Native Title Report

2002

Aboriginal & Torres Strait Islander Social Justice Commissioner

Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Attorney-General as required by section 46C(1)(a) Human Rights & Equal Opportunity Commission Act 1986.

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Artist Acknowledgement

The artwork reproduced on the cover is *Galaxy Gateways* by Bronwyn Bancroft, an Aboriginal artist and designer whose artworks have been collected by galleries and museums throughout Australia, in the USA and Germany. Exhibitions of her art have been shown in Australia as well as in Indonesia, New Zealand, the USA, France and Germany. A descendant of the Bundjalung people of New South Wales, Bronwyn grew up in the small country town of Tenterfield. She now lives in Sydney with her three children.

Bronwyn Bancroft states that: 'I painted a series of works in 2001, titled *Galaxy Gateways*. This image is one of that series. It is my visual search for truth about Aboriginal land and its place in history, as we are constantly reminded that the Universe holds the key to millions of questions'.

We thank Bronwyn for granting us permission to reproduce the painting. Copyright is held by the artist.

About the Social Justice Commission logo

The right section of the design is a contemporary view of a traditional Dari or head-dress, a symbol of the Torres Strait Islander people and culture. The head-dress suggests the visionary aspect of the Aboriginal and Torres Strait Islander Social Justice Commission. The dots placed in the Dari represent a brighter outlook for the future provided by the Commission's visions, black representing people, green representing islands and blue representing the seas surrounding the islands. The Goanna is a general symbol of the Aboriginal people.

The combination of these two symbols represents the coming together of two distinct cultures through the Aboriginal and Torres Strait Islander Social Justice Commission and the support, strength and unity which it can provide through the pursuit of Social Justice and Human Rights. It also represents an outlook for the future of Aboriginal and Torres Strait Islander Social Justice expressing the hope and expectation that one day we will be treated with full respect and understanding.

Human Rights and Equal Opportunity Commission

21 January, 2003

The Hon Daryl Williams AM QC MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney,

I am pleased to present to you the *Native Title Report 2002*.

The report is provided in accordance with section 209 of the *Native Title Act 1993*, which provides that the Aboriginal and Torres Strait Islander Social Justice Commissioner submit a report regarding the operation of the *Native Title Act* and its effect on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders.

This year's report discusses recent native title decisions and examines the effect of these findings in relation to the human rights of Aboriginal and Torres Strait Islanders.

Yours sincerely,

W. Jonas

Dr William Jonas AM
Aboriginal and Torres Strait Islander
Social Justice Commissioner

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Introduction

The year under review in this, my fourth Native Title Report, is a year in which the High Court has handed down its decision in several significant native title cases thus elucidating the principles upon which the recognition and extinguishment of native title are determined. 2002 marks the end of a ten year period since the *Mabo* decision[1] first introduced the dual concepts of recognising and extinguishing native title. For ten years the interpretation of their meaning has proceeded in the courts, first through submissions to and decisions by lower courts, then to the appeal process in which further arguments were tested and judged, until their final crystallisation by the High Court. These principles and their effect on the human rights of Indigenous peoples are the subject of this report.

In order to understand the effect of these principles on the day to day lives of Indigenous people it is important to relate them to the broader dialogue on Indigenous issues. This is particularly important because of the failure in Indigenous policy formulation to take native title into account when devising strategies to meet those goals where traditional land, culture and governance structures could play an integral role. Sidelining native title in this way is indicative of a broader trend in Indigenous policy-making under the rubric of 'practical reconciliation' and epitomises its failure to recognise rights as a vehicle for transforming the social and economic conditions of Indigenous communities.

My introduction to last year's Native Title Report discusses the debate, which continues to dominate the ideological battlefield, around rights and the assumptions on which that debate rests. As I indicated there, the debate fails to distinguish between two types of rights relevant to Indigenous people: citizenship rights and inherent rights. An analysis of the arguments reveal that what are actually being attacked as ineffective in halting the spiral of poverty and violence in Indigenous communities, are citizenship rights. While upholding the right of Indigenous people, like all other people, to make choices, such

1 *Mabo & o'rs v Queensland (No 2)* (1992) 175 CLR 1.

rights have not produced an improvement in Aboriginal people's lives. Yet no-one is seriously suggesting that the solution to the poverty in Indigenous communities lies in taking away citizenship rights.

As indicated in my previous Report[2] citizenship rights alone are not a tool of social change and indeed, can entrench the inequality that already exists between Indigenous and non-Indigenous people. We need to go further with rights and adopt an approach that aims to achieve substantive equality, not just formal equality, through special measures and the full recognition of Indigenous people's human rights, including their inherent right to their traditional land.

While this debate continues at an ideological level, certain agreed principles have emerged as fundamental to bringing about the changes necessary to redress the poverty that distinguishes the conditions of Indigenous people's lives from non-Indigenous.

First, it is generally agreed that for policy or legislation to redress Indigenous disadvantage, Indigenous people need to participate in its formulation and implementation. Participation does not mean consultation. Participation occurs at a fundamental level, in the final decision-making but also in the design, implementation and monitoring of the policy or legislation concerned. As Paul Briggs, a key Indigenous leader in the Shepparton area was reported as saying to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in their Inquiry on Indigenous capacity building, 'Everyone involved in Indigenous affairs needed to acknowledge the vision that Aborigines had for their own future'.[3] It is essential that the goals that non-Indigenous governments and policy makers have for the future direction of Indigenous people is filtered through the vision Indigenous people have for themselves.

Second, for Indigenous people to move out of the cycle of poverty, they need to establish, in their communities or in the areas in which they live, a sustainable economic base. This economic base must generate sufficient wealth to provide meaningful employment and move the Indigenous people driving it out of poverty. A concomitant of the development of an economic base is the development of a social and technical infrastructure necessary to sustain it. This includes a reduction in the consumption of drugs and alcohol to a level compatible with a productive working day and adequate housing, health and educational facilities.

What then does native title have to do with these necessary conditions for social and economic transformation in Indigenous communities? In order to answer this question it is necessary to understand the significance of the relationship on which native title is based, the relationship between Indigenous people and their traditional land.

The depth of this relationship is conveyed in the account in chapter 4 of the relationship between the peoples of the Western Desert and their homeland, a place where their spirit and their ancestor's spirit belong. While particular features

2 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, Human Rights and Equal Opportunity Commission, Sydney, 2002, p9.

3 The Age newspaper, 26 September 2002, p11.

of their relationship to the land may be unique it shares some important common features with the relationship that other Indigenous people around the world have with land.

These common features have been summed up in a number of informative and educative United Nations reports on the relationship of Indigenous people to their land, submitted through the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.[4] The one point on which these reports are all consistent is their recognition of the unique and fundamental relationship that Indigenous people have with their land. Professor Erica-Irene Daes tabled her final report of the study entitled *Indigenous people and their relationship to land* in June 2001.[5] Prof Daes has noted:

> Since the establishment of the Working Group on Indigenous Populations, indigenous peoples have emphasised in that forum the fundamental nature of their relationship to their homelands. They have done so in the context of the urgent need for understanding by non-indigenous societies of the spiritual, social, cultural, economic and political significance to indigenous societies of their lands, territories and resources for their continued survival and vitality. In order to understand the profound relationship that indigenous peoples have with their lands, territories and resources, there is a need for recognition of the cultural differences that exist between them and non-indigenous people, particularly in the countries in which they live. Indigenous peoples have urged the world community to attach positive value to this distinct relationship.[6]

On the basis that land continues to have a spiritual, social, cultural, economic and political significance to Indigenous people, what role does this relationship play in the key triggers identified for change in Indigenous communities: participation and economic development?

Participation. The process by which Indigenous communities participate in the development of policies and laws that seek a change in that community's direction requires an understanding of the way in which the political structures and authority that emanate from the traditional relationship of Indigenous people to land continues to shape that community. Thus, for instance, traditional owners may continue to hold authority, especially in matters of traditional law and custom, even though a range of non-traditional political structures may provide an interface between the community and the non-Indigenous system. The interaction of these levels of authority within the Indigenous community and the obligations and responsibilities associated with Indigenous decision-making at all levels need to be taken into account in order to ensure full and effective participation has occurred.

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4 E Daes, *Indigenous peoples and their relationship to land*, United Nations document number ('UN doc') E/CN.4/Sub.2/2001/21, 11 June 2001; M Martinez, *Study on treaties, agreements and other constructive arrangements between States and indigenous populations*, E/CN.4/Sub.2/1999/20, 22 June 1999; M Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, UN doc E/CN.4/Sub.2/1986/7/Add.4.

5 E Daes, op.cit.

6 E Daes, *Indigenous peoples and their relationship to land*, UN doc E/CN.4/Sub.2/2000/25, 30 June 2000, para 11.

Another important way in which the traditional relationship to land shapes the participation process is in its contribution to the definition of the geopolitical entity through which policies which seek to transform Indigenous social and economic relationships are directed, i.e., the region. Regional plans, regional agreements and regional progress must be developed with a thorough understanding of the boundaries as they are influenced by traditional law and custom. So too this understanding underlies the participation of Indigenous people in the formulation and implementation of these plans and agreements occurring on a regional basis.[7]

Economic development. The second necessary condition to transforming Indigenous communities, economic development, while often posited as unrelated, or indeed antithetical to the traditional relationship that Indigenous people have to their land, in my view, requires a thorough understanding of this relationship.

In the first place, ownership of land, including traditional ownership, can be viewed as ownership of an asset from which development can take place. This is illustrated by the recent agreements on the Burrup Peninsula which provide monetary benefits, employment and training opportunities to the native title groups in the area while at the same time protecting their heritage and culture. These types of arrangements, found between many native title claimant groups and industry, involving varying degrees of wealth and benefit, can be identified as a result of the legal recognition given to the traditional relationship that Indigenous people continue to have with their land.

However, the extent to which recognition of the traditional relationship of Indigenous people to their land can provide direct economic benefits to the vast majority of Indigenous people in Australia is limited. Not all traditional land will have inherent economic value, and not all Indigenous people can qualify as traditional owners of land entitled to the economic wealth that land may generate through a native title agreement.

There is another benefit, an indirect one but nevertheless significant, that the recognition of traditional relationships to land can contribute to the development of an economic base for Indigenous people. This benefit comes from an understanding of the relationship between economic development and the social, cultural and environmental context in which development takes place.

Sustainable development has emerged as a new paradigm of development, integrating economic growth, social development and environmental protection as interdependent and mutually supportive elements of long-term development. The concept of sustainable development recognises that economic development is not just the exploitation of resources wherever they happen to exist, but also must take account of the relationships in which development occurs, including the cultural values of the community.

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7 See *Native Title Report 2001*, op.cit., pp87-105; and C O'Faircheallaigh, 'Process, Politics and Regional Agreements' in *Land, Rights, Laws: Issues of Native Title*, Australian Institute of Aboriginal and Torres Strait Islander Studies, February 1998.

The relationship of Indigenous people to their land is widely recognised as a basis for their cultural values and identity and as such must be taken into account in the policies aimed at achieving sustainable economic development. Obvious examples of economic development founded on the traditional cultural values of a community are the initiatives around tourism and Indigenous art. However the notion of sustainable development does not require that industries be restricted to particular types, but that all developments, from mining to tourism, take account of the needs of the cultural values of a community and occurs with their informed consent.

Native title provides an important frame of reference by which participation and economic development can transform the conditions of Indigenous people's lives. Yet its capacity to contribute to this process has been hampered, first by the legal system that operates to restrict rather than maximise these outcomes and second by the failure of government to integrate native title into the range of policy options available in achieving this goal.

This year's Native Title Report analyses the restrictions placed on the capacity of native title to achieve outcomes for Indigenous people through its construction in the legal system. The focus in chapter 1 of the Report is on the tests established in the decisions of *Yarmirr*,[8] *De Rose*,[9] and *Yorta Yorta*,[10] and the recognition of native title. Emerging from these decisions is a concept of recognition as not simply the law providing a vehicle for Indigenous people to enjoy their cultural and property rights, but rather one where the law becomes a barrier to their enjoyment and protection.

One tier of this barrier is constructed by a notion of sovereignty that denies the law-making power of Indigenous people after its acquisition by the British Crown. Thus the infrastructure that supports the rights and interests recognised in native title law by s223(1) of the *Native Title Act 1993* (Cwlth) ('NTA'), the traditional laws and customs, is not a functioning system but one which ceased to operate from the time that British sovereignty was imposed. The rights and interests recognised in NTA s223(1) as native title, must be created by traditional laws and customs existing prior to British sovereignty.

The second tier of this barrier is constructed by limiting the recognition of native title to only rights and interests separated from the traditional laws and customs which created them. Without recognition of the traditional laws and customs that create them, native title rights and interests are a bundle of rights, able to be eroded one by one whenever their exercise is inconsistent with the rights and interests created by the laws of the non-Indigenous legal system.

The third tier in the barrier to Indigenous people gaining recognition and protection of their traditional rights and interests in land as they are observed and acknowledged in contemporary society, is the difficulty of proving the

8 *Commonwealth v Yarmirr; Yarmirr v Northern Territory* [2001] HCA 56 (11 October 2001).
9 *De Rose v State of South Australia* [2002] FCA 1342 (1 November 2002).
10 *Members of the Yorta Yorta Aboriginal Community v Victoria & o'rs* [2002] HCA 58 (12 December 2002).

elements that constitute the statutory definition of native title. While the recognition of native title is restricted to rights and interests disconnected from the traditional laws and customs, in order to obtain this limited recognition the native title claimants must prove that those rights and interests are possessed under traditional laws and customs acknowledged and observed by the claimant group. In other words, traditional laws and customs are an element of the proof of native title but they are not an element of its recognition. Moreover, the standard and burden of proving this element is very high.

This standard of proof stems from a fundamental tenet of the High Court's interpretation of s223(1) that the laws and customs of Indigenous people are a body of norms or a normative system under which rights and interests are created.[11] A normative system of laws, it is said, gets its identity from being observed and acknowledged by a society. Moreover it is the observation and acknowledgement of laws and customs that define a particular society. The two, laws and society, are thus inextricably linked. The establishment of the existence of a body of traditional laws and customs prior to sovereignty requires proof of continuous observance and acknowledgement of those laws and customs since sovereignty. In order to prove this, native title claimants must also prove that the transmission of these traditions and customs was from one society to the next.

The NTA and the common law construct native title in a society that must exhibit a vital and ongoing relationship with its laws even though the regenerative capacity of these laws has been removed by the imposition of sovereignty. Then, if such a society can be shown to exist, the recognition of native title is limited to the rights and interests that emanate from such laws. This is the final tier in the barrier preventing native title from giving real outcomes to Indigenous people in contemporary society: this requirement to exhibit vitality while at the same time denying its recognition.

Such a construction also denies the place that Indigenous culture has for Indigenous people in contemporary Australian society. Society, Indigenous and non-Indigenous, cannot be finally determined through the laws observed but exist in a plurality of social, political and legal spaces, changing as the context changes. In this dynamic relationship between law, society and identity, Indigenous culture can still be a vital and transformative force, even though it can interchange with non-Indigenous culture. It is this vitality that has been removed in the construction of native title presented by the High Court.

While the *Yorta Yorta* decision has clarified the tests for recognition of native title, the High Court decisions in *Miriuwung Gajerrong*[12] and *Wilson v Anderson*[13] have provided clear principles on how native title is extinguished at law.

Chapters 2 and 3 of the Report seek to delineate these principles in order to participate in and progress a long-standing debate concerning the extinguishment of native title. The central issue in this debate is whether the extinguishment of native title, as it occurs under Australian law, is racially

11 See pages 31-33, below.
12 *Western Australia v Ward and o'rs* [2002] HCA 28 (8 August 2002).
13 *Wilson v Anderson and o'rs,* [2002] HCA 29 (8 August 2002).

discriminatory. It is an important debate about the ethical underpinnings of a legal regime which gives recognition to the inherent rights of Indigenous people.

The test which the High Court adopted in *Miriuwung Gajerrong* to determine whether laws or acts which create rights in third parties extinguish native title, either completely or partially, requires a comparison to be made between the legal nature and incidents of the rights created by statutory or executive acts and the native title rights arising out of traditional law and custom. Where there is an inconsistency between these two sets of rights then native title is either completely extinguished or extinguished to the extent of the inconsistency.

The result of applying this inconsistency test is that the native title rights most susceptible to extinguishment by the creation of non-Indigenous interests are exclusive rights, such as the right to control access to country. On the other hand the native title rights that best survive this test are ones expressed at a high level of specificity, limited to the conduct of activities on the land rather than the control of activities on the land, and confined to traditional activities rather than contemporary activities.

Underlying the inconsistency test is a hard and driving logic: either the rights compared are consistent or they are inconsistent. If consistent, native title continues. If inconsistent, native title is extinguished. Glaringly absent from this logic is the possibility of co-existence, where rights are negotiated and mediated to enable a diversity of interests to be pursued over the same land. The idea that the law could assist to build relationships rather than separate interests was not explored. Yet, before the High Court for their consideration was a range of legal options which could underpin a co-existence approach.

