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**The Native Title Amendment
Bill 1997: a different order of
uncertainty?**

J. Clarke

No. 144/1997



DISCUSSION PAPER

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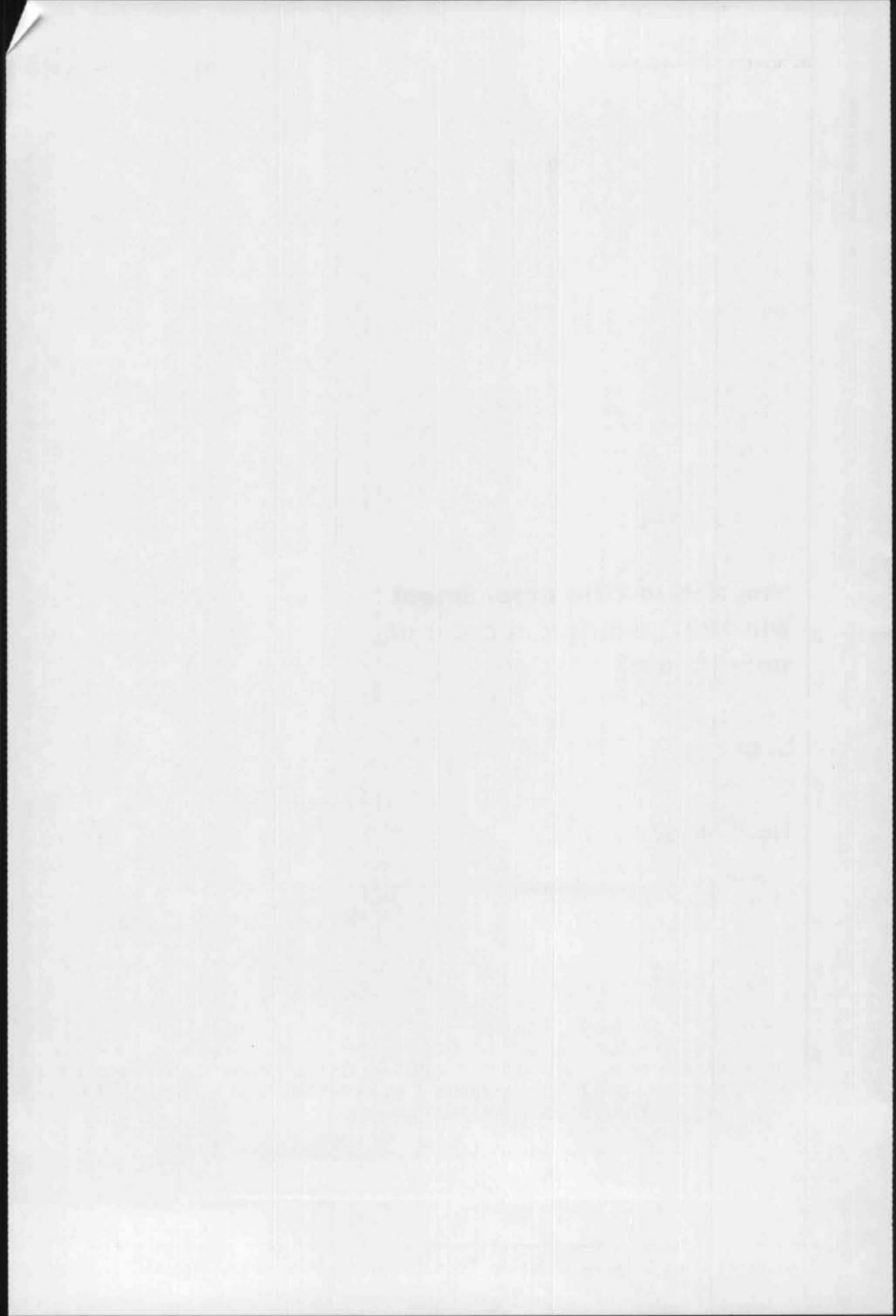


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Summary

This paper analyses the likely contribution of the Native Title Amendment Bill 1997 to the 'certainty' of other land titles after the High Court decision in *Wik Peoples v Queensland*.

It concludes that, while the Bill contains several 'bucketloads' of extinguishment, its main impact on native title in pastoral areas will be one of extensive and permanent suppression by expanded pastoral land uses, at significant public expense. The costs of this direct and *de facto* extinguishment are unknown and probably unknowable. There is a real risk that future governments will be tempted to unravel this extinguishment if the costs of compensation prove too high, with a resulting increase in uncertainty as to the location of native titles in future.

The paper examines the Bill's 'validation' of mining tenements granted over coexisting native title on pastoral leasehold. This validation rewards governments which defied the 'future acts' regime of the *Native Title Act 1993* (NTA), penalising the one government (Western Australia) which complied with it and miners which relied on that government for tenement grants but have not yet received them.

The Bill contains many provisions unrelated to Wik. Many re-instate the pre-*Racial Discrimination Act 1975* (RDA) position—that governments, not Aborigines, control use of land and resources, particularly in remote areas, and that Crown-granted titles enjoy a position of privilege over native titles. Under the Bill, a much diminished version of the NTA 'right to negotiate' (RTN) may be available only to those people who prove their native title in the Federal Court, where their claim was made within six years of the Bill's commencement. Even for those claimants who meet the strict claims sunset clause, the RTN may be available only over land which has never been granted on another title or reserved for public use, including as a national park, and which lies outside of towns.

While the Bill's reassertion of government control over 'land management', and its denial of native title holders' right to participate in that management, may appear to produce 'certainty', these factors contribute to wider political uncertainties about the future of native title law. The paper measures the Bill against the international human rights standards embodied in the RDA. It concludes that the Bill is inconsistent with these standards, and that its enactment will impliedly repeal the RDA's protection of native title, attracting negative international attention and triggering United Nations complaints. These political developments may have significant implications for Australian trade.

Finally, the paper examines arguments about the Bill's unconstitutionality under the Commonwealth Parliament's 'races' power. It concludes that the High Court may require Parliament to use its 1967 referendum power to benefit Aboriginal people, not to discriminate against them. However, the definition of 'benefit' may be crucial. If 'benefit' involves only a slight improvement on the position of native title under the discriminatory common law rules of

extinguishment, only some of the Bill's provisions may be unconstitutional. But if 'benefit' requires either racial non-discrimination or indigenous consent, many other parts of the Bill will be unconstitutional. Either way, if the Bill is enacted in 1997, uncertainty over its constitutionality (and over the validity of those titles which depend on it) is unlikely to be resolved before the end of 1998.

Note

A reference in this paper to a proposed section ('prop s') of the *Native Title Act 1993* is to a section of the Act as it would be amended by the *Native Title Amendment Bill 1997*. A reference to a section ('s') is to a section of the existing Act.

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An earlier version of this paper, based on a June 1997 draft Bill, was presented to a CAEPR seminar in August 1997. The discussant was Robert Orr of the Wik Task Force in the Department of Prime Minister and Cabinet. A severely abbreviated version of this paper appeared in the October 1997 edition of *Indigenous Law Bulletin*.

Introduction

The Native Title Amendment Bill 1997 contains the fourth set of proposed amendments to the *Native Title Act 1993* (NTA) since its commencement (Commonwealth of Australia 1996a). Large sections of the Bill (such as those relating to the commencement of claims in the Federal Court, the 'right to negotiate' (RTN) and a governance regime for representative bodies) build on earlier proposed amendments, but many other proposed changes are new.

The Bill is designed to 'simplify native title processes, improve the workability of the act [*sic*], and increase community understanding and acceptance of native title issues and processes' (Commonwealth of Australia 1997a). For reasons which I discuss below, however, it is unlikely that the Bill will improve the Act's 'workability'. There is uncertainty over the constitutionality of at least some of its provisions, and a dimension of political 'uncertainty' (associated with provisions which extinguish or suppress native title) as to whether future governments will unravel it in order to save on compensation costs.

The Bill is said to be a response to the High Court decision in *Wik Peoples v Queensland* (1996) 187 CLR 1. However, many parts of the Bill have nothing to do with *Wik*, and some parts relating to pastoral leases are arguably not justified by *Wik* (compare Clarke 1997a). The Bill is said to result from 'an intensive series of consultations with all interested parties' by the Prime Minister before release of the 'ten point plan' on which it is based (Commonwealth of Australia 1997a, 1997b). A 'working draft' was made publicly available in late June 1997, and is said to have been the subject of 'extensive discussions' with interest groups (Commonwealth of Australia 1997b). However, before the draft Bill was released, the Commonwealth Government signalled that it would only consider minor amendments to it. Indigenous groups (and possibly other stakeholders) thus take issue with the extent and *bona fides* of government consultations with them, raising important questions about the level of indigenous consent to the Bill's enactment. (As discussed below, notional indigenous 'consent' to the Bill may be a factor relevant to its constitutionality.) Further, the Bill diverges from the draft on some important matters of detail.

Overview

Background 'uncertainty'

The main political justification for the Bill was 'uncertainty'¹ arising from the decision in *Wik*. This 'uncertainty' related to:

- i. the practical question of how pastoral lessees and native title holders can exercise valid, coexisting² rights to the same land;
- ii. the legal question of whether pastoralists may expand their rights in future. 'Uncertainty' of this kind stems from the established principle (re-affirmed in *Wik*) that titles defined by statute (such as pastoral leases) confer only

those rights which the statute allows the Crown to grant (*Cudgen Rutile v Chalk* [1975] AC 520). It also stems from the fact that the NTA requires the consent of coexisting native title holders before a State government (or parliament) may authorise expansions of pastoral land uses which could not be visited on a freeholder;³

- iii. the legal validity of other rights (mainly mining tenements) granted over pastoral leasehold and coexisting native title after the commencement of the NTA on 1 January 1994. This 'uncertainty' arises from State governments breaching the NTA's 'future acts' regime,⁴ especially by granting tenements over pastoral leasehold in which there is coexisting native title without according native title holders the RTN. Those governments have acted *unlawfully*—or at least recklessly as to the validity of their actions.⁵

Relationship between the Bill and post-Wik 'uncertainty'

Practical 'uncertainty' over the exercise of coexisting rights

The Bill contains three main responses to the first, practical type of 'uncertainty'. In a few cases, it will obliterate coexisting native title by reference to other events in the land's tenure (including the land's prior grant on 'exclusive tenure', the proclamation of stock routes over it or its vesting in a statutory authority). In most cases, however, the Bill maintains the coexistence of native title and pastoral leases. However, it may harden the extinguishing impact of pastoral leases on native title by insisting that extinguishment is permanent in circumstances where the common (judge-made) law might have treated it as temporary.⁶

Where coexisting rights are preserved, the Bill employs a mechanism developed by indigenous and industry groups: agreements between native title holders, other land users and (in some cases) governments over the exercise of coexisting rights. And where native title rights are not obliterated but not yet proven, the Bill preserves in the form of statutory access rights any factual (regular, physical) access to pastoral leasehold land which native title claimants enjoyed at the date of the Wik decision. However, as discussed below, a strict claims registration test stands between claimants and these statutory rights, and past 'lock-outs' will have removed the basis for the rights altogether. Further, it is likely that the statutory access rights created by the Bill will restrict the exercise of native title rights pending determination of claims.

In the present political climate, debate about the desirability of pastoral leases being treated as 'exclusive' (and thus extinguishing of native title) may not be over. However, the Bill's provisions indicate that the government agrees with the High Court that not all such leases confer exclusive possession.

'Uncertainty' over future expansion of pastoral activities

The Bill's 'solution' to 'uncertainty' about future expansion of pastoralists' rights involves extensive suppression of coexisting native title on pastoral leasehold, at significant public expense. Permitted uses of pastoral and agricultural⁷ leasehold (and native title land adjacent to 'farms') will be expanded well beyond farming and grazing uses to encompass 'primary production', broadly defined. Expansion of 'primary production' involves the 'non-extinguishment principle': native title is suppressed for the duration of the authorised activities. Given the experimental nature of some agricultural and pastoral 'diversification' activities, some suppressed native titles may revive after those activities are discontinued. However, as is generally the case with the non-extinguishment principle, expanded primary production is more likely to lead to permanent suppression—*de facto* extinguishment—of native title.

These expanded uses will be permitted without native title holder consent. The Bill therefore derogates from the principle of non-discrimination law which insists that native title be treated like freehold. Besides their obvious political appeal for a pastoral and agricultural constituency, these provisions seem to reflect the government's view that coexisting native title on pastoral leases is inferior to freehold.

