

Native Title

Implications for land management

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PREFACE

The native title debate has been one of the most acrimonious and divisive political debates in Australia's history. The historic task of reconciliation requires a just settlement of claims by Aboriginal and Torres Strait Islander people to land. The authors of this paper conclude that legislated extinguishment would be a severe and enduring blow to reconciliation; negotiation is essential.

The purpose of this paper is threefold. Firstly, the paper is an extremely valuable source of information about the known, basic facts on native title. The second purpose is to stimulate informed discussion about the interaction between land use planning and management and native title, and to explore the factors involved in the valuation of land subject to native title.

However, the overriding purpose is to counter the extent of misinformation in the wider community on native title generally, and to make an informed contribution to public discussion about the impacts of native title on land tenure systems.

Clive Hamilton
Executive Director

NATIVE TITLE: IMPLICATIONS FOR LAND MANAGEMENT

A DISCUSSION PAPER

By Ed Wensing and John Sheehan*

APRIL 1997

1. THE EMERGENCE OF NATIVE TITLE

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 CLR 1*, declaring that the common law of Australia recognised native title. The judgement addressed some of the basic premises of our legal system and our society, specifically the legal fiction of *terra nullius* (a land belonging to no one).

In reaching its decision in the *Mabo* case, the High Court reflected on the history of the dispossession of the indigenous people. Brennan J., with the agreement of Mason CJ., and McHugh J., considered that “the Court could not perpetuate a view of the common law which was unjust, did not respect all Australians as equal before the law, and was out of step with international human rights norms”. In addition, Deane, Gaudron and Toohey JJ. considered the nineteenth century concept of *terra nullius* to be “repugnant and inconsistent with historical reality” (Attorney-General’s Department 1994:C1).

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. Other former British colonies, such as New Zealand, Canada and the USA, have long recognised that two tenure systems exist in their countries:

1. There is the system introduced on colonisation - from which freehold and leasehold titles flow; and
2. A pre-existing indigenous system - from which indigenous property rights derive.

In Australia indigenous property rights were not recognised until the 1992 High Court *Mabo* decision overturned the concept of *terra nullius* on which Australia’s whole land tenure system had been based. The High Court recognised that indigenous people’s 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 for reasons of social justice and historical integrity, native title could no longer be denied or removed.

The Commonwealth saw the judgement as providing an important opportunity to rebuild, on fair and just foundations, the relationship between our nation and its indigenous people (Lavarch 1994:iii). At the end of 1993 the Commonwealth enacted

the *Native Title Act* to provide for the **recognition** and **protection** of native title to the extent recognised by the common law of Australia.. The *Act* was also introduced in order to:

- validate non-Aboriginal titles which may have been invalid due to the operation of the *Racial Discrimination Act 1975*/native title interaction;
- provide for a process for allowing future activities to proceed without undue impact on native title rights; and
- provide a process for the determination of compensation for acts which may have impaired or extinguished native title after the commencement of the *Racial Discrimination Act 1975* .

Contrary to popular belief, the *Native Title Act 1993* **does not create native title rights**. Native title rights do not flow from the Crown, and therefore can never be granted through Government legislation, unlike land rights. Section 10 of the *Act* provides for the **recognition** and **protection** of native title as a right recognised by the common law, by providing processes to facilitate its recognition and ensure it receives the same kind of legal protection as other titles. The *Act* specifically sets up a process for Aboriginal and Torres Strait Islander people to come forward and have their native title recognised and recorded in a way that ensures the existing legal rights and interests of other parties in the same area are also protected. The *Act* also provides that native title is not able to be extinguished contrary to the *Act*.

As a result of the *Mabo* decision by the High Court, Australian property law is undergoing fundamental re-thinking. According to Sharp (1996:16), the *Mabo* judgement is a break in the legal system of land law. “So pervasive is a naturalised notion of English law as *the* law, so deeply has this conviction permeated common sense, that it becomes a feat of some magnitude to admit the existence of, to comprehend within its own terms, and to place on the same footing, a type of land law which remains embedded in genealogy and is consequently not ‘free’ to be traded” (Sharp 1996:16).

Two systems of law and culture are meeting, and the native title legislation is an attempt to come to grips with the divergent perceptions and attitudes of two cultures to a basic resource - land.

The decision by the High Court in *Western Australia vs. the Commonwealth* confirmed the Commonwealth’s right to enact the *Native Title Act 1993*. Aborigines, pastoralists, mining and development companies, and local Councils are experiencing to varying degrees, frustration as a result of the uncertainties arising from the concept of native title at common law.

In December 1996, the High Court handed down its decision in *Wik Peoples vs. State of Queensland and Others*. The decision confirmed that native title may exist over land which is or has been subject to a pastoral lease, or possibly some other forms of statutory estates. The Court decided that existing pastoral leases issued prior to 1 January 1994 and the rights granted under them are valid, and that the rights of the pastoralist prevail over native title rights to the extent of any inconsistency.

As a result, governments must now recognise the possible existence of native title issues when dealing with land. The process involves the likelihood of the existence of native title, and deciding whether the proposed action will affect any native title. As native title may survive over pastoral leases, the *Native Title Act 1993* may:

- restrict government acts (eg the grant of permits) in relation to pastoral lease land where such acts affect native title and could be done over freehold land;
- require native title holders to be given procedural and compensation rights in relation to most future acts over pastoral lease land (in general, the same procedural and compensation rights that a holder of freehold title would be entitled to); and
- require compliance with the ‘right to negotiate’ provisions of *the Native Title Act 1993* for the grant of mining titles over pastoral lease land, or the compulsory acquisition of pastoral lease land in order to make a grant to a third party (Attorney-General’s Department 1997).

Since the *Wik* decision, two issues have received attention:

- acts done on or after 1 January 1994 in relation to pastoral lease land which did not comply with the *Native Title Act 1993* may turn out to be invalid. For example, the grant of a new pastoral lease or the grant of mining titles over pastoral lease land without following the ‘right to negotiate’ procedure,
- there is a possibility that activities of a pastoralist in the exercise of rights under the lease may now be restricted by the *Native Title Act 1993*, particularly where such activities are conditioned on further governmental approval. The variation of pastoral lease conditions or the grant of additional permits required by the pastoralist before engaging in non-pastoral activities on leased land, may also be restricted

Some commentators have suggested that the above are reasons why pastoralists, some State Governments and others are calling for the extinguishment of native title on land subject to statutory estates. These matters are explored in more detail in Part 9.

Since the *Wik* decision, two issues that have come to light are the valuation of land that may be subject to native title and the valuation of indigenous property rights, especially where such rights are impaired or extinguished, resulting in a compensation claim. Native title holders are entitled to compensation for any loss or impairment of their native title rights and interests on “just terms”, consistent with Section 51(xxxi) of the Australian Constitution which guarantees that compensation must be paid for any property right expropriated. These matters are also explored in more detail in Part 9.

While it is not possible to remove the uncertainty, or to provide dramatically new insights into an understanding of these issues, we can at least attempt to describe the known, basic facts of native title, and to begin to explore the relationships between native title and the functions of planning and land valuation.

Australia’s recent change of government and the consequent re-examination of this legislation and recent High Court decisions, are slowly clarifying our understanding of native title. Nevertheless, the *Native Title Act 1993* was a necessary response to the *Mabo* decision, and any amendment or interpretation of the *Act* must, of necessity,

recognise that native title requires a response which is socially just, economically feasible and environmentally responsible.

Furthermore, indigenous Australians are now an integral part of Australian society and its political framework. They have rights under the common law and these rights are protected by the *Racial Discrimination Act 1975*. Indigenous people must therefore, be seen as an equal partner in matters affecting land use planning and management.

2. THE SPECIAL NATURE OF INDIGENOUS PEOPLE'S RELATIONSHIP TO LAND

Land, to non-indigenous Australians, is primarily an economic asset which can be bought and sold at will. This is not to deny that to many people it also represents a home to which strong emotional ties may develop.

However, to indigenous peoples, land represents this and much more. The Aboriginal and Torres Strait Islanders' relationship to land is "of a deeper kind than the narrow conception of ownership of land as a thing to be mastered or traded, the conception embodied in English law". (Sharp 1996:16).