These alternatives were not taken up by the High Court primarily because of the pre-eminence given to the way in which native title was extinguished through the statutory framework of the NTA. The prescription of extinguishment in the confirmation and validation provisions of the NTA mandated an approach in which native title could be extinguished partially or completely. In addition, the Court found that the non-extinguishment principle had no operation in the common law principles of extinguishment and were limited in application to the provisions of the NTA.[14] The principles of extinguishment outlined in the Court's decision in *Miriuwung Gajerrong* are a result of the Court's interpretation of both the statute and the common law working together to determine the full extent of extinguishment under Australian law.

Chapter 3 subjects these principles of extinguishment to the tests of discrimination that were reiterated and affirmed in the *Miriuwung Gajerrong* decision. An analysis of the domestic law of discrimination under the *Racial Discrimination Act 1975* (Cwlth) within the decision that establishes the principles of extinguishment of native title, provides a sharp contrast between the non-discriminatory approach to the protection of native title and that being affirmed.

The principles underlying a non-discriminatory approach to the protection of native title are set out at Annexure 1. In summary, a non-discriminatory approach measures the extent to which the law permits Indigenous property rights to be enjoyed against the extent to which the law permits the enjoyment of other

14 See pages 47-48, below.

property rights. Thus the law must provide native title with the protection necessary to ensure it can be enjoyed, according to its tenor, and to the same extent as non-Indigenous interests in land. Even where property rights like native title are unique in their origin and characteristics, discrimination is found not by comparing these characteristics with the characteristics of non-Indigenous property rights but by comparing the extent to which the property rights are able to be enjoyed, regardless of the characteristics of each. The content of traditional law and custom does not have to be unpacked and compared with non-Indigenous interests, as it is in the inconsistency test. It is only the protection provided by the law as it applies to Indigenous property rights and non-Indigenous property rights that requires comparison.

Constructed in a non-discriminatory way, native title law should be a vehicle for the continued enjoyment and protection of Indigenous property and culture and can contribute to the transformation that has been identified as necessary in redressing the spiral of poverty that besets Indigenous communities.

Chapter 4 of the Report discusses the impact of the law of native title, particularly in relation to extinguishment in the *Miriuwung Gajerrong* and *Wilson v Anderson* decisions. The extinguishment of native title by the creation of perpetual grazing leases in the Western Division of New South Wales and the creation of nature reserves in Western Australia, highlight the implications of these decisions on the human rights of Indigenous Australians. This chapter also discusses measures to ameliorate the effects of findings of extinguishment.

Now that the principles of recognition and extinguishment have been crystallised by the High Court and the effect of these principles on the day to day lives of Indigenous people is known, it is urgent that the law be evaluated against the human rights standards that Australia is committed to maintaining. Chapter 5 outlines the way in which human rights principles can direct the changes that are required to make our domestic law consistent with international law.

There are various levels at which reform of the native title system can take place. The most obvious level is the legislative one, given that the NTA controls the level of protection afforded native title. Clearly changes would have to occur at this level although the recognition and protection of native title may not ultimately depend on legislation. For instance, the recognition and protection of Indigenous rights to land may be enshrined in a treaty or agreement which supersedes statutory rights. Alternatively rights might be protected on a number of levels with ultimate protection residing in the Constitution.

In considering reform at this level I do not seek to map out every possible or preferred legislative amendment to the NTA. Rather I seek to identify broad areas in which reform is required and underlying mechanisms by which injustices can be redressed. Against this approach of reforming the present system must be weighed the benefits of enshrining Indigenous rights to land in a completely different protective system to that which presently exists, such as an arbitral system suggested by Justice McHugh in *Miriuwung Gajerrong*.[15] While consideration of such alternative systems is beyond the scope of this report,

15 See page 127, below.

they must be seriously considered in view of the legal tests established to gain recognition of native title and the difficulty of changing the fundamental assumptions of these tests within the current system as it is governed by the NTA.

A similar process of evaluation is required at the political level. This is particularly pressing in view of the Court finding in *Miriuwung Gajerrong* that the NTA rather than the common law directs the native title processes of extinguishment and recognition, confirming the primary role of the Commonwealth in the protection of native title. The Commonwealth must now accept responsibility for the law as it stands and, equally importantly, re-evaluate the means by which the law can be changed to make it consistent with Australia's international law obligations.

However, even if human rights standards are not accepted as the benchmark for evaluating and changing the native title system, the agreed goals of increasing participation of Indigenous people in determining their own future and establishing an economic base in Indigenous communities, would require that every option that meets these goals, including the inherent rights of Indigenous people to the recognition of their traditional relationship to land, be utilised to their greatest potential.

Chapter 1

Recognition of native title

Introduction

Native title is an intersection of two different legal systems and cultures. The way in which Australia chooses to give recognition to the relationship that Indigenous people have with their land, and the range of options it considers to express that relationship, are matters that affect the human rights of Indigenous people.

Over fourteen months, from October 2001 to December 2002, the High Court delivered three judgments clarifying the legal criteria for the recognition and extinguishment of Indigenous relationships to land. The *Yarmirr*,[1] *Miriuwung Gajerrong*,[2] and *Yorta Yorta*[3] decisions bring to a close the developmental phase of the law of native title in which alternative positions and interpretations of crucial principles were canvassed and decided upon by lower courts. Emerging from the High Court is a concept of recognition as not simply the law providing a vehicle for Indigenous people to enjoy their cultural and property rights, but rather one where the law becomes a barrier to their enjoyment and protection. It is appropriate, now that the law has been crystallised by the High Court, to consider whether the way in which Australia has chosen to give recognition to Indigenous relationships to land is consistent with the human rights standards Australia has undertaken to uphold.

Human Rights Standards relevant to the Recognition of Native Title

Native title reflects a relationship to land which is the very foundation of Indigenous culture, religion, and economic and governance structures. International human rights standards provide considerable direction on a State's obligations with respect to the protection of the cultural, religious, property and

1 *Commonwealth v Yarmirr; Yarmirr v Northern Territory* [2001] HCA 56 (11 October 2001) ('*Yarmirr*').
2 *Western Australia & o'rs v Ward & o'rs* [2002] HCA 28 (8 August 2002) ('*Miriuwung Gajerrong*').
3 *Members of the Yorta Yorta Aboriginal Community v Victoria & o'rs* [2002] HCA 58 (12 December 2002) ('*Yorta Yorta*')

governance rights of Indigenous people. These standards derive from a wide range of sources including the main human rights treaties, statements from treaty bodies monitoring the implementation of these treaties, United Nations General Assembly resolutions, and the principles emerging from world conferences.

Cultural Rights

The preservation and protection of Indigenous culture is addressed in the *International Covenant on Civil and Political Rights*[4] ('ICCPR') and the *Convention on the Rights of the Child*.[5] Both treaties have similar wording, providing that persons belonging to ethnic, religious or linguistic minorities have the right, in community with their group, to enjoy their own culture and to use their own language.[6] The Human Rights Committee, the international body that monitors the ICCPR's implementation, has explained the importance of these rights, noting:

> [ICCPR] article 27 [protecting minority culture] relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.[7]

ICCPR article 27 is the basis of a number of general principles in relation to the protection of culture of Indigenous communities. Many of these can be understood from the following comment of the Human Rights Committee:

> [A]rticle 27...recognise[s] the existence of a "right" and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party. ...
>
> [T]he rights protected under article 27...depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.[8]

4 999 United Nations Treaty Series ('UNTS') 171 (Australia joined 1980) ('ICCPR').
5 1577 UNTS 3 (Australia joined 1990).
6 ICCPR, op.cit., art 27, see also *Convention on the Rights of the Child*, op.cit., art 30.
7 Human Rights Committee, *General Comment 23 – The rights of minorities*, (1994) para 9; in *Compilation Of General Comments And General Recommendations Adopted By Human Rights Treaty Bodies*, United Nations document number ('UN doc') HRI/GEN/1/Rev.5, 26 April 2001, p147.
8 Human Rights Committee, *General Comment 23 – The rights of minorities*, op.cit., para's 6.1 & 6.2.

These principles have been referred to in various decisions of the Human Rights Committee clarifying the operation of article 27. The Human Rights Committee explained that Indigenous people have the right to engage in economic and social activities which are part of the culture of the community to which they belong;[9] that development that threatens the way of life and culture of an Indigenous group breaches article 27;[10] and that protecting the traditional rights of an Indigenous group may weigh against a State enacting general laws permitting public rights (e.g. general rights to hunt or fish).[11] Importantly, the Human Rights Committee emphasised that the right to enjoy culture not only protects traditional means of livelihood, but can also be applied in the use of modern technology.[12]

Guidance on how Australia should be protecting native title interests can be gleaned from the Concluding Observation of the Human Rights Committee in which they express their concerns about the inconsistency between the 1998 amendments to the *Native Title Act 1993* (Cwlth) ('NTA') and Australia's obligations under ICCPR article 27:

> The Committee is concerned...that the Native Title Amendments of 1998 in some respects limit the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands. The Committee recommends that the State party take further steps in order to secure the rights of its indigenous population under article 27 of the Covenant. The high level of exclusion and poverty facing indigenous persons is indicative of the urgent nature of these concerns. In particular, the Committee recommends that the necessary steps be taken to restore and protect the titles and interests of indigenous persons in their native lands, including by considering amending anew the Native Title Act, taking into account these concerns.
>
> The Committee expresses its concern that securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities, which must be protected under article 27, are not always a major factor in determining land use.[13]

9 Human Rights Committee, *Länsman -v- Finland*, UN document CCPR/C/52/D/511/1992, 8 November 1994, para 32.2; and Human Rights Committee, *Ominayak -v- Canada*, UN document CCPR/C/38/D/167/1984, 10 May 1990, para 32.2

10 Human Rights Committee, *Ominayak -v- Canada*, op.cit., para 33.

11 *Concluding observations of Human Rights Committee: Sweden*, UN doc CCPR/C/79/Add.58, 9 November 1995, para 18.

12 Human Rights Committee, *Länsman -v- Finland*, op.cit., para 9.3.

13 Human Rights Committee, *Concluding observation of the Human Rights Committee: Australia*, UN doc A/55/40 para's 498-528, 24 July 2000.

Equality and Non-Discrimination[14]

The guarantees of equality before the law and racial non-discrimination[15] are contained in article 26 of the ICCPR and articles 2 and 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*[16] ('ICERD'). In particular, States have an obligation in article 5 of ICERD to prohibit and to eliminate racial discrimination and to guarantee the right of everyone to equality before the law, including in the enjoyment of the right to equal treatment before the tribunals and all other organs administering justice,[17] the right to freedom of religion[18], and the right to own property alone as well as in association with others.[19]

In its recent decision in *Awas Tingni*,[20] the Inter-American Court of Human Rights held that the right of everyone to the use and enjoyment of their property in article 21 of the American Convention on Human Rights: '[t]hrough an evolutionary interpretation of international instruments for the protection of human rights … protects property in a sense which includes, amongst other, the rights of the members of the indigenous communities within the framework of communal property'.[21] The Court continued: '[T]he close ties of indigenous people with the land must be recognised and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations'.[22] The Court ordered Nicaragua to carry out the delimitation, demarcation and corresponding titling of the lands of the Awas Tigni community, within 15 months, with full participation by the community, and taking into account its customary law, values customs and mores.[23]

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14 See also discussion on discrimination in chapter 3 of this Report.

15 The international legal approach to equality is one of substantive rather than formal equality: G Triggs, 'Australia's Indigenous Peoples and International Law' (1999) 23 *Melbourne University Law Review* 372 at 379-381; also Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31(1986) paras 150, 158. The Committee on the Elimination of Racial Discrimination ('CERD') has recognised as aspects of the principle of equality the obligations of States parties to ICERD (inf.) to ensure that no decisions directly relating to the rights and interests of indigenous peoples are taken without their informed consent, as well as to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands and territories and resources: *General Recommendation XXIII – Indigenous Peoples*, (1997) para's 4-5, in *Compilation Of General Comments And General Recommendations Adopted By Human Rights Treaty Bodies*, op.cit., p192.

16 660 UNTS 195 (Australia joined 1975) ('ICERD').

17 ibid., art 5(a).

18 ibid., art5(d)(vii).

19 ibid., art5(d)(v).

20 *The Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights, 31 August 2001, available at <www.corteidh.or.cr/seriecing/serie_c_79_ing.doc> (accessed 15 January 2003).

21 ibid., at [148].

22 ibid., at [149]

23 ibid., at [164].

Under the principles of equality, Australia is required to ensure that people have the ability to enjoy the right to equal participation in cultural activities without discrimination.[24] Often, to ensure equal enjoyment of culture as specified in human rights standards, additional measures are necessary for the members of minority and Indigenous groups. That is, society needs to ensure 'substantive equality' (where all groups have equal opportunity to enjoy human rights) rather than just 'formal equality' (where equal treatment of all can result in some groups having less opportunity because of relevant differences). Substantive equality is required by international human rights standards[25] and agreed as an appropriate measure by the Commonwealth Parliament[26] and current Australian Government.[27] Previous High Court decisions also support a non-formalistic, substantive understanding of equality.[28]

An important aspect of Indigenous communities being able to exercise the rights in ICCPR and ICERD is for the communities to have effective participation in, or give prior consent to, decisions that affect them. The United Nations General Assembly emphasises that persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life;[29] as does the *Vienna Declaration and Plan of Action* calling on states to 'ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them'.[30] Critically, however, the concepts of effective participation and prior informed consent apply not only at a broad level but to individual events affecting individual communities:

> States should ensure that no decisions directly relating to the rights and interests of Indigenous people are taken without their informed consent;[31] and
>
> Indigenous communities must have effective participation in decisions that affect the community, especially where culture manifests in a particular way of life assoc with use of land resources (e.g. fishing or hunting and the right to live in reserves protected by law).[32]

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24 ICERD, op.cit., art 5(e)(v).

25 W McKean, 'The Meaning of Discrimination in International and Municipal Law' (1970) 44 *British Yearbook of International Law* 178 at 185–186; G Triggs, op.cit., at 379-381; Australian Law Reform Commission, op.cit.,; see also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2000*, Human Rights and Equal Opportunity Commission, Sydney, 2001, pp50-52.

26 Commonwealth Parliament, *Sixteenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund: CERD and the Native Title Amendment Act 1998*, Canberra, June 2000, para 3.7.

27 *Native Title Report 2000*, op.cit., pp52-53.

28 *Street v Queensland Bar Association* (1989) 168 CLR 461 per Brennan J at 513-514, and per Gaudron J at 570-71, 573; and *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 per Gaudron & McHugh JJ at 478.

29 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, United Nations General Assembly ('UNGA') resolution 47/135, UN doc A/47/49, 18 December 1992, art 2(2).

30 *Vienna Declaration and Programme of Action* (UN doc A/CONF.157/23, 25 June 1993, endorsed by UNGA on 20 December 1993, UN doc A/RES/48/121, para 2), part I para 20 (also part II para 31).

31 CERD, *General Recommendation XXIII – Indigenous Peoples*, op.cit., para 4(d).

32 Human Rights Committee, *General Comment 23 – The rights of minorities*, op.cit., para 7.

The principle of effective participation is one that can apply to decisions made by governments on the policy and legislative regimes they propose for Indigenous people. The formulation of native title policy and legislation was directly referred to in the 1999 decision, of the Committee on the Elimination of Racial Discrimination ('CERD'), on the amendments to the NTA:

> [T]he amended Act appears to wind back the protections of indigenous title offered in the Mabo decision of the High Court of Australia and the 1993 Native Title Act. ... The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State party's compliance with its obligations under article 5(c) of the Convention [ICERD]. Calling upon States parties to "recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources," the Committee[CERD], in its general recommendation XXIII, stressed the importance of ensuring "that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent".[33]

Relationship between equality and rights of minorities to protection of their culture

In international jurisprudence, particular regimes for the preservation of the characteristics and traditions of minorities are accepted as consistent with, and sometimes required to achieve factual or substantive equality. According to the Permanent Court of International Justice, 'there would be no true equality between a majority and a minority if the latter were deprived of its institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority'.[34] The purpose of particular measures for the protection of minorities is to maintain basic characteristics which distinguish minorities from the majority of the population, and hence institute factual equality between members of the minority group and other individuals.

The recognition and protection of the distinct rights of Indigenous peoples is also implicit in the concept of equality. CERD has recognised as aspects of the principle of equality the obligations of States to protect Indigenous culture. CERD explained that States must ensure that Indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.[35]

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33 CERD, *Decision 2(54) on Australia*, (UN document A/54/18, para 21(2)) 18 March 1999, para's 8 & 9.

34 *Minority Schools in Albania* (1935) PCIJ Ser A/B No 64, p 17; also *South West Africa Second Phase, Judgment* [1966] ICJ Rep 6 at 303–4, 305 per Tanaka J; UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Main Types and Causes of Discrimination*, UN Sales No 49.XIV.3 (1949), paras 6–7; F Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* UN Sales No E.91.XIV.2 (1977), reprinted United Nations Human Rights Study Series No 5 (1991), para 239; also UN doc E/CN.4/52 (1947), Section V; A Bayefsky, 'The Principle of Equality or Non-Discrimination in International Law' (1990) 11 *Human Rights Law Journal* 1 at 27; Triggs, op.cit., at 379-381.

35 CERD, *General Recommendation XXIII – Indigenous Peoples*, op.cit., para 4(e).

> [T]he provisions of ... [ICERD] apply to indigenous peoples. The Committee [CERD] is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized. The Committee calls in particular upon States parties to... ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.[36]

Freedom of Religion and Belief

The High Court, in the *Miriuwung Gajerrong* decision, recognised the relationship between Indigenous people and their land as a spiritual one. Native title, as a recognition of Indigenous relationships to land encompass this spiritual dimension.