Uncertainty stemming from illegal post-NTA grants

The Bill addresses 'uncertainty' over the validity of other land dealings after the NTA's commencement in two ways. This problem is 'solved' partly by the provisions which obliterate some coexisting native titles (discussed above). Where native title continues to exist, however, the Bill allows 'validation' of other land dealings in the period 1 January 1994–23 December 1996, where those dealings related to land previously held on freehold or on any non-mining leasehold tenure, or to land previously the subject of a 'public work'. ('Public work' includes areas, like stock routes, which are not true public works: prop ss 251D and 253). Thus the Bill entrenches the preferred legal position of State governments like Queensland's, which refused to comply with the NTA in issuing mining tenements—the position that native title presented no obstacle to tenement grants. This is despite the fact that Western Australia complied with the NTA's 'future acts' regime for two of the three years of its operation when granting similar tenements.

Other amendments

Many aspects of the Bill have nothing to do with post-Wik 'uncertainty'. This is not simply because the Bill contains overdue amendments relating to the constitution and functions of the National Native Title Tribunal (NNTT),⁸ or because it responds to a widely perceived need to 'tighten up' the test for native title claims which attract the RTN (see below). It is also because the Bill embodies

a more general policy of ensuring that land development proceeds 'unimpeded' by native title. It does so by partly re-instituting the pre-*Racial Discrimination Act 1975* (RDA) position:⁹ that governments—not Aborigines—control use of land and resources, particularly in remote areas, and that some Crown-granted titles enjoy a position of privilege over native titles.

The Bill remodels the RTN in a manner which severely limits its content and availability. These parts of the Bill also treat native title as inferior to freehold—they treat it like neighbouring (and sometimes former neighbouring) interests in the same land. Thus coexisting native title on pastoral leases is treated as being like pastoral leasehold, regardless of its content.

Consistent with this approach of diminishing native title, the Bill imposes a six-year sunset clause on the making of claims. As I discuss below, this clause is out of step with other limitations on property rights claims. Because it does not prevent claims continuing to be made under common law principles, the sunset clause will drive those claims which remain uncommenced (for reasons of cost or complexity) after six years back to the State courts, increasing the cost of judicial administration and uncertainty for parties. Further, the sunset clause will deprive claimants in State courts of the statutory RTN, forcing them to resort to the general law of injunctions to protect their title against interference. Resort to the general law is likely to increase uncertainty over the future of resource developments on native title land.

The Bill's provisions

Direct extinguishment

Meaning of 'extinguish'

The Bill employs an expanded definition of 'extinguishment' which cuts off the possibility that, at common law, native title is capable of reviving upon the expiry of a pastoral lease or other non-exclusive title. Parliament will declare that extinguishment has been permanent, no matter what the judges might say (prop s 237A).

Extinguishment by 'previous exclusive possession acts' and 'previous non-exclusive possession acts'

The Bill 'confirms' that native title is¹⁰ completely and permanently extinguished if a 'previous exclusive possession act' has been done to the land (or waters) to which it relates (prop ss 23C and 23E). 'Previous exclusive possession acts' encompass land dealings at any time in history before the Wik decision (prop s 23B). The definition includes land dealings which confer exclusive possession (such as freehold titles), dealings which may or may not confer exclusive possession, depending on their terms (such as 'community purpose leases') and land dealings which manifestly do not confer exclusive possession (including

stock routes, wells, 'memorials'¹¹ and reserves vested in statutory authorities—for example, parks vested in the Northern Territory Conservation Land Corporation). That is, the Bill extinguishes native titles which presently coexist with these titles and land uses. '[T]he extinguishment is taken to have happened when the act was done' or, in the case of public works, when 'construction or establishment of the public work began' (prop s 23C).

The government is aware that the Bill does more than merely 'confirm' prior extinguishment. The Bill states that compensation is payable for extinguishment by the 'previous exclusive possession act' provisions to the extent that native title was not already extinguished (prop s 23J).

Parallel provisions ensure permanent partial extinguishment of native title by 'previous non-exclusive possession acts'—grants of 'non-exclusive' agricultural and pastoral leases (prop ss 23F–23I and 23J). Here, the difference between the common law and the Bill will be significant if the judges develop a common law principle that non-exclusive tenures have merely suppressed native title for their duration. Again, the Bill provides compensation to cover this gap (prop s 23J).

'Just terms'

Where the Bill employs the expanded definition of 'extinguish', but the judges would have used a more limited concept, and where the Bill otherwise extinguishes unextinguished native title, it will effect an acquisition of property within section 51(31) Commonwealth Constitution. To be valid, the Bill must provide 'just terms' compensation. In combination with existing provisions of the NTA, the Bill does generally allow for this compensation to be paid (see existing section 53 and prop s 51A). However, as discussed below, the quantum of compensation is unknown and probably unknowable.

Further, some commentators have suggested that 'just terms' requires more than mere compensation—it may imply fair procedures, which are not provided, especially when the Bill extinguishes native title retrospectively. I discuss this argument further below.

The Schedule

'Previous exclusive possession acts' include pre-Wik 'Scheduled interests' (prop s 23B(2)(c)(i) and 249C). An amendment to the Bill (Commonwealth of Australia 1997d) adds a new 39-page Schedule 1 to the Act. It lists leases and similar titles to be treated as conferring exclusive possession, whether or not they actually do (prop s 247A, 248A). These include leases granted under State and Northern Territory law since as early as 1829. A number of factors (terms and obligations (as defined by statute), purpose, area, history, location, rights granted to third parties and capacity to upgrade) have governed whether or not a lease was scheduled. '[T]he government has taken a cautious approach in determining whether any particular lease should be included in the Schedule' (Commonwealth

of Australia 1997e), with the result that pastoral leases are not included. However, titles and categories of titles are capable of being added to the Schedule by regulation (prop s 249C). Present debates within the government apparently centre around defining the Schedule's contents by legislation (in particular, around whether *Western Lands Act 1901* (NSW) grazing leases should be included), but those leases could be added quietly by regulation after the Bill is enacted.

Compensation implications

Complete obliteration of native title under the 'previous exclusive possession acts' provisions removes the need to be concerned about it. (Similarly, permanent extinguishment of native title on non-exclusive tenures limits the need to consider a revived, fuller native title in pastoral areas in future.)

However, obliteration of native title brings its own uncertainties. Since compensation is payable for every extinguishment effected by the Bill, and since its extinguishing impact potentially stretches back to 1788, the Federal Court¹² will be faced with compensation claims by Aboriginal people whose ancestors' land was affected in the 1800s by leases of picnic reserves, Crown leases to churches (including, possibly, for Aboriginal missions),¹³ stock routes and road reserves now disused. Records of these types of titles and uses are likely to be more incomplete than registers of pastoral leases. Unless government or industry produces evidence of such records, native title holders might presume that their titles are intact and fail to make compensation claims. (There is no sunset clause on the making of compensation claims relating to extinguishment by a 'previous exclusive possession act'.) Native title may still become an issue only when a third party seeks to use land. While the Court will no longer be required to make delicate judgments about consistency between other titles and native title, it will need to judge whether past land dealings really were 'previous exclusive possession acts'—or even whether they really occurred.

Where a 'previous exclusive possession act' is proven, uncertainty arises as to the quantum of compensation payable for extinguishment, particularly extinguishment 'confirmed' to have occurred long ago. It will be difficult for the Federal Court to determine in 1998 the extent to which a native title was already extinguished by the grant of a 'community purpose lease' in 1800, in order to work out the extent of additional extinguishment brought about by the Bill. This question requires the Court to assess not only the rights of the lessee, but also the content of Aboriginal tradition in 1800. The Bill purports to cap compensation at the freehold value (prop ss 23J, 51A), but this cap is subject to the constitutional requirement that compensation be on 'just terms'. What 'just terms' constitutes in the native title context is not clear, but is likely to be substantial, in light of the religious and cultural significance of land to many indigenous people.

The entitlement to 'just terms' presumably dictates just terms in all the circumstances at the time when the Bill comes into force, not just terms at the

time when the extinguishing land dealing occurred. Compensation payments are likely to be significantly enlarged by this requirement. (Alternatively, if the relevant time is the time of the extinguishing land dealing, the Bill does not address the difficult question of whether interest should be paid on extinguishment compensation. 'Interest up to judgment' might be payable calculable under the *Federal Court of Australia Act 1976* (Cth) section 51A, although it will not be payable before 1984: *State Bank of NSW v Commonwealth Savings Bank of Australia* (1986) 67 ALR 123.)

Overlapping categories of 'past' land dealings

A land dealing may be a 'previous exclusive possession act', even if it could be a renewal of a validated 'past act'¹⁴ or an 'intermediate period act' (see below) (prop s 23B(2)(a)). The fact that the categories overlap in this way means that the first question one should ask about any pre-Wik land dealing is: 'is it a previous exclusive possession act?' If so, there is no need to consider native title at all, even if the dealing was illegal when done. There is no need to apply complex provisions relating to the impact of the four categories of 'past acts' and 'intermediate period acts'¹⁵ on native title.¹⁶ From the industry point of view, compensation is not a concern, because compensation for statutory obliteration of native title is payable by governments (prop s 23J(2) and (3)).

The government's selective approach to the rights of native title holders and other landowners is revealed by the Bill's treatment of the anomalous position of pastoral leases which are 'past acts'. Under the NTA, those pastoral leases are 'category A past acts' (section 229(3)) which extinguish native title completely (section 15(1)(a)), regardless of the common law relationship between these types of leases and native title. The Bill preserves this anomaly. Pastoral leases granted between 1975 and 1994 extinguish native title completely (prop s 23G(2)).¹⁷ But pre-1975 pastoral leases and any leases granted for the first time after 1994 extinguish native title to the extent of their inconsistency with it because they are 'previous non-exclusive possession acts' (prop s 23G(1)). Extinguishment is taken to have occurred at grant and to have involved extinguishment of any native title rights to exclusive possession.

Preservation of this anomaly benefits those pastoralists granted leases between 1975 and 1994 and is of considerable significance to native title holders in the Northern Territory, where pastoral leases were re-issued on perpetual tenure under the *Pastoral Land Act 1992* (NT).

'Bucketloads of extinguishment?'¹⁸

The Bill brings about considerable direct, permanent extinguishment of native title. However, this type of extinguishment is more limited in extent than it might have been. This is partly because of the government's sensitivity to the possibility of a Senate refusal to pass the Bill. The government also acknowledges that more extensive extinguishment would enhance the likelihood of successful

constitutional challenges, enlarge taxpayer-funded compensation payments and cause 'permanent disaffection between indigenous and non-indigenous Australians', 'misunderstanding' between urban and rural Australians and difficulties for the mining industry in negotiating agreements with Aboriginal people. International non-discrimination standards, the views of the international community (including their implications for Australian trade) and a possible Olympic boycott are also acknowledged (Commonwealth of Australia 1997b). I discuss some of these issues further below.

Ironically, however, the Bill's more important impact on native title arises from its provisions allowing extensive non-extinguishment of native title. As I discuss below, by authorising extensive non-consensual future uses of native title land, with consequent permanent suppression of native title, the Bill will bring about extensive *de facto* extinguishment and a correspondingly large compensation bill. *De facto* extinguishment gives rise to the same concerns about the Senate, unconstitutionality, bad race relations and international reactions as does direct extinguishment (Australian Law Reform Commission 1997).

Certainty? The New South Wales coal example

Direct and *de facto* extinguishment raise important questions about whether extinguishment is a 'solution' to post-Wik 'uncertainty'. How long will it take to calculate the compensation? What if extinguishment compensation (and its administration) costs so much that taxpayers refuse to bear it? This may produce further uncertainty, as the example of extinguishment of private rights to *in situ* coal in New South Wales illustrates.

In 1981, the New South Wales Parliament extinguished these private rights,¹⁹ replacing them (partly in response to a political campaign by former owners) with a right to compensation (*Coal Acquisition Act 1981* section 6 and *Coal Acquisition (Compensation) Arrangements 1985*). In 1985, a Coal Compensation Board and Review Tribunal were appointed and claims commenced. The Board's Chairman estimated that its work could be finalised within two years. In that period, the Board was swamped by 10,000 claims, and interim payments were made to overcome hardship to former coal owners caused by delay (NSW Coal Compensation Board 1996). In 1990, the cost of compensation had proven to be so high that some private coal holders were given back their coal instead (*Coal Ownership (Restitution) Act 1990* and *Regulations 1995*). By 1994, a further 12,000 claims had been made and \$175 million paid in compensation (NSW Coal Compensation Board 1996)—by a government not subject to a constitutional requirement of 'just terms'.²⁰ By 1997, the Board had considered 27,000 claims, allocating \$500 million in compensation in relation to about 5,000 of these, and restored title to coal the subject of another 400 claims. At April 1997, it still had to deal with about 1,200 claims, including claims for restitution.²¹ In 1997, yet another legislative amendment allowed re-vesting in the Crown of some private coal ownership restored in 1990, forcing its owners to accept compensation (*Coal Acquisition Amendment Act 1997*)! The Board's

operations were to have been officially wound up at 30 June 1997, but the Board continues on half staff in order to implement the 're-vesting in the Crown' legislation.