Land is the basis for the creation stories, religion, spirituality, art and culture. It is also the basis for relationships between people, with earlier and future generations, and with other species. The basic perspective of all Aboriginal groups is that they belong to the land with which they are associated and their relationship to that land is inalienable. People belong to the land, and have duties and responsibilities as its custodians.

In April 1993, Aboriginal Land Councils and the Aboriginal and Torres Strait Islander Commission (ATSIC) produced an 'Aboriginal Peace Plan', a document which engaged directly with the question of the content of native title (cited in Sharp 1996:218). It did so from a perspective that joined together a special relationship with land and the right to legal recognition of native title. Two inter-related rights are identified:

1. the inalienable right to own, inherit and bequeath land; and
2. the right to self-determination, expressed in two forms:
 - the right to decide whether other people may or may not develop resources associated with one's land;
 - the right to an economic base on which to develop according to local principles.

Together these inter-related rights provide a basis for self-determining development that includes both economic development and so called traditional activities (Sharp 1996:218).

The loss of land, or damage to land, can cause immense harm to indigenous peoples. Today, arbitrary State borders, cadastral boundaries, farming fences and highways sever the sacred tracks symbolising the dispossession of many Aboriginal people from their land (ATSIC 1996:4). According to Pearson, "Aboriginal culture is inseparable from the land to which Aboriginal title attaches. The loss or impairment of that title is not simply a loss of real estate, it is a loss of culture" (quoted in Sharp 1996:219).

Influential inquiries into proposals for land rights legislation (in the years before native title was recognised) and other major inquiries such as the Mr Justice Fox's Inquiry into the Ranger Uranium Mine in the 1970's (Fox *et al.* 1977), and the Resource Assessment Commission's Inquiry into Coronation Hill (RAC 1991), all reached the same conclusion - that the relationship of indigenous Australians to their land was special and that they should have considerable power to control developments affecting their land, including mining activity (ATSIC 1996:4).

According to the High Court in *Mabo v. the State of Queensland (No. 2) (1992) 175 CLR 1*, 'native title' consists of rights and interests which are possessed by Aboriginal and Torres Strait Islander people under traditional laws and customs, which give rise to a relationship with land or waters. Native title is held by Aboriginal and Torres Strait Islander people who have maintained a "continuing connection" with the land and waters, according to their traditional law or customs, where this connection continues from the time of first European settlement to the present day.

The nature of indigenous connection with land or waters:

- is defined by the traditional law and customs of Aboriginal and Torres Strait Islander people, taking into account that a society's laws and customs may change over time;
- may or may not be communal;
- may be physical or spiritual, but not necessarily both. Physical occupation is not needed for native title to exist;
- allows native title to be surrendered, but not to be bought or sold;
- includes but is not restricted to rights relating to land use and access.

Connection may involve responsibilities and mutual obligations between the land and the people connected to it, in ways not envisaged by Western systems of land ownership.

According to Reynolds (1996:196) the 'rights of the soil' is the oldest question in Australian politics, launched on its long life on the first official day of white settlement, and often overlooked, sometimes for decades at a time, resting like an unexploded bomb under the foundations (Reynolds 1996:196). The *Mabo* decision of the High Court introduced the notion of acknowledging and respecting rights to land which are 'of a kind unknown to English-Australian law' (Sharp 1996:45). To understand the Aboriginal and Torres Strait Islanders' relationship to land requires recognition of the right to own and inherit land in ways qualitatively different from those recognised in Australia before (Sharp 1996:54).

3. THE DEFINITION OF NATIVE TITLE

Native title is the term used to describe the rights held by Aboriginal and Torres Strait Islanders to land and waters under their custom and customary law.

Where Aborigines and Torres Strait Islanders have maintained a traditional connection with the land, native title has existed for many thousands of years. Traditional lands and waters had been taken from Aboriginal and Torres Strait Islander people without consent, and without compensation for loss or impairment of their native title rights. The impact of the *Mabo* judgement is that some Aboriginal and Torres Strait Islander

people may continue to hold native title rights over some parts of Australia, according to common law.

Native title is not a new type of land grant by governments to Aboriginal and Torres Strait Islander people on the basis of race. These are existing rights that have previously not been recognised in Australian common law. Native title pre-exists European settlement of Australia and may continue to exist in areas where:

- **it has not been extinguished, and**
- **Indigenous people have maintained their connection with the land and/or waters in question according to traditional law and custom.**

As with familiar tenures - freehold and leasehold - it comprises rights and interests. Native title is most commonly a communal title, and the rights under it are communal rights.

The form that native title takes; the rights that it represents, however, will vary according to circumstances and from place to place. These rights can only be ascertained with certainty by a determination of the Federal or High Courts. They may include the right:

- to live on the land
- to go anywhere on the land or waters
- to hunt and fish on or from the land or in the waters
- to collect food from the land or waters
- to collect such items as timber, stone, ochre, resin, grass or shell from the land or waters to make weapons, tools or such
- to conduct ceremonies on the land or waters, and
- to prevent other people doing these things.

4. THREE FORMAL PROCESSES FOR THE RECOGNITION OF NATIVE TITLE

It should be noted that from the perspective of the traditional owners of this country, native title has always been and remains a pre-existing interest whose existence is not dependent on a grant from any government or a determination of a court. At the present time, native title can be formally or officially claimed and established in one of three ways. Claimant communities can select any one of these courses of action to have their native title claims recognised and protected.

4.1 Original Jurisdiction of the High Court

Under common law any Aboriginal and Torres Strait Islander can, on behalf of their community of traditional owners, lodge a claim for determination by the High Court. This is what Eddie Mabo did on behalf of the Murray Islands people in Torres Strait in the landmark High Court case *Mabo vs. the State of Queensland*.

4.2 Determination of Native Title under the *Native Title Act 1993*

Any Aboriginal or Torres Strait Islander person, can on behalf of their community of traditional owners, lodge a claimant application with the National Native Title Tribunal to have their native title recognised over a particular territory. The primary role of the National Native Title Tribunal (NNTT) is as a mediator. If the parties cannot reach agreement the Tribunal must refer the application to the Federal Court for a Judge to decide the outcome. The Federal Court may ask native title applicants to produce evidence of their continuing connection to the land or waters, according to their traditional laws and customs. If the parties can reach agreement the matter is also referred to the Federal Court and a consent determination of native title is made if it is appropriate to do so. An appeal on disputed matters would go to the High Court. The role of the NNTT is discussed further in Part 7.

4.3 Indigenous Land Use Agreements (ILUA).

An ILUA is an agreement by a representative Aboriginal/Torres Strait Islander body, or persons claiming to hold native title for an area, with other persons, that one or more 'future acts' may be done, subject to any agreed conditions. However, ILUAs are likely to be broader than dealing only with 'future acts'. They are also likely to cover the exercise/interaction/confirmation of co-existing rights and interests.

Under proposed amendments to the *Native Title Act 1993*, when an agreement is reached, any party may apply to have it registered on a new *Register of Indigenous Land Use Agreements*. Registration of such agreements will be directed to providing validity for the authorised future acts. Broadly, registration will mean that

- a future act covered by the agreement will be valid to the extent that it affects native title;
- the 'right to negotiate' procedures do not apply;
- the non-extinguishment principle applies; and that
- there are arrangements for compensation (PM&C 1996).

The benefits of ILUAs include the avoidance of costly and lengthy delays in the courts and their ability to resolve day-to-day issues such as the closing of gates on pastoral leaseholds which the courts cannot easily deal with. ILUAs also avoid the adversarial approach. It should be noted that such agreements do not necessarily require a determination of native title to be made. One of the more significant draw backs with such agreements is that they may not be binding on successive parties. However, the option of formally registering agreements may alleviate this problem.

The people in Cape York have negotiated an ILUA (The Cape York Regional Agreement) between the Cape York Land Council, the Cattlemen's Union, the Aboriginal and Torres Strait Islander Commission Peninsula Regional Council, the Australian Conservation Foundation and The Wilderness Society, that recognises the property rights of all stakeholders in the region. The agreement extends well beyond the resolution of native title issues, and addresses the broader imperatives of ecological, economic, social and cultural sustainability (Horstman 1996) However, it is worth noting that the Cape York Regional Agreement is the first of such agreements being negotiated in areas where indigenous property rights may arise. There is growing interest in ILUAs, as there is increasing evidence that resolution of formal claims is not going to occur in a time frame acceptable to the various stakeholders, aboriginal and non-aboriginal.

