practical statutory pathway into the agreement process by affording a wide range of mechanisms and procedural options for:

- ‘side’ or ancillary agreements to the claim mediation process
- negotiated settlements
- future act agreements
- land access and use agreements
- co-management or partnership agreements
- framework, process and heads of agreements.

Smith argues that such agreements can be local or regional in their geographic coverage; operate as stand-alone or sequential to other agreements; and cover specific or multiple purposes. She suggests that these characteristics should provide a practical foothold into the unknown territory of the larger scale regional agreements which could be expected to develop over well-defined geographic areas (such as Western Australia’s Kimberley region), enabling a practical conceptualisation of how such agreements might be secured<sup>39</sup>.

### 5.2.3 Benefits

The ILUA provisions offer a set of agreement-making mechanisms which are relatively user-friendly and potentially afford parties with:

- flexibility
- greater legal certainty and enforceability
- improved post-agreement implementation including monitoring
- the development of preferred processes more attuned to cultural, social and economic realities.

ILUAs have the potential to be:

- cost efficient and timely
- sustainable
- inclusive in their potential coverage of issues and parties

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<sup>38</sup> Smith, DE, Indigenous Land Use Agreements: the Opportunities, Challenges and Policy Implications of the Amended NTA, Discussion Paper No. 163/1998, Centre for Aboriginal Economic Policy Research, ANU, 1998

<sup>39</sup> Ibid

- productive of workable and just outcomes based on a practical interpretation of co-existence<sup>40</sup>.

#### 5.2.4 Potential Challenges

Notwithstanding that most potential stakeholders regard the inclusion of ILUAs as a step in the right direction especially regarding their capacity to improve the grant of mining-related tenements and thus to offer more surety for companies and claimants alike, there are potential challenges and disadvantages identified by Smith, which include:

- certification difficulties associated with identifying all persons with native title rights and interests entitled to be a party to an agreement and the related difficulty of gaining their authorisation
- possible procedural complexity related to the objection process
- variable organisation role and increased workload responsibilities of Native Title Representative Bodies and their future relationship with Prescribed Bodies Corporate
- continuing oppositional behaviour of key stakeholders. New Federal Government taxation proposals may also act as a disincentive to the agreement process and increase transaction costs associated with the negotiation of agreements.

Smith notes that most important amongst the challenges to parties in obtaining equitable, just, timely and durable outcomes will be the need to:

- develop effective, professional Native Title Representative Bodies with high levels of negotiating skills and the organisational capacity to provide certification
- overcome the debilitating effects of intra-Indigenous conflict which will always prove inimical to agreement
- secure the active engagement and policy support of governments at all levels
- ensure adequate and co-ordinated levels of funding for all potential Indigenous and other parties.

#### 5.2.5 Flexibility

Smith identifies that another potential advantage of the ILUA provisions is their flexibility. An ILUA can be developed to be implemented in stages or tagged to sequential future agreements. To varying degrees, all three types of ILUAs, but particularly the alternative procedure agreement, offers the opportunity to develop preferred alternative processes and frameworks. For example, at any stage of a claim mediation, or in respect to particular landuse or future act negotiations, this form of ILUA could be used to uniquely:

- develop a Heads of Agreement listing a future timetable and substantive issues for continuing negotiation
- specify codes of practice and benchmarks to be used for negotiating, implementing and monitoring the components of an agreement
- provide a framework and processes for making other agreements.

Any of these might include procedures and criteria for:-

- good faith negotiation

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<sup>40</sup> Ibid



- meeting arrangements, including location and composition
- establishing and maintaining the mandates of native title spokespersons
- establishing and gaining the authorisation of the native title group
- the role of negotiating teams and their legal representatives
- the mechanisms for obtaining variations to component processes or stages
- dealing with issues of confidentiality
- information exchange and the role of the media
- the preferred involvement of government and representative bodies
- cost-sharing and minimisation arrangements.

#### 5.2.6 Shared Understanding

In conclusion, Smith warns that the future effectiveness and durability of an agreement will be influenced by the extent to which its terms and conditions have been fully and clearly communicated to all persons who have native title rights and interests. The drafting of an ILUA would not need to be legally or technically cumbersome and more effective cross-cultural communication of its terms and conditions could be enhanced by the use of plain English and Indigenous language translations.

The registration of such agreements requires notification and an opportunity for other parties to object to their registration. Once registered however, future acts done under the agreements are valid. When requested, the Tribunal is able to assist parties in the development of an agreement.

#### 5.2.7 The economics of ILUAs

One of the major issues in the conduct to date of native title negotiations and in general relation to native title business, is that various stakeholders have not felt or been able to participate to the extent necessary due to lack of resources, especially funding. While the Commonwealth government has now installed a policy of providing financial assistance to stakeholders other than native title holders - who are variously funded but essentially through the ATSIC<sup>41</sup> allocation to native title - the warning bells should sound in reference to whether all necessary stakeholders will be in a position to participate directly in the process of working through agreements. Diane Smith identifies this issue as an immediate challenge to the development of ILUAs<sup>42</sup>. It is worth noting that the amended NTA enables provision by the Commonwealth Attorney-General of legal or financial assistance to parties (or intending parties) to an ILUA, in relation to negotiating an agreement; taking part in any inquiry, mediation or proceeding in relation to an agreement; or in resolving any dispute.

Smith notes that:

The taxation aspects of native title are currently being reconsidered, in particular, the treatment of payments made by way of compensation to native title holders or claimants. It seems likely that the Cape Flattery Silica Mine decision (*see Cape Flattery Silica Mine Pty*

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<sup>41</sup> Aboriginal and Torres Strait Islander Commission, Australia's "peak" body for representing Indigenous interests

<sup>42</sup> Smith, D, *Indigenous Land Use Agreements: Opportunities and Challenges*, Working with Native Title and Reaching Agreement - National Forum, Brisbane, 1998

*Ltd -v- the Commissioner of Taxation for the Commonwealth of Australia, 9 July 1997*) will apply, so that payments made by non-native title parties for the ‘temporary impairment or suspension’ of native title under an ILUA will be tax deductible in the hands of the person making the payment. The Commonwealth’s proposed tax treatment of all payments received by native title groups under an ILUA for the temporary impairment or suspension of native title rights and interests, will be to tax all such receipts (irrespective of the form of the payment) via a withholding tax applied at the rate of 4%. Such a withholding tax system will likely operate as a disincentive to native title parties.

It would also seem likely that the success of an agreement would be proportional to the effort put into the implementation phase, such that properly resourced parties with appropriate budgets and acting with good will to optimise the terms of the agreement, are likely to be those which signal to others that ILUAs are not just possible, but also efficient, durable and “user-friendly” in achieving the outcomes they were designed to achieve. Smith observes that experience in Australia and overseas has shown that valuable agreements can quickly become unsustainable and hotly contested if implementation costs and responsibilities have not been agreed upon and identified in the agreement.