The result of these legislative attempts to extinguish private property rights in New South Wales is considerable uncertainty as to where privately owned coal actually lies—even more uncertainty than existed before 1981, when the mineral's location (if not the identity of its private owner) could at least be determined by reference to the land's tenure history. While that particular uncertainty is mitigated by other statutory provisions, similar uncertainty in the native title context will not necessarily be so easily mitigated. It is entirely possible that, in five or ten years' time, the cost of native title extinguishment compensation (including the costs of having it determined by the Federal Court) will have proven so high that governments will decide that it is more politically feasible to give some native title back to its former owners. As with New South Wales coal, while it is no easy matter to determine now where native title exists, it will be more difficult to locate randomly restored native titles. New South Wales coal illustrates the dangers of governments underestimating in advance the costs of legislative extinguishment of private rights.

***De facto* extinguishment and discriminatory compensation?: Validation of 'intermediate period acts'**

As the above discussion indicates, under the Bill freehold title granted over native title land by the Queensland Government in 1995 will be a 'previous exclusive possession act', regardless of the fact that it was granted illegally. Similarly, the illegal 1995 construction of a 'public work' is a 'previous exclusive possession act'. However, if the land has a more complex tenure history, these grants may also be 'intermediate period acts' (prop ss 232A and 232B) which are validated (prop ss 22A, 22F)²² by the Bill.

'Intermediate period acts' include land dealings:

- done between 1 January 1994 and 23 December 1996,
- over native title land previously²³ the subject of a valid grant of freehold or any lease (other than a mining lease) or a valid 'public work' (including a stock route, well, memorial, disused road reserve),

where the acts were:

- 'invalid to any extent because of [the present 'future acts' regime] or for any other reason, but... would have been valid to that extent if the native title did not exist' (prop s 232A).

Thus the definition of 'intermediate period act' embodies the pre-Wik 'orthodoxy' that freehold and all leasehold grants and 'public works' had extinguished native title, with the result that subsequent grants of other titles to the same land had no impact on native title.

The definition of 'intermediate period act' and 'previous non-exclusive possession act' also overlap. A pastoral lease granted illegally in 1995 is a 'previous non-exclusive possession act', but it is also a validated 'intermediate period act'.²⁴

Mining tenements will be 'intermediate period acts' where they have been granted in breach of the RTN regime. Validated 'intermediate period' mining tenements suppress native title (prop ss 22B(d) and 232D, s 238). Native title holders are entitled to 'compensation' for suppression of their rights for the tenement's duration. Compensation is payable by the government which did the act (prop ss 22D and 22G). While Commonwealth compensation may need to provide 'just terms' (section 53 and prop s 22E),²⁵ it is not clear how compensation is to be calculated at the State level.²⁶ It appears that the RDA has no ongoing operation in this context,²⁷ and that there will therefore be no prohibition in Commonwealth law on the States and Territories paying native title holders compensation at discriminatory levels.

Direct and *de facto* extinguishment to come: valid 'future acts'²⁸

With many exceptions, the NTA allows only 'non-discriminatory' future extinguishment or suppression of native title. The Bill preserves the present 'same treatment as freehold' standard, but marginalises its importance by creating many more exceptional categories of permitted 'future acts' which could not be done to freehold or other titles without the owner's consent. These proposed changes will involve significant 'non-extinguishment' of native title. Much 'non-extinguishment' compensation will be paid by the taxpayer, despite the direct benefits of extinguishment and non-extinguishment to private landowners. State governments are expressly prohibited from passing on to 'non-exclusive' pastoral and agricultural lessees the costs of upgrading those titles via compulsory acquisition of coexisting native title (prop s 24MD(5)).

The 'future'?

The Bill preserves the present definition of 'future acts'—legislation enacted after mid-1993 and other (mainly executive) action taken after 1 January 1994 (section 226, prop s 233). Some 'future acts' amendments are expressly limited to acts done after Wik. Some are expressed as operating retrospectively (prop s 24GC and item 17(1) in Schedule 5). Transitional provisions state that the new 'future acts' and RTN provisions generally 'apply to future acts taking place after the commencement of this Act' (Item 2 of Part 2 of Schedule 5). However, amendments relating to 'primary production', water, fish and airspace, renewals, extensions and enforceable upgrades of title, use of land consistently with earlier reservations and 'facilities for services to the public' commence from 23 December 1996, if necessary without the requisite notice to native title holders (Item 3 of Schedule 5). The Bill thus expands the category of acts which were 'permissible' in the immediate past, as well as those permissible in future.

Treatment of existing standards

The Bill reproduces some of the present standards for 'future' use of native title land (or waters). It allows governments to deal with land (including in an extinguishing manner) where no native title claimants respond to a 'non-claimant application' aimed at flushing them out (prop Part 2, Div 3, Subdiv F). It allows governments to deal with the offshore without regard to native title, except by paying the kind of compensation paid for acquisition of 'corresponding' rights (prop Part 2, Div 3, Subdiv N).²⁹

Preservation of the present 'freehold standard' allows compulsory acquisition of, and the grant of mining tenements over, native title land (prop Part 2, Div 3, Subdiv M). But in its definition even this standard has been run down to allow some activities which typically occur only on Crown land: grants of opal or gem licences (prop s 24MB(2)). As noted, the availability of significant new exceptions to the 'freehold' standard (see below) mean its overall importance is diminished.

Indigenous land use agreements

The Bill provides extensively for authorisation of 'future acts' on native title land under registrable, enforceable 'indigenous land use agreements' (ILUAs) (prop Part 2, Div 3, Subdiv B, C and D and Part 8A).³⁰ In an improvement on the NTA, not all of these agreements need involve governments—they can be made with industry. Some types of agreements ('body corporate agreements') may only be made by people who have proven and registered native title, but others ('area agreements' or 'alternative procedure agreements') may be made by claimants (including, in some cases, unregistered claimants) and representative bodies.

The Bill creates one incentive for the use of ILUAs: they can limit the compensation payable to native title holders (prop s 24EB(4), (5), (6)). However, this incentive and the usefulness of ILUAs generally is undermined by other provisions—those which allow 'future acts' without native title holders' consent, or those which limit the RTN about compulsory acquisition by governments intending to confer rights on third parties (see below). The incentive to use ILUAs is further diminished by the fact that compensation payable for most future acts permitted without native title holders' consent—especially acts benefiting pastoral and agricultural lessees—is payable by governments, not industry.³¹

Expansion of 'primary production'

The definition of 'primary production', although borrowed from the *Income Tax Assessment Act 1936* (Cth), is not identical to the Tax Act definition.³² 'Primary production activity' includes cultivating land, maintaining, breeding or agisting animals, taking or catching fish or shellfish, forest operations, horticultural activities, aquacultural activities and leaving land fallow or de-

stocking it in connection with another primary production activity (prop s 253). It does not include mining (prop s 24GA).

Post-Wik acts permitting primary production and associated activities on pre-Wik 'non-exclusive' agricultural or pastoral leases (and their renewals) are valid and suppress coexisting native title for their duration (prop s 24GB). State governments may now authorise pastoralists to engage in those activities, even if the leases do not presently allow it. Indeed, the Bill goes further, expressly stating that native title is no obstacle to a leaseholder engaging in 'primary production' (that is, even without the necessary authority to do so from the State) (prop s 24GC). Since, in the past, State governments have turned a blind eye to pastoralists' illegal 'diversification', this last provision is likely to encourage continued unauthorised use of pastoral land.

'Farmstay tourism' may also be authorised, as long as it is incidental to other primary production and does not involve tourists 'observing activities or cultural works of Aboriginal peoples or Torres Strait Islanders' (prop s 24GB(2) and (3)). Presumably this covers works by deceased persons? A lease may not be converted to exclusive possession or freehold title under these provisions (prop s 24GB(4)), although the nature of the title may not matter much where extensive land uses are permitted. Compensation is payable by the government authorising the expanded pastoral use. There is nothing in the Bill to indicate that State governments will recoup this compensation from lessees.

The 'primary production' amendments potentially expand the rights of people other than 'non-exclusive' agricultural and pastoral lessees. Governments may grant to farmers (people on pre-Wik freehold titles, pastoral and agricultural leases) post-Wik non-leasehold rights to engage in 'off-farm' activities 'directly connected to' primary production within their boundaries. A State government may grant a farmer the right to take water from nearby land subject to full native title, even though a farmer would not be granted such rights over neighbouring freehold (or even a neighbouring pastoral lease) except consensually by its owner. The only constraint on the grant of such rights is a requirement that the taking of water 'does not prevent native title holders... from having reasonable access to the area' (prop s 24GD). Native title is thus stereotyped as a set of rights to roam around land. Governments (and lessees) may also grant third parties post-Wik rights to take timber and extractive minerals from land held under pre-Wik 'non-exclusive' pastoral and agricultural leases. The only constraint on the grant of such rights is a requirement to notify Aboriginal representative bodies (prop s 24GE).

Grants of 'off-farm' rights and third party rights to take timber and extractive minerals are valid and suppress native title. Compensation is payable by governments, not the beneficiaries.

Other permitted acts which do not meet the 'freehold standard'

Provisions relating to 'management of water and airspace' are concerned with privileging Crown-granted irrigation and fishing rights, and the right of governments to grant them in a discriminatory manner, over native title.³³ Private water and fishing rights will suppress native title. Compensation will be paid by governments (prop Part 2, Div 3, Subdiv H).

These amendments are not necessary for the 'management' of water and airspace—governments already have complete control over the offshore. They have the same (non-discriminatory) control over onshore native title to water, and airspace over native title, as they have over waters adjacent to freehold and airspace above freehold. They have the same control over native title rights to fish as they have over other (landowner or public) rights to fish. All of this amounts to considerable control. For example, in 1997, the South Australian Parliament abolished all common law rights to water (*Water Resources Act 1997* (SA) section 7(9)).³⁴ This Act is consistent with the NTA.³⁵ However, the Bill's provisions seek to secure governmental control and the titles it gives rise to, even in circumstances of *racial discrimination*. Under the Bill, it would be possible for South Australia to abolish only native title rights to water, leaving other common law water rights intact.

Provisions allowing construction of 'facilities for services to the public' over native title (prop Part 2, Div 3, Subdiv K) are in a similar position. Governments can already authorise these things if they do so in a non-discriminatory manner. However, these provisions redefine the comparator by which 'discrimination' is measured. In pastoral areas, native title holders' rights regarding construction of these facilities will be limited to 'reasonable access' and the 'procedural rights' of pastoral lessees, not freeholders (prop ss 24KA(1)(c) and 24KA(7)).

Provisions relating to 'renewals and extensions etc' (prop Part 2, Div 3, Subdiv I) create considerable scope for extinguishment by 'pre-existing rights-based acts' as well as permanent suppression by ongoing renewal of rights created under the expanded 'primary production' and 'water' provisions (prop s 24IC(b)(iii)). There are 'renewal' and 'upgrade' provisions in the NTA, but they mainly allow renewal and upgrading of titles granted before the NTA commenced—many of them at a time when governments did not know that native title existed (secs 25, 228 (3)–(9)). The Bill would allow extension or enlargement of titles granted after 1 January 1994, including those granted in contravention of the NTA.³⁶ These provisions provide another reward for State governments which chose to flout the law.

A 'pre-existing rights-based act' is something done after Wik³⁷ in exercise of an enforceable pre-Wik right (including a right illegally granted and subsequently validated) (prop s 24IB(1)). A Queensland pre-Wik right to upgrade a pastoral lease to freehold would allow the lease to be freeholded under this provision, without the State using its compulsory acquisition powers. Native title would be extinguished by the freehold grant, although it would be suppressed by grant of a

lesser title which did not confer exclusive possession (prop s 24ID(1)(b)). Compensation is payable by government, not the landowner (prop s 24ID(2)).

Short time frames, government prerogatives and new federalism: changes to the RTN and claims processes

Changes to the RTN

This right presently applies to grants of exploration and mining tenements and to compulsory acquisitions of native title which benefit third parties. It benefits 'registered native title bodies corporate'—bodies which hold proven native title—and 'registered native title claimants'—people who lodge a native title claim under the NTA with the Tribunal Registrar (secs 29, 30, 57, 61, Parts 7 and 8, 'registered native title body corporate' and 'registered native title claimant' in s 253; *NT v Lane* (1995) 138 ALR 544).³⁸

The most important changes to the RTN stem from changes to the proposed test for registering claims, and from the proposed claims sunset clause. I discuss these changes further below. These changes will largely restrict the RTN to people who have already proven (and registered) native title. Few claimants will have access to the RTN—either because they are unable (or unwilling, given the time, effort and uncertainty involved) to meet the claims registration test at the outset, or because they have not registered claims under the Act within the six-year period where no parallel 'recognised State/Territory bodies' are established to receive claims after that time. People who make claims in the State courts after the six-year period has expired will need to rely on the general law of injunctions to protect their native title. Increased resort to applications for interlocutory injunctions (which allow a court to freeze development while the respective rights of the parties are tried) is likely to increase uncertainty over the future of development on native title land.