In October 1996, an agreement was signed between the Dunghutti people and the NSW Minister for Lands over an area of about 12.4 hectares of former Crown land at Crescent Head in NSW. This is the first claim before the National Native Title Tribunal on which agreement had been reached and the first time a State Government has agreed to recognise native title on the Australian mainland. The resolution of the native title application involved negotiation and mediation between 24 separate parties, which included community groups, and State and Local Governments. The Dunghutti agreement makes provision for part proceeds from the subdivision to go to the Dunghutti people. The valuation issues arising from this agreement are discussed in Part 9.

5. WHAT ARE THE LIMITS TO RECOGNITION OF NATIVE TITLE?

Indigenous people's rights in relation to land and waters may have been lost, as far as Australian law is concerned, in several ways:

- by the people themselves ceasing to exist; or
- by the people losing the customary law and traditions on which their title is based; or
- by the people surrendering their native title to the Crown, possibly in exchange for other benefits; or
- by extinguishment.

In this context the term 'extinguishment' means that the traditional title holders 'lose their connection with the land or waters'. Title will not have been extinguished simply by a modified lifestyle and a change in customs, but indigenous people who have undergone fundamental changes to their way of life may have more difficulty in establishing title (*Mabo vs. the State of Queensland (No. 2)*: 44, 83, 150).

It has been held by the Federal Court that the grant of land to an Aboriginal Land Trust under the *Aboriginal Land Rights (Northern Territory) Act 1976* does not extinguish, and is not inconsistent with, the continued existence of Native Title.

Native title can be extinguished by agreement with the native title holders, or in giving effect to an acquisition of native title. Native title can also be extinguished by the exercise of the Crown's sovereign power (legislative or executive). Prior to 1975 native title was extinguished by legislative or executive actions, mostly by State and Territory Governments since they largely deal with land management issues, and by Imperial, Colonial and Commonwealth governments. But a clear and plain intention or clear and unambiguous words are required for this to have occurred (*Mabo vs. the State of Queensland (No. 2)*: 46, 51, 84, 152, 160). No compensation is payable for that extinguishment. Since the enactment of the *Racial Discrimination Act 1975* compensation is payable for the extinguishment or impairment of native title rights. This aspect is discussed in more detail in Part 9.

Land acquired by the Crown prior to 1 January 1994 for use by itself will extinguish native title to the extent of any inconsistency in use. This includes land acquired for roads, railways, and buildings such as post offices and other public facilities. However, land acquired for some future use will not extinguish native title. Extinguishment will not have taken place in relation to waste lands of the Crown or where the continuing use

is not inconsistent with native title, such as lands set aside for national parks (*Mabo vs. the State of Queensland (No. 2):51*).

The recognition of native title cannot displace the validly granted rights of other land/water owners and users. Native title may co-exist with other rights. For example, the High Court in the *Wik* case decided that the grant of a pastoral lease does not necessarily extinguish native title. Where there is any inconsistency between the rights granted under a pastoral lease and native title rights and interests, the former prevail. Or to put it more simply, where pastoral leases and native title clash, native title must always yield. Thus, where there is no inconsistency both sets of rights may co-exist.

Pursuant to the *Native Title Act 1993*, laws may be passed by State Governments confirming existing public access to places such as waterways and beaches. However, Aboriginal and Torres Strait Islander peoples may negotiate management agreements and conditions that take their native title rights into account.

6. WHAT IS THE ROLE OF THE NATIONAL NATIVE TITLE TRIBUNAL?

The National Native Title Tribunal is an independent Commonwealth body established under the *Native Title Act 1993*.

The Tribunal does not have the power to make decisions about whether native title exists. It assists native title applicants and others (including pastoralists and miners) whose legal rights and interests may be affected by the recognition of native title, reach agreements about how everyone's rights may co-exist. The Tribunal also acts as an "arbitral" body that makes administrative decisions only if there is no negotiated agreement on proposed "future acts" (discussed below) such as mining or mineral exploration, or the compulsory acquisition of native title by a Government for transfer to somebody else. **The decision made is whether the proposed act can proceed, not whether native title exists in the area affected.**

Upon reaching a consensus agreement with all concerned, the application is referred to the Federal Court for a Judge (if he or she considers it appropriate) to make a consent order for a determination of the native title, in the terms of the mediated agreement. The recognition of native title cannot be imposed on any party during mediation. If no consensus is reached then the Tribunal will also refer the matter to the Federal Court.

Under the *Native Title Act 1993*, the Tribunal is required to work in ways that are just, fair, economical, informal and prompt.

There are three types of processes the Tribunal deals with.

6.1 Claimant Applications

'Claimant Applications' are applications lodged with the National Native Title Tribunal by any Aboriginal or Torres Strait Islander person, who can on behalf of their community of traditional owners, apply for the determination of native title. This does not mean that the applicants are asking for native title. It means they are stepping forward to assert the existence of their native title and to be recognised and recorded as the native title holders over that area.

Acceptance of a Claimant Application does not mean that native title has been recognised. It means that the application has entered an administrative process that leads to mediation.

The tribunal takes all reasonable steps to identify current rights and interests affected by the acceptance of a Claimant Application, and writes to the people and/or organisations holding such rights or interests to inform them of the acceptance decision. It is also required to publish notices in local, State and national newspapers, and to inform local broadcasting services. The Tribunal also notifies government authorities, indigenous land councils and legal services and ATSIC offices and peak industry bodies.

Any person or organisation whose interests may be affected by the recognition of native title in a particular area over which a claimant application has been lodged, can apply to be a party in the mediation. They can do this by writing to the Tribunal stating details of their interest and how it may be affected. However, this must occur before the expiry of a notification period published by the Tribunal. The interests of recreational users of land and waters (eg. anglers, campers, bushwalkers, etc.) can usually be represented by Local Government councils or by Commonwealth, State or Territory Governments. Although in certain cases they may also become parties to an application.

Once a Claimant Application is accepted by the Tribunal as having met the criteria for entry into a mediation process, Tribunal members are appointed to act as mediators during negotiations between the native title applicants and other people that have legal right or interest in the same area. Through mediation, the Tribunal assists indigenous people, governments, industry, including pastoralists and miners, and others to negotiate proposed uses of land and water in areas where native title may exist.

6.2 Non-Claimant Applications

'Non-Claimant Applications' are applications from any person or incorporated body with a right, power or privilege in relation to a particular area of land or water where native title may exist (but where there are no known native title holders or applicants) for a determination of native title.

The only way that members can establish with certainty whether native title exists over a particular piece of land, where no Determination has yet been obtained, is to request the instructing party or local Council to initiate a **Non-Claimant Application** to obtain such a Determination under Section 70 of the *Act*. **It is important to note that only parties having an interest in the subject land may initiate such an application.**

The Tribunal assesses Non-Claimant Applications for acceptance in a process that normally takes about two weeks. Acceptance of an application does not mean there is no native title.

The Non-Claimant Application is advertised by the Tribunal so that any indigenous people that may hold native title over the area in question can come forward and assert their rights, by lodging a Claimant Application with the Tribunal.

If no Claimant Application is lodged in response to the advertisement by the end of a designated notification period, then the Non-Claimant Applicant receives protection of

Section 24 (1)(c) of the *Native Title Act 1993* to do act/s over the area in question that may validly extinguish or impair native title.

If a Claimant Application is lodged and accepted in response to the advertisement, then the Non-Claimant Application is dismissed, and the persons or organisation involved becomes a party to the Claimant Application. During mediation they can negotiate with the native title applicants any future plans they may have for the area being claimed.

6.3 Future Acts

‘Future acts’, as defined in Section 233 of the *Native Title Act 1993*, are legislation on or after 1 July 1993, or other acts by governments or other persons on or after 1 January 1994, which affect native title. For example, future acts include the grant of freehold titles, agricultural leases, mining leases and exploration licences. An act ‘affects’ native title ‘if it extinguishes native title rights and interests or if it is wholly or partly inconsistent with their continued existence, enjoyment or exercise’ (Section 227).