> [T]he connection which Aboriginal peoples have with "country" is essentially spiritual. ... The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA [Native Title Act]. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.[37]

The right to freely practice one's religion and belief is protected at international law. Article 18 ICCPR states:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to… manifest [t]his religion or belief in worship, observance, practice and teaching.[38]

The Human Rights Committee has clarified the requirements of this article, emphasising:

- 'belief' and 'religion' are to be broadly construed[39] – the protection of article 18 is not confined only to institutionalised religions;[40] and
- 'worship' includes ritual and ceremonial acts giving direct expression to beliefs, as well as the various practices integral to such acts.[41]

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36 ibid., para 's 2-4(e).
37 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [14].
38 ICCPR, op.cit., art 18.
39 On the characterisation of Aboriginal belief-systems as religions, see M Charlesworth, 'Introduction' in M Charlesworth (Ed) *Religious Business: Essays on Australian Aboriginal Spirituality*, Cambridge University Press 1998 xiii at xv; W Stanner, 'Some Aspects of Aboriginal Religion' written 1976, reproduced in Charlesworth, ibid, at 1.
40 Human Rights Committee, *General Comment 22: Right to freedom of thought, conscience and religion*, (1993) para 2; in *Compilation Of General Comments And General Recommendations Adopted By Human Rights Treaty Bodies*, op.cit., p144.
41 ibid., para 4.

Article 18(2) of the ICCPR provides an important protection to the freedom of belief, in prohibiting coercion from impairing the freedoms to have the religion or belief of one's choice. There is commentary suggesting that the human right to freedom of religion and belief provides support for protection of sites that are sacred or significant to Indigenous people.[42]

Justice Kirby, in the *Miriuwung Gajerrong* decision, emphasised the lack of attention, in native title cases, that has thus far been given to the freedom of religion,[43] which is protected not only in international human rights standards, but under the Australian Constitution.[44] His Honour indicated that freedom of religion could provide greater protection of Indigenous interests than has, to date, been accorded:

> There is one further possibility that I should mention. It concerns the possible availability of a constitutional argument for the protection of the right to cultural knowledge, so far as it is based upon the spirituality of Australia's indigenous people. That involves the application of s 116 of the Constitution, which provides a prohibition on laws affecting the free exercise of religion. The operation of that section has not been argued in these appeals. ... The full significance of s 116 of the Constitution regarding freedom of religion has not yet been explored in relation to Aboriginal spirituality and its significance for Aboriginal civil rights. ... One thing is certain – the section speaks to all Australians and of all religions. It is not restricted to settlers, their descendants and successors, nor to the Christian or other organised institutional religions. It may be necessary in the future to consider s 116 of the Constitution in this context.[45]

Self Determination[46]

Native title has its origins in a system of law and custom in which the land plays a fundamental role. A recognition of the relationship between Indigenous people and their land must also include a recognition of the law-making and governance structures in which land plays a fundamental role. These structures form the basis to a right of self determination.

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42 'Article 18 [freedom of religion]...might well assist in securing access to and control of sacred sites, skeletal remains, burial artefacts and other items of religious or cultural significance to Indigenous Australians', S Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights*, The Federation Press, Sydney, 1998, p192.
Another commentary indicates that proposing article 18 as supporting the right to exclude people from a place would be 'new ground' for this article: 'It is unfortunate that the HRC [Human Rights Committee] has issued so few consensus comments on the limits to the freedom to manifest religion or belief. It would be instructive, for example, for the HRC to issues opinions on the permissibility of restrictions of such religious activities as polygamy, animal sacrifice, or the exclusion of women from the church hierarchy': S Joseph, J Schultz & M Castan, *The International Covenant on Civil and Political Rights*, Oxford University Press, Oxford, 2000, at [17.13].

43 *Miriuwung Gajerrong*, op.cit., at [586].

44 Section 116.

45 *Miriuwung Gajerrong*, op.cit., per Kirby J at [586].

46 See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, chapter 2.

The right of self-determination is enshrined in Article 1 of the ICCPR and the *International Covenant on Economic, Social and Cultural Rights*[47] ('ICESCR'). Australia is a party to both of these covenants and is bound to act in compliance with their terms. Common Article 1 reads as follows:[48]

> **Article 1**
>
> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Recent practice by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights (i.e., the two committees that operate under and interpret the standards in the two international covenants) clearly identifies self-determination as a right held by Indigenous peoples, including in Australia. This can be seen from the following concluding observations and jurisprudence of the committees.

Human Rights Committee

- *Concluding observations on Australia*,[49] which states that 'The State party should take the necessary steps in order to secure for the Indigenous inhabitants a stronger role in decision making over their traditional lands and natural resources (article 1, para 2)'.[50] The List of Issues of the Committee had asked included 'What is the policy of Australia in relation to the applicability to the Indigenous peoples in Australia of the right of self-determination of all peoples?'[51]
- *Concluding observations on Canada*.[52] In this observation, the Human Rights Committee emphasised the link between the control of land and resources and self-determination. The committee called for Canada's decisive and urgent action toward land and resource allocation, and also recommended the country cease extinguishing inherent aboriginal rights as such a practise is incompatible with article 1 of ICCPR.

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47 993 UNTS 3 (Australia joined 1975) ('ICESCR').

48 For a commentary on these provisions see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1999*, Human Rights and Equal Opportunity Commission, Sydney, 2000, pp89- 97.

49 UN doc A55/44, para's 498-528, 24 July 2000.

50 ibid., tenth para.

51 UN doc CCPR/C/69/L/AUS, 25 April 2000, issue 4.

52 UN doc CCPR/C/79/Add.105, 7 April 1999, paras 7 & 8.

- *Concluding Observations on Norway*, which provides that 'the Committee expects Norway to report on the Sami people's right to self-determination under Article 1 of the Covenant, including paragraph 2 of that article'.[53]
- *Concluding observations on Sweden*.[54] The Human Rights Committee indicated its concern at the limited extent to which the Sami Parliament can have a significant role in the decision-making process on issues affecting the traditional lands and economic activities of the indigenous Sami people, such as projects in the fields of hydroelectricity, mining and forestry, as well as the privatization of land. The Committee recommended the State party take steps to involve the Sami by giving them greater influence in decision-making affecting their natural environment and their means of subsistence.[55]
- *Ominayak (Lubicon Lake Band) v Canada*;[56] and
- *Marshall & or's on behalf of Mikmaq tribal society v Canada*.[57]

Committee on Economic, Social and Cultural Rights

- *List of Issues: Australia*: 'What are the issues relating to the rights of indigenous Australians to self-determination, and how have these issues impeded the full realisation of their economic, social and cultural rights?'[58]
- *Concluding observations on Canada* (see also the List of issues: Canada[59]). The comments of the Human Rights Committee, in its observations on Canada, are equally relevant to Australia: 'The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people from their lands... [P]olicies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party.[60]
- *Concluding observations on Columbia*. The Committee on Economic, Social and Cultural Rights, in its comments on Colombia, emphasised how the principle of informed consent operates to protect indigenous culture. The committee's directions to Colombia are equally important for Australia, in urging the country '...to ensure that indigenous peoples participate in decisions affecting their lives. The Committee particularly urges the State party to consult and seek the consent of the indigenous peoples concerned prior to the implementation of timber, soil or subsoil mining projects and on any public policy affecting them'.[61]

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53 UN doc CCPR/C/79/Add.112, 5 November 1999, para 17; see also para 10.
54 UN doc CCPR/CO/74/SWE, 24 April 2002.
55 op.cit., para 15.
56 op.cit.,
57 Decision of the Human Rights Committee, UN doc CCPR/C/43/D/205/1986, 3 December 1991.
58 UN doc E/C.12/Q/AUSTRAL/1, 23 May 2000, Issue 3.
59 UN doc E/C.12/Q/CAN/1, 10 June 1998, issue 23.
60 Committee on Economic, Social and Cultural Rights, *Concluding observations: Canada,* UN doc E/C.12/1/Add.31, 10 December 1998, para 18.
61 Committee on Economic, Social and Cultural Rights, *Concluding observations: Colombia,* UN doc E/C.12/1/Add.74, 30 November 2001, para 33.

The Legal Recognition of Native Title

The way in which Indigenous people obtain recognition of their traditional rights to land is through the legal system. Under the NTA, Indigenous people must apply to the Federal Court to obtain a determination that native title exists, that particular persons or a group of persons hold the title and that the title gives rise to particular rights and interests in relation to a particular area of land.[62] Where the claim coincides with other non-Indigenous interests, the relationships between the two sets of rights must be set out in the determination. A determination may take place by consent, or it may be the conclusion to a lengthy hearing.

For instance, the *Yorta Yorta* case commenced in February 1994, with the first directions hearings being held in October 1995. The trial began in October 1996 with opening submissions and concluded one and a half years later in May 1998. Altogether the trial Judge sat on 114 days and heard 201 witnesses – the transcript exceeded 11,500 pages. The decision was delivered in December 1998. The *Miriuwung Gajerrong* case commenced in April 1994, with the first directions hearings commencing in March 1995. The trial began in February 1997, occupied 83 days, and the Judge's decision was delivered in November 1998.

In order to get a determination that native title exists, Indigenous people must prove all the elements of the title contained in section 223(1) of the NTA. The elements of the statutory definition of native title are as follows:[63]

- Native title is comprised of the rights and interests of Indigenous people.
- The rights and interests comprising native title may be communal, group or individual rights and interests.
- The rights and interests must be in relation to land or waters.
- The rights and interests must be possessed under the traditional laws acknowledged and the traditional customs observed by the peoples concerned: NTA s223(1)(a).
- The rights and interests must have the characteristic that, by the traditional laws acknowledged and the traditional customs observed by the relevant peoples, those peoples have a connection with the land or waters claimed: NTA s223(1)(b).
- The rights and interests in relation to the land or waters must be recognised by the common law of Australia: NTA s223(1)(c).

These elements and their application to a particular claim are the subject of High Court decisions in *Yarmirr* and, more recently, *Miriuwung Gajerrong* and *Yorta Yorta*. The recent Federal Court decision in *De Rose*[64] also provides direction on these issues. It is now clear that the standard and burden of proof required to establish the elements of the statutory definition of native title are so high that many Indigenous groups are unable to obtain recognition of the

62 Sections 61 and 225.
63 From *Yorta Yorta*, op.cit., per Gleeson CJ, Gummow & Hayne JJ at [33]-[35].
64 *De Rose v State of South Australia* [2002] FCA 1342 (1 November 2002) ('*De Rose*').

traditional relationship they continue to have with their land. In turn, their cultural, religious, property and governance rights, recognised at international law and embodied in this relationship, fail to be recognised and protected under Australian law. The elements of the definition, and the court's interpretation of these elements, that cause me concern are as follows:

- First, the process of recognising rights and interests arising from Indigenous laws and customs into native title rights and interests recognised under the NTA is not a neutral process but is based on a number of assumptions which transform and diminish the rights arising from Indigenous law and custom rather than providing a vehicle for their enjoyment.
- Second, the requirement under s223(1)(a) of the NTA that rights and interests must be possessed under the traditional laws acknowledged and the traditional customs observed by the peoples concerned, has been interpreted by the courts to require proof of continuous observance and acknowledgement of those laws and customs since sovereignty. The standard and burden of proof in relation to s223(1)(a) is a significant barrier to Indigenous people gaining recognition and protection of their traditional rights and interests in land as they are observed and acknowledged in contemporary society.
- Third, the requirement in NTA s223(1)(b), that by the traditional laws acknowledged and the traditional customs observed by the relevant peoples, those peoples have a connection with the land or waters claimed requires has been interpreted by the courts to require not only maintenance of cultural knowledge but a high level of connection to a specific area of land.
- Fourth, the requirement of NTA s223(1)(c), that the rights and interests in relation to the land or waters must be recognised by the common law of Australia has been interpreted to exclude important rights to sea country where these rights could have been recognised albeit regulated or impaired to allow other non-Indigenous interests to be enjoyed.

The Process of Recognition

The human rights principles outlined above can provide the Court with important guidelines in translating Indigenous laws and customs into rights and interests that can be recognised by the non-Indigenous legal system. These principles require that Indigenous relationships to land be provided with the protection necessary to ensure they can be enjoyed, according to their tenor and to the same extent as non-Indigenous interests in land. Constructed in this way, native title should be a vehicle for the continued enjoyment of Indigenous culture within the protection of the law.

There were positive indications in early court decisions that, in recognising Indigenous relationships to land, the law of native title would retain the essential identity of these relationships as Indigenous. Characterising native title as an inherent right deriving from Indigenous laws and customs, was an important aspect of the *Mabo* decision[65] and represented a breakthrough from other forms

65 *Mabo & o'rs v Queensland (No 2)* (1992) 175 CLR 1 (*'Mabo'*).

of statutory recognition given to Indigenous land rights. Consistent with this decision the definition of native title under the NTA does not simply replace the rights that arise from traditional laws and customs with statutory rights. Rather it seeks to retain within the definition the origins of native title in the traditional laws and customs acknowledged and observed by Indigenous peoples.

These were signs that the non-Indigenous law would not unnecessarily limit the recognition of Indigenous relationships to land but would simply provide a vehicle to transport these relationships into contemporary society. The relationship between the Indigenous and non-Indigenous legal systems was conceived in the *Fejo* decision[66] as 'an intersection of traditional laws and customs with the common law'.[67] This indicated that native title would be a location or space for recognition rather than a boundary confining recognition to particular rights and interests falling within it.

While the majority decision of the High Court maintained the analogy of 'intersection' in considering the claim of the Yorta Yorta people,[68] it was clear by the time of this decision that the law was not simply a recognition space and many claims would remain outside the protection of native title law.

A critical factor in understanding the way in which native title law confines the recognition of the rights and interests arising from Indigenous laws and customs is by uncovering the assumptions underlying the Court's conception of sovereignty and the consequences it attributes to the acquisition of sovereignty by the British Crown. To do this it is necessary to examine the reasoning, not only in the *Miriuwung Gajerrong* and *Yorta Yorta* decisions but also in the decision where the relationship between British sovereignty and the recognition of Indigenous rights to land is first discussed, the *Mabo* decision.

Sovereignty and the recognition of native title

The *Mabo* decision is usually associated with overturning terra nullius as the basis of the acquisition of British sovereignty which in turn allowed the courts to recognise native title. Yet there is a troubling disjuncture in the reasoning of the High Court in *Mabo*. On the one hand terra nullius was overturned because it failed to recognise the social and political constitution of Indigenous people. Yet the recognition of native title was premised on the supreme power of the state to the exclusion of any other sovereign people. Thus the characteristics of Indigenous sovereignty, the political, social and economic systems that unite and distinguish Indigenous people as a people were erased from the developing law of native title.

Confirming the principle in the *Seas and Submerged Lands* case[69] that the 'acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the Courts of that

66 *Fejo v Northern Territory of Australia* (1998) 195 CLR 96.
67 ibid., per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ at 128.
68 *Yorta Yorta*, per Gleeson CJ, Gummow & Hayne JJ at [31] & [38].
69 *New South Wales v Commonwealth* (1975) 135 CLR 337.

state',[70] Justice Brennan in *Mabo* identified the extent of the court's power as merely 'determining the consequences of an acquisition [of sovereignty] under municipal law'.[71]

The assertion in *Mabo* of supreme and exclusive sovereign power residing in the State has been confirmed in the *Miriuwung Gajerrong* and *Yorta Yorta* decisions. In the *Miriuwung Gajerrong* decision, the Court attributes the 'inherent fragility' of native title to the imposition of a new sovereign order.

> An important reason to conclude that, before the NTA, native title was inherently fragile is to be found in this core concept of a right to be asked permission and to speak for country. The assertion of sovereignty marked the imposition of a new source of authority over the land. Upon that authority being exercised, by the creation or assertion of rights to control access to land, the right to be asked for permission to use or have access to the land was inevitably confined, if not excluded. But because native title is more that the right to be asked for permission to use or have access (important though that right inevitably is) there are other rights and interests which must be considered, including rights and interests in the use of the land.[72]

It can be seen in the *Miriuwung Gajerrong* decision, as in the *Mabo* decision, that the construction of native title at common law as an inherently fragile and inferior interest in land, originates from an assumption that the nature of the power asserted by the colonizing state is singular, total and all-encompassing. The consequences of this for the extinguishment of native title are discussed in chapter 2. The *Yorta Yorta* decision illustrates the consequences of this for the recognition of native title.

> Upon the Crown acquiring sovereignty the normative system which then existed [Indigenous laws and customs] could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence only to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order of the new sovereign.[73]

The implications of the *Mabo* decision, that native title does not give recognition to the economic political and legal systems of Indigenous people, as a people, are fully realised in the *Yorta Yorta* decision.

> [W]hat the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty.[74]

The basis for limiting native title to the recognition of rights and interests and not the laws and customs from which these emanate can be found in this paragraph. The monopoly on law-making held by the new sovereign renders

70 ibid., per Gibbs J at 388.
71 *Mabo*, op.cit., per Brennan J (with whom Mason CJ and McHugh J agreed) at para 32 of His Honour's judgement.
72 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [91].
73 *Yorta Yorta*, op.cit., per Gleeson CJ, Gummow & Hayne JJ at [43].
74 ibid., at [44].

the law-making capacity of the Indigenous legal system defunct upon sovereignty being acquired. For this reason the recognition of native title rights and interests is limited to those created prior to the acquisition of sovereignty.