## **6. PARTICIPATION OF THE BROADER COMMUNITY INCLUDING ACKNOWLEDGMENT OF EXISTING RIGHTS AND INTERESTS**

### **6.1 Notification of Applications for Native Title**

When an application is filed in the Federal Court, a copy must be given to the Native Title Registrar of the National Native Title Tribunal who is then required to give notice of details of the application to bodies or persons who may be affected by the claim, including (among others):

- any person who when the application was filed held a proprietary interest in relation to any of the area covered by the application which is registered in a public register of interests
- any local government body for the area
- any person whose interests may be affected by a determination in relation to the application.

The notice must specify a time within which persons, bodies or organisations can write to the Federal Court to become a party to the proceedings, and the Federal Court is required as soon as practicable after the expiry of the notice period to refer the application to the Tribunal for mediation, where consideration has to be paid to the nature, extent and manner of exercise of the native title rights and interests in relation to the area; the nature and extent of any other interests in relation to the area; and the relationship between these rights and interests. Thus a broad range of potentially affected persons have access to the mediation process where the aim is to reach an agreed determination of native title.

### **6.2 State, Territory and National Liaison Committees**

The Tribunal has established liaison committees in Western Australia, South Australia, Victoria, New South Wales, Queensland and the Northern Territory, and a national committee in Canberra, which meet regularly in order to discuss the operation

of the NTA in the particular jurisdiction, and to discuss revised procedures or policies, to develop and enhance working relationships, to provide learning opportunities, and to propose strategies for more effective engagement of stakeholders.

### **6.3 Goldfields Mediation Service**

The Goldfields Mediation Service, aimed at facilitating agreements between native title claimants and miners, has been operating in Kalgoorlie since 22 August 1996, providing a mediation facility for native title parties, miners and others involved in the negotiations over the grant of mining leases, exploration and prospecting licences, and where the Government intends to compulsorily acquire land for development. Specific functions of the service include:

- working to improve community understanding of native title and requirements for future dealings in land
- facilitating the negotiation of just and sustainable agreements between native title claimants and miners
- provision of administrative assistance to mining parties, particularly prospectors and small operators involved in negotiations under the Tribunal's future act process
- assistance in the resolution of intra-Indigenous disputes, in conjunction with the Goldfields Land Council.

A Goldfields Mediation Council is supported by the Service, and meets quarterly to ensure the interests of a broad range of native title stakeholders are taken into account. Members include representatives from the Goldfields Land Council, Chamber of Minerals and Energy, Pastoralists' and Graziers' Association, Kalgoorlie Chamber of Commerce and Industry, Association of Mining & Exploration Companies, Amalgamated Prospectors' and Leaseholders' Association, the Department of Minerals and Energy, the Department of Land Administration, and the Country Shires Association.

The Mediation Council monitors and advises the Tribunal on the operation of the mediation service as well as recommending practical measures for facilitating mediation between the State, miners, pastoralists and native title parties in relation to claims and future act matters<sup>43</sup>.

## **7. ISSUES OF WILLINGNESS AND GOOD FAITH ON BEHALF OF PARTIES AND GOVERNMENT**

As referred to above, the five year period over which the Tribunal has been operating has been characterised by a range of strategic behaviours in relation to purported negative effects of the legislation, with much of this designed to achieve statutory reform. Much of the media coverage over this period has described the NTA as unworkable, and in a range of ways the amendments should be able to improve efficiency and promote a more positive environment for parties to engage with the fact of native title. Already it is clear that various governments are adopting very positive strategies in order to facilitate outcomes. The Queensland government is something of a pacesetter, and has gone on record to state that its "preferred position in relation

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<sup>43</sup> NNTT, PR96/32, 14 August 1996

to the future management of lands where native title is an issue is through comprehensive agreements, negotiated with good will and in good faith, by all interested parties. Agreements worked out on the ground by those involved offer a more flexible, co-operative and potentially more wide-ranging and creative way of dealing with native title and land management issues’<sup>44</sup>.

There are indications that various “peak bodies”, which act to represent the interests of their stakeholder constituencies in mining, pastoralism, farming, fishing, and so on, are also becoming focused on agreement-making as an alternative means to protect members’ interests.

## **7.1 Registration Test**

The introduction of a registration test for native title claims can be expected to eventually resolve issues inherent in the right to negotiate where proponents have in the past faced having to negotiate with up to twenty or more different claimant groups. The working through of this test will act to “force” withdrawal of some claims and to consolidate others. Hopefully the mediation of claims will become easier and lead to further determinations of native title by agreement of parties (where the requisite continuity of connection, identification of native title rights and interests, and membership of the group can be clearly established). Passing the registration test allows native title applicants to:

- access the right to negotiate
- oppose non-claimant applications over the same area
- confirm pastoral lease access rights where these rights existed on 23 December 1996 (the date of the High Court's *Wik* decision)
- gain the benefit of certain other procedural rights (including the right to enter into a registered Indigenous Land Use Agreement).

## **7.2 The Future Act Workload in Western Australia**

### **7.2.1 Workload and Policy**

Perhaps the major issue over the five years since 1 January 1994 has been the huge workload in Western Australia in relation to the future act regime, in particular since May 1995 when the government began using the NTA in order to clear proposed mineral tenements, where the State made an assessment that native title might be impacted (exempting only private freehold, which forms a very small proportion of the total area of Western Australia). To illustrate this workload (and the effort that both the Tribunal and the Western Australian Department of Minerals and Energy in particular have devoted to managing the workload in this three and a half years), the NTA requires that government notify its intention to grant, and in that period over 13,000 such notices have been issued. In the context of an explosive amalgam of overlapping claims, a relatively undereducated constituency in relation to native title, and the inherent complexity of the legislation, it might seem surprising that any outcomes have been achieved at all, but in spite of the above and a rather large degree of strategic behaviour by parties, many agreed outcomes have been reached.

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<sup>44</sup> Native Title Services, Department of Premier and Cabinet, Queensland Government: Native Title - The Queensland Response, 1998

Nonetheless a large backlog of unissued titles - particularly mining leases - remains with the Department of Minerals and Energy, and this has been exploited by various peak bodies as factual illustration of the incapacity of the NTA to deal effectively with the mining industry in particular. This is not to deny the presence of major issues in the industry in respect of native title (especially the presence of overlapping claims which gives rise to the need for companies to seek the agreement of each native title claimant group, and strategic behaviour by native title parties and/or their representatives in seeking conditions beyond the capacity of smaller firms in particular to meet). Notwithstanding such complexity, there are many extremely positive companies and individuals who have done their best in a difficult period to work within the constraints of complex processes, and to actively seek means to reach agreements and to enhance processes, rather than dissipate energy in an endless political debate. The mining and exploration industry in Western Australia is the most significant export industry in the state, achieving a prominence which to a certain extent contributes to the definition of what it means to be a West Australian.