Generally, future activities over land where native title may exist are permissible, if they are also capable of being done over land that is held in freehold title. A future permissible act may impair or extinguish native title.

When Governments propose to do permissible future acts over land where native title may exist, such as the compulsory acquisition of land for public works, native title holders would attract whatever procedural rights are available to ordinary title holders under the relevant legislation that enable the act to be done. These may include:

- being notified;
- having an opportunity to object; and
- being entitled to compensation on just terms if the acquisition goes ahead.

The future act regime in the *Native Title Act 1993* is therefore, non-discriminatory in respect of native title. Governments may make certain grants of interests over land in which people hold freehold or leasehold titles (e.g. mining tenements). The same applies to land in which indigenous people hold, or may hold, native title.

Included in the category of permissible future acts are:

- certain renewals, regrants or extensions of various leases (commercial, agricultural, pastoral or residential) provided that they do not create a greater interest in the land than was created by the lease;
- acts in relation to an offshore place;
- a ‘low impact future act’; and
- an agreement covered by Section 21 of the *Native Title Act 1993*.

Other future acts that affect native title are ‘impermissible future acts’ and are invalid.

If Governments propose to compulsorily acquire land for the purpose of transferring it to a third party, or create a right to mine (eg. by granting a mining lease or allowing mineral exploration), and it is considered that native title will be affected, then there are specific procedures under the *Native Title Act 1993* that Governments must follow. The procedures allow and set standards for how such activities are to proceed. For these

types of future acts, native title holders and registered claimants are entitled to a “right to negotiate” as described under the *Act*, before such an act can be done. These rights do not extend to a right of veto.

‘Low impact future acts’ are acts which:

- take place before and do not continue after a determination that native title exists; and
- do not consist of:
 - the grant of a freehold estate or lease, or confer a right to exclusive possession;
 - the excavation or clearing of any of the land,
 - mining;
 - the construction of any building structure or other thing that is a fixture (other than a fence or gate); or
 - the disposal or storage of any garbage, or poisonous or toxic substance.

‘Low impact future acts’ are ‘permissible future acts’ and unlike other permissible future acts, they do not attract compensation under the *Native Title Act 1993*, nor do they attract the procedural rights of a freeholder.

The Tribunal’s role is to ensure that agreements recognise and respect the rights and interests of all people involved in the best way possible.

7. WHAT ARE NATIVE TITLE REPRESENTATIVE BODIES AND WHAT IS THEIR ROLE?

Aboriginal and Torres Strait Islander Native Title Representative Bodies (NTRBs) are established by Section 202 of the *Native Title Act 1993*. Currently, NTRBs may assist native title holders with the research and preparation of claims for native title, assist in the resolution of disagreements amongst potential claimants, and represent claimants in negotiations and proceedings relating to matters affecting native title.

A review of the NTRBs was carried out by ATSIC in 1995, the Department of Prime Minister and Cabinet and the Centre for Aboriginal Economic Policy at the Australian National University. The report of the Review contained many recommendations dealing with the roles and responsibilities of representative bodies, including their coverage and jurisdiction, current workloads and resource needs, funding levels, financial management, administrative procedures and accountability. In particular, the Review expressed concern that the current regulatory framework for NTRBs was inadequate and recommended that they be given a statutory framework to improve their functioning and accountability, and in turn facilitate the efficient operations of the *Native Title Act 1993* (PM&C 1996:28).

The Government is proposing to amend the *Act* to establish an enhanced statutory framework for representative bodies to improve their accountability and performance. The core functions of NTRBs will be the ‘facilitation and assistance’ of native title holders in consultations, mediations, negotiations and other proceedings for applications, future acts, land use agreements and any other matter relating to the *Native Title Act 1993*. The amendments propose that there be only one representative body for each designated area and that the Minister have the power to determine the size of designated areas or to insist that a number of representative bodies be merged.

The amendments also propose that NTRBs be required to provide the Native Title Registrar with certification for native title applications and Indigenous Land Use Agreements. Certification must state that the claim or the agreement is made with the authority of the native title holders and that all reasonable efforts have been made to identify all the native title holders. A claim or Indigenous Land Use Agreement cannot be registered unless there is certification, or the Registrar is satisfied that there has been proper identification of the native title holders and their consent has been obtained (PM&C 1996:29).

Consultation with NTRBs will therefore, become an important source of information about native title in an area, as well as a convenient way of consulting with potential native title interests (ATSIC 1996).

8. HOW CAN THE EXISTENCE OF NATIVE TITLE BE ASCERTAINED?

While all the circumstances that extinguish native title are not clear, we do know that native title has been extinguished over land which is:

- freehold. Native Title cannot displace privately owned homes, backyards, farms, or other private property such as commercial or residential land held in freehold (fee simple) title;
- subject to certain classes of Crown leasehold, where there is a clear and plain intention to extinguish native title occurred (*Mabo vs. the State of Queensland (No. 2)*:46, 51, 84,152,160). It should be noted that some leasehold interests permit the exercise of certain activities by indigenous people within the leased area. The exclusivity test is critical therefore, in ascertaining whether or not native title is extinguished. The duration of the leasehold interest, the conditions of its granting, and the degree of exclusivity of occupation are major factors which will probably determine the capacity of the leasehold interest to extinguish indigenous property interests, whatever the bundle of interests may be. In addition, as the duration of leases can vary from perpetuity to only a few years, the question therefore, is whether duration *per se* is fundamental in determining whether native title is extinguished (Sheehan and Playford 1997). The High Court in its recent judgement in the *Wik* case has alluded to the issue that some Crown leases issued since 1 January 1994 may be invalid if the proper processes were not followed.
- put to a public purpose prior to 1 January 1994. For example by the construction of public works such as roads or airports.

Where such grants were made between the introduction of the *Racial Discrimination Act 1975* on 31 October 1975 and the *Native Title Act 1993* on 1 January 1994 (described in the *Act* as 'past acts'), they have been validated to the extent to which they affect native title by the *Native Title Act 1993*.

Native title may continue to exist on, for example (and this list is not exhaustive):

- vacant crown land
- some leasehold
- State forests

- national parks
- public reserves
- land held by Government agencies
- land held in trust for Aboriginal communities
- beaches or foreshores
- lakes, rivers and creeks
- oceans, seas, and reefs.

Where native title continues to exist, the recognition of native title cannot displace other existing legal rights and interests in the same area. Native title may co-exist with other legal rights and interests, as per the *Wik* decision of the High Court.

If there is a need to establish whether native title is a consideration in any planning or valuation task, it is necessary to apply in writing to the National Native Title Tribunal for a search of the Register of Native Title Claims. The Principal Registry in Perth holds a complete Register. The regional offices in Sydney, Adelaide, Darwin and Brisbane have a register relevant to their States. The Register will indicate:

- the date of the application
- the name and address of the claimant
- the area of land and waters covered by the claim, and
- a description of the people who are claiming native title.

Material which is regarded as sensitive and confidential is held on a Confidential File.

Where the existence of native title has been established by a Determination process, this information will be recorded on the Native Title Register. The Register will contain the following information:

- the Court or Tribunal which made the Determination
- date of Determination
- the area of land or waters covered by the Determination
- what was determined, including:
 - (i) who the common law holders of native title are; and
 - (ii) the name and address of any prescribed body corporate holding the native title rights and interests.

The Registers and the Working File may be examined for a fee, and material may be photocopied.

The Royal Australian Planning Institute (RAPI) and the Australian Institute of Valuers and Land Economists (AIVLE) have jointly prepared a more detailed Background Paper to provide guidance to planners, valuers and land economists in determining whether native title is a consideration for the particular task or decision in hand (RAPI and AIVLE 1997).

In any event, it is important always to be aware of the possibility that native title may exist (in certain circumstances and in areas where it has not been extinguished), regardless of whether there is currently a native title application or Determination to indicate its presence. In other words, native title may currently exist in areas throughout

Australia where it has survived, even though its existence in particular areas or the identity of possible native title holders are currently unknown to decision making authorities.