Many of the Bill's detailed changes to the RTN were foreshadowed in 1996. These include changes to the right's application by removing it from:

- all tenement renewals (regardless of whether other landowners may object to or veto renewals) (prop s 26);
- exploration grants unlikely to impact significantly on land³⁹ where representative bodies are notified, native title parties have State law landowner objection and 'natural justice' rights, and explorers are required by law or 'procedures' to consult native title parties on site protection, land access and exploration programme (prop s 26A). (The Bill expands on these 1996 proposals for 'approved exploration acts' by treating alluvial gold or tin mining in the same way: prop s 26B);
- exploration or mining grants which 'are not likely to interfere directly with the physical aspects of native title holders' community life (see prop ss 32 and 237). This change (to the so-called 'expedited procedure') will overcome the Federal Court ruling that negotiation is required where a grant would

impact directly on the spiritual aspects of community life (*Ward v WA* (1996) 1 AILR 549);⁴⁰ and

- mining grants if the right has applied at the exploration stage and has imposed conditions on mining, and those conditions have been met (prop s 26D). (Again, this change applies regardless of whether other landowners have 'disjunctive' objection rights, as they do in Western Australia. Prop s 24MD(6)(a) excludes the application of these state law standards to native title holders.)

In a useful proposed amendment, the Bill will allow (exploration) tenement grant conditions to prescribe procedures for dealing with issues arising in the future (prop s 27B). This amendment may overcome problems encountered by the NNTT in imposing conditions on mining at the exploration stage (*Koara People v WA*, unreported, 8 August 1997 per Nicholson, J.). Also as foreshadowed in 1996, the right will apply once to multiple acts forming one project (prop ss 29(9) and 42A).

The 1996 proposals also foreshadowed changes to the RTN's content:

- governments must give three, not two, months' notice of an act to which the right applies (prop s 30); however
- the negotiation period for mining tenements has been shortened from six months to four months. Time runs from the date on which notice was given, leaving an effective time of one month for mining negotiations (prop s 35) (Smith 1996);
- all parties, not just government, must negotiate in good faith, but good faith need not extend to 'matters unrelated to the effect of the act on... native title' (prop s 31(2)). Thus there is no insistence on negotiation in good faith about other matters central to Aboriginal concepts about responsibility for land—for example, about (physical or traditional) protection from activities associated with mining of sites outside proposed tenement boundaries, involvement in the management of any proposed mine or transfers of other land to Aboriginal hands;
- the Minister (Commonwealth, State or Territory: prop s 27A) may intervene in negotiations or arbitration to decide that the act may be done if 'likely to be of substantial economic benefit to Australia' (a benefit which would be substantially reduced if the determination was not made at the relevant time), if native title holders 'will gain significant benefits' from it, and if it is in the national (State or Territory) interest (prop s 34A). (The Minister may also intervene to prevent the act.) The Minister may intervene after notifying negotiation parties and any arbitral body involved, and giving the parties limited 'natural justice' (prop s 36B);⁴¹
- after giving an urgency notice, the Minister may intervene, in the national (State or Territory) interest, in arbitration if a decision has not been made within four months and 'is unlikely to be made within a period that is reasonable having regard to all the circumstances' (prop s 36A). Again, the

parties are entitled to only limited 'natural justice' before intervention (prop s 36B).

Under the Bill, the RTN will not apply to third party compulsory acquisitions for 'infrastructure facilities': roads, ports, airports, electricity generation and transmission facilities, oil, gas and mineral storage, transmission or transportation facilities, dams, pipelines and communication facilities (prop s 26(1)(c)(iii)(B) and 'infrastructure facility' in s 253). Compulsory acquisition of the Century mine pipeline would not attract the RTN under the Bill.

As foreshadowed in 1996 proposed amendments, the RTN will not apply to the inter-tidal zone (prop s 26(3)). The inter-tidal zone is re-defined as onshore 'waters', not land ('land' and 'waters' in s 253). This means that, for the purposes of the 'freehold standard', the zone is only as well protected as waters adjacent to freehold land, not freehold itself (prop ss 24MA and 24MB). This re-definition (which makes little sense in Aboriginal cultural terms) and the removal of the RTN from the zone are apparently justified 'because native title holders will not have the equivalent of exclusive possession' over the zone—presumably because native title coexists with public access rights to beaches (Commonwealth of Australia 1997c). Thus, the protection accorded native title in the inter-tidal zone, like the protection accorded coexisting native title on pastoral leasehold, is down-graded according to a particular view of its content—the idea that it is an inferior right to land which deserves inferior protection. Such an approach is at odds with the principles of racial non-discrimination law, which insist on equal protection for property rights, whatever their source or their calibre (*Mabo v Queensland (no 1)* (1988) 166 CLR 186 and *WA v Commonwealth* (1995) 183 CLR 373).

Nor will the RTN apply in an opal or gem mining area where 'at least some rights' involve mining in five hectare blocks for five year periods (prop s 26C). Taking into account proposed amendments to the 'freehold standard' (see above), this means not only that native title can be affected by these tenements where freehold would not, but also that native title holders so affected have neither State law landowner objection rights, nor the RTN (prop s 24MD(6)(d)).

The RTN will not apply in a town or city (prop s 26(2)(f)). 'Town or city' is defined differently for different states. In 'settled' Australia, it means what the Commonwealth Minister believes was a town or city at 23 December 1996. In Western Australia, South Australia and the Northern Territory, it is whatever was constituted as a town ('township', 'suburban lands', 'municipality', 'park land adjacent to a township') under State or Territory law at 23 December 1996 (prop s 251C). It appears, however, that the 'Greater London' boundaries of Darwin are not included.⁴²

Potential substitution of the RTN by State law

Perhaps the most controversial amendment involves potential substitution of the RTN on current *and former* leased, 'non-exclusive freehold' (such as Aboriginal reserves) or public use reserves (such as, national parks)⁴³ by State and

Territory 'alternative provisions' (prop s 43A).⁴⁴ The 'alternative provisions' will not apply where native title is extinguished by the Bill—for example, in 'vested' national parks by the 'confirmation of extinguishment' provisions. However, they could apply to coexisting native title—such as native title on 'non-exclusive' pastoral or agricultural leases which is partially extinguished by the 'previous non-exclusive possession acts' provisions. The 'alternative provisions' could also apply to full native title on which other land dealings have had no extinguishing impact, either because those dealings merely regulated native title (as in the case of non-'vested' national parks), or because they merely suppressed it (as may have occurred with statutory leases other than those covered by the definition of 'previous non-exclusive possession act').

Research by the Northern Land Council indicates that, if the full potential of prop s 43A is exploited, the RTN could be excluded from more than 90 per cent of Australian land. Less than 10 per cent of Australian Crown land has never been alienated or reserved as leasehold, 'non-exclusive freehold' or public use reserve (Northern Land Council 1997).

The 'alternative provisions' reveal the government's determination to treat unextinguished native title like neighbouring rights to land, regardless of its content, and regardless of the extent to which it has been affected by coexisting titles. This determination is borne out by prop ss 43A(5) and 43B, which contemplate different State laws applying to 'different kinds' of land or waters. By 'different kinds', the Bill means different kinds as defined by State laws under which other interests in the land are granted or reserved, not as defined by Aboriginal tradition or the law of native title. For example, prop s 43B allows for the RTN to apply to native title outside of 'leased or reserved areas' (and former leased or reserved areas), but for state 'alternative provisions' to apply to adjacent native title on 'leased or reserved areas' affected by the same proposed mining tenement grant.

In order to substitute for the RTN in the 'third party compulsory acquisition' context, state 'alternative provisions' must give native title holders 'the same procedural rights' as freeholders (prop s 43A(3)). However, in order to substitute for the RTN as it applies to mining tenement grants on leases or 'non-exclusive freehold', State 'alternative provisions' must only provide coexisting native title holders with procedural rights equivalent to those of a lessee or other title holder (prop s 43A(4)(a)). Similarly, 'alternative provisions' which contain appropriate notification procedures and give registered native title parties rights to object and to be heard (not necessarily by an independent body) may govern tenement grants on public use reserves (prop sec 43A(4)(b)). This means that, while 'full' native title on vacant Crown land attracts the RTN, similarly 'full' native title in a national park potentially attracts inferior objection rights.

(These state 'alternative provisions' need not provide 'just terms' or non-discriminatory compensation for native title holders. However, the 'freehold standard' provisions discussed above seem to provide at least 'freeholder' (if not 'just terms') compensation for native title holders, even where the RTN is

displaced by 'alternative provisions' of state law (s 240 and prop s 24MD(2)(d) and (e) and (3) and (4)).⁴⁵

The application of State 'landowner objection to mining' rights to native title is particularly inappropriate. Objection rights in the Mining Acts arose in a specific historical context—land use conflicts between pastoralism and agriculture on the one hand and mining on the other—and are inappropriate to the Aborigines-land relationship. Further, those rights vary enormously from state to state, creating problems for native titles which lie across state borders.

The fact that State 'alternative provisions' can apply to areas formerly affected by non-exclusive titles or reserves raises interesting questions about the comparator to be used to ensure that native title holders' procedural rights are 'equivalent to those conferred on' holders of other rights (prop s 43A(4)(a)(i)). Where land was the subject of a five-year lease grant in 1920, are native title holders entitled to procedural rights 'equivalent' to those of the 1920 lessee, or 'equivalent' to those of a similar lessee in 1998?⁴⁶

Claims registration test

As foreshadowed in 1996, under the Bill it will be possible to proceed with a claim in the Federal Court without registering it under Part 7. However, registration will be essential for claimants to obtain the RTN and access rights to pastoral land (these access rights are discussed below).⁴⁷

Tighter controls on what claims may be made, together with a tighter registration test, mean that, under the Bill, claims attracting the RTN must:

- contain extensive prescribed information (prop ss 62(2) and 190C(2));
- not be made to 'previous exclusive possession act' areas;
- not claim exclusive possession over areas affected by 'previous non-exclusive possession acts' (prop s 61A);
- contain maps and physical descriptions of land which satisfy the Registrar as to whether the claim relates to a particular area (prop ss 62(2)(a), 190A(6) and 190B(2));
- satisfy the Registrar that all claimants are named or included;
- describe the rights claimed so that the Registrar can readily identify them (prop ss 62(2)(d) and (e) and 190B(4));
- describe the factual basis on which the rights are asserted sufficiently to support the assertion that they exist (prop ss 62(2)(e), 190A(6) and 190B(5));
- convince the Registrar that, *prima facie*, each right claimed can be established (prop ss 190A(6) and 190B(6));
- satisfy the Registrar that at least one applicant has or had a *traditional physical connection* with the area (prop s 190A(6) and 190B(7));
- not relate to ownership of minerals or petroleum where the Registrar knows that the Crown owns them (prop s 190B(9)(a));

- not claim exclusive possession of an offshore place (prop s 190B(9)(b));⁴⁸
- not relate to a native title which the Registrar knows is extinguished (prop s 190B(10));
- not be made by a group which includes a *person who is party to an overlapping registered claim* (prop s 190C(3));⁴⁹
- be either certified by a representative body or made by member of the claimant group authorised (by traditional or agreed process) to make it. Certification may only occur where the representative body believes the applicant is 'authorised' to make the application and all reasonable efforts have been made to identify other possible applicants (prop ss 190C(4), 202(4)(d) and (5), 'native title group' in 253 and 'authorise' in 251A).

The new registration test will be applied retrospectively to all unresolved claims made after 27 June 1996.⁵⁰ It will be applied to claims made before that date which coexist with 'non-exclusive' pastoral or agricultural leases, and those subject to post-June 1996 proposals for mining tenement grants or third party compulsory acquisitions which attract the RTN. However, RTN processes on claims (to areas other than 'non-exclusive' pastoral or agricultural leases) made before 27 June 1996 will be allowed to continue where those processes commenced under the unamended NTA, whether or not the claim meets the new registration test (Schedule 5 Part 4).

Ironically, if the present situation is maintained, preservation of 'old Act' RTN processes on pre-June 1996 claims may have a more substantial impact in Western Australia than in states which defied the 'future acts' regime.