### 7.2.2 Alternative Scenarios

Given the political and cultural setting in Western Australia it should not be too surprising that the State Government has spent significant sums in the courts challenging native title in various ways, and also in deriding the operations and effectiveness of the right to negotiate. It could be argued that a very different result - in reference to the backlog mentioned above - might have been achieved if the Western Australian government had acted more positively from the beginning in encouraging agreement-focused behaviour, and in resourcing its operational areas to optimise outcomes. Similarly, the continuous negative commentary from various peak bodies has acted to install and perpetuate a culture of adversity, with claims that the exploration and mining industry was in decline due to the effects of native title. Such statements would appear to fly in the face of numerous media reports accenting a resurgent industry, but one also subject to the vagaries of market access, other access issues, consumer demand, environmental constraints and price collapse. In order to rebuke what had become a common understanding that native title was indeed responsible for a large impact on industry - keeping aside that some governments had deliberately stayed outside the right to negotiate provisions either by ignoring them almost completely as occurred in Queensland until last year's change of government, or by installing their own version of the Tribunal to manage future acts, as in South Australia - ATSIC commissioned Ian Manning, a resource economist with the National Institute of Economic and Policy Research in Melbourne to analyse the impact of native title and the right to negotiate on mining and exploration in Australia.

### 7.3 The Manning Papers

Manning's paper<sup>45</sup> (and a postscript published eight months later - refer below) compared relationships between the mining industry and Indigenous People under two distributions of property rights – the current distribution, which includes the right of Indigenous people to negotiate for exploration and mining on their lands, and the pre-

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<sup>45</sup> Manning, I, Native Title, Mining and Mineral Exploration: the impact of native title and the right to negotiate on mining and mineral exploration in Australia, National Institute of Economic and Industry Research, ATSIC, 1997

NTA system. He concluded that under the current distribution (post-*Mabo* and post-NTA):

- there is little evidence for the claim that native title has reduced mining investment
- some mining investment has been delayed, but more often due to counter-productive strategic behaviour by various parties than by the provisions of the NTA. With forethought and good faith, most such delays could be avoided
- costs to the mining industry have increased in the order of 1%, but with important corresponding benefits, including security of tenure and improved relations with the local population
- there are significant opportunities for economic development in remote areas which cannot be achieved by any other means.

In general, Manning found there is strong evidence that the benefits of the right of Indigenous people to negotiate with the proponents of mining projects significantly outweigh the costs. He observed that these economic and social benefits accrue not just to Indigenous people themselves, but also to the mining industry and to the national economy.

The updated report<sup>46</sup> contended that the right to negotiate underlies significant new opportunities in remote area economic development. Manning argued that without the right to negotiate, current best practice in the planning of remote area mines would deteriorate and opportunities for agreements which benefit both the miner and the people of remote areas would be overlooked. Further, he noted that despite the threatened curtailment of the right to negotiate under the proposed amendments to the NTA, Aboriginal negotiators and mining companies have continued to negotiate agreements with win-win characteristics, with agreements increasingly focused on Aboriginal employment and enterprise development components.

To illustrate the type of commitment shown by major resource companies, the report referred to the Memorandum of Understanding reached between Rio Tinto and the Aboriginal and Torres Strait Islander Commission and signed on 26 May 1998, which commits both organisations to cooperation at national, state and regional levels to increase the training, employment and business development opportunities of Aboriginal people in the company's operations.

Manning concluded that:

The mining industry appears to be in a quandary. On the one hand, in support of the NTAB<sup>47</sup> it has been anxious to emphasise its difficulties with the right to negotiate; on the other hand, it has very significant achievements to report based on its negotiations with Aboriginal people. The industry has opportunities to build on these achievements. Nothing has happened to assuage the fear expressed in the (November) paper, that curtailment of the right to negotiate will place those mining companies which have led the improvement in miner/Aboriginal relationships in direct competition with the laggards in the field, resulting in a general deterioration of relationships and a failure to build on present achievements.

## **7.4 Moving Toward an Agreement Culture**

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<sup>46</sup> Manning, I, *Native Title, Mining and Mineral Exploration: A Postscript*, National Institute of Economic and Industry Research, ATSIC, 1998

<sup>47</sup> Native Title Amendment Bill 1997

It appears that the attitude of peak bodies to the amended legislation is generally positive as much of what they have campaigned for over the years has been incorporated in the amendments, whereas bodies representing Indigenous parties remain very concerned with the extinguishing aspects including the scheduled interests, and also with the reduced right to negotiate opportunities. Thus it would be unrealistic to expect that a further rash of court challenges will not eventuate, thus causing significant delays to the process generally (but in the course of decisions and challenges to those, adding to the precedent case history which is necessary in settling a range of difficult issues arising from various interpretations of what remains a very complex statute).

Nonetheless, individual companies are forging ahead to make agreements in order to get their projects up and running, by essentially standing outside the complexity and ambiguity, and doing private deals with native title holders in order to have tenements granted. There is an increasing trend toward the formation of coalitions among both Indigenous and industry parties, with the aim of seeking single negotiating points. Such focused behaviour could be expected to deliver efficiency gains - including lower transaction costs - as parties become better informed and begin to adopt new forms of strategic behaviour as the culture of agreement making takes hold.

The Tribunal has sought discussions with the Western Australian government for early in 1999 in order to explore ways to reach agreements on Western Australia's most promising native title applications. The government's decision in December 1998 - following its failure to have complementary legislation passed by the Legislative Council - to continue operating under Federal native title laws rather than persist with the establishment of a state-based alternative regime (at least for the time being) has offered an opportunity to devote more attention to achieving mediated outcomes, noting that agreed determinations or other agreements about native title are important steps in addressing the uncertainty which is of real concern to Government and industry<sup>48</sup>.

It would seem likely that the achievement of some agreed determinations of native title in Western Australia would contribute significantly to an atmosphere of trust and confidence that native title applications can be resolved without threatening the rights and interests of any party. The experience in Queensland to date has demonstrated that each agreement serves as a model for many other communities in demonstrating how positive outcomes can be achieved through constructive negotiations.

## **8. LAND AND RESOURCE MANAGEMENT IN RELATION TO LITIGATED DETERMINATIONS OF NATIVE TITLE BY THE FEDERAL COURT**

### **8.1 Croker Island (Northern Territory) - Native Title in the Sea**

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<sup>48</sup>NNTT, PR98/83, 24 December 1998

The only determination to date regarding native title and marine areas/resources - confirming that native title can be found to exist offshore - was determined by the Federal Court on 6 July 1998<sup>49</sup>. Justice Olney determined that:

- communal native title exists in relation to the sea and sea-bed within the claimed area
- the native title is held by the Aboriginal peoples who are yuwurrumu members of the Mandilarri-Ildugij, the Mangalara, the Murran, the Gadura-Minaga and the Ngaynjaharr clans (the common law holders)
- the native title rights and interests do not confer possession, occupation, use and enjoyment of the sea and sea-bed within the claimed area to the exclusion of all others
- the native title rights and interests which the Court considers to be of importance are the rights of the common law holders, in accordance with and subject to their traditional laws and customs to have free access to the sea and sea-bed within the claimed area for all or any of the following purposes:-
  - \* to travel through or within the claimed area
  - \* to fish and hunt for the purpose of satisfying their personal domestic or non-commercial communal needs including the purpose of observing traditional, cultural, ritual and spiritual laws and customs
  - \* to visit and protect places which are of cultural and spiritual importance
  - \* to safeguard their cultural and spiritual knowledge.
- the native title rights and interests of the common law holders in relation to the sea and sea-bed within the claimed area are affected by, and to the extent of any inconsistency must yield to, all rights and interests in relation to the sea and sea-bed within the claimed area which exist pursuant to valid laws of the Commonwealth of Australia and of the Northern Territory of Australia.