9. WHAT ARE THE ISSUES FOR LAND MANAGEMENT?

The *Mabo* and *Wik* decisions of the High Court and the introduction of the *Native Title Act 1993* have significant ramifications for land managers. Any discussion of planning and land management issues needs to commence from the proposition that, in certain circumstances, native title exists and is a reality that needs to be taken into account.

9.1 Issues for Land Use Management

A role for land use managers

The professions involved in land management have a vital role to play in allaying fears and misconceptions about native title and in raising public acceptance and understanding of the possible existence of native title (in certain circumstances). Land use managers, with their specialist skills in integrated planning and in understanding the spatial dimensions of public policy, can assist the various interests (indigenous and non-indigenous) to look at how best to use and manage land sustainably for present and future generations.

They also have a vital role to play in developing genuine and productive relationships between indigenous and non-indigenous people, and should not be seen as advocates for any particular interest(s), but rather as facilitators in assisting the various parties to come to an understanding of the need for stewardship in sustainable land use and management for present and future generations. **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.**

Land use planning is ultimately about people and their relationship with land and other natural resources, and the skills that land use managers bring to this process are those of recognising and accommodating competing or multi-layered interests. In setting the broader land use planning frameworks for traditional Anglo-Australian land uses and activities, managers will play a key role in helping to manage those legal rights and interests in conjunction with native title. It is these skills that are so necessary in ensuring that the rights and interests of indigenous Australians are properly taken into consideration in planning and land management decisions affecting their rights and interests.

Land use managers also need to be aware of how indigenous people perceive Anglo-Australian planning and environmental controls. Traditionally, these controls have been used to regulate the exploitation of land and resources for their economic potential. Indigenous people may not always share the view that significant benefits can flow from sound planning processes and from the regulation of development and building.

Indigenous people may also be ambivalent because their involvement in land use planning processes has often been only token and because such processes have not taken account of Indigenous peoples' rights, interests, needs or aspirations. Currently, there are few guidelines or protocols for involving Aboriginal people or organisations in formal planning processes.

A formidable task lies ahead in terms of enhancing the image of land use planning and management and what it has to contribute to the interaction between native title and

such processes, and, perhaps, to providing a framework for clarifying that interaction. Various techniques are available, ranging from making such processes more inclusive of indigenous people's rights, to developing more formal protocols between relevant land management agencies and local Aboriginal people or organisations.

An Interim Agreement signed in May 1996 between the Broome Shire Council and the Rubibi Working Group representing the native title applicants in the Broome area, is a good precedent. Amongst other things, the Interim Agreement provides for the recognition and respect of each other's interests and agreement to work together on a range of matters, including the development of a planning strategy for the town of Broome which will identify:

- areas of land of special cultural significance to Aboriginal people;
- areas of land to be the subject of joint management arrangements; and
- areas of land subject to continuing development pressures in respect of which Aboriginal interests require specific recognition and protection (Broome 1996).

Such agreements provide an important framework for the mutual recognition of rights and interests, and for ensuring that the parties work together in ways that advance the interests of the whole community and continues to promote harmonious community relations.

The relevance and potential significance of formal protocols between various parties should not be underestimated. The South Australian and Queensland State Governments have developed formal protocols with their respective State Local Government Associations on a wide range of matters, including planning. These documents provide a useful starting point for the development of improved relations between relevant planning authorities and Indigenous people on planning matters.

In any event, just as the rights and interests of others are intimately involved in the planning process, it is also important and relevant that indigenous people be intimately involved in all stages of the planning process, including the planning and management of all potential native title land. The principal aim should be to ensure that the rights, interests, needs and aspirations of the native title holders, as well as those of others, are addressed in both the planning process and in determining broader regional management arrangements.

The interaction between native title and land use planning

Two questions are pertinent in relation to the interaction between native title and land use planning. The first is whether land that is subject to native title can continue to be identified or designated for particular land uses in planning documents. The second is whether or not the property rights of native title holders can be subject to traditional planning, development and environmental management controls which all other title holders are subject to.

In relation to the first question, planning documents may be subject to the *Native Title Act's* 'equal treatment with freehold' or 'ordinary title' test. This test is contained in Section 235(5)(b) of the *Native Title Act 1993*, and provides that a permissible 'future act' includes acts that can be done in relation to land that is or may be subject to native title as if "the native title holders concerned instead hold ordinary title to it".

One possible interpretation is that non-statutory strategic planning policies which identify future or possible land use intentions, may validly be made over land subject to native title to the same extent they are valid over land held in freehold or ordinary title. In other words, planning policies can continue to identify land for particular purposes, provided such designations can be promulgated over freehold land. In this respect, planning is non-discriminatory between land held in native title or freehold.

In relation to statutory planning documents (that is those having the force of law) made or amended on or after 1 July 1993, their effect on land that is or may be subject to native title is more problematic. If the planning instrument causes greater restrictions than it otherwise would in relation to freehold title, then it will fail the 'ordinary title' test. Another important consideration is whether the land in question is Crown land and whether the planning instrument has application over Crown land. Furthermore, an instrument that regulates an activity (i.e. fishing) on Crown land and adversely affects the rights and interests of native title holders to a greater extent than non-native title holders, may in fact be discriminatory.

It is important to note that planning schemes and documents cannot extinguish native title, as attempts by State Governments to extinguish native title by statute and without any rights to compensation were ruled invalid by the High Court because of *the Racial Discrimination Act 1975*. In any event it will be necessary in relation to a permissible future act, to use the 'future acts' or 'non-claimant' processes under the *Native Title Act 1993* (as discussed in Part 6) to enable the act to be done. If no native title holders respond to a non-claimant application with a claimant application, then planning and development proposals are valid, regardless of whether the act can be done on land that is held in freehold title.

In relation to the second question, caution needs to be exercised in assuming that the property rights of native title holders can be made subject to the usual planning and land use controls that apply to other forms of title. At this stage the situation is not clear. This is because planning is a way of regulating land use and development in traditional Anglo-Australian land title systems, and the extent to which native title can be made subject to the same kinds of controls embedded in Anglo-Australian planning and environmental protection legislation is unknown. While Kirby P. in *Mason v. Tritton (1994)*, has expressed the view that native title holders are not able to remove themselves from the ordinary regulatory mechanism of Australian society, we are of the view that this can only be clarified in the fullness of time through further discovery, and that negotiation almost certainly must occur to resolve these issues (Hughes 1995).

Indeed, the issues of whether native title can be regulated or modified in some way may arise in the Torres Strait Islands. The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs is currently conducting an inquiry into Greater Autonomy for the Torres Strait Islanders. In a submission to the Inquiry, the Australian Institute of Valuers and Land Economists (AIVLE) has expressed the view that the likely predominance of indigenous property rights in the region will, of necessity, lead to land management systems which recognise that native title rights will not be subject to the usual planning, development and environmental management controls to which all other title holders are subject. Existing native title and the likelihood of further claims in the region strongly suggests that any administrative

arrangements for self-government will need to be suited to those cultures (AIVLE 1997b).

The links between land use planning and management, and statutory leasehold

Statutory leasehold systems of land tenure were developed in Australia in response to pressures from squatters for some kind of tenure over Crown land that they had originally taken illegally. The rapid spread of grazing over vast areas of the continent “posed a challenge to colonial governments in reconciling the immediate needs of pastoralists” with other emerging or potential interests (Holmes 1996:243), as well as concern about the fact that the land was being forcibly taken from the indigenous people “without treaties or consent founded on sufficient compensation” (Reynolds 1996:144).

It is in this context that statutory leasehold tenure emerged as a flexible instrument for the granting of selective property rights to pastoralists to engage in certain approved activities, while reserving all other rights to the state and, in most cases, also protecting or recognising the rights of indigenous peoples to continue to use and occupy the land (Reynolds 1996:152). Pastoral (statutory) leases currently account for 42 per cent of Australia’s land area and 67 per cent of all land held under freehold or leasehold (Holmes 1996:244).

Statutory leasehold tenure has most relevance in the pastoral zone where individual landholdings may embrace an area greater than some coastal local government areas, and where there is a compelling public need to negotiate agreements with lessees about the management of such large tracts of land. They also have relevance on lands involving multiple users as well as multiple uses such as grazing, commercial and private tourism, field education, fishing and hunting, and Aboriginal customary uses, with or without native title, and where conservation values can be preserved as a public responsibility.