More than 600 live claims are presently lodged with the Tribunal. Of these, around 300 relate to land in Western Australia. Less than half of these (128) were made before June 1996 (NNTT 1997).⁵¹ Tribunal statistics do not record the relationship between claims and 'future act applications' (those under which the Tribunal is asked to perform RTN arbitration). However, 'future act applications' made before June 1996 must relate to pre-June 1996 claims, because any claimants will have emerged at the negotiation phase.

There are now only two live 'future act applications' in Western Australia. However, a much larger number of proposed grants (around 10,000) have been the subject of RTN notification (under s 29) since 1995 (Western Australia Ministry of the Premier and Cabinet 1997). Most of these should therefore be the subject of negotiation (under s 31). The figure of 10,000 includes more than 330 s 29 notifications in relation to which the WA Mines Minister had applied for Tribunal arbitration before June 1996. The Minister withdrew these 'future act applications' after the Federal Court held (in June 1996) that 'good faith' negotiations were a necessary precondition to Tribunal arbitration (NNTT 1997, *Walley v WA* (1996) 137 ALR 561). However, *negotiations* in relation to many of these tenements should still be on foot. Further, the 1997 figure of 10,000 will include many other pre- and post-June 1996 RTN processes on pre-June 1996 claims which have not yet been the subject of 'future act applications' to the

NNTT.⁵² Claimants in these cases will enjoy the benefit of the RTN in relation to the particular mining tenements proposed, but not in relation to future proposed tenement grants unless they meet the new claims registration test.

The Western Australian position might be compared with that in the other states and territories. In the Australian Capital Territory, only one of a total of three presently live claims was lodged before June 1996. In the Northern Territory, nine of the present 25 live claims was lodged before that time. In NSW, the figures are 26 out of a total of 87 presently live claims; in Queensland, 25 out of 174; in South Australia, 10 out of 22; in Victoria, two out of 20. (Some of these pre-June 1996 claims will, however, relate to 'non-exclusive' pastoral and agricultural leases. There are no live claims from Tasmania before the NNTT.) As noted, there has been far less use of RTN processes in other States, both before and after June 1996. Outside of Western Australia there are only eight live 'future act applications' for NNTT arbitration: seven relating to the Century Zinc mine in Queensland, and one from the Northern Territory (NNTT 1997).

Thus there is limited potential for preservation of 'old Act' RTN processes outside of Western Australia. Even in Western Australia, it appears that the potential for fairly extensive preservation of these processes could be simply circumvented. Governments which can issue s 29 notices should be able to withdraw them. If all 'old Act' s 29 notices on pre-June 1996 claims were withdrawn by the Western Australian Government and replaced with fresh notices under the amended Act, access to 'old Act' RTN processes could be then denied to claimants whose pre-June 1996 claims failed to meet the new registration test.

Access rights to non-exclusive pastoral and agricultural leases

The Bill 'guarantees' claimants' traditional access to 'non-exclusive' pastoral and agricultural leasehold (prop Part 2, Div 3, Subdiv Q). 'Traditional access rights' exist independently of reservations in favour of Aboriginal people in Crown Lands Acts and site protection laws (prop s 44D). However, narrowly defined 'traditional access rights' may prevent the exercise of fuller native title.

A person has access rights if she is a member of a native title group with a registered claim and, at 23 December 1996, she (or her ancestor) had regular physical access to the land for the purposes of traditional activities (prop s 44A).⁵³ (The claims registration test means that at least one member of this group will need to have enjoyed personally a 'traditional physical connection' with the land.) The Bill freezes this factual access in time, giving it a new legal status—subject to the rights of the lessee (prop s 44B). However, Aboriginal people 'locked out' of pastoral leases at the time of the Wik decision will enjoy no such rights. Further, during the period when a registered claim gives rise to statutory 'traditional access rights', no-one may enforce native title rights to gain access to the land (prop s 44C).

'Traditional access rights' thus provide a mechanism for the substitution of tradition-based legal rights with rights based in the political *status quo* between

particular native title holders and particular pastoralists (or their predecessors in title).

Sunset clause

The six-year sunset clause applies to non-claimant and claimant applications for the determination of native title by the Federal Court (prop s 13(1A)). It does not apply to Federal Court determinations of native title (including determinations associated with compensation applications). The sunset clause does not apply to compensation applications arising out of extinguishment of native title by 'previous exclusive possession acts', 'past acts' or 'intermediate period acts'. However, a separate six-year sunset clause applies to compensation claims arising out of 'future acts' (prop s 50(2A)). It requires the making of compensation claims within six years of the commencement of the Bill or the doing of the 'future act', whichever is later.

The claims sunset clause does not appear to apply to determinations of native title by 'recognised State/Territory bodies' (bodies approved for this purpose by the Commonwealth Minister) exercising claims determination functions under consistent State legislation (prop s 207A).⁵⁴ However, since the existence of 'recognised State/Territory bodies' depends on them being proposed by a State or Territory Minister and approved by the Commonwealth Minister, whether or not such bodies exist after six years will depend on political factors.

The claims sunset clause is out of step with provisions limiting other actions to establish property rights (for example, provisions of Limitations Acts which allow a dispossessed landowner 12 years or more of protection against adverse possession claims). The clause would itself amount to an acquisition of property in the constitutional sense if the amended NTA prevented common law native title claims—claims in the ordinary courts—where those courts are not specially approved as 'recognised State/Territory bodies' (s 51(31) Constitution, *Georgiadis v Overseas Telecommunications Corporation* (1994) 179 CLR 297, *Commonwealth v Mewett* (1997) 147 ALR 299).⁵⁵ However, since common law claims remain possible, the sunset clause will simply drive uncommenced claims back to the ordinary courts, where they will take longer, cost more and produce more unpredictable outcomes than they do now.

An important consequence of the sunset clause will be its impact on the RTN. As noted, under the amended Act, the RTN will be available only to those proven holders of native title who register their title on the National Native Title Register, and to those claimants who meet the stringent new claims registration test (including where it is applied retrospectively).

It will not be possible to register a claim made in the Federal Court after the six-year period expires because it will not be possible to make such a claim (prop s 13(1A), 63 and 190A). After six years, it will be possible to register a claim made before a 'recognised State/Territory body', if such a body exists (prop s 190(1)(b)). However, where no such bodies exist, it will not be possible to register a claim

made in a State court or the High Court, although it will remain possible to register a native title proven in the ordinary courts (prop s 193(1)(c)). Common law claims can never be registered on the Register of Native Title Claims—even if, for political reasons, they turn out to be the only kinds of claims which can be made after six years (prop ss 189, 190).⁵⁶ In those circumstances, it is to be expected that native title claimants will resort to the general law of injunctions to protect their titles from unauthorised interference.

Applicants for interlocutory (interim) injunctions must demonstrate that there is a 'serious question to be tried' in future by a court, that the 'balance of convenience' requires the protection of their rights pending trial of that question, and that their rights will not be adequately protected by the payment of damages later. A 'serious question' could arise where the proposed grant of a mining tenement over, or proposed compulsory acquisition of, native title land threatens to damage important Aboriginal sites. Because heritage legislation provides one possible basis for the grant of an injunction, it is likely that the claims sunset clause will operate to displace concerns about the protection of native title into the arena of heritage law.

Relationship between the Bill and international standards of racial non-discrimination

Australia is bound by a number of international human rights standards which the Bill infringes. I consider two of those standards—racial non-discrimination (equality) and minority cultural rights—here (International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights, Article 27).⁵⁷ Racial non-discrimination standards in particular are of considerable importance to the international community.⁵⁸ Since 1996, there has been extensive public debate about whether proposed amendments to the NTA infringe these standards (Commonwealth of Australia 1996b; Clarke 1997b). This debate has been made unnecessarily complex by highly politicised use of racial non-discrimination terminology, and by confusion over how the international standards are applied by international and Australian institutions.

Politicisation of concepts from racial non-discrimination law

In 1993, during the NTA's drafting, indigenous 'negotiators' agreed with the Keating Government that the proposed Act could be characterised as a 'special measure' for the purposes of racial non-discrimination law. A 'special measure' is a measure which would be racially discriminatory, were it not for the fact that it benefits a disadvantaged racial group in an effort to advance their human rights. The 'negotiators' appear to have agreed to this characterisation in order to secure public acceptance for the negotiated package which, although it contained provisions discriminating against native title holders (the 'past acts' regime), also

contained many provisions improving on the common law position of native title holders (the Land Fund, 'non-extinguishment principle', 'freehold test' and RTN).

The present government has sought to rely on this characterisation of the NTA in general (and/or the RTN in particular) to support its attempts to 'wind back' the NTA's 'beneficial' provisions. For example:

In amending the right to negotiate provisions, the Government is exercising the discretion it has in relation to instituting, maintaining and formulating such special measures (Commonwealth of Australia 1997c).

The political characterisation of the NTA as a 'special measure' drew on a 1985 decision of the High Court about the *Pitjantjatjara Land Rights Act 1981* (SA) (*Gerhardy v Brown* (1985) 159 CLR 70). In that decision, the High Court characterised the South Australian legislation (permanent legislation conferring special land rights over traditional land on Pitjantjatjara people) as a 'special measure'. According to the High Court, had the South Australian Act not 'benefited' a disadvantaged racial group, it would have involved racial discrimination. However, the significance of the High Court's decision needs to be understood in the context of Australia's constitutional arrangements (see below). Further, many commentators have argued that the High Court's definitions of 'racial discrimination' and 'special measures' are out of step with international law (Sadurski 1985; Pritchard 1995; Clarke 1997b). Indeed, the High Court might revise its own views on these issues. In deciding the challenge to the constitutionality of the NTA, the High Court characterised the NTA as 'either as a special measure... or as a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the [Convention] (*WA v Commonwealth* (1995) 183 CLR 373). The Court may be prepared to adopt a definition of 'equality' more attuned to international law understandings (see below).

Definitions of non-discrimination (equality) and 'special measures' under international law

Under international law, non-discrimination and equality are different sides of the same coin. However, 'equality' and 'non-discrimination' are difficult concepts to define, given variation in human populations. Sometimes equality can be achieved by treating all people in exactly the same way ('formal equality'). But sometimes it can only be achieved by treating different people in an *appropriately* different manner, according to *relevant* differences between them ('substantive equality'). Appropriately different treatment is not discrimination—it is a way of achieving genuine equality. It is not prohibited but required by international law (*South West Africa cases (Second Phase)* [1966] ICJR at 305–6).

An important difference between native title holders and other landowners is a difference of *cultural values relating to land*. Aboriginal relationships with land may be founded on religious, not economic, concepts, which insist on a continuity of relationship between people and land and the ongoing responsibility of people for land. Different treatment of native title holders and other landowners where

there is no relevant difference between them (for example, where both consent to land development) is discrimination. But appropriately different treatment of native title holders in a way that respects their cultural difference (for example, by involving them in land management under the RTN) is required to avoid discrimination. The International Covenant on Civil and Political Rights juxtaposes articles outlawing racial discrimination with an article requiring the special protection of minority cultures, including indigenous cultural values relating to land. Measures protecting minority cultures

merely allow minorities to enjoy rights which are enjoyed by the rest of the population. Such measures produce 'an equilibrium between different situations' and should be maintained as long as the groups concerned wish (McKean 1983).

'Special measures' are defined by the International Convention on the Elimination of All Forms of Racial Discrimination. Besides obliging Australia to outlaw racial discrimination and to provide for equality before the law in the enjoyment of human rights (including property rights), the Convention requires Australia to take 'special measures' for the (sole) purpose of securing the adequate advancement, development or protection of disadvantaged racial groups, in order to ensure that those groups enjoy human rights equally with other Australians. The Convention's definition of 'special measures' suggests temporary, catch-up measures which respond to economic need or some other circumstance which can be changed, not permanent measures (like laws for the protection and proof of native title) which respond to cultural difference.⁵⁹

Application of non-discrimination standards internationally and nationally

International application

At the international level, United Nations Committees (the Human Rights Committee (HRC) and the Committee on the Elimination of Racial Discrimination (CERD)) apply the relevant international standards. They do so in the context of considering periodic compliance reports from states like Australia, or individual complaints of human rights breaches against states by citizens or residents. These Committees make non-binding findings about whether or not a state is in breach of its international obligations. While governments can sometimes ignore these findings, it would be difficult for Australia to ignore a finding that its laws discriminate against members of a particular racial group. Such a finding would provoke considerable negative interest in the Asia-Pacific region.

Domestic application

The International Convention on the Elimination of All Forms of Racial Discrimination has been implemented into Australian legislation, in particular the RDA. This Act is applied by Australian courts and tribunals. *It is not a constitutional document*—it is simply Commonwealth legislation. A fundamental

principle of Anglo-Australian constitutional law holds that parliaments have power to repeal their own legislation, and that they may do so impliedly (by enacting later inconsistent legislation) as well as expressly. Thus (subject to any constitutional constraints—see below), the Commonwealth Parliament is free to repeal the RDA—or to repeal its application to native title by amending native title legislation to authorise discriminatory treatment of native title holders. Repeal of the RDA would place Australia in breach of our international law obligations (leading to complaints to United Nations Committees), but would not necessarily raise constitutional issues to be adjudicated by the High Court.