The Croker Island claimants claimed ownership of resources including minerals on or below the seabed, and the right to control their use by others. The decision is of direct interest to offshore petroleum companies and to mining companies whose infrastructure resides offshore in coastal waters, since the finding that native title exists may have practical consequences for management of offshore resources<sup>50</sup>. While there are many claims around the Australian coastline which include substantial areas of sea, there have been no mediated (agreed) determinations of native title over marine resources. Nonetheless a number of non-native title agreements have been reached in such areas, including in relation to pearl farming.

#### 8.1.1 *Broome Pearls Agreement*

In 1992 Broome Pearls reached an agreement with Aboriginal communities in coastal areas to the north of Broome which included:

- access and transit rights (for anchorage, fishing, hunting and sheltering)
- suitable buoys and reflectors and spacing of longlines for safe navigation through the area
- staff of Broome Pearls would not access mainland Aboriginal land areas without written permission of the Aboriginal community
- support for Aboriginal employment in the pearling industry, including training and career development.

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<sup>49</sup> Mary Yarmirr & Ors v The Northern Territory of Australia & Ors [1998] 771 FCA (6 July 1998)

<sup>50</sup> Gishubl, G, *Native Title and the Sea - the Croker Island Case*, AMPLJ No 17, 1998



## 8.2 Miriung Gajerrong - Western Australia/Northern Territory

The Federal Court's 24 November 1998 decision<sup>51</sup> that native title existed over part of the land claimed by the Miriung Gajerrong people in the eastern Kimberley of Western Australia and an adjacent area of the Northern Territory - the WA and NT governments have sought leave to appeal to the High Court - demonstrates clearly that where native title is determined to exist, whether through agreement or litigation, the nexus between the "new found" rights and interests in land and waters will need to be articulated in partnership with other interest holders. The claim area included a national park, two artificially created lakes, works associated with an irrigation scheme, a large number of reserves for various purposes and land gazetted as a townsite. On the Northern Territory side, the areas claimed were Keep River National Park and three freehold lots held by Aboriginal corporations as community living areas. Much of the claim area had, in the past, been subject to grants of pastoral leases which contained reservations under the *Land Act* (WA) in favour of Aboriginal people<sup>52</sup>.

Justice Lee found that:

- "native title" is to be distinguished from "native title rights and interests", with the former being a right to land under which the latter are enjoyed
- common law native title is not a bundle of rights; rather it is a right to land arising from the significant connection of an Indigenous society with land under that society's customs and culture
- difficulty in proving the boundary of the area claimed or the membership of the community will not of itself be sufficient to deny the existence of communal native title
- the applicants were not required to show a biological connection between each member of the claim group and an ancestor in occupation at the time sovereignty was asserted. They need only show a sufficient connection by way of actual, or implied, genealogical links to show that the community in occupation at the time sovereignty was asserted was the predecessor of a community that now claims native title
- skill in locating and knowledge regarding the use of bush medicines and foods provide strong evidence of the maintenance of a physical connection with the claim area. The practice of hunting and fishing is motivated by the desire to maintain a connection with the land and with their ancestors
- a community of Miriung and Gajerrong people exists which is identified by common beliefs, mutual recognition of membership, shared use of, or reference to, the Miriung or Gajerrong languages, and observance, as members of that community, of practices based on traditional laws and customs
- the Miriung and Gajerrong community has an ancestral connection to the Aboriginal community or communities which occupied the claim area at the time of assertion of British sovereignty. It follows that the communal title in respect of the claim area is the title of the Miriung and Gajerrong people
- native title existed over that part of the land covered by the application where it had not been extinguished (the determination area)
- the native title rights and interests derived from and exercisable by reason of the existence of native title over the determination area were particularised as rights:-

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<sup>51</sup> *Ward v State of Western Australia* (Unreported Federal Court, WAG6001 of 1995, Lee J, 24 November 1998)

<sup>52</sup> The following material on the Mirriung Gajerrong decision was prepared as a draft case note - not yet published - by Lisa Wright of the Tribunal's Legal Research Unit

- \* to possess, occupy, use and enjoy the area
- \* to make decisions about the use and enjoyment of the area
- \* of access to the area
- \* to control the access of others to the area
- \* to use and enjoy resources of the area
- \* to control the use and enjoyment of others of resources of the area
- \* to trade in resources of the area
- \* to receive a portion of any resources taken by others from the area
- \* to maintain and protect places of importance under traditional laws, customs and practices in the area
- \* to maintain, protect and prevent the misuse of cultural knowledge of the common law native title holders associated with the area.
- the native title exists concurrently with other, non-native title interests in the determined area
- the exercise of some of the concurrent native title rights may be regulated, controlled, curtailed, restricted, suspended or postponed either by operation of legislation or by the nature and extent of other interests created by the Crown
- by reason of the reservation to the interest granted by the Crown to a pastoral lessee, pastoral leases are burdened by the native title which burdens the title of the Crown.

Clearly there is substantial effort in front of the local community of interest holders to give effect to this interpretation, even if following appeals by the Western Australian and Northern Territory governments, the decision is somewhat reduced. In the words of Justice Lee:

How concurrent rights are to be exercised in a practical way in respect of the determination area must be resolved by negotiation between the parties concerned. It may be desirable that the parties be assisted in that endeavour by mediation, a course contemplated, perhaps, by the (NTA)<sup>53</sup>.

It might be considered somewhat ironic that mediation of this claim is where the whole process started over four years ago, and that the failure of parties to reach a Tribunal-mediated agreement is what put the case before the Federal Court.

### **8.3 Yorta Yorta - Victoria**

On 18 December Justice Olney of the Federal Court in Victoria handed down his decision<sup>54</sup> in relation to a claim for native title made by members of the Yorta Yorta community over land and waters within Victoria and New South Wales, including the Barmah Forest, and the Murray and Goulburn Rivers<sup>55</sup>. His decision was that:

- the evidence did not support a finding that the descendants of the original inhabitants occupied the land since 1788 nor that they continued to observe and acknowledge, throughout that period, the traditional laws and customs in relation to land of their forebears. The “tide of history” had washed away any real acknowledgment of their

<sup>53</sup> *Ward v State of Western Australia* (Unreported Federal Court, WAG6001 of 1995, Lee J, 24 November 1998), p258

<sup>54</sup> *Yorta Yorta v the State of Victoria & Ors*, Unreported, VG No 6001 of 1995, Olney J, 18 December 1998

<sup>55</sup> This discussion relies on a draft casenote (unpublished) prepared by Ilse van Wijngaarden of the Tribunal’s Legal Research Unit

- traditional laws and any observance of their traditional customs
- the foundation of the claim to native title in relation to the land previously occupied by their ancestors having disappeared, the native title rights and interests previously enjoyed were not capable of revival
- except in the case where there has been necessary extinguishment (eg. a freehold grant or an exclusive possession lease) the existence and nature of the claimed native title rights and interests must first be established before any question relating to inconsistent non-native title rights can be resolved. It follows that in a case where native title has not been found to exist, there is no occasion to embark upon any further inquiry
- did not consider whether, and to what extent, native title rights and interests have been subjected to extinguishing events, nor the question of coexistence of native title and other rights
- observed that conservation of timber and water resources were issues of relatively recent origin about which the original inhabitants could have had no concern and which cannot be regarded as matters relating to the observance of traditional laws and customs
- whilst mounds, middens and sacred trees provided evidence of Indigenous occupation and the use of the land, there was no evidence to suggest that they were of any significance to the original inhabitants other than for utilitarian value nor that any traditional law and custom required them to be preserved
- fishing was engaged in as a recreational activity rather than as a means of sustaining life
- modern practices associated with re-burial of ancestors were not a part of the traditional laws and customs handed down from the original inhabitants.