Historically, statutory leasehold tenure has proven to be a very flexible instrument in awarding property rights and duties. The most important attributes of statutory leasehold, when compared with freehold, are:

- limitations on land use, with uses being generally confined to pastoral use;
- limitations on clearing and removal of trees and other native vegetation;
- requirements to fulfill obligations in property investment, minimum stocking and, in some cases, residence (although in some States this provision is now obsolete);
- more recently, obligations to ensure that use is sustainable and, if required, to undertake property management planning;
- limitations on transferability, aggregation and subdivision, in pursuit of State policies concerning the structure of land ownership;
- for pastoral holdings, requirement to surrender land on expiry of lease;
- payment of an annual lease rental; and
- accountability to a public landlord.

These conditions or controls are implemented and enforced by means of two-party agreements between the Crown as lessor, and lessees. The use of statutory leases as distinct from the granting of freehold title, meant that governments were able, through conditions attached to leases, to use them as a land management tool.

Many statutory leases were initially directed towards serving long-standing goals of rural development, property improvement and closer settlement. With the achievement of these goals, less attention is being focussed on development and residence conditions, with the Crown now placing more emphasis on duty of care and sustainable land use (Holmes 1996:247).

The use of statutory estates (e.g. leases) involving two-party agreements have distinct advantages in ensuring that the broader public interests in land use and management are met.

The links between statutory leasehold and native title

The High Court in *Wik Peoples vs. State of Queensland and Others (1996)*, found that native title rights may co-exist with other rights, including rights granted under pastoral leases, and that the grant of a pastoral lease does not necessarily extinguish native title. Where there is any inconsistency between the rights granted under a pastoral lease and native title rights and interests, the former prevail. Thus, where there is no inconsistency, both sets of rights may co-exist.

Indeed, Toohey J. states in a postscript to his judgement, “To say that the pastoral leases in question did not confer rights to exclusive possession on the grantees is in no way destructive of the title of those grantees. It is to recognise that the rights and obligations of each grantee depend upon the terms of the grant of the pastoral lease and upon the statute which authorised it” (Toohey J.:82).

There are major legal impediments against any move towards freehold, not the least being the need to accommodate native title.

The Australian Conservation Foundation (Media Release 13 February 1997) in an alliance with a broad range of other environmental groups, have expressed concern at proposals to convert pastoral leases to freehold, claiming that this would “lead to even greater levels of environmental damage. Grazing lands should remain leasehold to retain the public interest in the maintenance of environmental values and native title rights” (Horstman 1997 and ACF 1997). The ACF believes that conversion of pastoral leases to freehold tenure will considerably weaken controls over land management. They are concerned that the extinguishment of native title by the conversion of leasehold land to freehold and could remove opportunities for negotiation of regional agreements about land use, economic development, and environmental protection. As discussed above, statutory leases are an important mechanism for ensuring that broader public interests in sustainable land use and management are met.

The National Framers’ Federation (NFF 1997) has stated that pastoralists want certainty in relation to such uses, as well as in relation to the range of activities that pastoralists can engage in. Among the concerns raised by pastoralists are their desires to use their leases for purposes other than those for which the pastoral leases were originally issued.

In some instances pastoralists are carrying out activities (such as eco-tourism) which are not within the range of permissible uses as defined in their current leases, and for which they have not sought or obtained the approval of the lessors. They have presumed that such uses would be permitted on their leases. Under leasehold, the lessor always retains

the right to grant further development or use rights, with or without conditions, or to refuse them for whatever reasons.

The decision of the High Court in *Wik* in finding that native title can co-exist on pastoral leases also raises the question as to whether the existence of other non-pastoral uses can be permitted without negotiation with the native title holders, and the question of whether some compensation may be payable for the extent to which they reduce the value of native title. The only kinds of uses or developments that will require the approval of native title holders in the future are those which are not already authorised by the pastoral lease.

Pastoral leases generally contain provisions relating to controls over land use and management. If the lease documents are properly constructed, then it should be possible to do whatever is necessary to undertake activities for which the lease has been issued. For example, under a pastoral lease it should be possible to construct fences, watering holes, and other activities incidental to and consistent with the conduct of pastoral activities. Provided lessees comply with the conditions of their leases, they have the same kinds of rights to use and quiet enjoyment as those held under freehold tenure, including the right to engage in approved activities or uses without interference.

If pastoral lessees wish to change the range of uses they can carry out on their leases, then they will need to seek the requisite approvals, as other title holders are required to do in similar circumstances. This will require the agreement of the lessor (the Crown Lands Department or its equivalent) and may involve a planning or development application and will, quite properly, be subject to local or State planning and development approval processes. In relation to native title, the State may need to use the processes under *the Native Title Act 1993*.

The co-existence of pastoral and native title rights and interests is not in itself remarkable or problematic. The co-existence of rights and interest in land is common place both at common law and under statute throughout Australia. For example, through restrictive covenants, easements, profits a prendre, and mining tenements. They are characterised by a clear enunciation of each of the interests in order that they do not conflict. Once the parameters have been identified and the means for determining conflicts are clarified, then there is no bar to the continued, concurrent enjoyment of the rights and interests of each party (Tehan 1997:7).

In order to accommodate the co-existence of native title and pastoral leases, it is necessary to more clearly define the parameters of each of the rights. Shared land uses in other contexts do provide some practical examples. The legal basis for such shared or co-existing interests varies, but there are some common elements. These include:

- clear enunciation of the rights and interests of the various parties;
- articulation of the regime on which co-existence and shared land use can continue to occur; and
- articulation of a basis for resolving conflicts (Tehan 1997:6).

Indeed, many of these elements also characterise the concurrent use and enjoyment of land by non-indigenous parties. It is also common practice in land use planning to codify the range of permissible land uses and activities that can occur on a particular

parcel of land, and there is no logical reason why similar approaches cannot be applied to pastoral activities.

In conclusion, there are no land use planning or land management reasons why legislation should be introduced to extinguish native title on pastoral leases or indeed, on any other forms of statutory leasehold. However, what is essential is an acknowledgment of the special attachment to land enjoyed by indigenous people as a basis for the arrangements and the development of meaningful and reliable relationships among the joint land users.

9.2 Issues for Valuing Native Title

There are several issues in this area. Namely, the valuation of land subject to native title, the valuation of native title itself, especially where native title may be impaired or extinguished and compensation is payable, and the effects of the *Wik* decision on the value of pastoral leases.

The valuation of land subject to native title

Land valuation is based on a number of factors, including the highest and best use accorded to it under the relevant planning and development controls.

Obviously, the greatest right in land will be that which grants ‘exclusive possession’. Native title holders do not enjoy the right to sell their land, as do freeholders, and it is inconsistent with the concept of native title to adopt a basis of valuation which assumed the right to develop a potentially higher use. The basis of valuation should have regard to the existing use of the property (or an activity consistent with that use) and, most likely, little regard should be given for greater development potential.

The issue of surrendering native title rights to the Crown in return for the granting of freehold rights and the consequent opportunity to sell, develop, or offer as security, has yet to be fully explored.

The agreement between the Dunghutti people and the NSW Minister for Lands referred to in Part 4.3, does not provide a precedent in this area. The land located at Crescent Head comprises 12.4 hectares of former Crown land, and was the subject of a claim lodged on 10 October 1994 by the Dunghutti Aboriginal Community. The resolution of the native title claim involved negotiation and mediation between over 20 different parties, including community organisations, Local Government, the NSW State Government, and the National Native Title Tribunal. The Dunghutti Aboriginal Community was recognised as the native title holders, and agreed to the return of the land to the State Government in order for the land to be sold for housing. As a result, the particular circumstances of the agreement embodied a specific compensation package.

The AIVLE has stated that “The compensation package ought not to be viewed as providing a precedent and is certainly not indicative of the true market value evidence of comparable sales for the settlement of other native title claims. The particular circumstances of the agreement met the specific needs of both the State Government and the Aboriginal community, permitting finalisation of the existing residential land subdivision” (AIVLE 1997c).