> To hold otherwise would be to deny the acquisition of sovereignty and as has been pointed out earlier, that is not permissible. Because there could be no parallel law-making after the assertion of sovereignty it also follows that the only rights and interests in relation to land or waters, originating otherwise than in the new sovereign order, which will be recognised after the assertion of that new sovereign order are those that find their origin in pre-sovereignty law and custom.[75]

In fastening the recognition of native title to a pre-sovereign system of laws, every claimant group must satisfy a court that the contemporary expression of their culture and their religion, does not emanate from Indigenous laws or customs that were created after sovereignty. Whenever present beliefs or practices appear in any way to differ from past beliefs and practices, the issue of whether these differences can be seen as evidence of a new set of laws and customs or adaptations of the pre-sovereign set of laws is raised and subject to proof. The difficulties of proving this distinction are discussed below. What is important to note here is the concept of sovereignty on which this distinction is based and how this concept limits the recognition of contemporary expressions of Indigenous culture.

Yet the assumption of exclusive sovereignty by a colonial power over Indigenous people is not shared in the world view of Indigenous people nor at international law. The evolution of the principle of self-determination at international law challenges the notion that the non-Indigenous state has exclusive jurisdiction over traditional land, not by replacing it with exclusive Indigenous jurisdiction, but by challenging the foundations on which the assertion of paramount control by one group to the exclusion of all others rests.[76]

> Any conception of self-determination that does not take into account the multiple patterns of human association and interdependency is at best incomplete and more likely distorted. The values of freedom and equality implicit in the concept of self-determination have meaning for the multiple and overlapping spheres of human association and political ordering that characterize humanity. Properly understood, the principle of self-determination, commensurate in the values it incorporates, benefits groups – that is, 'peoples' in the ordinary sense of the term – throughout the spectrum of humanity's complex web of interrelationships and loyalties, and not just peoples defined by existing or perceived sovereign boundaries.[77]

The right to self-determination forms the basis on which Indigenous people may share power within the existing state. It gives Indigenous people the right to choose how they will be governed.

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75 ibid.

76 See *Social Justice Report 2002*, op.cit., chap 2.

77 SJ Anaya, *Indigenous Peoples in International Law*, Oxford University Press, New York, 1996, p79.

While, within Australian jurisdiction, the notion that Indigenous peoples may continue to exercise law-making power within a colonial state breaches what is referred to by the High Court as a 'cardinal fact'[78] a very different approach has been adopted in Canadian jurisprudence. In *Campbell v Attorneys-General & The Nisga'a Nation*,[79] the terms of a treaty which gave legislative (and thus law-making) power to the Nisga'a people in relation to education, the preservation of their culture and the use of their land and resource were challenged as a breach of the Canadian Constitution. One basis of the challenge was that any right to self-government or legislative power was extinguished at the time of Confederation following the enactment of the then *British North America Act* (now called the *Constitution Act 1867*).

Even though Aboriginal laws did not emanate from a central print oriented law-making authority, the Court confirmed, as it has in Australia, that the Aboriginal peoples of Canada had legal systems prior to the arrival of Europeans. In the case of the Nisga'a people these legal systems, although diminished, were found to have continued after contact.

The next question was whether these functioning legal systems can be recognised under Canada's common law. The British Columbia Court reviewed previous North American authorities including *Johnson v M'Intosh*,[80] *Cherokee Nation v Georgia*,[81] and *Worcester v Georgia*[82]. In these cases, the then Chief Justice Marshall had assessed historical relations between British authorities and aboriginal peoples in North America prior to the American Revolution. In *Johnson v M'Intosh*, Chief Justice Marshall concluded that the Indigenous peoples' right to govern themselves had been "diminished" but not extinguished. The Chief Justice's statements on this matter were adopted 150 years later in *Van der Peet*:[83]

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.[84]

A review of the Canadian authorities also demonstrated that there was judicial authority, since Confederation, for the recognition of Indigenous customary law. Consequently the Canadian court found that the right to self-government and the power to make laws had survived Confederation, and were capable of recognition as part of Aboriginal title.

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78 *Yorta Yorta*, op.cit., per Gleeson CJ, Gummow & Hayne JJ at [55].
79 *Campbell & o'rs v Attorney General (British Columbia) & o'rs* (2000) BCSC 1123 (Supreme Court of British Columbia, 24 July 2000).
80 21 U.S. (8 Wheat) 543 (1823).
81 30 U.S. (5 Pet.) 1 (1831).
82 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832).
83 *R v Van der Peet* [1996] 2 SCR 507 at 542.
84 *Johnson v M'Intosh*, op.cit., at 572-3.

The construction of native title as a bundle of rights and interests, confirmed in the *Miriuwung Gajerrong* decision, also reflects the failure of the common law and the NTA to recognise Indigenous people as a people with a system of laws based on a profound relationship to land. Native title as a bundle of separate and unrelated rights with no uniting foundation is a construction which epitomises the disintegration of a culture when its law-making capacity, that is its sovereignty, is neatly extracted from it.

In the *Yorta Yorta* decision, the High Court considered the distinction made in the NTA between the law-making system of Indigenous people and the rights and interests that emanate from this system. It is only the latter which is recognised as native title, even though, in order to obtain this recognition, Indigenous people must prove they have acknowledged and observed their traditional laws and customs continuously since sovereignty. This requirement is discussed in the following section.

This separation of rights and interests from the laws they originate in was recognised by the High Court as fragmenting an otherwise integrated order. This construction however was considered necessary by the legislation governing the recognition process. In the *Miriuwung Gajerrong* case, the High Court could see that:

> [T]he connection which Aboriginal peoples have with "country" is essentially spiritual. ...It is a relationship which sometimes is spoken of as having to care for, and being able to "speak for" country. "Speaking for" country is bound up with the idea that, at least in some circumstances, others should ask for permission to enter upon country or use it or enjoy its resources, but to focus only on the requirement that others seek permission for some activities would oversimplify the nature of the connection that the phrase seeks to capture. The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.[85]

In this fragmented form, every right and interest for which recognition is claimed needs to be identified. An issue that arose in the *Miriuwung Gajerrong* decision, in relation to identifying native title rights and interests, was whether the translation from their context in Indigenous law to ones recognisable by the common law was possible without diminishing their original meaning. The Court's difficulty in giving culturally appropriate meaning to the core Indigenous concepts of 'a right to be asked and speak for country' illustrates this point.

> [I]t may be accepted that the right to be asked for permission and to speak for country is a core concept in traditional law and custom. As the primary judge's findings show, it is, however, not an exhaustive description of the rights and interests in relation to land that exist under that law and

85 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [14].

> custom. It is wrong to see Aboriginal connection with land as reflected only in concepts of control of access to it. To speak of Aboriginal connection with 'country' in only those terms is to reduce a very complex relationship to a single dimension. It is only to impose common law concepts of property on peoples and systems which saw the relationship between the community and the land very differently from the common lawyer.[86]

Having recognised that Aboriginal connection to country might be different to a property right to control the land, reflecting a deeper spiritual relationship with the land, the Court promptly explains how the core concepts of a right to be asked permission and to speak for country are rightly expressed in common law terms as rights to possess, occupy, use and enjoy the land to the exclusion of all others.

> The expression of these rights and interests in these terms [the right to exclusive possession occupation use and enjoyment of the land] reflects not only the content of a right to be asked permission about how and by whom country may be used, but also the common law's concern to identify property relationships between people or things as rights of control over access to, and exploitation of, the place or thing.[87]

Having found the common law equivalent for these core concepts of traditional law and custom the Court is able to determine the extent to which the creation of rights to control access to land under the non-Indigenous property system would extinguish them.

> An important reason to conclude that, before the NTA, native title was inherently fragile is to be found in this core concept of a right to be asked permission and to speak for country. The assertion of sovereignty marked the imposition of a new source of authority over the land. Upon that authority being exercised, by the creation or assertion of rights to control access to land, the right to be asked for permission to use or have access to the land was inevitably confined, if not excluded. But because native title is more that the right to be asked for permission to use or have access (important though that right inevitably is) there are other rights and interests which must be considered, including rights and interests in the use of the land.[88]

Thus even though Indigenous relationships to land, in their cultural context, may be unique and incommensurable, through the native title process they are given a meaning which renders them comparable to non-Indigenous property rights and thus able to be extinguished.

The result of this approach is that even though Aboriginal people continue to maintain a spiritual connection with the land, the common law will consider their native title rights to be extinguished where inconsistency occurs. This disjuncture between Aboriginal law and culture and common law recognition was acknowledged in the High Court decision.

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86 ibid., at [90].
87 ibid., at [88].
88 ibid., at [91].

> [T]he recognition may cease where, as a matter of law, native title rights have been extinguished even though, but for that legal conclusion, on the facts native title would still subsist.[89]

Between the fact of the continuing connection of Indigenous people with their land and the protection of this relationship in contemporary society are the legal processes of recognition and extinguishment. Together these processes impair the extent to which Indigenous people are able to enjoy their cultural and property rights.

The Relationship between the Recognition and Extinguishment of Native Title

A bundle of rights approach to recognition creates an inherently weak title that is able to be eroded, piece by piece. The relationship between the identification of native title as a bundle of rights and interests and their extinguishment through the inconsistency of incidents test is noted in chapter 2. In identifying native title rights and interests, the Court was not content to leave their identity indeterminate or ambiguous where an unresolved question of extinguishment might exist.

> [T]o find that, according to traditional law and culture, there is a right to control access to land, or to make decisions about its use, but that the right is not an exclusive right, may mask the fact that there is an unresolved question of extinguishment. At least it requires close attention to the statement of "the relationship" between the native title rights and interests and the "other interests" relating to the determination area.[90]

In ensuring that the identity of native title rights contained no unresolved questions of extinguishment it was important to identify any exclusive rights that might imply a measure of control by Indigenous groups over access to land. Describing native title rights to 'possession' as distinct from possession to the exclusion of all others was considered misleading in that it 'invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms'.[91] Similarly, identifying a non-exclusive right to make decisions about the use and enjoyment of land was considered 'not easy'.[92]

As I explain in chapter 2[93] the characterisation of native title rights that best survive once all other interests are given full enjoyment are ones which are expressed at a high level of specificity;[94] are limited to the conduct of activities on the land rather than the control of activities on the land;[95] and confine those activities to traditional rather than contemporary ones.

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89 ibid., at [21].
90 ibid., at [53].
91 ibid., at [52] & [89].
92 ibid., at [49].
93 See *Comparing Rights* section, pages 51-53, below.
94 See, e.g. *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [29].
95 ibid., at [52].

Thus, for example, a right to dig for ochre was better able to survive the grant of a mineral lease on the same land than a right to utilise the resources of the land. Similarly a right to hunt and gather was better able to survive the grant of a pastoral lease than a right to control access to the land or make decisions about the use of the land. To find its place in the gaps and crevices of non-Indigenous interests, native title must be small, flexible and harmless.

The *Miriuwung Gajerrong* and the *Yorta Yorta* decisions together elucidate the fundamental principles on which the Court decide not only the way in which native title is recognised and extinguished, but the relationship between them. The *Miriuwung Gajerrong* case in particular presented the Court with a factual context in which the recognition and the extinguishment of native title are interrelated issues. Prior to these decisions the processes of recognition and extinguishment represented a troubling disjuncture in the law of native title with recognition understood as overturning terra nullius by giving it legal status and so protecting Indigenous rights to land. Extinguishment, on the other hand, protected non-Indigenous interests in land at the expense of Indigenous interests. This tension in native title law, between the recognition of native title with its origins in equality, and extinguishment with its origins in discrimination, has now been resolved. The views of Justices Callinan and McHugh give an indication of the course which the law of native title has taken.

Justice Callinan expressed the view in the *Miriuwung Gajerrong* decision that the way in which the law of native title resolves 'the chasm between the common law and native title rights' has reduced native title to 'little more than symbols':

> I do not disparage the importance to the Aboriginal people of their native title rights, including those that have symbolic significance. I fear, however, that in many cases because of the chasm between the common law and native title rights, the latter, when recognised, will amount to little more than symbols. It might have been better to redress the wrongs of dispossession by a true and unqualified settlement of lands or money than by an ultimately futile or unsatisfactory, in my respectful opinion, attempt to fold native title rights into the common law.[96]

The 'attempt to fold native title rights into the common law' in the *Miriuwung Gajerrong* case meant native title gave way to non-Indigenous interests every time. Justice McHugh also commented in that decision upon the injustice of a system in which the comparison of competing legal rights inevitably results in the further dispossession of Indigenous interests:

> The dispossession of the Aboriginal peoples from their lands was a great wrong. Many people believe that those of us who are the beneficiaries of that wrong have a moral responsibility to redress it to the extent that it can be redressed. But it is becoming increasingly clear – to me, at all events – that redress can not be achieved by a system that depends on evaluating the competing legal rights of landholders and native title holders. The deck is stacked against the native title holders whose fragile rights must give way to the superior rights of the landholders whenever the two classes of rights conflict.[97]

96 *Miriuwung Gajerrong*, op.cit., per Callinan J at [970].
97 *Miriuwung Gajerrong*, op.cit., per McHugh J at [561].

Section 223(1)(a) of the NTA requires that the rights and interests that can be recognised as native title must be possessed under the traditional laws acknowledged and the traditional customs observed by the peoples concerned. This has been interpreted by the Court in the *Yorta Yorta* decision to require proof of continuous observance and acknowledgement of those laws and customs since sovereignty. The Court's interpretation of s223(1)(a) establishes it as a significant barrier to Indigenous people gaining recognition and protection of their traditional rights and interests in land as they are observed and acknowledged in contemporary society.

In the previous sections I commented on the fragmentation caused by the separation of the rights and interests that the law of native title recognises from the laws and customs in which they originate.[98] While the notion of sovereignty relied on by the Court prevents the recognition of Indigenous legal systems and their law-making capacity after the acquisition of sovereignty, claimants nevertheless have to show in s223(1)(a) that the rights and interests which are capable of recognition are possessed under traditional laws acknowledged and traditional customs observed by them. The difficulty of this task is due to the interpretation the Court gives to the meaning of the term 'traditional laws and customs' in s223(1)(a).

A fundamental tenet of the Court's interpretation of s223(1)(a) in the *Yorta Yorta* case is that the laws and customs of Indigenous people are a body of norms or a normative system under which rights and interests are created.[99] This, it says, follows from *Mabo* and the NTA itself. The effect of the British Crown acquiring sovereignty is that the Indigenous normative system that created rights and interests could not validly continue to do so after this date. Upon sovereignty, it was replaced by the imposition of a new normative order. Thus recognition of native title rights and interests is restricted either to those created by the new normative system or to those created by the Indigenous normative system of laws and customs before sovereignty.[100] The Court confirmed that the native title rights to which the NTA refers are rights and interests created before sovereignty by Indigenous laws and customs. This is what is to be understood as 'traditional' in the phrase 'traditional laws and customs' in s223(1)(a). As pre-sovereign rights and interests they are the relics of a legal system that no longer functions or at least 'validly'[101] functions in the contemporary world.

A further condition placed by NTA s223(1)(a) on the recognition of native title rights and interests stems from the relationship between the normative system of laws and the society that creates it. A normative system of laws, it is said, gets its identity from being observed and acknowledged by a society. Moreover it is the observation and acknowledgement of laws and customs that define a particular society. The two, laws and society, are thus inextricably linked:

98 See pages 27-29, above.
99 *Yorta Yorta*, op.cit., per Gleeson CJ, Gummow & Hayne JJ at [39] & [40].
100 ibid., at [43] & [44].
101 ibid., at [43].

> Laws and customs arise out of, and in important respects, go to define a particular society. In this context, "society" is to be understood as a body of persons united in and by its acknowledgement and observance of a body of law and customs… To speak of rights and interests possessed under an identified body of laws and customs is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a particular society that exist as a group which acknowledges and observes those laws and customs.[102]

Based on this interdependent relationship between laws and society, the recognition of rights and interests possessed under traditional laws and customs, as required by s223(1)(a) of the NTA, is said to be dependent on there being a society which observes and acknowledges this body of laws and customs. Thus, in order to prove rights and interests are possessed under traditional laws and customs, a claimant group must also prove that the observance and acknowledgement of the traditional laws and customs that create those rights and interests is by a body of persons united as a society. Once the society no longer exists then nor do the laws that are the foundation of the rights and interests requiring recognition. To have native title rights and interests recognised by a court the proof of the continuous existence of a society which observes and acknowledges the tradition laws and customs is required. Given the important role that the interdependent relationship between law and society, posited by the High Court, plays in the recognition and proof of native title, it requires a critical appraisal.

The relationship proposed by the High Court between law and society can be understood in two different ways. If the Court is proposing that law is an external condition for the existence of society, the identity of a particular society being the result of its members observing a particular set of laws, then the law cannot at the same time be a product of that society or an internal aspect of the identity of that society. Similarly, if society is proposed as an external condition for the existence of a body of laws, any particular body of laws being a product of the norms of that society, then the society cannot at the same time be a product of that law, or an internal aspect within the definition of that law. On this analysis the relationship that the Court is positing between law and society is circular and difficult to support.