Olney J took the view that by 1881 those through whom the claimant group were seeking to establish native title were no longer in possession of their tribal lands and had, by force of the circumstances in which they found themselves, ceased to observe those laws and customs based on tradition which might otherwise have provided a basis for the present native title claim. He found that despite efforts to revive the lost culture of their ancestors, native title rights and interests once lost are not capable of revival. Therefore, traditional title having expired, the Crown's radical title expanded to a full beneficial title.

Clearly these two decisions illustrate the unpredictability of native title claimants' likelihood of success in having their native title recognised and determined. This decision might have been expected to provide - in the event of native title being determined to exist in the claim area - guidance in reference to the way in which concurrent or coexisting rights in state forests and the waters of the major river systems concerned, might interact with other, non-native title rights (refer above discussion on the Miriuwung Gajerrong decision). The Yorta Yorta People are currently considering an appeal to the High Court.

#### **8.4 The New Zealand Experience**

Clearly the Australian jurisdiction is a long way behind New Zealand when it comes to the incorporation of Indigenous interests in the management of marine resources, this disjunction reflecting among other matters the power and presence of treaty in New Zealand compared with the complete absence of any such instrument in Australia. The reality in Australia - clearly not one which suits all political palates (witness the rise of One Nation during 1998) - is that "we still have a problem...of a dispossessed people, and we all need to be aware that native title law in Australia is still in its infancy. Australia is several decades behind countries like New Zealand

and Canada in terms of developing a wider appreciation, understanding and acceptance of the reality of native title”<sup>56</sup>.

The engagement of Maori in New Zealand fisheries as reflected in Te Ohu Kai Moana (Treaty of Waitangi Fisheries Commission) has no comparable basis in Australia, though the practical working out of native title matters over time might be expected to result in Indigenous property rights being accounted for in questions relating to marine resources and their allocation, access and management. Indeed, in relation to marine resources, Indigenous Australians could be expected over time to take up some of the matters which Te Ohu Kai Moana has responsibility for (helping Maori to get into, and develop, “the business and activity of fishing”), including<sup>57</sup>:

- allocation of assets
- organising annual lease rounds (make quota available)
- ensuring widest possible representation into the legislative process
- development of the new *Maori Fisheries Act*
- development of regulations protecting customary fishing rights
- input into fisheries policy and management issues<sup>58</sup>
- training and development strategy, aimed at ensuring Maori have skills to match their fisheries assets, including a scholarship programme.

In the absence of a treaty recognising prior ownership it would not seem possible that Australia might one day have its own version of the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992*, which provides for the development of allocation procedures for Maori fisheries assets.

## 8.5 *Delgamuukw* Decision - Canada

The Canadian Supreme Court decision in *Delgamuukw*<sup>59</sup> has implications for Australia on the nature of native title and native title rights, proof of their existence and the interpretation of oral histories. However it is important to bear in mind the differences between the Australian and Canadian positions<sup>60</sup>, for example in reference to mineral rights. In each state of Australia legislation reserves mineral rights to the Crown. Lands vested in Aboriginal lands trusts are exclusive of mineral rights yet recognise and specify that royalties in respect of mining licences or leases be paid to the trusts. The NTA implies in the future act regime provisions that native title land is available for mining, if the parties so agree, or unless the Tribunal determines otherwise, whether or not native title has been determined. This is contrary to the inherent limitation on Aboriginal title land use in Canada which restricts use of Aboriginal title land to activities which are not irreconcilable to the special attachment to the land.

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<sup>56</sup> Wensing, E, and Sheehan, J, *Native Title – Implications for Land Management*, The Australia Institute, Discussion Paper No. 11, April 1997

<sup>57</sup> Te Ohu Kai Moana, Maori Fisheries Website: [www.Maori-Fisheries.org.nz](http://www.Maori-Fisheries.org.nz)

<sup>58</sup> Indigenous representatives sit on a number of fisheries management advisory committees around the country, eg. “REEFMAC” (Reef Fish Management Advisory Committee) and similar in Queensland)

<sup>59</sup> *Delgamuukw v British Columbia* (unreported, Supreme Court of Canada, 11 December 1997, Lamer CJ and La Forest, L’Heureur-Dube, Sopinka, Cory, McLachlin and Major JJ)

<sup>60</sup> Cowan, C, Legal Research Unit, National Native Title Tribunal, 4 March 1998 (unpublished casenote)

The inherent limitation on activities irreconcilable to the attachment to the land and the view expressed in *Delgamuukw* that Aboriginal title land must be surrendered to the Crown for a purpose destructive of the special attachment to the land (eg. toxic waste disposal or open pit mining), is not a concept that has been argued in Australia. The question of whether native title holders have a right in minerals as suggested in the Federal Court's *Mirriuwung Gajerrong* decision will no doubt be one of the grounds raised in the appeal (refer 8.2 above).

This major Canadian decision affirms the desirability of negotiated settlements from the government as well as from the Indigenous perspective. No court system will in the long term sustain an unjust imposed settlement of native title, yet governments constantly make the mistake of seeing such a solution<sup>61</sup>.

## **9. FUTURE ACT DETERMINATIONS IN RELATION TO LAND AND RESOURCE MANAGEMENT**

The Tribunal has an arbitral role<sup>62</sup> in deciding whether grants of mining and exploration tenure, or compulsory acquisitions of native title interests in land where government intends to transfer that area to a third party, can be made if agreement between parties is not able to be reached inside the negotiation process established under the future act regime of the NTA. Examples of such decisions include the proposed Mungari industrial estate near Kalgoorlie, the Koara decision concerning proposed grants of mining leases, and the compulsory acquisition of native title interests in land near Darwin, proposed for the development of a liquefied natural gas facility.

### **9.1 Compulsory Acquisition - Mungari Industrial Estate**

The Government of Western Australia was granted clearance under the NTA to proceed with the compulsory acquisition of native title rights and interests on 1185ha of vacant Crown land east of Kalgoorlie to enable development of the proposed new Mungari Industrial Park<sup>63</sup>. The Tribunal determined that the development could proceed, subject to conditions, after earlier negotiations between the State Government and three local native title applicant groups failed to reach an agreement.