However, the RDA does have one constitutional impact. Like the present NTA, it sets national standards for the treatment of a particular subject (human rights in the case of the RDA, and native title in the case of the NTA). So long as those standards insist on non-discrimination, State laws allowing discrimination will be inconsistent with them. (The Constitution s 109 says that State laws which are inconsistent with Commonwealth laws are invalid to the extent of the inconsistency.) So the present RDA, like most of the present NTA, 'knocks out' discriminatory State laws.

Interesting possibilities arise, however, where the NTA as amended by the Bill begins to authorise discrimination, rather than to outlaw it. First, being a later law of the same Parliament, the Bill as enacted will in part impliedly repeal the RDA as it applies to native title. The law of Australia will then say: it is illegal to discriminate against people on the grounds of race, except that some discrimination against Aborigines in the native title context is permitted. Secondly, State laws which discriminate against Aborigines in the native title context may be consistent with the new NTA, not inconsistent with it, and therefore no longer unconstitutional on inconsistency grounds.

Racial discrimination in the Bill

It is easy to assert racial discrimination, but it is important to identify exactly how it occurs. The extent to which the Bill discriminates against native title holders may be measured in a number of different ways.

First, a law is discriminatory if it *prefers the rights of non-Aborigines over those of Aborigines*. It is unusual in Australian law for private property rights to be removed or suppressed for the benefit of other private landowners. Normally, private property rights are acquired in the public interest (as occurred with private coal in New South Wales). However, the Bill benefits other landowners by extinguishing some unextinguished native titles, and by giving preference to 'intermediate period acts', 'primary production activities' and private water and fishing rights over the native title which those activities suppress. The Bill's 'title upgrading' provisions extend in time the preference given to other landowners over native title holders in the NTA. Its 'third party compulsory acquisition' provisions (also in the NTA) are open to discriminatory administration—they are designed to allow the acquisition of native title to benefit other landowners, and

are highly unlikely to be used to acquire other titles in order to benefit native title holders.

Secondly, a law may be discriminatory if it *fails to provide the property rights of Aborigines with protection approaching the protection given other landowners*. The Bill does this in a number of ways. For example, the Bill's 'confirmation' of past extinguishment, validation of 'intermediate period acts', expansion of 'primary production activities' and privileging of private water and fishing rights are achieved without native title holders' consent, in circumstances where other landowners' consent would have been sought. In the case of validation of 'intermediate period acts', native title holders' compensation entitlements may be set at a discriminatory level. The Bill authorises on native title land mining and fossicking which would not be permitted on private land, but deprives those native title holders of both landowner objection rights and the RTN. Similarly, native title holders whose RTN is cut off by Ministerial intervention are denied both sets of objection rights. As noted, the Bill allows discriminatory treatment of native title holders whose rights relate to water. And it imposes a sunset clause about half the length of the shortest period for time-limited property claims (adverse possession claims) under State Limitation Acts. The Bill sometimes *requires native title to be treated like an inferior right to land*. This is the case under those amendments which allow substitution of the RTN by State laws applicable to current or former non-exclusive freehold, leasehold or public use reserves. It is also the case under amendments allowing the use for 'primary production activities' of 'off-farm' land subject to native title.

Finally, discrimination should also be measured by the Bill's *failure to provide 'substantive equality' via appropriately different treatment of unique aspects of Aboriginal culture*. A RTN is an appropriate response to the special relationship between Aboriginal people and land. Its time-frames should make some concessions to the slowness of Aboriginal decision-making processes, and its content should reflect something of the Aboriginal sense of obligation to land and the need for participation in traditional land's management. The right should not be made inaccessible by an unduly strict registration test or rendered meaningless by Ministerial intervention. Nor should it be wound back by reference to non-Aboriginal concepts of land's history or significance (for example, the distinction between towns and other areas or the distinction between land previously reserved or alienated and other Crown land). Similarly, protection of the inter-tidal zone should reflect something of the significance of that area to Aboriginal people, not its (in)significance in non-Aboriginal culture.

Taking non-discrimination seriously

Australia's international law obligations dictate that these discriminatory provisions of the Bill are not enacted, especially when indigenous groups object to them. Further, even if the present NTA does provide 'equality' in the international law sense, Parliament could provide better for the non-discriminatory treatment of native title—in ways which are efficient from the public policy point of view.

For example, Parliament should abolish altogether (for the past as well as for the 'future') the racially discriminatory common law rule that native title has been extinguished forever by grants of inconsistent titles to the same land. This rule could be replaced, as it has been for the 'future', by the 'non-extinguishment' principle. (As noted below, the common law rule provides an inappropriate starting point for consideration of how native title should be treated in the 1990s.) Obviously, however, an amendment of this kind would be the complete opposite of the proposed re-definition of 'extinguish' in the Bill.

It is also desirable that Parliament (or State Parliaments) legislate to transfer ownership of Crown land over which native title claims are likely to be successful to its native title holders. Automatic land transfers of this kind would avoid the need for costly mediation and litigation, could provide titles which are better protected than native title, may relieve Aboriginal pressure for recognition of native title to other nearby areas, and could establish in advance the management terms for areas of environmental or other significance. Land transfers would not relieve governments of the obligation to consider whether native title claims to other areas should be acceded to, but would provide a just starting point for the national negotiation of native title.

The Bill's constitutionality

The Bill's constitutionality is also the subject of intense public debate. That debate relates mainly to the nature of the power conferred on the Commonwealth Parliament by the 1967 constitutional referendum on the 'Aborigines' question. However, it also touches on questions of whether the Bill provides 'just terms' compensation. Further, some commentators have argued that enactment of the Bill will bring about the unconstitutionality of the RDA under the Commonwealth Parliament's 'external affairs' power.

The 'races' power and the 1967 referendum

The government relies mainly on this power for the constitutionality of the NTA as amended by the Bill. The Constitution section 51(26) gives Parliament power to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'. Before 1967, this power did not extend to 'the aboriginal race in any State', but these words of limitation were removed by the 1967 referendum.

Intentions behind the 1967 referendum

There is little doubt that, in political terms, the change brought about by the 1967 referendum was one designed to benefit Aboriginal people. This is reflected in the unofficial 'vote Yes' campaign material and in contemporaneous media commentary. It is also clear from the official 'case for Yes' put to the electorate (there was no 'case for No', the proposed change having secured the support of all members of Parliament), although less clear from the Prime Minister's second

reading speech on the *Constitution Alteration (Aborigines) Act* 1967 (Commonwealth of Australia 1967; Attwood et al. 1997).

In 1967, the 'Aborigines question' was actually two questions—the question relating to amendment of section 51(26), and another relating to the removal of section 127, which prevented Aboriginal people being counted in the census for political purposes. Further, the 'Aborigines question' was the second of two put to the electorate. The first—a proposal to break the nexus between the numbers of members of the House and the Senate—was defeated, indicating that the 'electors were more than capable of distinguishing between the issues presented to them' (Attwood et al. 1997).

High Court interpretation of the 'races' power

Despite the intentions behind the 1967 referendum, many High Court judges seem to have interpreted the Commonwealth's 'races' power as one which authorises both discrimination in favour of Aboriginal people and discrimination against them, and to some extent the government relies on this view for the Bill's constitutionality. The issue is far from clear, however, because since 1967 the Commonwealth has not passed a law which the Court has been prepared to say discriminates against Aboriginal people. (Most Commonwealth 'Aboriginal affairs' laws since 1967 have been 'beneficial'. Only the 'past acts' provisions of the present NTA have discriminated against Aboriginal people, but the High Court tolerated these provisions in the context of legislation which was said to benefit Aboriginal people in its overall operation (*WA v Commonwealth* (1995) 183 CLR 373).

However, several judges have hinted that in future they might interpret the 'races' power (at least as it applies to Aboriginal people) as a power to make laws which benefit Aboriginal people only.⁶⁰ The constitutional question for the Court could well become: 'could Parliament reasonably have determined that the Act as amended benefits Aboriginal people'? If the answer is 'yes', the amended Act will be constitutional, even if the judges would have assessed the issue of 'benefit' differently.

Measuring 'benefit': a 'beads and blankets' approach?

The real question (one overlooked by many commentators) is: if the judges do interpret the power in this manner, what definition of 'benefit' will they use? What should the Bill be measured against in order to assess whether it is beneficial?

In the 1995 challenge to the constitutionality of the NTA, the judges seemed to measure 'benefit' against the background of the racially discriminatory common law (which says native title may be extinguished by unilateral government action, including the grant of an inconsistent title to someone else, but which only permits the extinguishment of other titles under 'compulsory

acquisition' legislation). Despite the presence in the Act of other beneficial measures (such as the Land Fund), the judges seemed to regard the main 'benefit' conferred by the NTA to be its removal of native title's common law vulnerability to extinguishment (*WA v Commonwealth* (1995) 183 CLR 373).

There are a number of ways in which the Act removes that vulnerability (for example, it does so by introducing the 'non-extinguishment principle' but also by preventing the grant of many titles over native title land on the 'freehold standard'). However, it may be that legislation which merely limits, rather than removes that common law vulnerability will also be considered 'beneficial' by the High Court. The fact that the Bill preserves the present 'non-extinguishment principle' may be enough to see it characterised as 'beneficial', simply because it improves on the common law position, under which native title may be extinguished forever by at least some inconsistent grants.

Such an approach to 'benefit' is undesirable from a policy point of view. Removal of the common law vulnerability of native title to extinguishment has already been achieved by the RDA (*Mabo v Queensland (no 1)* (1988) 166 CLR 186 and *WA v Commonwealth* (1995) 183 CLR 373). There is no need for further legislation to achieve such a 'benefit', unless that legislation achieves other ends (as, arguably, the NTA does). Those ends should be beneficial by comparison with the position of equality brought about by the RDA, not 'beneficial' by reference to the discriminatory common law—a standard more appropriate to the 1960s than the 1990s.

Even on the narrow standard of 'benefit' (benefit as compared to the common law position), some parts of the Bill appear unconstitutional. For example, the 'confirmation of extinguishment' provisions place native title holders in a position worse than their position under common law. So do those parts of the 'past acts' regime under which pastoral leases granted after 1975 but before 1994 extinguish native title completely. While such provisions were tolerated by the High Court in 1995 in the wider context of a largely 'beneficial' measure, they are unlikely to be tolerated in the context of a much more discriminatory amended NTA.

Other possible approaches to 'benefit': non-discrimination or consent

There are other ways in which the High Court could measure 'benefit' for the purposes of the 'races' power. It could take into account the international law standards, although it has largely shied away from doing so in constitutional cases (as opposed to cases in which it is asked to 'develop' the common law or interpret legislation) (but compare the views of Justice Kirby in *Newcrest v Commonwealth* (1997) 147 ALR 42). It could take into account the background provided by the RDA, although it refused to do so when assessing the constitutionality of the NTA in 1995.⁶¹ The Court does not normally assess the constitutionality of one Commonwealth law by reference to the existence or content of another—unless the first is an explicit amendment of the second, when

it considers the constitutionality of the amended law as a whole. An approach under which the Court assesses the constitutionality of legislation by reference to other legislation is likely to be considered too intrusive of Parliament's 'sovereign' right to repeal and amend its own laws.

However, it may be that the Court can assess the issue of 'benefit' by reference to the question of whether the Bill meets with notional indigenous 'consent'. The present NTA was enacted after 'unprecedented negotiations' with Aboriginal 'representatives' (Commonwealth of Australia 1993). As in other contexts, the Court may be able to develop a concept of constructive Aboriginal consent which it determines has been met in the case of a law relying on the 'races' power (compare Justice Brennan in *Gerhardy v Brown* (1985) 159 CLR 70). Such a construct would not require actual consent (which may be impossible to obtain, given the fragmented nature of the indigenous polity). However, it should involve meaningful negotiations with indigenous groups, their involvement in development of legislation, and some formal indication of approval of the legislation, at least by some indigenous groups or 'leaders', if not by all of them. The present NTA may meet these fairly low standards, but it is doubtful that the Bill does so. Only some of its provisions appear to meet with the consent of the National Indigenous Working Group.

'Just terms': section 51(31) Constitution

As noted, section 51(31) Constitution requires that Commonwealth laws which authorise the acquisition of property from any person or a State provide 'just terms' compensation. The Commonwealth Parliament may only allow the acquisition of property 'for any purpose in respect of which the Parliament has power to make laws'. This means that the government cannot rely for the Bill's constitutionality on section 51(31) alone—it needs to rely on a combination of section 51(31) and 51(26).