Perhaps, however, the Court is describing a more dynamic relationship between law and society whereby each interacts with the other so that society affects laws which in turn affect society and so on. On this understanding neither law nor society is a primary determinant of the other but they interact over time to produce changes in each other.

If the Court is affirming this dynamic relationship between law and society then it must also affirm that it is the open and incomplete nature of these two elements, law and society, that allow each to redefine themselves through changes in the other. Laws do not exist as a complete body of norms but are constantly negotiated and interpreted within a social arena. Society also cannot be finally determined through the laws it observes but exists in a plurality of legal and

102 ibid., at [49] & [50].

political spaces, assuming different identities as the context, including the legal context, changes.

While this dynamic view of the relationship between law and society as unstable, incomplete and dynamic accords with contemporary notions this is not the relationship that Indigenous people must establish to obtain recognition of native title. Indeed this type of relationship, which recognises a plurality of identity is anathema to the Court's understanding. The Court's view of society is one that is given complete identification through the laws it observes. Moreover, in the same tautological way that society and law are given existence, so too their existence ceases. Society ceases being a society once it ceases observing the laws that define it and once society ceases observing the laws they cease to be laws:

> And if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality.[103]

The consequence of the Court's view of the relationship between law and society for Indigenous applicants is that, under NTA s223(1)(a), this closed circle of identification between Indigenous laws and society must be maintained from sovereignty to the present. The claimants must establish that there has been continuous observance and acknowledgement of the laws and customs of Indigenous people since sovereignty. In order to show this they must also show that, since sovereignty, the society observing these Indigenous laws and customs did not cease to exist.

However the real difficulty that makes the task of proving s223(1)(a) of the NTA almost impossible is the combination of requiring proof of a vital and ongoing relationship between the Indigenous law and Indigenous society while at the same time denying the law making function of the Indigenous legal system. By definition the vitality necessary to sustain this mutually identifying relationship from sovereignty to the present day has been denied, or at least the normative system of laws and customs. Inevitably, like Indigenous laws, Indigenous society must follow quickly behind to become a relic of a once vital and functioning society. To then expect that these entities, that have been relegated to a previous era can go on interacting in a self sustaining fashion possessing rights and interests, observing traditional laws and customs, defies credibility and more importantly, proof.

In this context, real evidentiary difficulties arise for Indigenous applicants seeking recognition of native title. The questions that arise and which they must satisfy include: What is the content of pre-sovereign laws and customs?[104]; Are the

103 ibid., at [50].

104 'The native title rights and interests which are the subject of the Act [NTA] are those which existed at sovereignty, survived that fundamental change in legal regime, and now, by resort to the processes of the new legal order, can be enforced and protected. It is those rights and interests which are "recognised" in the common law. ... It may be accepted that demonstrating the content of that traditional law and custom may very well present difficult problems of proof. But the difficulty of the forensic task which may confront claimants does not alter the requirements of the statutory provision', ibid., at [77] & [80].

rights and interests presently possessed, rights and interests possessed under pre-sovereign laws and customs?;[105] Are differences between the rights and interests presently possessed and those possessed before sovereignty differences which result from developments of or alterations to the traditional laws and customs or are they differences that result from new laws and customs that are generated after sovereignty?[106] When does an interruption to the observance of traditional laws and customs amount to cessation of their observance?;[107] When can it be said that the observance of laws and customs is by a new society even though the laws and customs are similar to or even identical with those of pre-sovereign society?[108]

The Court recognises that these difficult evidentiary questions are made even more difficult by the fact that the traditional laws and customs are transmitted orally from generation to generation. In the cultural context in which proof of these very difficult elements are required, the amendments to s82 of the NTA can be seen as a further denial of the rights of Indigenous people to cultural equality. Under the original NTA a court was 'not bound by technicalities, legal forms or rules of evidence'[109] and was bound to 'pursue the objective of providing a mechanism of determination that is fair, just, economical, and prompt'.[110] Under the amendments, a new s82 provides that a court is bound by the rules of evidence 'except to the extent that the Court otherwise orders'.[111] The difficulty of building a base for the court to draw inferences on the content of traditional laws and customs prior to sovereignty, their ongoing transmission from generation to generation by oral form and their present possession is, under these amendments, almost insurmountable.

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105 ibid., at [86].

106 'Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence *only* to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order of the new sovereign. ... [A]ccount...[can] be taken of any alteration to, or development of, that traditional law and custom that occurred after sovereignty. Account may have to be taken of developments at least of a kind contemplated by that traditional law and custom. ... But what the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. ... Because there could be no parallel law-making system after the assertion of sovereignty it also follows that the only rights or interests in relation to land or waters, originating otherwise than in the new sovereign order, which will be recognised after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom', ibid., at [43] & [44].

107 '[D]emonstrating ... some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not *necessarily* be fatal to a native title claim. ... [A]cknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed *now* could not properly be described as the *traditional* laws and customs of the peoples concerned... [I]t must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs', ibid., at [83], [87] & [89].

108 ibid., at [87].

109 NTA, prior to 1998 amendments, s82(3).

The second of the criteria required by the NTA to satisfy the definition of native title or native title rights and interests that are possessed under the traditional laws and customs acknowledged and observed by the Aboriginal peoples or Torres Strait Islanders is set out in s223(1)(b):

> the Aboriginal peoples of Torres Strait Islanders, by those laws and customs, have a connection with the land or waters.

As the High Court pointed out in *Yorta Yorta*, the NTA sets out that the source of connection is traditional law and custom, not the common law.[112] However, the NTA gives no further guidance as to what is required by 'connection' for native title to be recognised through a determination, either by consent or through litigation. Some indication of the Parliament's intention may be given in the section setting out the conditions for registration of a claim. Despite the status of the registration process as an administrative test only, these conditions require the Native Title Registrar to make an assessment of the factual basis for claimed native title[113] and to be satisfied that at least one member of the native title claim group 'currently has or previously had a traditional physical connection with any part of the land or waters covered by the application'.[114] Justice Callinan referred to this provision of the NTA in his reasons in *Yorta Yorta*,[115] although the courts have explicitly rejected the need for 'on-going or continual physical occupation of the land' by the claimants in the decisions of *De Rose*[116] and *Miriuwung Gajerrong*.[117]

Despite the clear finding of the High Court in *Yarmirr*,[118] *Yorta Yorta*,[119] and *Miriuwung Gajerrong*[120] that the NTA, rather than the common law, is the primary basis for deciding the scope of recognition of native title, the development of the concept of connection, and the standard of proof to be met by claimants, are not to be found in the NTA. In practice, the courts, along with State governments, have played a key role in elaborating the meaning of s223(1)(b) and therefore the standard of proof for connection to be met by claimants. State governments have done this in the mediation process by insisting, as a prerequisite to their effective entry into mediation, on a connection report that

110 ibid., s82(1).
111 NTA, s82(1).
112 *Yorta Yorta*, op.cit., per Gleeson CJ, Gummow & Hayne JJ at [34].
113 NTA, s190B(5).
114 NTA, s190B(7)(a).
115 *Yorta Yorta*, op.cit., per Callinan J at [184].
116 op.cit., at [567].
117 op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [63]; also Full Federal Court decision in *Western Australia v Ward & o'rs* [2000] FCA 191 (3 March 2000) per Beaumont & Von Doussa JJ at [245] (with whom North J agreed at [682]).
118 op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [7] & [15].
119 op.cit., per Gleeson CJ, Gummow & Hayne JJ at [75].
120 op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [25].

meets their published requirements.[121] The courts have taken the approach that the ultimate burden of proof rests with the claimants.[122]

In taking this approach, the Courts have themselves noted a number of problems arising from 'the intersection of traditional laws and customs with the common law'[123] and with the NTA. In *Miriuwung Gajerrong*, the High Court points out 'the difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests' but notes that this is required by the NTA. The Court concludes that 'the spiritual or religious is translated into the legal'.[124] In addition to the evidentiary difficulties of proving the elements of native title[125] Justice O'Loughlin in *De Rose* deals at some length with the evidentiary problems that are seen as peculiar to native title claims, particularly in what is normally regarded as hearsay evidence.[126] Although bound by NTA s82(1), His Honour sets out his reasons for accepting hearsay evidence – that is, what Aboriginal witnesses, with an oral history, were told about traditional laws and customs, particularly by older generations. A third problem identified in *De Rose* is the deficiency of the adversarial process, in which the court's decision can only be made on the basis of the evidence presented, without being able to assess whether the evidence is or is not complete or adequate.[127] As O'Loughlin J observes 'If that evidence was inadequate to deal properly with the subject, it could mean that the findings that I make on the subject are likewise inadequate'.[128] This is a critical issue for the recognition of native title, both because of the acknowledged difficulties of 'expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests', but also because of the accessibility and quality of legal representation for the claimants, a point to which I shall return below.

In order to achieve recognition of their native title through a determination of native title therefore, claimants must meet the requirement of NTA s223(1)(b) that they have a connection with the land or waters claimed, by their traditional laws and customs. This means that, for a consent determination, they must satisfy other parties – but particularly State or Territory governments and, increasingly, the Commonwealth[129] – that they have this connection and, for a litigated determination, the courts. The courts have mentioned the requirement for connection in a number of the most recent cases, but it is dealt with at

121 Department of the Premier and Cabinet, *Guidelines for the Provision of Evidentiary Material In Support of Applications for a Determination of Native Title*, Government of Western Australia, October 2002.
The Queensland Government document *Compiling a Connection Report* is currently being revised and will be posted back to this site when complete: <www.premiers.qld.gov.au/about/nativetitle/newweb/pages/brochures.htm>, accessed 15 January 2003.

122 *Coe v Commonwealth* (1993) 118 ALR 193 per Mason CJ at 206; *De Rose* at [265] & [913].

123 *Fejo*, op.cit., per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ at [46].

124 *Miriuwung Gajerrong*, per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [14].

125 See pages 33-34, above.

126 *De Rose*, op.cit, at [264]-[271].

127 ibid., at [89] & [144].

128 ibid., at [89].

129 The Hon. D Williams, Attorney-General, 'Native title: the next 10 years', Address to *Native Title Conference 2002: Outcomes and Possibilities*, Geraldton, 4 September 2002, para 38-40.

greatest length in *De Rose*, where the judge saw it as the central issue in dispute.[130]

Interpretation of connection to country in De Rose v South Australia

The claimants in *De Rose* were 'those Yankunytjatjara people who have historical, spiritual and ancestral relationship to the claim area'.[131] The area claimed was over three pastoral leases, known collectively as De Rose Hill Station, in the far north-west of South Australia. The Court heard evidence from twenty-six Aboriginal people, many of whom lived and worked on the Station at some stage of their lives, at least up until 1978, when the last Aboriginal stockmen left the property. The judge found that native title over the Station has not been extinguished by legislation[132] and that therefore a determination of non-exclusive native title was available to the claimants. His Honour accepted much of the evidence of the Aboriginal witnesses. The Court took evidence on country at thirteen sites on or near the Station. These sites were among sixty-five possible sites identified by the claimants as significant, forty-six of which are on De Rose Hill Station.[133] The Judge accepted that 'what I saw and observed satisfied me that the witnesses and participants showed that they possessed knowledge of the particular sites and knowledge of the activities in which they engaged at those sites'.[134] Referring to the High Court's reasoning in *Miriuwung Gajerrong*,[135] Justice O'Loughlin held that a physical connection to the land is not a requirement for a grant of native title.[136] His Honour also rejected the need for a strict test of biological descent to be applied[137] and accepted that it would be possible to make a finding of substantial maintenance of continuity of connection from sovereignty, even where there may have been 'significant gaps' in the chronology of the historical timeline.[138]

Despite all this, the *De Rose* decision was that no native title exists in the claim area. Justice O'Loughlin's reason for that finding was the failure of the claimants to satisfy him that 'they now have any connection with the land and waters within the claim area'.[139]

In reaching this finding, Justice O'Loughlin focuses on the absence of the claimants from De Rose Hill Station for the last twenty years and what he concludes was not just a physical absence but their failure over that period to attend to any 'religious, cultural, or traditional ceremony or duty' on the Station.[140]

130 *De Rose*, op.cit., at [49].
131 ibid., at [31].
132 ibid., at [246]-[247].
133 ibid., at [205].
134 ibid., at [381.
135 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [64].
136 *De Rose*, op.cit., at [377].
137 ibid., at [559].
138 ibid., at [570].
139 ibid., at [915].
140 ibid., at [107].

His Honour noted that, 'although a spiritual or cultural connection only may suffice for the purposes of [NTA] s223(1)(b), the assessment of whether the requirement has been met will always be a question of fact'.[141] He also emphasised that connection to country must be current[142] and that a 'mere' connection with land or waters is insufficient; as set out in NTA 223(1)(b), the connection must be 'by those laws and customs' – that is 'because of' or 'as a result of' traditional laws acknowledged and traditional customs observed.[143] His finding in relation to almost all of the Aboriginal witnesses is that they had 'abandoned' their connection to the claim area.[144]

In accepting that the Aboriginal witnesses still retain knowledge of their traditional laws and customs – have indeed retained their culture[145] – Justice O'Loughlin makes a distinction between 'adherence to' and 'knowledge of' traditional laws and customs and concludes that the claimants' 'adherence to' has 'eroded away'.[146] This conclusion is to a significant extent based on two factors. One of these is the Judge's assessment that twenty years – less than one generation – is an adequate period on which to draw conclusions about loss of connection, despite continuity of knowledge and the competence of witnesses to perform 'two very remarkable ceremonies'.[147] Secondly, his conclusion is based on his analysis of the reasons for people having left the Station as being principally associated not with 'their Aboriginal lifestyle, traditions or customs', but by aspects of 'European social and work practices'.[148] He puts forward that the two main reasons why the Aboriginal people left De Rose Hill were the opening of the community centre at Indulkana in 1968 and the loss of work after the Pastoral Award in 1968. Both of those reasons, in His Honour's view, 'deny the presence of a continuing native title connection with the area'.[149] This theme of incompatibility between 'non-Aboriginal factors such as work and wages and his [a claimant's] daughter's education' and 'Aboriginal law or customs',[150] and therefore of loss of connection, recurs throughout the reasons for judgement. It sits with the occasional observation such as finding 'preposterous' one of the women witness's claims that the lack of a car has been her reason for not visiting her land,[151] or that a spiritual connection with the land would suffice 'where *Anangu* have been forcibly dispossessed of their land but that has not been suggested here'.[152]

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141 ibid., at [569].
142 ibid.
143 ibid., at [891].
144 The reference in [599] of Justice O'Loughlin's reasons is in relation to the claimant Peter De Rose. The same observation is made by the Judge for each of the following Aboriginal witnesses. The High Court in *Yorta Yorta* subsequently rejected the use of 'abandonment' as a way to describe the consequences of interruption in acknowledgement and observance of traditional laws and customs: *Yorta Yorta*, op.cit., per Gleeson CJ, Gummow & Hayne JJ at [90].
145 *De Rose*, op.cit., at [903].
146 ibid., at [907].
147 ibid., at [903].
148 ibid., at [896].
149 ibid.
150 ibid., at [681].
151 ibid., at [816].
152 ibid., at [892].

The inclusion of such remarks in the reasons for judgement and the assumptions underlying them about the exotic character of traditional laws and customs suggest that the expansion of the concept of connection in *De Rose* goes well beyond the requirements both of the NTA and of the common law. They also raise concerns about the extent to which the Court in *De Rose* has unnecessarily expanded the NTA's requirement for connection and interpreted it in a way that may infringe on the right enshrined in human rights instruments to participate in the cultural life of the community.[153]

The *De Rose* judgement is now under appeal to the Full Federal Court. The grounds of appeal include Justice O'Loughlin's finding that the claimants had no connection or had abandoned their connection to the claimed area. In the light of the High Court's clear indication that the principle source of recognition of native title is the NTA rather than the common law, the courts have the opportunity to revisit the interpretation of connection in a way that better reflects both the traditional laws and customs of Aboriginal peoples and Torres Strait Islanders on the one hand, and human rights law on the other.

Interpretation of connection to country in Kennedy v Queensland

Kennedy[154] was a non-claimant application by the holder of a pastoral lease near Winton in Queensland that native title does not exist over the property.[155] Because the application was unopposed, the Federal Court made the order, as permitted under certain conditions in the NTA, that native title does not exist over the area. In his reasons for judgement, however, Justice Sackville noted that the Koa People had initially lodged a claimant application in response to the non-claimant application, that they subsequently withdrew that application, and that they also withdrew as parties to the non-claimant application. On that basis, and in the absence of any evidence from the Koa People, he concluded that 'there are indeed no native title interests over Castle Hill' and that 'any connection that may have existed between the Aboriginal peoples of the area and Castle Hill, in accordance with traditional laws and customs, has not been maintained'.[156]

One of the Judge's reasons for his finding was the evidence presented by Mr Kennedy that, since commencing occupation on Castle Hill in December 1951, he had never seen Aboriginal people carrying out any traditional activities on the property and that no Aboriginal people had been present on the property except for work, and that that ceased after 1962. The evidence was that there had been no physical presence of Aboriginal people on Castle Hill for over forty years. The Judge's acceptance of physical absence as a sufficient reason for loss of connection[157] is at variance with the findings in other courts, including the Full Federal Court in *Miriuwung Gajerrong*[158] current at the time of the *Kennedy* decision and confirmed more recently by the High Court, as discussed earlier.