Compensation for loss or impairment

Native Title holders are entitled to compensation for any loss or impairment of their native title rights and interests on “just terms”, consistent with Section 51(xxxi) of the Australian Constitution which guarantees that any property right taken by government must be paid for. “Just terms” has been interpreted by the High Court as requiring the payment of compensation on the basis of **special value to the owner**, not the value to the acquiring authority. This will include the payment of compensation, if applicable, for damage to the remaining land due to severance, injurious affection, consequential losses, and disturbance, in addition to the value of the land or interest taken.

The test as to the extent to which compensation is payable in respect of a past act which impaired native title is known as the *Similar Compensable Interest Test*, and may be found at Section 240 of the *Native Title Act 1993*. It provides that compensation will be payable if:

- the act relates to an onshore place; and
- the compensation would have been payable in respect to the act, if the native title holders had instead held freehold title to the land, or if they held freehold title to the land surrounding or adjoining any waters concerned.

Section 17 of the *Act* details these various entitlements to compensation.

It may be that the ability to negotiate benefits or payments to Aboriginal groups, without recourse to the legislative requirements of the *Act* should be recognised, where appropriate, as part of the special value to the owner when compensation is being assessed. The measure of special value to the owner was stated in *Pastoral Finance Association Ltd v The Minister (1933)* as being “. . . that which a prudent man in [the owner’s] position would have been willing to give for the land rather than fail to obtain it.”

No provision is made in Australian land acquisition laws for the payment of compensation for **sentimental value**. This is consistent with the Privy Council’s 1939 decision in the *Raja Vyricherla* case:

“ . . . it is often said that it is the value of the land to the vendor that has to be estimated. This, however, is not in strictness accurate. The land, for instance, may have for the vendor a sentimental value far in excess of its market value. But the compensation must not be increased by reason of any such consideration.”

As yet there appears to be no Australian court decision which allows the payment of compensation for elements of cultural or spiritual value; however, if the intention is to pay compensation for ‘special attachment’, this will indeed break new ground for both the courts and the property professions.

In his Second Reading Speech to the Native Title Bill, the then Prime Minister (Mr Paul Keating) said:

“Just terms will be payable for the extinguishment of native title. We take the view that any special attachment to the land will be taken into account in determining just terms” (House of Representatives, Hansard 16 November 1993: 2882).

Valuers are generally familiar with valuing traditional compensation items such as special value to the owner and solatium (a discretionary judicial payment), in addition to the usual valuation of land and buildings. However, it is clear that the valuation of indigenous property rights will necessitate the utilisation and interpretation of case law relating to these issues. This valuation methodology, when applied to indigenous property rights, will enable the various component parts of a specific claim, and that assessment of compensation for the expropriation of such property rights will address cultural, environmental and economic values.

The limited literature presently available suggests that special value to the owner and solatium can be constructed to cover compensation, for example, for loss of access to ceremonial lands, spiritual deprivation and loss, and loss or perceived loss of social environment. In many situations the measure of loss, under compensation law, is the cost of reinstating as far as possible, those rights, possibly at another location.

The assessment of compensation for special attachment under the *Act* will raise some interesting points of law and valuation practice. The *Native Title Act 1993* does provide for compensation to take a non-monetary form, if the claimant so requests. All or part of that compensation may take the provision of facilities and services. Ultimately, we will be dependent on the decisions of the courts to establish the necessary precedents.

Other indigenous people experience a similar attachment or association with the land. The Maori people of New Zealand, and the native people of North America, use similar terms and expressions to describe their relationship to the land. It would be fair to say that this element of compensation for special attachment has not been satisfactorily addressed in any of the Common Law countries.

As native title was not recognised in Australia until 1992, there does not yet exist any substantive case law on the nature and valuation of indigenous property rights. Claims for compensation for the loss or impairment of native title need to be treated individually and dealt with on their specific merits.

The impact of the Wik decision on pastoral leases and valuation

It is clear that the legal processes of elaborating the concept of native title are going to take some time, as they will need to be dealt with on a case-by-case basis (Blackshield 1996). Pastoral and mining interests have indicated that they are unwilling to wait for these extended legal processes, preferring the Federal Government to extinguish native title on leasehold land (AIATSIS 1997). This raises two potential problems:

- extinguishment would necessitate amending the *Racial Discrimination Act 1975*; and

- Section 51(xxxi) of the Constitution requires the Commonwealth to pay compensation on “just terms” for the acquisition of property rights such as native title, as discussed above. While Section 51(xxxi) of the Constitution applies only to the Commonwealth, the States and Territories are effectively bound to apply the same rules under their own compulsory acquisition legislation by the operation of *the Racial Discrimination Act 1975* and the *Native Title Act 1993*.

According to Garth Nettheim (1996), Visiting Professor of Law at the University of New South Wales (*The Sydney Morning Herald*, 28 December 1996), “...while the Commonwealth could override the *Racial Discrimination Act 1975* to extinguish native title, it would come at the price of very substantial compensation obligations”. Such action may not be feasible as it could also put Australia in breach of the *International Covenant on the Elimination of all Forms of Racial Discrimination*, to which Australia is a signatory.

Significantly, Toohey J. (75, 76) in his decision in the *Wik* case states that: “at one end of the spectrum native title rights may approach the rights flowing from full ownership at common law. On the other hand they may be an entitlement to come on to the land for ceremonial purposes”.

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.

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-pendre.

It is important that lenders (and their valuers and advisers) recognise that little has changed, and almost certainly the property rights of pastoral leases continue no less secure than previously. Indeed, the Australian Institute of Valuers and Land Economists (AIVLE 1997a) issued a press release stating that any attempt to extinguish or modify the common law rights of native title holders is ill-conceived. The AIVLE also stated that any action to reduce or remove the compensation to be paid would create an undesirable precedent for all Australians.

While determining the nature and ambit of native title is probably the most pressing task that has emerged since the *Mabo* and *Wik* decisions, the willingness of various stakeholders to enter into voluntary negotiations with a view to reaching fair land access agreements for all stakeholders, is welcomed.

10. A BASIS FOR RECONCILIATION

For indigenous people land is the basis for their indigenous identities and the foundation for the enjoyment of their rights.

“To fully understand why land rights are so important to Indigenous peoples, you have to move out of the paradigm that sees land as purely a commodity to

exploited. The deep connection which Indigenous peoples have with our land has been totally disregarded by non-Indigenous cultures. For us, land has a spiritual, cultural, political and economic value. It supports our identity, our spirit, our social relations, our cultural integrity, and our survival. Land is the source of our physical and spiritual sustenance. Removed from our land we are literally removed from ourselves. Again, we have to emphasise this right because it has been so grossly violated” (Dodson 1997:3).

Until 1992 there was a total denial that Indigenous peoples had any rightful claim over land in Australia. Dodson (1997:3) maintains that until the *Mabo* decision indigenous people were “forced into a position where land rights were seen as essentially a matter of welfare, dependent on the generosity of the state - a degrading and humiliating position”.

As Henry Reynolds observes, the single most important element in the white settlement of Australia was “the revolutionary concept of private property which the settlers brought with them from Britain along with the will and the weapons to impose it in Australia”. Settlers arrived in the colonies “with the desire to own the land and everything on it “in the most absolute manner“ and that they would “not comprehend joint ownership” (Reynolds 1996:190). In the absence of a treaty, the dispossession of the indigenous people was only achieved through armed force and a savagery and violence which demoralised and decimated the Aboriginal population. Traditional history texts refer to the ‘colonisation’ of Australia, whereas Reynolds maintains that the terminology should more correctly be the “invasion of their country” (Reynolds 1995:28).

The violent conflict between the indigenous people and the whites continued for almost 150 years and spanned three-quarters of the time of European occupation. According to Reynolds, land has always been at the centre of conflict between black and white Australians. A direct line can be drawn from the events of October 1788 when Governor Phillip led an armed party to confront a group of blacks, to the punitive expeditions which decimated the Aboriginal community in central Australia in the late 1920s. “A majority of Aborigines have at least one relative of their own, their parents’ or their grandparents’ generation who was gunned down, whipped, raped or for one reason or another taken away - often forever - by white people” (Reynolds 1996:30, 133, 196).