Conditions attached to the Tribunal's determination, which applies only to the three native title claimant groups which obtained the right to negotiate, include:

- continued access by the native title parties to unsold or unleased areas of the park, except for project development, security or safety reasons
- the Government to help the native title parties to identify contract opportunities and to participate in tendering for contracts
- the Government to provide contractors and purchasers with a list of the employment qualifications and experience of the members of the native title parties

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<sup>61</sup> Bartlett, R, *The Need for Negotiated Settlements*, Indigenous Law Bulletin, February 1998, Vol 4, Issue 9

<sup>62</sup> This role is able to be performed by state/territory governments if complementary legislation is approved by the Commonwealth

<sup>63</sup> NNTT, PR98/3, 20 December 1997

- a conservation site and gnamma hole of Aboriginal heritage significance not to be sold or leased to non-native title parties
- the native title parties and the WA Environmental Protection Authority to be notified of any proposal by a purchaser to conduct industrial activity in the park
- the Government must inform purchasers of the terms of the *Aboriginal Heritage Act* WA and provide them with reports of Aboriginal heritage site surveys within the park area
- if any of the three native title parties obtain a determination of native title, the Government must appoint at least one representative from the group to a Mungari Advisory Board.

## **9.2 Proposed Grant of Mining Lease - Koara People**

The National Native Title Tribunal determined that seven mining leases could be issued by the State Government in an area which was the subject of a native title application by the Koara People<sup>64</sup>. The proposed leases, all of which are north of Leonora in the eastern Goldfields of Western Australia, can be granted by the Department of Minerals and Energy under conditions set by the Tribunal to protect the native title rights and interests of the Koara People. Conditions of the grants include that:

- the Koara Peoples' access to the land covered by the mining leases be maintained
- sites of particular cultural significance are protected
- in the event of a mining development being proposed, a social impact assessment study be conducted
- the Koara People be given employment and training opportunities where possible
- the mining operators undertake training to raise their awareness of the Koara Peoples' culture.

## **9.3 Wickham Point Determination (Liquefied Natural Gas)**

The National Native Title Tribunal approved the compulsory acquisition of native title rights and interests that cleared the way for the construction of a liquefied natural gas plant on 600ha of land at Wickham Point in Darwin Harbour. The area is subject to native title applications by the Larrakia and Danggalaba peoples. The Tribunal also decided that a further 3,800ha at Wickham Point could be developed to the extent that it is ancillary to projects in the proposed industrial and commercial precinct, including deep water access, infrastructure, and safety and security features for hazardous activities.

While the decision made clear that the proposed development would have a significant adverse impact on the activities and way of life of the Larrakia native title claimants, it was equally clear that the proposed development (by Phillips Oil Company) could result in substantial economic and public benefits. Conditions attached to the approval included that:

- native title parties were granted access to the land and waters in the Wickham Point precinct
- cultural and environmental protection obligations were observed
- native title holders were involved in liaison committees related to the project

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<sup>64</sup> NNTT, PR98/23-24 June 1998

- employment and training opportunities on the project for native title holders were encouraged.

The project developers propose to bring natural gas to the plant by sub-sea pipeline from the Bayu-Undan gas field in the Timor Sea, and transfer the product to tankers for shipment to markets. The Tribunal did not rule on what compensation should be payable for the compulsory acquisition of any native title rights, leaving compensation to be negotiated when proposals for development were more clearly identified<sup>65</sup>. (This paper does not make other than passing reference to issues of compensation for effect of developments on native title. Few applications for native title compensation have been made, with little precedent to rely on or, for that matter, to report on, though a significant literature is developing.)

## **10. LOCAL GOVERNMENT**

### **10.1 Involvement of Local Government**

While a range of positive outcomes is arising from negotiations between native title claimants and other parties, a parallel theme is emerging that much of the emphasis is on the particulars in a local/regional setting, including at the level of local government. It is becoming clear that local government authorities have a major interest in native title claims and in both comprehending matters of process and in educating their local constituents. To this effect a partnership has been developed between the Australian Local Government Association (ALGA) and the Tribunal - the Local Government Project - in order to develop a national framework designed to increase awareness of native title generally, the NTA, and issues arising locally. One of the first products of this working relationship is "Working With Native Title", a booklet produced as a cooperative venture between the Tribunal and the Western Australia Municipal Association, with funding provided by the Council for Aboriginal Reconciliation. The Foreword, written by Cr John Campbell, President of ALGA, challenges local government to get involved:

Native Title is more than an issue of land. It offers all Australians an opportunity to focus on defining rights, duties, jurisdictions and governance as a mature nation. Litigation offers one path, but this is a long costly option. Local agreements offer a negotiated outcome based on local history, experience and mutual cooperation. Local Government is pivotally placed to bring together communities. A considered response to Native Title with a primary focus in negotiated outcomes requires the active participation of Local Government.

### **10.2 Practical Assistance**

More recently, ALGA has produced a guide titled "Working out Agreements between Local Government & Indigenous Australians - A Practical Guide"<sup>66</sup>. The guide, prepared by ALGA in cooperation with ATSIC, notes that local and regional agreements offer a positive and constructive approach to the resolution of issues affecting a community's economic, social and environmental well-being, and aims to provide local councils with:

<sup>65</sup> NNTT, PR98/54, 2 October 1998

<sup>66</sup> Australian Local Government Association & ATSIC, "Working out Agreements between Local Government & Indigenous Australians - A Practical Guide", 1998

- increased awareness of the opportunities for agreements between Council and Indigenous citizens
- a detailed knowledge of the context and pre-requisites for developing a local or regional agreement
- a better understanding of the critical components of local and regional agreements
- a framework for working through the processes of developing, implementing and reviewing an agreement
- examples of good practice and pointers to additional resources.

It would appear that a greater emphasis on integrated planning - including education and training - will be necessary to achieve the type of outcomes and relationships depicted above. Natalie Hewitt observes that the content of state and local government planning policies will be the instruments that enable the Integrated Planning Act (Queensland) 1997 to articulate the aspirations of native title holders<sup>67</sup>:

The importance of the content of future planning policies clearly can not be understated. The challenge to local government and indigenous communities therefore lies in negotiating mutually beneficial planning instruments which capture the aspirations of native title holders in both their role as an owner of land and as part of the wider interest of the community.

### **10.3 Statements of Mutual Recognition**

In the past three years or so a number of local government authorities have joined with their local Indigenous community in declaring, in a “statement of mutual recognition”, that the interests of the community as a whole would best be served by acknowledging each others’ rights. The sentiment expressed in such agreements is powerful and inclusive, and is being adopted in kind by an increasing number of municipalities around Australia, including Broome and the City of Bunbury in Western Australia; Ipswich City Council and Cardwell Shire Council in Queensland; Eurobodalla and Newcastle in New South Wales; and the Shire of Yarra Ranges in Victoria.