153 ICESCR, op.cit., art15; *Universal Declaration of Human Rights* (UNGA resolution 217A (III), UN doc A/810 at 71, 10 December 1948), art27(1).
154 *Kennedy v State of Queensland* [2002] FCA 747 (13 June 2002) ('*Kennedy*').
155 cf NTA s61(1)(2).
156 *Kennedy*, op.cit., at [34].
157 ibid.
158 *Western Australia v Ward & o'rs* [2000], op.cit.,

Justice Sackville identified a second reason for being satisfied that the withdrawal of the claimant application by the Koa People demonstrated their loss of connection to the area. This was that the Koa People had the benefit of legal advice and representation arranged by the Gurang Land Council, a Native Title Representative Body[159] ('NTRB'). Unfortunately, this assumption made by His Honour cannot be justified, given the current situation of NTRBs. The inadequacy of resources and resultant limits on the ability of NTRBs to perform their statutory functions appropriately has been drawn to the attention both of the courts and of the Commonwealth on a number of different occasions.[160] Although there was an increase in this funding in the 2002 Federal budget, it remains inadequate to meet the onerous demands placed on NTRBs. This has serious implications for the recognition and protection of native title under the NTA, and also for the protection under human rights law of people's right to enjoy culture.[161]

At one level, the decision in *Kennedy* is of limited relevance to other native title claims because of the particular circumstances of its being an unopposed non-claimant application. On another level, the Judge's finding of loss of connection for the reasons he sets out raises some concerns about the direction of the courts in limiting even further the scope of recognition of native title.

Limitations set by the Courts on the Protection of Cultural Knowledge

The judgement in *De Rose* illustrates a further way in which recent court decisions have dealt with the question of connection in the context of its relation to cultural knowledge. In *De Rose*, the claimants sought a limited right to protect their cultural knowledge by preventing 'the disclosure otherwise than in accordance with traditional laws and customs of tenets of spiritual beliefs and practices (including songs, narratives, rituals and ceremonies) which relate to areas of land or waters, or places on the land or waters'.[162] Justice O'Loughlin rejected this with reference to the Full Court and High Court decisions in *Miriuwung Gajerrong* that 'matters of spiritual beliefs and practices are not rights in relation to land and do not give the connection to the land that is required by s223 of the NTA'.[163] This finding seems inconsistent with the High Court's statements that 'the connection which Aboriginal peoples have with "country" is essentially spiritual',[164] a proposition with which Justice O'Loughlin agreed.[165] It is also at odds with traditional law and custom, and with the observation of the High Court in *Miriuwung Gajerrong* that 'to some degree, for example respecting access to sites where artworks on rock are located, or ceremonies

159 *Kennedy*, op.cit., at [32].
160 This issue was addressed in some detail in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, Human Rights and Equal Opportunity Commission, Sydney, 2002, pp67-72. NTRB under-funding has most recently been discussed in *Ministerial Inquiry into Greenfields Exploration in Western Australia*, Department of Mineral and Petroleum Resources (WA), 2002, p88.
161 *Native Title Report 2001*, op.cit., p85.
162 *De Rose*, op.cit., at [50].
163 ibid., at [51].
164 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [14].
165 *De Rose*, op.cit., at [568].

are performed, the traditional laws and customs which are manifested at these sites answer the requirement of connection with the land' as set out in s223(1)(b).[166] Nevertheless, in *Miriuwung Gajerrong*, the High Court took the view that recognition of the right as asserted in that case went beyond the recognition available under the NTA[167] and indicated that protection of cultural knowledge is to be sought not in the NTA but in other statutes and cases relating, for example, to intellectual property or copyright. Cultural heritage laws offer a further avenue for protection.

This approach by the courts makes clear that it is unlikely that the NTA will be seen as a vehicle for the protection of cultural knowledge, even though the High Court in *Miriuwung Gajerrong* identified some of the conditions under which this might be possible.

Recognition by the Common Law under s223(1)(c)

The NTA, in its definition of native title in s223(1)(c), requires that any rights or interests sought to be recognised as 'native title' must 'be recognised by the common law'. This phrase was directly addressed in the High Court's decision in *Yarmirr* where the High Court explained that the common law cannot recognise Indigenous rights where the two are inconsistent.[168]

In *Yarmirr* the High Court found that an exclusive right to control access to the sea could not be recognised because it was inconsistent with the public right of navigation and fishing and Australia's international obligation to permit innocent passage of ships through Australia's territorial sea. Exclusive rights to traditional sea country, constituted by an elaborate system of laws and customs, were not given recognition. In relation to the exploitation of their sea country, particularly commercial fishing and petroleum exploration, native title holders are thus relegated to bystanders in the major natural resource developments taking place in their sea country.

An alternative approach suggested by Justice Kirby, that the rights of control over the sea were qualified or regulated by the rights of navigation and innocent passage[169] but still able to be recognised, was not adopted by the majority.[170] This approach seeks to maintain, wherever possible, Indigenous culture while at the same time allowing full expression to the rights recognised by the common law. It is also consistent with a human rights approach to the recognition of native title rights and interests. Instead the Court found that where there was any element of inconsistency, native title would be extinguished.

166 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [59].
167 ibid., at [58]-[60].
168 *Yarmirr*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [42].
169 ibid., per Kirby J at [272]-[282].
170 '[T]here is a fundamental inconsistency between the asserted native title rights and interests and the common law public rights of navigation and fishing, as well as the right of innocent passage. The two sets of rights cannot stand together and it is not sufficient to attempt to reconcile them by providing that exercise of the native title rights and interests is to be subject to the other public and international rights', *Yarmirr*, ibid., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [98].

The recent High Court decision in *Yorta Yorta* has also provided further direction on the Court's interpretation of s223(1)(c). There the Court made clear that this subsection does not invite incorporation of the entire body of the common law into the NTA. Instead there are two main purposes that the section serves:

> First, the requirement for recognition by the common law may require refusal of recognition to rights or interests which, in some way, are antithetical to fundamental tenets of the common law. ... Secondly, however, recognition by the common law is a requirement that emphasises the fact that there is an intersection between legal systems and that the intersection occurred at the time of sovereignty. The native title rights and interests which are the subject of the Act [NTA] are those which existed at sovereignty, survived that fundamental change in legal regime, and now, by resort to the processes of the new legal order, can be enforced and protected. It is those rights and interests which are "recognised" in the common law.[171]

The second of these features, and its effect on the recognition of contemporary Indigenous culture, has been discussed above in relation to s223(1)(a). The first feature, refusal of recognition to rights that are antithetical to fundamental tenets of the common law, was not elaborated upon in the *Yorta Yorta* decision but was briefly considered in the *Miriuwung Gajerrong* decision where the Court referred to 'the general objective of the law of the preservation and protection of society as a whole'.[172]

It is difficult to know from the case law so far, the extent to which the requirement by the High Court, that the rights and interests recognised as native title are consistent with the fundamental tenets of the common law, will provide further bases for restricting the enjoyment by Indigenous people of their human rights.

Conclusion

The standard of proof and the burden it places on Indigenous applicants seeking recognition of the contemporary expression of their culture and identity is very high. They must prove a normative system of laws and the seamless transmission of these laws from one society to the next to the present day. Yet what do Indigenous people get from this recognition process once they have overcome these legal hurdles? They don't get recognition of the laws and customs that generate rights and interests. They don't get recognition of the systems that keep their culture vital and developing. They don't get recognition of their spiritual connection with the land or their governance structures.

These are the rights that, at international law, Australia has agreed to protect and maintain. Yet these are not the rights that are recognised by native title law. From native title law, Indigenous people get recognition of a bundle of rights and interests that is extinguished completely or partially whenever their enjoyment is inconsistent with non-Indigenous people's enjoyment of their rights and interests.

171 *Yorta Yorta*, op.cit., per Gleeson CJ, Gummow & Hayne JJ at [77].
172 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [21].

Chapter 2

Extinguishment of Native Title

The two recent High Court decisions in *Miriuwung Gajerrong*[1] and *Wilson v Anderson*[2] have clarified some important issues regarding the extinguishment of native title under the *Native Title Act 1993* (Cwlth) ('NTA') and its relationship with extinguishment under the common law. They also provide some important insights into the meaning of discrimination as it responds to the specific issues raised by the recognition of native title, a proprietary interest which is inherent to a particular racial group. This section of the Report seeks to delineate the Court's decision on these issues in order to participate in and progress a long-standing debate concerning native title.

The central issue in this debate is whether the extinguishment of native title as it occurs under Australian law is racially discriminatory. It is an important debate about the ethical underpinnings of a legal regime which for the first time gives recognition to the inherent rights of Indigenous people.

In respect of the original NTA, there appeared to be little doubt, both internationally and domestically, that the legislature had put in place an equitable system that had the overall consent of Indigenous people. The Committee on the Elimination of Racial Discrimination ('CERD') accepted in 1993 that the original NTA was compatible with Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*[3] ('ICERD') although this finding was contested by various Aboriginal activists. In 1995 the High Court in *Western Australia v Commonwealth*[4] ('*Native Title Act Case*') declared the original NTA to be either a special measure under s8 of the *Racial Discrimination Act 1975* (Cwlth) ('RDA') or 'a law which, though it makes racial distinctions is not racially discriminatory'.[5]

1 *Western Australia v Ward & o'rs* [2002] HCA 28 (8 August 2002) ('*Miriuwung Gajerrong*').
2 *Wilson v Anderson & o'rs* [2002] HCA 29 (8 August 2002) ('*Wilson v Anderson*').
3 660 United Nations Treaty Series 195 (Australia joined 1975).
4 (1995) 183 CLR 373 ('*Native Title Act Case*').
5 ibid., per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ at 483.

In 1998 the debate was enlivened by the introduction into Parliament of substantial amendments to the NTA which provided for the statutory extinguishment of native title. In particular, the introduction of the confirmation provisions, which provided for the extinguishment or partial extinguishment of native title by the creation of non-native title tenures and classes of tenures, was criticised as a breach of the international and domestic law on racial equality. The extension of the validation provisions, which reversed the effect of the RDA in order to validate discriminatory laws which affected only native title, was also the subject of widespread criticism both in and out of Parliament.

The prolongation of this debate to the present is partly due to the fact that there is no commonly accepted mechanism for arbitrating it. The attempt, in March 1999, by CERD to provide an authoritative decision to the effect that the amended NTA was discriminatory[6] and failed to meet Australia's obligations under ICERD, was immediately condemned by the Commonwealth Government as unbalanced and 'blatantly political'.[7] The criticisms of the NTA by the Human Rights Committee in 2000 following CERD's observations were met with similar hostility.

Despite this opposition, CERD's 1999 decision did trigger a further examination of the issue in 2000 when the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund ('PJC') conducted an Inquiry into CERD's findings.[8] I noted in my *Native Title Report 2000* that the dialogue generated by this Inquiry was important in elevating the overall level of understanding within the community of the meaning of equality in relation to Indigenous people and native title.[9] I also noted that positions did not change as a result of this dialogue and the debate continued to be waged along political party lines. Indeed the PJC provided two opposing reports consistent with this division.

The rejection by the Government of the CERD findings was also a rejection of the authority of CERD to finally determine the issue. Australia has made it abundantly clear, in the native title arena and in respect of other human rights issues, that it does not consider itself morally bound by the decisions and observations of United Nations' human rights committees. Yet there is no

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6 Committee on the Elimination of Racial Discrimination ('CERD'), *Decision 2(54) on Australia*, UN doc CERD/C/54/Misc.40/Rev.2, 18 March 1999.

7 The Hon A Downer, Minister for Foreign Affairs, *Government to review UN treaty Committees*, Press Release, 30 March 2000. For discussion on the government's response to the CERD decision see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, Human Rights and Equal Opportunity Commission, Sydney, 2001, pp79-83; and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2000*, Human Rights and Equal Opportunity Commission, Sydney, 2001, pp26-27.

8 On 9 December 1999 the Senate referred to the PJC for inquiry and report; (a) whether the finding of the Committee on the Elimination of Racial Discrimination (CERD) that the *Native Title Amendment Act 1998* is consistent with Australia's international legal obligations, in particular, the Convention on the Elimination of All Forms of Racial Discrimination, is sustainable on the weight of the informed opinion, (b) what amendments are required to the Act, and what processes of consultation must be followed in effecting those amendments, to ensure that Australia's international obligations are complied with; and (c) whether dialogue with the CERD on the Act would assist in establishing a better informed basis for amendment to the Act.

9 *Native Title Report 2000*, op.cit., pp5-6.

effective mechanism for the settlement of this debate at a domestic level. While the High Court considered it briefly in the context of the constitutional challenge of the NTA by Western Australia in the *Native Title Act Case* the question whether the extinguishment of native title, as it occurs through the NTA, is a breach of the RDA is effectively removed from judicial scrutiny as explained by the High Court in that case:

> [E]ven if the *Native Title Act* contains provisions inconsistent with the *Racial Discrimination Act*, both Acts emanate from the same legislature and must be construed so as to avoid absurdity and to give to each of the provisions a scope for operation. The general provisions of the *Racial Discrimination Act* must yield to the provisions of the *Native Title Act* in order to allow those provisions a scope for operation. But it is only to that extent that, having regard to s7(1), the *Native Title Act* could be construed as affecting the operation of the *Racial Discrimination Act*.[10]

Section 7(1) of the NTA[11], contrary to its suggestion, does not subject the NTA to judicial review on the basis of discrimination.

Another factor which has postponed the resolution of the debate as to whether the extinguishment of native title as it occurs under Australian law is discriminatory, is that there has been a high level of uncertainty around the two important components essential to its determination: first the interpretation that the High Court would give to the extinguishment provisions of the NTA and its relationship with extinguishment at common law; and second the meaning of discrimination as it applies to native title. The High Court, in *Miriuwung Gajerrong* and *Wilson v Anderson* has thrown judicial light on both these issues. This chapter considers the developments that have emerged in determining the extinguishment of native title. Chapter 3 considers the developments in relation to the notion of discrimination contained within the RDA and its application to native title. With both these concepts clarified, chapter 3 concludes there is no doubt that the extinguishment of native title, as it occurs under Australian law, is racially discriminatory both domestically and at international law. Once this fact is confronted the government should move to put native title on a firm footing of equality. Chapter 5 suggests various approaches to this exercise and ways in which the law could be amended.

Extinguishment

The High Court decisions in *Miriuwung Gajerrong* and *Wilson v Anderson* give clear direction on how the extinguishment of native title occurs first through the statutory framework of the NTA, including the State and Territory laws authorised by the NTA, and second through laws or executive acts which create rights in non-native title parties which are inconsistent with the continuance of native title rights. These two levels are not independent but work together in determining the full extent of extinguishment under Australian law.

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10 *Native Title Act Case*, op.cit., per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ at para 144 of their Honours' reasons.

11 'This Act is intended to be read and construed subject to the provisions of the *Racial Discrimination Act 1975*'.

Mechanisms of Extinguishment: An Overview[12]

The High Court has made it very clear in both *Miriuwung Gajerrong* and *Wilson v Anderson* that the NTA is the primary source for determining the extent to which the law recognises and extinguishes native title. The legislative control over the protection and extinguishment occurs through section 10 of the NTA which states that native title is recognised and protected in accordance with the NTA, and section 11(1) which proscribes extinguishment that is contrary to the NTA.

The chief mechanism by which the NTA effects both the protection of native title and its extinguishment is through prescribing what State and Territory laws are valid and the conditions and effect of their validity. As the High Court said in the *Native Title Act Case*:

> A law protecting native title from extinguishment must either exclude the application of State and Territory laws or prescribe the areas within which those laws may operate. The Commonwealth has chosen to prescribe the areas within which those laws may operate. The Commonwealth has chosen to prescribe the areas available to control by other laws by prescribing what State and Territory laws are valid or invalid and, if valid, the conditions of validity. … The use of the term [valid], its derivatives or its opposite…so far as those respective terms relate to a State law, must be taken to mean having, or not having, (as the case may be) full force and effect upon the regime of protection of native title otherwise prescribed by the [NTA]. In other words, those terms are not used in reference to the power to make or to the making of a State or Territory law but in reference to the effect which a State law, when validly made, might have in creating an exception to the blanket protection of native title by s11(1). In using the terms 'valid' and 'invalid' the [NTA] marks out the areas relating to native title regulated exclusively by the Commonwealth regime.[13]

The NTA 'marks out' through two sets of provisions, the confirmation provisions and the validation provisions, an extensive area in which the creation of tenures by legislative and executive acts, prior to 1996,[14] will have full force and effect so as to extinguish native title. While s11(1) ensures that the extinguishment of native title is not inconsistent with the NTA, the NTA only specifies non-extinguishment in relation to future acts and some categories of acts affected by the RDA.[15] The NTA, through the validation and confirmation provisions, stipulates that the effect of creating specified tenures or classes of tenures is to extinguish native title either completely or partially. It leaves it to the State and Territory governments to enact legislation under the authority of the NTA which extinguishes native title in respect of these tenures. In addition the NTA permits

12 See Annexure 3 for *Summary of the validation and confirmation of extinguishment provisions in the Native Title Act 1993*; and Annexure 2 for a table showing various tenures and their affect on native title, following the recent High Court decisions.