While it appears that the Bill provides 'just terms' compensation, some commentators have argued that 'just terms' requires fairness in procedures (Commonwealth of Australia 1997f). For example, it might be said that native title holders whose title is extinguished retrospectively by the 'confirmation of extinguishment' provisions have been denied proper notice of that acquisition (indeed, they can never be given that notice, since the extinguishment is deemed to have occurred at the time of historical land dealings). Similarly, despite the six-year 'future acts' compensation sunset clause, the Bill contains no procedure by which native title holders can be notified of the suppression of their title by a permitted 'future act' which does not attract the RTN (such as a 'primary production activity').

If these arguments are accepted by the High Court, their effect will be to invalidate those parts of the NTA as amended by the Bill which provide for the extinguishment or suppression of native title without proper notice.

Constitutionality of the RDA

If the NTA (itself an implied amendment of the RDA) is amended so as to allow discriminatory treatment of native title, some commentators argue that this will make the RDA unconstitutional. The RDA relies for its constitutionality on being a 'proportionate' implementation into Australian law of the International Convention on the Elimination of All Forms of Racial Discrimination under the Commonwealth Parliament's 'external affairs' power (s 51(29) in the Constitution).

Discriminatory amendments to the NTA will lead to a loss of 'proportionality' between Australian law and the international standard. The new 'disproportionality' could be the subject of complaints to United Nations Committees. However, if it is the subject of a constitutional challenge, difficult questions arise. First, it is not particularly clear that the High Court can determine the constitutionality of an Act (the RDA) by reference to other legislation which merely repeals it *by implication*, rather than expressly. Secondly, unless the High Court interprets the 'races' power 'beneficially', the only result of such a constitutional challenge would be the unconstitutionality of the RDA. The amended NTA would still stand as an exercise of Parliament's power to make laws discriminating against Aboriginal people.

Constitutional challenges and uncertainty

One thing is clear. If the Bill is enacted, it will be the subject of immediate constitutional challenge by indigenous groups. A challenge based on the 'races' power may be successful in 'knocking out' at least those provisions of the amended NTA which place native title in a worse position than under the common law, and could result in more extensive unconstitutionality of the legislation. It is not clear whether a 'just terms' challenge to the extinguishment and suppression provisions would be successful.

Whatever decision the High Court makes on the issue, uncertainty about the Bill's constitutionality will generate more uncertainty about titles and other rights which depend on it. Even if the Bill is enacted in 1997, this uncertainty is unlikely to be resolved before the end of 1998, when any High Court decision could be expected.

Conclusions

Wik did not create 'uncertainty of title' for affected pastoralists. However, it did raise important practical questions about the exercise of coexisting pastoral and native title rights, and legal questions about the future expansion of pastoral activities. Any 'uncertainty of title' stemming from the decision relates to titles (mainly mining tenements) granted over coexisting native title on pastoral leasehold after the NTA's commencement where governments have failed to observe RTN procedures.

The Bill responds to post-Wik uncertainty in several ways:

- i. By extinguishing altogether some native titles, at public expense. These 'bucketloads of extinguishment' do not generally flow from the grant of pastoral leases, but from other events in the land's tenure history (for example, the proclamation of stock routes or the 'vesting' of statutory reserves). Complete extinguishment may also be brought about where pastoralists are entitled under State law to 'upgrade' to freehold.
- ii. By ensuring that partial extinguishment of native title on pastoral leases is permanent, and by allowing the States to authorise an enormous expansion in permitted 'primary production activities' on pastoral leases, at public expense. These uses will not technically involve an upgrade to freehold title, but may effectively allow the land's use as if it were freehold. Native title will not technically be extinguished by these expanded uses, but will be effectively extinguished because it will be permanently suppressed by them.
- iii. By allowing the validation of mining tenements granted over coexisting native title on pastoral leasehold in defiance of the RTN, at public expense. While validation provides 'certainty' for those miners who were powerless to prevent governments acting beyond the law, it rewards those governments which did so, penalising the Western Australian government (which engaged in technical compliance with the NTA after 1995) and miners in that State.

Since the quantum of extinguishment or suppression compensation payable by the Commonwealth must provide 'just terms', and since in most cases the States and Territories are required to provide similar compensation, the financial cost of enacting the Bill is unknown and probably unknowable. This cost may have significant political consequences: as the example of private coal in New South Wales illustrates, future governments may be tempted to unravel extinguishment where compensation costs prove too high, producing greater uncertainty as to the location of native titles.

The Bill contains many provisions unrelated to Wik. It preserves, anomalously, the negotiated NTA position of pastoral leases granted after 1975 and before 1994, allowing these pastoral leases (but not similar leases granted earlier or later) to extinguish native title completely. Its 'primary production' provisions allow the use of adjacent native title land without consent by all kinds of farmers and lessees. Its 'management of water and airspace' provisions are a thin disguise for discriminatory treatment of native title to these resources, apparently because the non-discriminatory management which the NTA allows is not sufficient for State governments accustomed to respecting only private rights which they have granted.

The present NTA's 'freehold standard' will retain a minor role in post-Wik land management under the Bill. However, this standard is redefined to allow on native title land some activities characteristically not permitted on freehold. This new formal discrimination adds to the existing possibility of the 'freehold standard' being administered in a discriminatory way—to allow the compulsory acquisition of native title to benefit other landowners, but not the compulsory

acquisition of other titles to benefit native title holders. Further, the availability of an increased range of permitted exceptions to the 'freehold standard' will marginalise its overall importance. The importance of ILUAs is similarly marginalised.

Under the Bill, native title holders will enjoy no RTN in relation to most minerals or petroleum exploration (including that which impacts adversely on the spiritual aspects of community life) and in relation to alluvial mining. The RTN will be displaced from mining where it has been exercised at the exploration stage, and will not apply in towns, cities, the 'inter-tidal zone' or to the sites of 'infrastructure facilities', even where those areas are significant for Aboriginal people. The application of the RTN may be reduced dramatically by its substitution by State government 'alternative provisions' which treat native title in the mining context like neighbouring interests to land—no matter how weak those interests are. The 'alternative provisions' will be capable of substituting for the RTN on all but the very small percentage of Crown land which has never been alienated or reserved for public use, leaving native title holders with few rights to participate in land management. As foreshadowed in 1996, the reformed RTN will provide only one month for negotiations, and will be subject to Ministerial override at the negotiation and arbitration stage, as well as after those processes are complete.

A further blow to native title parties' participation in land management will be effected by a combination of retrospective changes to the claims registration test and imposition of a claims sunset clause. The registration test is so tightly drafted that few claims will be registered, with the result that only people who prove and register their native title will obtain the RTN. While RTN processes which have commenced on pre-June 1996 claims are maintained, these may be relevant only to less than half of the claims made in Western Australia. Further, it appears that the State government could avoid even these preserved 'old Act' RTN processes. In the future, claimants who delay lodging their claims for more than six years—to allow resolution of internal political disputes (including those over succession to land) or proper anthropological research—may find themselves in the invidious position of having to make their claims in the State courts, without access to the RTN, and having to seek heritage-based injunctions to protect their title from interference.

Further uncertainty arises from the possibility that at least some of the Bill's provisions are unconstitutional, and that many of them will excite negative international interest because they offend international human rights standards.

Constitutional uncertainty arises from the possibility that the High Court will interpret the power conferred on Parliament by the 1967 referendum as one which authorises only laws which benefit Aboriginal people and Torres Strait Islanders, not laws which discriminate against them. While 'benefit' might be measured on a 1960s standard—the fact that the NTA as amended by the Bill removes some of the discriminatory vulnerability of native title under the common law—not all of the Bill's provisions meet even this limited standard. Further, the

Court may measure 'benefit' differently—insisting on a level of benefit which does not fall below that provided by the RDA, or a concept of benefit which involves at least notional indigenous consent. On either of these latter standards, few parts of the Bill will be constitutional. It may be that some parts of the Bill would also be unconstitutional because they fail to provide 'just terms' in procedures where native title is acquired.

There is no doubt that the Bill is inconsistent with the international law standards embodied in the RDA. Even if this inconsistency does not raise constitutional issues, it does raise international law issues—and important questions about the credibility of assertions that the Bill and the RDA are consistent. The Bill infringes formal standards of non-discrimination (those which insist that things which are relevantly the same be treated the same) by preferring the rights of non-Aborigines over those of Aborigines, and by failing to provide protection for native title which even approaches the protection of other titles, in some cases insisting that native title be treated like inferior rights to land. In diminishing the protection accorded native title, the Bill effectively re-defines its content as a set of rights:

- less than freehold;
- capable of being assimilated to neighbouring rights;
- which allow its holders to roam around land but do not amount to 'real' property;
- over which the holders have no real control; and
- which can be redefined to reflect the political *status quo* between native title holders and coexisting landowners.

The Bill also infringes substantive standards of non-discrimination by failing to provide appropriately different treatment for unique aspects of Aboriginal culture, in particular the religious basis of land ownership, with its insistence on ongoing responsibility of people for land.

This discrimination could generate successful complaints to United Nations human rights bodies, with associated negative international attention. Further, although international law will not prevent Parliament enacting the Bill, the Bill will operate as an implied repeal of the RDA. Assertions about the 'consistency' of the Bill and the RDA should be assessed in this context: the two will only be consistent because the Bill runs down the RDA standard, allowing discrimination against Aboriginal property rights under both Commonwealth and consistent State and Territory laws.

To encourage genuine non-discrimination—as opposed to opportunistic political use of non-discrimination law concepts—the Commonwealth Government should withdraw the Bill and commence meaningful negotiations with indigenous groups regarding future amendment of the NTA. There are some points of agreement from which to start:

- the claims registration test needs to be made stricter;

- indigenous land use agreements are desirable; and
- pastoralists and agricultural lessees may need some legislative guarantee that their leases authorise ordinary pastoral and/or agricultural activities.

Other useful starting points would be provided by:

- abolishing altogether the common law rule of permanent extinguishment;
- effecting (by negotiation with representative bodies) immediate transfers of identified Crown land to its native title holders on more secure Crown-granted titles designed to coexist with native title, much as land has been transferred to Aboriginal land trusts under Schedule 1 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). These land transfers could be made subject to agreed management and use regimes.

In the longer term, a non-discriminatory approach to amendment of the NTA which seeks at least notional indigenous consent is likely to produce less 'uncertainty' than the present Bill. Not only would such an approach identify ways of minimising compensation costs, but it would place the validity of the Bill within the control of the Parliament, not the High Court.

Notes

1. 'Uncertainty' is an imprecise term. It suggests an element of insecurity of title, or an element of 'sovereign risk' relating to regulation of a title's uses. But neither meaning applies to pastoral leases after Wik. The rights and obligations conferred and imposed by pastoral leases are the same in 1997 as in 1996. Leases' value is the same now as before Wik.
2. In Wik, the majority held that a pastoral lease extinguishes native title to the extent of inconsistency between the two. This means that coexisting native titles on pastoral leases are unlikely to be full native titles. However, an emphasis on the limited nature of coexisting rights may underestimate the importance of continuing land-related obligations for Aboriginal people whose country is held by a pastoralist. It may be that a coexisting native title is much fuller than the government anticipates, because of its underlying land-related obligations.
3. Pastoral leases are not granted over freehold, and thus involve discriminatory treatment of native title holders by comparison with freeholders. The NTA allows renewal of existing pastoral leases but prohibits future lease grants over native title land. It prohibits future expansions by governments of pastoral lease terms, because such expansions would not be allowed over freehold. Only a freeholder may grant a lease of freehold for pastoral purposes. The terms of such a lease are largely a matter for private agreement, subject to overriding environmental or other land use controls.
4. With many exceptions, the NTA's 'future acts' regime employs a 'same treatment as freehold' standard for land management. Mining is permitted on native title land where it is permitted on freehold. The special RTN is intended to provide a rough equivalent of landowner objection rights under state mining law and state compulsory acquisition laws. Titles granted in breach of these provisions are invalid: ss 22 and 28.
5. Those governments argue that they acted on the 'orthodoxy' that pastoral leases had extinguished native title completely. But this 'orthodoxy' was over-stated. It was always arguable, based on *Mabo v Queensland (no 2)* (1992) 175 CLR 1, that pastoral leases had only partially extinguished native title. The 'orthodoxy' has been employed politically to ensure that any High Court decision to the contrary could not survive.
6. The possibility that native title is not extinguished permanently by the grant of pastoral leases, but merely suppressed by those grants, was raised by Justice Toohey in Wik.
7. 'Agricultural leases' include aquacultural leases: prop s 247.
8. See generally Schedule 2 amendments requiring claims to be commenced in the Federal Court and then referred for mediation to the NNTT. These are made necessary by *Brandy v HREOC* (1995) 183 CLR 245. Prop s 27(3), which prevents judicial members of the NNTT from sitting on RTN matters, is made necessary by *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220.
9. The Bill's discriminatory provisions are out of step with its preservation of s 7, which provides that only those parts of the Act relating to 'validation' of other titles are

intended be inconsistent with the RDA. It is difficult to see how the integrity of s 7 can be preserved under the Bill.