The Ipswich City Council in south-east Queensland has developed an “Indigenous Australian Accord”, which has as its aims and objectives to:

- provide recognition for the Indigenous Australian community of Ipswich
- promote reconciliation and positive community relations within the Ipswich community
- provide accurate information in respect of the Indigenous community
- provide support for the local Indigenous community
- commit to working towards the provision of appropriate services in Ipswich for the Indigenous community.

The Council anticipates that the Accord will enhance cultural tourism opportunities in the area and also generate future economic development opportunities for the Indigenous community by the Indigenous community. It expects that such opportunities might support the evolution of successful partnerships through mutual respect and understanding<sup>68</sup>.

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<sup>67</sup> Hewitt, N, *Administration of Native Title Land Under the Integrated Planning Act (Qld) 1997*, Environmental and Law Planning Journal, Vol 15, No 5, October 1998

<sup>68</sup> Ipswich City Council, Indigenous Australian Accord, 1997



## **11. OPPORTUNITIES FOR DEALING WITH LAND AND RESOURCE MANAGEMENT ISSUES IN REGIONAL OR AREA SETTINGS**

### **11.1 Benefits of Making Regional Agreements**

Patrick Sullivan notes in an Overview Paper on Regional Agreements in Australia<sup>69</sup> a number of possible gains from engaging in agreement making of this kind rather than pursuing legal or other solutions. These include:

- avoiding the costs of mounting native title or compensation claims or, for the developer and for government, the cost of opposing them
- as a result progress may be achieved in a shorter time
- both sides gain political credibility by showing their ability to put aside ideological oppositions for the sake of co-existence
- certain outcomes that it is difficult to put a value on or legislate for, such as complex conservation and hunting access arrangements, may be more easily negotiated than litigated
- the uncertainty about the extent of rights and their implementation that prevents all sides from considered planning can be reduced
- the potential for building into agreements continuing Indigenous control may be better than winning judicial title but lacking planning, environmental and resource decision-making power.

### **11.2 Effectiveness of Agreement Making**

The former Registrar of the National Native Title Tribunal, Ms Patricia Lane (now part-time member of the Tribunal), former Member Mr Rick Farley and Director of Research Mr Tony McRae<sup>70</sup> have argued that regional agreements on native title are by far the most effective means for addressing the issue in Australia because they:

- can recognise Indigenous boundaries for country
- provide the best conditions for resolving issues of overlapping claims and forced removal from country
- accommodate differing uses of natural resources
- allow different tenure arrangements
- provide a framework within which government regulation of development can proceed smoothly and efficiently
- are a vehicle for infrastructure development in regional Australia
- are a more economically efficient means for dealing with competing land and resource use issues.

### **11.3 Characteristics of Successful Negotiations**

In a related paper the former Registrar and Director of Research<sup>71</sup> point out that the experience of the operation of the NTA to date would demonstrate that the goals of dealing with additional legal and social requirements of native title in a fair, reasonable and effective way, and the development of opportunities that will add

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<sup>69</sup> Sullivan, P, AIATSIS - NARU Issues Paper 17, April 1997

<sup>70</sup> Farley, R, McRae, T, & Lane, P, *Outlook for Regional Development: Opportunities for Regional Agreements*, Northern Australia Regional Outlook Conference, Darwin, 24 September 1997

<sup>71</sup> McRae, T, & Lane, P, *Native Title and Regional Development: Reinventing Old Relationships*", Northern Australia Regional Outlook Conference, Darwin, 24 September 1997

qualitatively to the lives of all Australians, can be achieved through negotiated local, regional and project-based agreements. They maintain that successful negotiations have the following characteristics:

- the parties recognise the multiple layers of interests in land and resources in Australia
- the agreements deliver real outcomes to all involved
- the terms of the agreement provide for evolution through changes in time and circumstance
- the parties recognise both the potential and limits of the physical environment.

#### **11.4 Regional Agreements - Comparisons with Canada**

In comparing the coexistence of Indigenous and non-Indigenous land rights in Australia and Canada in light of the *Wik* decision<sup>72</sup>, Kent McNeil argues that the High Court's decision in *Wik* is short of similar Canadian jurisprudence on Indigenous rights:

Those principles to acknowledge that Indigenous and non-Indigenous Australians have rights that can co-exist in *Wik* is not a radical departure from common law principles - instead, it is a cautious step towards applying some of a spirit of sharing and cooperation.

Mick Dodson<sup>73</sup>, the former Aboriginal and Torres Strait Islander Social Justice Commissioner, argues that regional agreements - as one mechanism for achieving social justice for Indigenous Australians - could include:

- settlement of native title claims under the NTA and non-native title claims outside the NTA
- new institutions and processes by which Indigenous Australians could participate in land-use planning, environmental and social impact assessment, and resource allocation policies
- recognition of Aboriginal co-management or self-management of agreed areas of land and sea, protected areas, and natural resources and wildlife
- participation in resource development and other economic activities.

In comparison, a study by Richardson<sup>74</sup> *et al* indicates that the core objectives for Canadian Indigenous people in pursuing regional agreements appear to have been to:

- define a new legal and political relationship between themselves and the Canadian (regional) governments
- establish a clear framework concerning access to and use of land and resources that accommodates the needs of Indigenous peoples and other interests
- preserve and enhance the cultural and social well-being of Indigenous societies

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<sup>72</sup> *Wik Peoples v Queensland* (1996) 141 ALR 637

<sup>73</sup> Smyth, Dr D, & Sutherland, J, *Indigenous Protected Areas - Conservation Partnerships with Indigenous Landholders*, Environment Australia, Commonwealth of Australia, 1996

<sup>74</sup> Richardson, BJ, Craig, D, & Boer, B, *Indigenous Peoples and Environmental Management: a Review of Canadian Regional Agreements and their Potential Application to Australia*, Environmental and Planning Law Journal, Vol 11, No 4, August 1994 and Vol 11, No 5, October 1994

- enable Indigenous societies to develop self-governing institutions and an economic base which will assist them to participate effectively in decisions which affect their interests.

It would seem that the similarities are more obvious than any differences in comparing the aims of Indigenous people living in very different worlds and acting to assert their “native title” rights and interests by reference to entirely different statutes. The convergence of these aims expresses a universal need of Indigenous people to reclaim what has been historically theirs, and to actively take up land use and resource management options as a consequence of the recognition under statute of their common law native title rights and interests.

### **11.5 Cape York Land Use Agreement - An Exemplar of the Regional Agreement Making Process**

Rick Farley, former member of the National Native Title Tribunal and a consultant on land management and native title, has observed in discussing the merits of the Cape York Land Use Agreement which he assisted in negotiating, that agreements on land use and access negotiated on a local and regional basis and implemented in partnership with the courts and government, are the preferred first option<sup>75</sup>. He describes the outcome as a voluntary agreement at regional level which accommodates the interests of those with different aspirations for land use. The Heads of Agreement was signed on 5 February 1996 by the Cape York Land Council; the Cattlemen’s Union, the Australian Conservation Foundation, the Wilderness Society and the Peninsula Regional Council of ATSIC.