13 op.cit., per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ at 469.

14 The exact dates differ depending on whether the act is an exclusive or non-exclusive possession act, an intermediate period act or a past act. These are set out in Annexures 3 and 2.

15 Category C and D past acts defined in the validation provisions and s23G of the confirmation provisions: NTA.

the extinguishment of native title where, at common law, such an effect is found to occur. I note in chapter 5 of this Report that the process of amending the NTA to make it consistent with human rights principles must address these tiers of extinguishment inherent in the structure of the legislation. Annexure 3 to this Report sets out, in plain English, how the validation and confirmation provisions of the NTA operate to prescribe what State and Territory legislation is given a complete, a partial or a non-extinguishing effect.[16]

The High Court's approach to extinguishment has been directed by the distinction, contained in the NTA, between complete extinguishment of all native title rights and interests and partial inconsistency in which native title is extinguished to the extent of any inconsistency. The High Court saw this statutory distinction as mandating an approach to extinguishment in which native title rights were to be identified as a collection of specific rights and interests.[17] Once identified in this way, extinguishment of specific rights or the totality of the rights occurs 'by laws enacted by or with the authority of, the legislature or by the act of the executive of powers conferred upon it'.[18] The High Court in *Wilson v Anderson* agreed with Justice Brennan's threefold categorisation of laws that had an extinguishing effect.

> Such laws or acts may be of three kinds: (i) laws or acts which simply extinguish native title; (ii) laws or acts which create rights in third parties in respect of a parcel of land subject to native title; and (iii) laws or acts by which the Crown acquires full beneficial ownership of land previously subject to native title. [19]

In relation to (i) above, an example of laws or acts which simply extinguish native title are the scheduled interests which the NTA prescribes to have an extinguishing effect.[20] Extinguishment in category (ii) occurs wherever the continued existence of one or more or all native title rights is inconsistent with the legal rights and interests created by executive or legislative acts.[21] This is referred to as the inconsistency of incidents test.[22] It is applied to determine the partial extinguishment of native title resulting from legislative or executive acts including those specified under the NTA as previous non-exclusive possession acts (non-exclusive agricultural and pastoral leases), and those not specified but otherwise valid acts. In these cases, native title is extinguished to the extent of its inconsistency with non-native title rights. The criteria for extinguishment under the inconsistency test are discussed below.

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16 The extinguishment of native title is defined in s237A NTA as permanent, meaning the native title is incapable of revival. Non-extinguishment is also defined in s238 as the continued existence of native title even though, where the act affects native title, the rights and interests have no effect either wholly or to the extent of the inconsistency.

17 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [76].

18 *Mabo & o'rs v Queensland (No 2)* (1992) 175 CLR 1, per Brennan J (with whom Mason CJ and McHugh J agreed) at 84.

19 *Wilson v Anderson*, op.cit., per Gleeson CJ at [4].

20 Sections 23B(c)(i) and s23C.

21 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [76].

22 ibid., at [79].

The non-extinguishment principle, in which native title continues to exist even though it has no effect in relation to inconsistent acts,[23] only arises where the NTA deems this to occur. The High Court were adamant in *Miriuwung Gajerrong* that there is no place in the inconsistency of incidents test for the suspension of native title rights in favour of non-Indigenous rights. The High Court explained it as follows:

> Two rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency; if they are not there will not be extinguishment. Absent particular statutory provision to the contrary, questions of suspension of one set of rights in favour of another do not arise.[24]

However, the Court did countenance the situation where native title rights were not inconsistent with the rights created under the grant of non-Indigenous tenures yet the 'doing of any activity in giving effect to them'[25] conflicted with the native title rights in question. In this event the rights under the non-Indigenous tenure, and the doing of any activity in giving effect to them, prevailed over the native title rights and interests but did not extinguish them.

These then are the mechanisms by which the NTA controls the extent to which native title is protected from or exposed to extinguishment and impairment. From a human rights perspective I have serious concerns with the operation and effect of these mechanisms. First, the criteria for determining the relationship between Indigenous and non-Indigenous interests on the same land fail to provide for the co-existence of these interests. Second, the NTA prescribes the extinguishment of native title in respect of an extensive range of tenures. Third, the NTA fails to limit the extinguishment of native title resulting from the creation of tenures other than those specified in the NTA, even though mechanisms are available to control this at a legislative level. Fourth, the NTA fails to proscribe the extinguishment of native title that, under the test of extinguishment, took place prior to the recognition of native title itself. Finally, the NTA fails to provide for compensation for the extinguishment of native title in the majority of cases.

Criteria for Extinguishment not Co-existence

The test which the High Court adopted in *Miriuwung Gajerrong* to determine whether laws or acts which create rights in third parties extinguish native title, either completely or partially, requires a comparison to be made between the legal nature and incidents of the rights created by statutory or executive acts and the native title rights arising out of traditional law and custom. Where there is an inconsistency between these two sets of rights then native title is either completely extinguished or extinguished to the extent of the inconsistency.

Underlying the inconsistency test is a hard and driving logic: a logic strongly identifiable with the legal process generally in its pursuit of a clear demarcation between conflicting rights leading to a final determination of disputes, one way

23 NTA, s238.
24 Per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [82].
25 ibid. at [193].

or the other. That is, either the rights compared are consistent or they are inconsistent. If consistent, native title continues. If inconsistent, native title is extinguished.

Glaringly absent from this logic is the possibility of co-existence, where rights are negotiated and mediated to enable a diversity of interests (at least more than one) to be pursued over the same land. The idea that the law could assist to build relationships rather than separate interests was not explored. Yet, before the High Court for their consideration was a range of legal options which could underpin a co-existence approach. The Court's development of its own approach to extinguishment brought into consideration these alternative approaches. It is to this development that I now turn.

Identifying Rights

Justice North, in his dissenting judgment in the Full Federal Court's decision in *Western Australia v Ward & o'rs*,[26] postulated native title as an underlying right to the land on which other rights to undertake particular activities or exercise control depended.[27] From this holistic concept of native title based on the traditional and unique relationship between Indigenous people and the land, inconsistency, and thus extinguishment, would only occur where the rights created by statute were inconsistent with this underlying right. Inconsistency, at the level of pendant rights only, would not result in extinguishment but rather their suspension for the duration of the inconsistency. When this inconsistency ceased, usually because of the expiry or cessation of the non-Indigenous right, native title would revive.[28] This approach allows for the co-existence of Indigenous and non-Indigenous rights, while at the same time prioritising non-Indigenous rights to enable their unimpeded exercise.

The notion that native title might be suspended rather than extinguished was rejected by the High Court. Their full reasons are as follows.

> First, it is an approach which proceeds from a false premise, that there can be degrees of inconsistency of rights, only some of which can be described as 'total', 'fundamental' or 'absolute'. Two rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency; if they are not there will be no extinguishment. Absent particular statutory provision to the contrary, questions of suspension of one set of rights in favour of another do not arise. Secondly, it is a mistake to assume that what the NTA refers to as 'native title rights and interests' is necessarily a single set of rights relating to land that is analogous to a fee simple. It is essential to identify and compare the two sets of rights: one deriving from traditional law and custom, the other deriving from the exercise of the new sovereign authority that came with settlement. It is true that the NTA (in par (b)(ii) of s23G(1)) and the State Validation Act (in par (b)(ii) of s12M(1)) speak of the 'suspension' of inconsistent native title rights and interests in certain circumstances.

26 [2000] FCA 191 (3 March 2000).
27 ibid., per North J at [784].
28 For analysis of the Full Federal Court decision see *Native Title Report 2000*, op.cit., pp 47 – 84.

> However, this statutory outcome is postulated upon an inconsistent grant of rights and interests which, apart from the NTA and the State Validation Act, would not extinguish the native title rights and interests. An example would be a post-1975 grant which, by operation of the RDA, was ineffective to extinguish native title rights and interests.[29]

The difference between the High Court and Justice North in formulating the inconsistency test is not, as the Court suggested, Justice North's 'false premise' that there can be degrees of inconsistency but rather their respective conceptualisations of native title against which an inconsistency with non-Indigenous rights is measured. Where native title is conceived as a deeper relationship to land, then inconsistency must be found to occur at this level for extinguishment to logically follow. Where it is conceived as a bundle of rights, with no underlying or unifying dimension, then inconsistency and thus extinguishment must occur at this more fragmented level.

Justice North's conceptualisation of native title was not the only one available to the High Court to support a relationship between Indigenous and non-Indigenous interests in land based on co-existence. The trial judge in the *Miriuwung Gajerrong* case, Justice Lee, proposed that the fact of occupation by a community at the time of the assertion of sovereignty founds a native title claim. Determining extinguishment did not require the breakdown of this community title into its constituent parts, but rather occurred where there was an assertion by the Crown, through legislation or executive act, to exercise permanent adverse dominion over the land.

The High Court contends that the correctness of its 'bundle of rights' approach is mandated by the NTA, 'particularly in the distinction now drawn in s23A … between complete extinguishment and extinguishment "to the extent of any inconsistency"'.[30] Yet it is difficult to see exactly how the regime of extinguishment under the confirmation provisions of the NTA mandates the Court's conceptualisation of native title and its extinguishment outside of the NTA. What the Court's contention does indicate is that its construction of native title is, to a large degree, driven by the logic of extinguishment rather than the other way round. That is, if native title can be partially extinguished then, it is reasoned, native title must be of a fragmentary nature. In contrast, Justice North's conception of native title, as an underlying relationship to land, determines the test he postulates for extinguishment. From a human rights perspective it makes more sense, and is certainly more logical, to base a test for the extinguishment of native title on an understanding of the nature and origins of the title rather than to formulate a concept of native title derived from the test postulated in the NTA for its extinguishment. This is particularly so where the concept of native title formulated ensures its fragility and susceptibility to ongoing extinguishment.

A further basis for the High Court's conceptualisation of native title as a bundle of rights stems from its interpretation of the requirements of s223 of the NTA that 'requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and

29 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [82].
30 ibid., at [76].

obligations which go with them'.[31] In chapter 5 of this report I discuss in greater detail the way in which the Australian legal system gives recognition to traditional Indigenous laws and customs and suggest alternative approaches consistent with Australia's human rights obligations. The Court recognises that the way in which an essentially spiritual connection is translated into legal rights and interests under the NTA perverts the Indigenous 'ordering of affairs'. Yet the majority Judges felt constrained to support this process rather than take a course different to that laid down by the NTA.

Comparing Rights

A consequence of, and indeed reason for, translating the Indigenous relationship with land into a bundle of rights is that it makes possible the otherwise difficult exercise of comparing unique Indigenous interests with non-Indigenous interests. Once Indigenous and non-Indigenous interests are put into the language of legal rights, one set emanating from the traditional laws and customs, the other from the Crown, the logic of extinguishment can be applied to determine whether a comparison of these rights draws any inconsistency.

A basis for inconsistency when the two sets of rights are compared is the assertion of control over the land by the new sovereign. This imposition is viewed as an all-encompassing one which doesn't need to be particularized as to the degree of control or object of control and would rule out control residing in any other entity.

The High Court has considered, in the *Miriuwung Gajerrong* decision, the issue of sovereignty and its relation with native title rights:

> An important reason to conclude that, before the NTA, native title was inherently fragile is to be found in this core concept of a right to be asked permission and to speak for country. The assertion of sovereignty marked the imposition of a new source of authority over the land. Upon that authority being exercised, by the creation or assertion of rights to control access to land, the right to be asked for permission to use or have access to the land was inevitably confined, if not excluded. But because native title is more that the right to be asked for permission to use or have access (important though that right inevitably is) there are other rights and interests which must be considered, including rights and interests in the use of the land.[32]

The extinguishment of native title rights to control or make decisions results not only from an analysis of the nature of native title, but from an assumption that the control exercised by non-Indigenous interests is singular, total and all-encompassing. On this assumption a comparison of rights inevitably draws an inconsistency between non-Indigenous and Indigenous control and authority over the same land. *Table No 1*, below, indicates the tenures in *Miriuwung Gajerrong* that partially extinguished native title. In all of those cases native title rights to control or make decisions or speak for country were extinguished.

31 ibid., at [14].
32 ibid., at [91].

As indicated, there were other possibilities and other assumptions before the High Court about the effect of the new authority on native title.[33] These allowed for co-existence of rights based on a notion of native title as a system of laws which, although unique, were internally strong and coherent. The majority in the High Court were unwilling to change not only their assumptions about the nature of native title but also, and perhaps more importantly, the nature of the power asserted by the colonising state.

The native title right to be asked permission to speak for country, and to control access to country, when compared to the rights created by many non-Indigenous tenures was found to be inconsistent with and thus extinguished by those rights.

A noticeable and, from a human rights perspective, alarming aspect of the exercise of comparing rights as it was applied in *Miriuwung Gajerrong* was that the characterisation of native title rights that best survived this test were ones which:

- were expressed at a high level of specificity;[34]
- were limited to the conduct of activities on the land rather than the control of activities on the land;[35] and
- confined those activities to traditional activities rather than contemporary activities.

Thus, for example, a right to dig for ochre was better able to survive the grant of a mineral lease on the same land than a right to utilise the resources of the land. Similarly a right to hunt and gather was better able to survive the grant of a pastoral lease than a right to control access to the land or make decisions about the use of the land. To find its place in the gaps and crevices of non-Indigenous interests, native title must be small, flexible and harmless.[36]

These characteristics of native title rights, particularly its specification as an activity on the land, contrast markedly with the legal rights in land found to emanate from the Crown. In fact the Court in *Miriuwung Gajerrong* was insistent that these latter rights were not to be identified by reference to the use that was made of the land after the grant was made but from an analysis of the legal effect of particular grants by or pursuant to the particular statute under consideration.[37] Indeed the High Court pointed out that the error in the majority's decision in the Full Federal Court, particularly in relation to its analysis of the Ord River Project, was to identify the non-Indigenous rights by reference to the uses made of the land rather than the legal rights which authorised those uses. The way rights were exercised was clearly distinguished from the rights themselves and to determine these one went to the statute which created those rights.

33 See pages 49-50, above.
34 ibid., at [29].
35 ibid., at [52].
36 The human rights implications of describing native title rights as specific activities is discussed in chapter 1 of this Report, especially pages 26-27.
37 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [143]-[151].

Approaching native title rights in a similar way would require the Court to consider more closely the traditional laws and customs as the source of rights and distinguish these from the exercise of rights or conduct of activities on country. This would direct the Court back to the underlying relationship that Indigenous people have with the land, an essentially spiritual affair, as distinct from the exercise of rights stemming from this relationship; a distinction similar to the position postulated by Justice North in the Full Federal Court. Where there is an inconsistency stemming from the laws themselves, between the underlying relationship that Indigenous people have with the land and the statutory relationship non-Indigenous people have with the land, then and only then, would extinguishment occur. Where there is inconsistency only in the exercise of rights, the non-extinguishment principle would apply in the way Justice North envisaged and consistent with the High Court's approach to this principle outlined above. Such an approach makes room for the continued existence of native title while at the same time ensuring that non-Indigenous people can continue utilising the land as they are authorised by statute to do: that is, co-existence.

Finding inconsistency

As indicated, inconsistency is the driving logic of extinguishment. Its seeming simplicity has already been disturbed by the possibility, discussed above, that the pre-packaging of native title rights has ensured their reduction and extinguishment.

Further difficulties arise in determining the 'extent of the inconsistency'. The High Court appears to prefer an approach in which the entire native title right is extinguished wherever an inconsistency occurs. The rights most likely to be extinguished in this process are controlling rights, such as the rights to control access, to make decisions, and speak for country.

> The more general the terms in which the findings are made as to the subsistence of native title, the more difficult the giving of specificity to findings of extinguishment, particularly where, as the NTA postulates, there may be partial extinguishment.[38]

An alternative approach, more sympathetic to co-existence, would allow so much of the native title right that is inconsistent with the rights under the grant to be excised from the native title right so as to eliminate the inconsistency, but not extinguish the native title right completely. This would allow generic native title rights to subsist except to the extent they are inconsistent with other statutory rights. Thus, for example, a native title right to speak for country could continue to exist albeit qualified by other rights in the same area. The extent of the inconsistency between the native title right to speak for country and rights under a pastoral lease may allow some residual decision-making powers in native title holders to remain, such as those suggested by Justice Kirby in *Miriuwung Gajerrong* including the right to protect the country from degradation and to care for it spiritually.[39] Justice Kirby expressed his disappointment that

38 ibid., at [82].
39 *Miriuwung Gajerrong*, op.cit., per Kirby J at [592].

his view on this point, expressed in *Yarmirr*,[40] that exclusive native title rights could retain a characteristic of exclusivity while being qualified by other public rights in the same area, was not supported.[41]

His Honour's approach appears consistent with sections 225 (b), (c), and (d) of the NTA which require a court to make a determination of 'the nature and extent of native title' and 'the nature and extent of other interests' in the determination area and 'the relationship between' the two. Yet the majority of the High Court in *Miriuwung Gajerrong* do not feel compelled by these provisions to adopt a similar approach to inconsistency.