10. The Bill operates directly on 'previous exclusive possession acts of the Commonwealth' only. It permits States and Territories to enact their own laws 'confirming' the extinguishment of native title by their own 'previous exclusive possession acts': prop s 23E.
11. A 'previous exclusive possession act' includes the construction or establishment of a public work: prop s 23B(7). The Bill expands the present definition of 'public work' (buildings and other fixtures, roads, railways, stock routes or major earthworks constructed or established by the Crown or a statutory authority) to include memorials, wells and bores, and to extend to things done by or on behalf of local government: prop s 253. The definition of 'public work' is further expanded by prop s 251D: land on which public works are constructed includes adjacent land 'the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work', for example road reserves.
12. Under the Bill, all native title claims and compensation claims will need to be commenced in the Federal Court, not the NNTT. See prop ss 13 and 61.
13. Not all such leases appear to be covered by prop s 23B(9), which exempts from the definition of 'previous exclusive possession act' grants or vestings of land under legislation benefiting Aboriginal people and Torres Strait Islanders.
14. 'Past acts' are defined in the present Act as land dealings done mainly before 1 January 1994 which were invalid because of the existence of native title: see s 228. The main possible source of invalidity of those dealings is the operation of the RDA on State land laws via s 109 Constitution. Thus 'past acts' consist mainly of those discriminatory State land dealings which occurred after 31 October 1975 but before 1 January 1994. 'Past acts' are validated by the NTA s 14 and parallel State laws.
15. See ss 229-232 and proposed Division 2A of Part 2, s 15 and prop ss 232A-232D.
16. Prop s 23C(3) provides that the 'effect of validation on native title' provisions in s 15 and prop s 22B do not apply to 'previous exclusive possession acts'.
17. Non-exclusive agricultural leases are in the same position. Other leases which are 'category A past acts' under the NTA are 'previous exclusive possession acts' under the Bill. Under both, they completely extinguish native title.
18. The Deputy Prime Minister, Mr Fischer, used this expression to describe the 'ten point plan'.
19. Private rights to coal had arisen because of early grants of the mineral along with the land. While coal was reserved from later land grants, coal already granted was not re-acquired by the Crown before 1981.
20. The constitutional requirement to pay just terms for the acquisition of property applies to the Commonwealth but not to the States.

21. Information provided by the Coal Compensation Board. In 1990, the Board found coal miners were encouraging private coal restitution to take advantage of a gap in royalty rates payable for publicly owned and some privately owned coal (NSW Coal Compensation Board 1996).
22. The 'validation' regime in the Bill involves 'acts attributable to the Commonwealth'. A State or Territory may validate 'intermediate period acts' attributable to it. Although 'previous exclusive possession acts' done between 1 January 1994 and 23 December 1996 will extinguish native title under the Bill, this alone will not necessarily make them valid. Those dealings still require validation as 'intermediate period acts' to overcome their breach of the NTA.
23. Note that there is no requirement that this *previous* grant have occurred before commencement of the NTA. A 1996 mining lease granted over an area first granted (illegally) as freehold in 1995 will be an 'intermediate period act'.
24. A 'non-exclusive' pastoral lease is a 'category B intermediate period act': prop s 232C. Such acts extinguish native title to the extent of inconsistency between them: prop s 22B.
25. In *Newcrest v Commonwealth* (1997) 147 ALR 42, 'just terms' compensation was payable for the regulation out of existence of property. The constitutional guarantee thus appears to apply to suppression and extinguishment of native title, including by the grant of a mining lease.
26. Prop s 22D states that native title holders are entitled to 'compensation' for an intermediate period act done by the Commonwealth. Prop s 22G provides that native title holders are entitled to 'compensation' for an intermediate period act validated by State or Territory law. However, the quantum of compensation payable by the State or Territory is not specified. It is not required to be calculated, as other compensation is calculated, under Division 5 of Part 2 of the NTA. It is apparently not required to reflect the compensation payable to other landowners whose land is the subject of tenement grants.
27. While the Bill continues to 'preserve' the operation of the RDA for the 'future', it provides that this 'preserved' operation 'does not affect the validation of past acts or intermediate period acts': prop s 7(2).
28. Prop s 24OA. Activities done in reliance on valid future acts prevail over native title and do not of themselves give rise to compensation entitlements: prop s 44H.
29. It is not clear what 'corresponding' rights are—statutory fishing rights?
30. ILUAs involving only registered native title holding bodies are easier to register than those involving other native title parties. Registration binds the parties and non-party native title holders: prop s 24EA.
31. Compensation relating to 'primary production activities' and enforceable title upgrades and renewals is payable by governments. While compensation for 'acts which meet the freehold standard', may be displaced onto the person benefiting from the grant, this is

explicitly outlawed in the case of compulsory acquisition of land for the purposes of upgrading a 'non-exclusive' pastoral or agricultural lease: prop s 24MD(4) and (5).

32. The Tax Act definition does not cover non-commercial activities, agistment, destocking and leaving land fallow. Its definition of 'forest operations' encompasses removal of trees.
33. These provisions encompass 'living aquatic resources', 'surface and subterranean water' and airspace.
34. Virginia Newell's honours research drew my attention to this provision (Newell 1997).
35. Under the NTA, a 'permissible future act' is one that applies in the same way to native title holders as to (hypothetical or real) freeholders in the land, or one which does not have the effect of causing the native title holders to be in a more disadvantageous legal position than (hypothetical or real) freeholders: s 235(2). Thus, even if the *Water Resources Act 1997* only impacted on native title rights to water (other common law rights having been abolished at some time in the past), it would not be 'discriminatory' on the 'same treatment as freehold' standard. It could only be discriminatory if it singled out for extinguishment native title rights and left intact other common law rights.
36. The 'freeholding' of a pre-1994 Queensland pastoral lease granted over native title land is permitted by the NTA. This is understandable, given the late 'discovery' of native title by the High Court in 1992. However, the Bill would permit the freeholding of a post-1994 Queensland pastoral lease granted over native title land, despite the fact that in 1994 the existence of native title was well known, as was the fact that Commonwealth law prohibited the grant of pastoral leases over native title land without native title holders' consent.
37. Assuming that Subdivision H does not operate before 23 December 1996.
38. The present claims 'registration test' involves no more than lodgment of a claim with the Registrar.
39. Note that the relevant impact is the impact on the land itself, not the impact on native title over the land. While exploration which impacts significantly on land is likely to have a significant impact on native title, the two impacts are not identical (exploration which has a significant impact on the traditional use or significance of land may not necessarily have a significant physical impact on it). This identification of native title purely with the physical landscape seems to draw on outdated ideas about Aboriginal people being part of the natural environment, rather than actors in it.
40. The Bill revises the expedited (that is, 'no negotiation') procedure to allow governments to withdraw their proposed use of the procedure, or to allow native title parties to withdraw their objections to its use. These provisions seem to provide a formal basis for an earlier practice: the resolution of RTN issues relating to exploration by private agreement.
41. Native title parties and the proposed tenement holder are to be given a chance to make submissions and one week to apply to submissions from the other party.

42. These boundaries are defined by a 1979 planning regulation preserved by the *Planning Act 1993* (NT). However, the definition of 'town or city' under the Bill refers to other legislation.
43. While mining is not always permitted in national parks, exploration is sometimes permitted. Further, whether or not exploration or mining is permitted depends (outside of the Northern Territory and the Great Barrier Reef) on State law.
44. These provisions are distinct from the 'alternative provisions' referred to in prop s 43, which reflect the RTN itself. Such confusing terminology (one term referring to two different concepts) is unusual in Commonwealth statutory drafting.
45. As noted, while the Commonwealth Parliament is subject to a requirement that it provide just terms in laws allowing the acquisition of property, this requirement does not apply to the States. It is not particularly clear whether it can 'carry over' to the level of State action permitted by a Commonwealth law (like the NTA) which sets the terms under which property may be acquired or suppressed under state law.
46. Thanks to Sean Brennan for drawing this defect to my attention.
47. Registered native title bodies corporate also enjoy the RTN. However, native title claims may be difficult to prove if the Federal Court applies the rules of evidence: prop s 82.
48. Note that, because the RTN does not apply in the offshore, there may already be little incentive for registration for an offshore claim.
49. The overlap needs to involve two claims registered under the new registration test, not the virtually non-existent registration test in the present Act.
50. The date on which the Native Title Amendment Bill 1996 was introduced into Parliament.
51. In an approach which may not provide complete accuracy, I have counted claims as having been 'made' before 27 June 1997 if they were accepted by the Tribunal by that date. The NNTT's *Timeline* records that, at 4 November 1997, 664 'claimant applications' had been made but 36 withdrawn, 13 rejected and one (Dunghutti) determined. However, 135 claims were recorded as 'not yet accepted'. I have counted these latter claims as 'live' claims on the assumption that they would be accepted under the present registration test.
52. These processes could include those relating to proposed grants of exploration tenements, as well as mining tenements, as s 29 notification is presently required in both cases. The Western Australian government has generally sought to use the 'expedited procedure' (s 32) to effect exploration grants. That 'procedure' allows the RTN to be avoided altogether. Since 1995, most exploration tenements have been granted under this 'procedure'. However, where native title parties object to the use of that 'procedure', as they increasingly have done, the NNTT must rule on whether it should be used. In Western Australia, the NNTT has had to consider 642 Aboriginal objection applications, about 80 of them lodged before June 1996. Where those applications have not been withdrawn and the NNTT has ruled that the 'expedited

procedure' does not apply, these pre-June 1996 RTN processes will also be preserved by the Bill.

53. 'Traditional activity' means hunting, fishing, gathering or camping, performing 'rites' and other ceremonies and visiting sites of significance, 'but only if it is carried on for traditional purposes of Aboriginal people or Torres Strait Islanders': prop s 44A(4).
54. The NTA allows approval of such bodies: s 251. The Bill would amend this provision and renumber it 207A. New s 207A, like present s 251, does require the Commonwealth Minister to be satisfied that '(2)(a) any procedures under the law of the State or Territory for... approved determinations of native title by the body... will be consistent with those set out in this Act' (the Bill adds 'as in force either before or after the commencement of... [the Bill as enacted]'). An argument *might* be made that this requires imposition of a sunset clause at the State or Territory level, but it seems unlikely that this is how prop s 207A(2)(a) operates.
55. This would mean that people who could not prove their claims within six years would be entitled to 'just terms' compensation for the effective 'acquisition' of their common law property rights after six years. If the sunset clause did operate in this way, s 53 of the NTA would provide the necessary 'just terms', increasing the overall compensation payable under the Bill.
56. Prop s 190 no longer requires registration of claims of which the Registrar is notified by the High Court. Prop s 189 no longer obliges the High Court to provide such notification.
57. Another important standard—self-determination—is more contested in its application to indigenous people and not capable of being 'enforced' by individuals before United Nations Committees. Other standards—such as those in the Draft Declaration on the Rights of Indigenous Peoples—are emerging standards to which Australia is not yet a party.
58. Racial discrimination is outlawed, and racial equality required, by the Convention, to which Australia has been a party for more than 20 years. However, some commentators suggest that racial non-discrimination is of such fundamental importance in international law that it exists independently of the Convention, in international 'customary' law.
59. University special entry schemes and training programs might be characterised as temporary, catch-up measures aimed at delivering the same educational standards to all Australians. But it is more difficult to classify apparently permanent services (policing, legal and health services) which respond to the uniqueness of Aboriginal and Torres Strait Islander communities as 'special measures'. Land rights and heritage laws not only appear to be permanent, but respond to the unique relationship between indigenous people and land. They do not aim at an assimilationist standard of equality, but rather at one which accommodates cultural difference.
60. See former Justice Deane in *Commonwealth v Tasmania (Tasmanian Dam case)* (1983) 158 CLR 1 at 273, Justice Gaudron in *Lim v Minister for Immigration* (1992) 176 CLR 1 at 56 and *Kruger v Commonwealth (the 'Stolen Generations' case)* (1997) 146 ALR 126

at 193. See also comments by Justice Gummow in *Kruger* at 228 and Chief Justice Brennan in the transcript of hearing of *Kartinyeri v Commonwealth* (the challenge to the *Hindmarsh Island Bridge Act 1997*), 3 September 1997.

61. 'The constitutional character of the NTA is not to be determined by reference to the regime established by the RDA, much less by reference to an estimate of whether it was necessary to replace it': *WA v Commonwealth* at 463.

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