The reality is that we still have a problem in Australia of a dispossessed indigenous 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.

The legal issues arising from native title will be resolved case by case - this is how the common law has always developed. According to Tony Blackshield, Professor of Law at Macquarie University, no other legal solution is possible in the difficult context of relationships between indigenous and non-indigenous Australians (*The Sydney Morning Herald*, 31 December 1996). The only way to achieve certainty is to negotiate at both, national and regional levels.

The example of Canada in negotiating agreements with its Indigenous peoples is an important guidepost for Australia. Such agreements have emerged only through sensitive negotiations that accept the co-existence of various property rights, indigenous and non-indigenous (Farley 1997). In Australia the mining industry appears to be undergoing a major shift in attitude toward the needs and wishes of Aboriginal communities and is negotiating agreements as a basis for resolving conflicts over rights and interests. For example, earlier this year Hamersley Iron, a subsidiary of CRA-RTZ, entered into a landmark agreement with the Gumala Aborigines in the Pilbara for the development of a \$500 million iron ore project (Georg 1997). Such agreements will become easier as the various stakeholders hone their negotiating skills.

The significance of the High Court's decision in *Mabo vs. the State of Queensland [No. 2] (1992)*, lies in the fact that it gave credibility to the indigenous people's assertion that they have rightful claims to land. In response to *Mabo*, the Federal Government introduced the *Native Title Act 1993* to protect the rights and interests of both indigenous and non-indigenous Australians who opt to use the processes established under the *Act*.

According to Peter Bailey, a visiting fellow at the Australian National University, President of the Canberra branch of the International Commission of Jurists (which promotes the rule of law) and former deputy chairman of the Human Rights Commission, the present procedures for establishing native title are

“a fair process for establishing the rights of pastoralists and Aboriginal peoples, with recognition a key element and a tribunal and the courts as a last resort. Pastoralists have always had their leases according to law, and they will continue to. The Aboriginal people can now claim customary rights according to law. The substance of the law as it now is should not be changed unless it can be shown to be to the benefit of all parties, not just one side. The present challenges to the law neither represent accurately what the law is - indeed, they seem wantonly to misrepresent it to fire up antagonism - nor do they make proposals that would benefit all parties. In the interests of justice and the rule of law, they should be resisted” (The Canberra Times, 3 March 1997).

In an address to the Royal Australian Planning Institute's National Congress in Perth in October 1996, Peter Dowding, Barrister, former Premier of Western Australia and former Minister for Planning in the Western Australian Government, said that planners are required to bring into account a wide view of community attitudes, beliefs and expectations. In every planning decision there is a recognition of competing rights that need to be accommodated. Even where a set of rights is not clear, there is recognition that competing rights or multi-layered rights need to be accommodated (Dowding 1996). He went on to say that the planning and land economy professions, above many others, have a responsibility to be able to recognise and accommodate the interests and rights of indigenous Australians.

Land use managers therefore need to be aware of native title considerations in all circumstances, including:

- the preparation of strategic plans which have policies which could affect land;
- the preparation of land use planning instruments, such as development control plans;
- the preparation and processing of re-zoning applications;
- the preparation and processing of Development Applications (DAs);

- day-to-day land management activities; and
- prosecuting or defending land use planning infringements.

Perhaps the application of common sense can be the major contribution of the professions to the native title debate. Land use managers are skilled at recognising and accommodating different rights and interests in the use, development and preservation of land and resources. With co-existence of native title with pastoral leases recognised by the High Court in the *Wik* decision, the application of such skills is increasingly important.

As Elizabeth Keith (1997:12) concludes, it is not necessary to place development interests above human rights. Secure and durable arrangements for development affecting native title will only emerge from a system of negotiation that fully respects the human rights of native title holders.

11. CONCLUSIONS

This paper has focussed on providing the known facts on native title and on discussing the implications for land use management and valuation. While the issues are far from resolved, the following conclusions can be drawn from the preceding discussion. They are summarised under several headings, as follows:

General:

- Native title pre-exists European settlement of Australia and may continue to co-exist in certain circumstances. As with familiar tenures - freehold and leasehold - native title comprises rights and interests.
- The 'future act' and 'non-claimant' processes in the *Native Title Act 1993* are adequate for the purposes of determining whether a particular land use or activity can proceed.
- The *Wik* decision of the High Court has confirmed that the recognition of native title cannot displace other existing legal rights and interests in the same area, and that they can continue to co-exist.
- Certainty for all parties can best be achieved by negotiation at both national and regional levels. Resolution of the inter-relationships between native title and Anglo-Australian forms of tenure need to be resolved on a case-by-case basis. This is how the common law has always developed.
- The special attachment to land enjoyed by indigenous people must be acknowledged as a basis for the arrangements and the development of meaningful and reliable relationships among the joint land users.
- The willingness of various stakeholders to enter into voluntary negotiations with a view to reaching fair land access agreements for all stakeholders, is welcomed.

Planning and land use management:

- There are no planning or land use management reasons why legislation should be introduced to extinguish native title on land held under statutory leasehold tenure.
- The issues are not about land ownership, but rather about sustainable land use and management, and these issues need to be separated.
- The co-existence of native title and pastoral leases can be accommodated by more clearly defining the parameters of each of the rights by:
 - clearly enunciating the rights and interests of the various parties;
 - articulating the regime on which co-existence and shared land use can continue to occur; and
 - articulating a basis for resolving conflicts.
- There are major impediments against converting pastoral leases to freehold, not the least being native title. Statutory leasehold agreements have become important mechanisms for achieving longer term and sustainable land management objectives.
- Land use managers have a vital role to play in allaying fears and misconceptions about native title, and more especially in raising public understanding and acceptance.
- Land use managers can assist the various parties to come to an understanding of the need for stewardship in sustainable land use and management for present and future generations.
- Land use managers also have an important role to play in better involving and accommodating indigenous people's interests in land use planning and management processes. Various techniques are available, including the use of formal protocols and agreements.
- Land use planners and managers have the necessary skills for recognising and accommodating different rights and interests in the use, development and/or preservation of land. With the co-existence of native title on pastoral leases recognised by the High Court, the application of such skills is increasingly important.
- Long term strategic planning documents may be validly made over land that is subject to native title provided they satisfy the 'ordinary title test' in *the Native Title Act 1993*. However, the extent to which statutory planning documents and controls apply to the property rights of native holders remains problematic. This can only be clarified in the fullness of time through discovery, and negotiation must occur.

Valuation

- The agreement between the Dunghutti people and the NSW Minister for does not provide a precedent. The particular circumstances of the agreement embodied a specific compensation package.
- Native Title holders are entitled to compensation for any loss or impairment of their native title rights and interests on "just terms", consistent with Section 51(xxxi) of

the Australian Constitution which guarantees that any property right taken by government must be paid for.

- Claims for compensation for the loss or impairment of native title need to be treated individually and dealt with on their specific merits.
- As yet there appears to be no Australian court decision which allows the payment of compensation for elements of cultural or spiritual value; however, if the intention is to pay compensation for ‘special attachment’, this will indeed break new ground for both the courts and the property professions.
- The *Wik* decision has no major ramifications for the valuation of pastoral leases. The property rights of pastoral lessees continue no less secure than previously, and any attempt to extinguish or modify the common law rights of native title holders on such grounds is ill-conceived.
- Extinguishment or modification of the common law rights of native title holders would create an undesirable precedent if any action was taken to reduce or remove the compensation to be paid.

The recognition of native title is inevitably about people - different people coming together, often for the first time, to establish positive and workable relationships about sharing land and resources in ways that respect the rights and interests of all. It is imperative that we learn some lessons from the past and find new ways of living together.

There is also a great need for patience and understanding by all concerned. As Ric Farley says, “The onus is on all parties to respond in a measured, constructive and respectful way. The outcome will determine whether Australia becomes an harmonious society, or one racked by division and strife” (Farley 1997).

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GLOSSARY

Fee Simple: In the English law of real property an estate in land, held heritably (fee), and descending to heirs generally, without restraint to any particular class of heirs (simple), as contrasted with a fee tail, or estate tail, or entailed interest. An estate in fee simple comes as close to absolute ownership as the system of tenure will allow. (Helmore 1966).

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