The outcomes of the negotiations were that:

- the pastoralists agreed to provide access for traditional owners to their leases for traditional purposes
- Aboriginal people agreed to exercise any native title rights in a way which would not interfere with the rights of the pastoralists
- the pastoralists and Aboriginal people agreed that their land should be assessed for high natural and cultural values. When identified, the values should be protected, including by World Heritage listing
- the environmentalists agreed to support a fund to purchase land with assessed high natural and cultural values. Aboriginal people would have a management role in land purchased by the fund. They also agreed that World Heritage listing should not exclude use by industry
- the Aboriginal people and the environmentalists agreed to improved tenure for pastoralists. Leases would be reviewed and upgraded
- in return, the pastoralists agreed that there should be two conditions attached to upgrading of a lease – it should allow for traditional access, and have an approved property management plan.

Implementation of this regional agreement remains subject to further consideration by the Queensland government.

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<sup>75</sup> Farley, R, *Changing face of land use in Australia*, Australian Institute of Valuers and Land Economists, Annual Rural Conference, Beaudesert, Queensland, 20 July 1996

## 12. INTERNATIONAL OBLIGATIONS

### 12.1 Relevant Treaties and Conventions

The imperative of Indigenous Australians to play a significant role in the management, custodianship, protection and control of land and waters has backing in Australia's international obligations imposed through treaties and conventions of various kinds<sup>76</sup>, including the:

- *World Heritage Convention* (“..the protection of traditional cultural landscapes is..helpful in maintaining biological diversity”)
- *Draft Declaration on the Rights of Indigenous Peoples* (Art. 26, “to own, develop, control and use customary environments, tenure systems and resource management practices”)
- *Draft Declaration of Principles on Human Rights and the Environment* (Art. 13, concerning “the right to benefit equitably from the conservation and sustainable use of nature and natural resources for a range of social purposes, the right to ecologically sound access to nature, and the preservation of unique sites”, and Art. 14, referring to Indigenous peoples’ rights to “have their territories protected from adverse impacts; to maintain their traditional way of life; and to control their lands, territories and natural resources”)
- *Global Biodiversity Strategy*, which among a long list of voluntary guidelines in relation to protected areas includes “develop new methods and mechanisms at the bioregional level for dialogue, planning and conflict resolution”, and “give weak and disenfranchised groups the means to influence how the bioregion’s resources should be managed and distributed”.

### 12.2 Partnerships in Land Management

While such matters might appear to have no direct relationship with the working through of native title claims, there is obviously a connection to prospects of agreeing on, for example, joint management of conservation reserves in the mediation of a native title claim which includes national park or other conservation reserve estate. There is at least one agreed determination of native title in draft form which has a parallel process of planning toward inclusion of the native title claimants in the joint management regime for a national park.

Marcia Langton argues for greater recognition, acceptance and utilisation of Indigenous knowledge, stating that sustainable ecological management is principally a problem of human decision making, and that the “...challenge for responsible management of north Australian landscapes is to develop beyond narrow disciplinary boundaries. This requires conceptualising the problems to include Indigenous people as significant partners with bodies of knowledge and practice with potential relevance to this challenge. Indigenous knowledge exists in its own right and will do so for so long as Aboriginal and Torres Strait Islander societies survive. Sound research and management planning can serve to identify that relevance”<sup>77</sup>.

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<sup>76</sup> Smyth, Dr D and Sutherland, J (ibid)

<sup>77</sup> Langton, M, *Burning Questions - Emerging Environmental Issues for Indigenous Peoples in Northern Australia*, Centre for Indigenous Natural and Cultural Resources Management, Northern Territory University, Darwin, 1998

It is reasonable to assume that as claims progress through mediation, increasing attention will be paid to the inclusion of at least some of the matters raised by Australia's international obligations toward Indigenous people and management of its biodiversity. In this sense the NTA is lending weight to a redistribution of responsibility for land management, which will increasingly have the inclusion of Indigenous interests as an outcome, and consequently, the reinsertion into land and resource management practices of traditional knowledge systems.

## 13. CONCLUSION

Justice French<sup>78</sup> has observed that:

The change that *Mabo* wrought was constitutional in its character. It provided the opportunity to bring to the relationship between Aboriginal and Islander people and the nation as a whole a new dimension of respect based upon recognition of rights. The future of reconciliation however, does not rest with the exercise of judicial power. Rather, it lies in the development of mutual trust and confidence. This can be achieved in part through the making of agreements, large and small, regional or local, between Aboriginal and Islander people and the polities and communities in which they live.

### 13.1 Mutual Benefits in Resource Management

The involvement and inclusion of Indigenous Australians in decisions concerning resource ownership, allocation and management, and landuse more generally, point to mutual benefits for the entire community. Non-Indigenous Australians are likely to gain access to expert knowledge previously disregarded, and to adopt landuse management practices which incorporate and reflect this knowledge. Aboriginal people are likely to gain increased levels of involvement in local processes, management, industry and commerce, through future act agreements, determinations of native title, and agreements arising through non-native title means (but with the shadow of *Mabo* and the NTA not too far away in the background as stimulants or catalysts for inclusion and reform). These might include:

- engagement in local government decision making
- membership of resource-sector management advisory boards
- statements of mutual recognition
- business and other partnerships, including tourism and cultural enterprises
- mining and exploration agreements (with outcomes such as but not limited to, work area clearance and site survey, earth moving, hydrological survey and installation of water delivery and storage systems, seed collection, and rehabilitation of mine sites)
- joint/majority management of conservation and other reserves, including protection of endangered flora and fauna
- direct involvement in local planning schemes
- involvement as interest-holders (native title property rights) in catchment management/landcare projects and similar
- ownership of resources, for example shares in business enterprises; dedicated fishing licences and/or quota; control of and custodianship of intellectual property rights in genetic systems being appropriated for scientific/medical research.

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<sup>78</sup> Local and Regional Agreements, Regional Agreements Paper No 2, AIATSIS, August 1997

It is the constellation of practical outcomes arising from engagement, understanding, relationships, empowerment, improved economic well-being and better quality of life that will act to facilitate reconciliation between Indigenous and non-Indigenous Australians, and lead to positive and enduring change in local and regional communities, for the benefit of all Australians. As Ed Wensing and John Sheehan point out, “in the longer term, the issues are not about land ownership, but rather about sustainable land use and management, and these issues need to be separated”<sup>79</sup>.

### **13.2 Toward a New Meaning**

This paper has illustrated something of the new dynamic in Australia as people and communities across the nation continue to struggle with the new world of “native title” and what it imports to the meaning of their daily lives. There is in fact not a single day that goes by without a state, national or regional newspaper running a story on native title, especially where some development or other is proposed, and the fact of a native title group having lodged a claim in the area becomes sufficient to excite the concerns and imagination of people. The “discovery” of a native title property right in *Mabo* and the translation of that into statutory force, continues to lever the nation toward an inclusive and just reconciliation, where the abundant natural resources of Australia’s land and waters can be managed in ways which reflect and incorporate the best knowledge and practice of both Indigenous and non-Indigenous systems.

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<sup>79</sup> Wensing, E, and Sheehan, J, *Native Title – Implications for Land Management*, The Australia Institute, Discussion Paper No. 11, April 1997