Finding extinguishment

The result of characterising native title in the language of legal rights, comparing them to statutory rights and finding inconsistency, is the extinguishment of native title. A question which arose in applying this test in both the *Miriuwung Gajerrong* and the *Wilson v Anderson* decisions was whether the inconsistency of incidents test was different to and not as rigorous as the test applied by courts to determine whether general property rights have been appropriated by a statute. A legislative intention to abrogate general property rights will not be inferred unless there is a clear and plain intention to do so.[42]

In both these decisions the High Court said that the clear and plain intention test was apt to be misleading when applied to native title insofar as it was thought to require a subjective intention on the part of those creating the tenures.[43] This was particularly so since native title was not recognised at the time the property laws under consideration in the *Miriuwung Gajerrong* and the *Wilson v Anderson* decisions were formulated.

Ensuring the test for extinguishment of native title is an objective test is not a concern from a human rights perspective. As Justice Kirby pointed out in *Miriuwung Gajerrong* the application of the inconsistency of incidents test is not, as such, in conflict with the requirement of a clear and plain intention to abrogate property rights, that being an objective test of whether the legislation has the effect of depriving Indigenous people of these rights.[44] What is of concern is if the presumption that a property right will not be extinguished, unless such an intention is manifest in the legislation, is more readily concluded for native title than it is for general property rights. This concern is expressed by Justice Kirby in *Wilson v Anderson*.[45] The test that requires that a clear and plain intention be evinced from legislation that is established to take away the basic human rights to own property and be immune from arbitrary dispossession of property should apply equally to protect the rights of Indigenous Australians as it does to protect the rights of non-Indigenous Australians.

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40 *Commonwealth v Yarmirr; Yarmirr v Northern Territory* [2001] HCA 56 (11 October 2001).

41 *Miriuwung Gajerrong*, op.cit., per Kirby J at [594].

42 F Bennion, *Statutory Interpretation: a code*, (3rd ed), Butterworths, London, 1997, section 278; *Clissold v Perry* (1904) 1 CLR 363 at 373; *Greville v Williams* (1906) 4 CLR 64; *Wade v New South Wales Rutile Mining Co Pty Ltd* (1970) 121 CLR 177 at 181, 182.

43 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [78]; *Wilson v Anderson*, op.cit., per Gleeson CJ at [5].

44 *Miriuwung Gajerrong*, op.cit., per Kirby J at [589].

45 *Wilson v Anderson*, op.cit., at [140]-[141].

The readiness with which the Court inferred either the complete or the partial extinguishment of native title from the creation of rights in third parties in *Miriuwung Gajerrong* can be ascertained from a consideration of the Court's application of the inconsistency test in respect of particular tenures. The case studies following indicate that the threshold at which the inconsistency of incidents test results in a finding of extinguishment of native title is lower than the threshold at which an appropriation of property is found to occur for general property rights.

It will also be seen in the case studies that, in determining whether native title was extinguished, the Court took into account the effect of the validation and confirmation provisions of the NTA and the way in which these provisions complemented and augmented the inconsistency test. As indicated, the legislative control over recognition and extinguishment of native title occurs through section 10 of the NTA which states that native title is recognised and protected in accordance with the NTA, and section 11(1) which proscribes extinguishment that is contrary to the NTA. The chief mechanism by which the NTA effects both the protection of native title and its extinguishment is through prescribing what State and Territory laws are valid and the conditions and effect of their validity. The way in which the confirmation and validation provisions prescribe the extinguishment of native title is set out in a *Summary of the validation and confirmation of extinguishment provisions in the Native Title Act 1993* provided as part of a set of resources produced by this Report.[46]

The case studies provide an illustration of the operation of both the inconsistency test and the NTA in determining either the complete or partial extinguishment of native title in relation to particular tenures.

- Complete Extinguishment

Complete extinguishment of native title by laws or acts which create rights in third parties occurs where the continued enjoyment of all native title rights is inconsistent with the legal rights and interests created by executive or legislative acts. Chief Justice Gleeson's decision in *Wilson v Anderson* provided a guide to when this might occur: where the law or act creates a right of exclusive possession in third parties in respect of a parcel of land the subject of native title.[47]

As can be seen from *Table No 1*, below, complete extinguishment occurred in *Miriuwung Gajerrong* in relation to seventy percent (seven from ten) of the tenures or executive acts considered. A striking example of the application of the inconsistency test to find complete extinguishment of native title is in relation to nature reserves. It is striking because nature reserves are not the type of interest one would think inconsistent with, let alone destructive of, Indigenous interests. And striking because it reflects the complete failure of the law to protect Indigenous interests in places where they might not only co-exist with non-Indigenous interests but flourish together.[48]

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46 Annexure 3.

47 *Wilson v Anderson* , op.cit., per Gleeson CJ at [11].

48 A further analysis of the inappropriateness of finding extinguishment of native title on nature reserves is discussed in chapter 4 of this Report.

Extinguishing native title on nature reserves

1 Identifying Rights

The creation of the nature reserves in Western Australia included in the claim area of the Miriuwung Gajerrong people occurs through a twofold process: reservation and vesting. The inconsistency test requires identification of the rights created by legislation and executive acts in both steps of this process.

The process of reserving land for the purpose of creating a nature reserve occurs under the *Wildlife Conservation Act 1950* (WA) ('Wildlife Conservation Act') and the *Land Act 1933* (WA) ('Land Act'). The Wildlife Conservation Act provides that 'nature reserve means land reserved to Her Majesty, or disposed of, under the Land Act or any other Act, for the conservation of flora or fauna'. Under the Land Act a reserve could be created for the 'conservation of…indigenous flora and fauna'. By s23(1) of the Land Act a person of Aboriginal descent is authorized to take sufficient flora and fauna for food for himself and family.

Under s33 of the Land Act, the Governor, by Order of Council, may direct that a reserve vests in a body or person to be held in trust for the identified purposes.[49] The effect of such an order is to vest the legal estate of the land in the person or body named, to be held by that person or body as trustee of a public charitable trust.[50]

2 Comparing rights, finding inconsistency

The High Court found that, by designating land as a reserve, the executive was asserting the right to say how the land could be used. This was inconsistent with the continued exercise by native title holders to decide how the land could be used or could not be used.[51] In addition the creation of a nature reserve was found to be inconsistent with a native title right to hunt or gather over land.[52]

The vesting of a reserve under s33 Land Act, which vests the legal estate in fee simple to the land in that body or person and obliges the body or person to hold the land on trust for the stated purposes, is inconsistent with the continued existence of any native title rights and interests in the land.

3 Finding Extinguishment

Before concluding that the result of the above inconsistency was the complete extinguishment of native title, the Court considered the operation of the NTA.

As indicated, the mechanism by which the NTA achieves both the protection of native title and its extinguishment is through prescribing what State and Territory laws are valid and the conditions and effect of their validity.

The only basis for the invalidity of a law which impacts on native title is that it is discriminatory under s10 of the RDA (which took effect from 31 October 1975). The grant of an interest in land is discriminatory if it fails to confer on native title holders a benefit enjoyed by other titleholders, or if it

49 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [235].
50 ibid., at [240].
51 ibid., at [219]-[220]
52 ibid., at [246].

imposes on native title holders a detriment that is not imposed on any other titleholders. Only the latter discriminatory effect will render the grant invalid.[53] The validation provisions of the NTA validate acts otherwise invalid as a result of the RDA and prescribe the effect that such discriminatory acts will have on native title. The confirmation provisions specify particular tenures that either extinguish or partially extinguish native title if the tenure is valid or validated by the validation provisions of the NTA.[54]

In determining whether the NTA protects native title from the extinguishing effect of the vesting provisions of the Land Act involving the establishment of a nature reserve, the following questions need to be answered:

(a) Is the vesting of a nature reserve under the Land Act valid either because (i) it occurred before the RDA, (ii) the RDA does not render it invalid or (iii) the RDA does render it invalid and the validation provisions of the NTA validate this otherwise invalid act?

(b) If the vesting is valid, do the confirmation provisions of the NTA prescribe the effect of the act on native title?

In relation to (a) the vesting of a nature reserve, both before and after 1975, is valid. Before 1975 the RDA has no effect. Where the vesting took place after 1975 (as it did in three instances in *Miriuwung Gajerrong*) the vesting was not invalid by the operation of the RDA even though it was discriminatory. That is because the nature of the discrimination was not such as to render the act invalid. Rather, the discrimination was the failure to confer a right to compensation to native title holders for the appropriation of their property in the same way provided to non-Indigenous title holders. The RDA operated to extend this benefit to native title holders rather than invalidate the vesting itself.

In relation to (b) the confirmation provisions do not provide for the effect of vesting involving the establishment of a nature reserve on native title. The confirmation provisions prescribe the effect of a 'previous exclusive possession act' is to extinguish native title completely and the effect of a previous non-exclusive possession act is to extinguish native title to the extent of any inconsistency. Section 23B(9A) provides that a vesting which involves the establishment of an area, such as a national, State or Territory park, for the purpose of preserving the natural environment of the area is not a previous exclusive possession act.

Thus while the NTA does not explicitly require the extinguishment of native title on nature reserves, it fails to protect native title where this occurs through the application of the inconsistency test. Native title is thus extinguished.[55] The failure of the NTA to proscribe the extinguishment of native title outside of the NTA is a concern from a human rights perspective and is discussed further at pages 65-69 of this Report.

The extinguishment of native title by the creation of a nature reserve illustrates the effect of applying a test which only considers the legal rights created, rather than the existing relationships and the possibility of their co-existence.

53 See chapter 3 for a full analysis of the effect of the RDA on laws.

54 See *Summary of the validation and confirmation of extinguishment provisions in the Native Title Act 1993,* annexure 3.

55 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [258].

- Partial Extinguishment

As indicated above, the main effect of partial extinguishment on native title is to extinguish native title rights to control access to land, speak for country, or make decisions in relation to the land.

An example of the way in which the High Court determines the partial extinguishment of native title rights to control access to the land was demonstrated in *Miriuwung Gajerrong* in relation to the grant of a mining lease under the *Mining Act 1978* (WA) ('WA Mining Act'). The extinguishment of native title rights by a mining lease does not occur under the confirmation provisions of the NTA. However the NTA fails to protect native title from the effect of the inconsistency test as it is applied by the common law.

Extinguishing native title rights by the grant of a mining lease

1 Identifying rights

Section 85 of the WA Mining Act confers upon the lessee of a mining lease a right of exclusive possession for 'mining purposes'. The High Court found that the grant of exclusive possession for mining purposes was directed at preventing others from carrying out mining activities, and it was not intended to exclude others from all parts of the lease.[56] The term 'mining purposes' was held to be broad and encompassed all rights necessary for its meaningful exercise.[57] A grant of a mining lease entitled the grantee to access the land for mining purposes.

2 Comparing Rights; Finding Inconsistency

The native title right to control access to the land was found to be inconsistent with the right to access under the grant of a mining tenement. Deciding inconsistency in relation to other native title rights was not possible without a greater particularisation of the rights claimed. The Court also raised the issue of inconsistency, not at the level of rights but at the level of the exercise of rights.

> The holder of a mining lease having a right to exclude for the specified purpose… may exercise that right in a way which would prevent the exercise of some relevant native title right or interest for so long as the holder of the mining lease carries on that activity. Just as the erection by a pastoral lease holder of some shed or other structure on the land may prevent native title holders gathering certain foods in that place, so too the use of land for mining purposes may prevent the exercise of native title rights and interests on some parts (even in some cases, perhaps the whole) of the leased area. This is not to say, however that the grant of a mining lease is necessarily inconsistent with all native title. But due to the generality of the determination respecting the content of native title being asserted, it is not possible, subject to one exception to accurately determine the native title rights that had been extinguished or to identify those that remain.[58]

The right identified as inconsistent with the grant of a mining lease was the native title right to control access to the land.

56 ibid., at [308].
57 ibid.
58 ibid.

3 Finding extinguishment

As noted in relation to vesting under the Land Act, it is necessary to consider whether the extinguishment resulting from the above inconsistency is contrary to the NTA.

In determining whether the NTA protects native title from the extinguishing effect of the grant of a mining lease, the following questions need to be answered:

(a) Is the grant of the mining lease valid either because (i) it occurred before the RDA, (ii) it occurred after the enactment of the RDA but the RDA does not render it invalid or (iii) the RDA does render it invalid and the validation provisions of the NTA validate this otherwise invalid act?

(b) If the mining lease is valid, do the confirmation provisions of the NTA prescribe the effect of the grant on native title?

In relation to (a), if the mining lease were granted before 1975, the grant would be valid and the extinguishment effective. There is nothing in the NTA to ameliorate this effect. Unsurprisingly the grants considered in *Miriuwung Gajerrong* took place after 1975. Thus the effect of the RDA needs to be considered. As previously indicated the grant of an interest in land is discriminatory if it fails to confer on native title holders a benefit enjoyed by other titleholders or if it confers on native title holders a detriment that is not conferred to any other titleholders. It is only in relation to the latter that the RDA renders the grant invalid. And it is only in relation to invalid acts that the NTA operates to validate the grant and prescribe the effect of a validated grant on native title holders. Thus it is necessary to compare the effect that the WA Mining Act has on native title compared with other forms of title.

In this regard where a mining lease is granted on private land or on Crown land the subject of a pastoral lease the owner or occupier of such land is entitled to compensation and other procedural rights.[59] While native title holders do not satisfy the definition of 'owner' there was some doubt as to whether they satisfied the definition of occupier under the WA Mining Act.[60] If native titleholders cannot satisfy the definition of 'occupier', the RDA is engaged because native titleholders have not been conferred a benefit enjoyed by others under the WA Mining Act. The effect of the RDA would be to extend the benefit conferred on other titleholders to native title holders. The effect would not be to invalidate the grant.

Consequently, native title holders do not get the benefit of the non-extinguishment principle that would flow from the validation of otherwise invalid mining leases under the validation provisions of the NTA.[61] Instead, the extinguishing effect of the grant of a mining lease upon the native title right to control access remains. Nor, in response to (b) above, do the confirmation provisions of the NTA change this outcome for native title holders.

59 *Mining Act 1978* (WA), sections 27-39 & 123-125.

60 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [317]-[319].

61 A mining lease is a category C past act under s239, the effect of which is to apply the non-extinguishment principle under s15 NTA.

- Non-extinguishment

As discussed above[62] the non-extinguishment principle, in which native title continues to exist even though it has no effect in relation to inconsistent acts, only arises where the native title rights are not inconsistent with the rights created under the grant of non-Indigenous tenures and where the doing of any activity in giving effect to the rights created by statute or executive act conflicts with the native title rights in question. In such a case the rights under the non-Indigenous tenure, and the doing of any activity in giving effect to them, prevail over the native title rights and interests but do not extinguish them.

The application of the non-extinguishment principle was demonstrated in *Miriuwung Gajerrong* in relation to pastoral leases in Western Australia. The Court found that many native title rights to use the land the subject of the pastoral lease would continue unaffected by the lease. These include the native title right to hunt or gather traditional food on the land. On the other hand the native title right to burn off the land was probably inconsistent with the rights under the lease and would be extinguished rather than suspended for the duration of the inconsistency. However where the leaseholder, in the exercise of rights under the lease, conducted activities that were inconsistent with the native title rights, such as the erection of a shed or fence, the doing of these activities would prevail over the native title rights.

Once applied, the inconsistency of incidents test is likely to either reduce the rights that native title holders can exercise on commonly held land to traditional activities or extinguish native title completely. The native title rights most vulnerable to extinguishment are ones which claim control over resources, control of access or use of the land and decision-making power in relation to the land.[63] The result of such extinguishment is that outcomes that native title can deliver to Indigenous people are significantly reduced. The hope that native title would deliver economic and political outcomes from the exercise of these rights is unlikely to be realised. The NTA has not only failed to address this process, it has contributed to it. This will be discussed in the following sections.

NTA Prescribes Complete and Partial Extinguishment of Native Title

The extent to which native title is extinguished is within the statutory control of the Commonwealth. The High Court has made it clear that the NTA now directs the native title processes of extinguishment and recognition through s10 and s11 of the NTA. It is clear from the case studies that the NTA fails to give native title adequate protection from extinguishment. The NTA, through the validation and confirmation provisions, marks out a vast area in which State and Territory laws will have full effect to completely or partially extinguish native title. These provisions not only fail to address past extinguishment of native title, they substantiate it in a vast number of cases. The following tables and commentary outline the effect that these provisions have on native title in relation to particular tenures considered in the *Miriuwung Gajerrong* and *Wilson v Anderson* decisions.

62 Page 48 of this Report.
63 See *Table No 1*, page 56.

The confirmation provisions

The confirmation provisions were inserted into the NTA by the 1998 amendments. The title of the new provisions, 'confirmation of past extinguishment', indicates a government intention to codify existing legal principles established in the few High Court decisions then available, principally *Mabo (No 2), Wik*[64] and the *Fejo*[65] decisions. This extrapolation from existing decisions became one of the most contentious aspects of the 1998 amendments. The 1998, 1999 and 2000 Native Title Reports criticize this process as confirming the discriminatory effect of State laws on native title.

The confirmation provisions operate to give full effect to either specific tenures or categories of tenures resulting in the extinguishment of native title, where there is a grant of exclusive possession, or the partial extinguishment of native title where there is no grant of exclusive possession. A summary of the operation of these provisions is contained in Annexure 3 of this Report.

The *Wilson v Anderson* decision illustrates the immense impact that the confirmation provisions can have upon Indigenous aspirations for legal recognition of their traditional interests. Chapter 4 of this Report provides a detailed account of the human cost of the confirmation provisions to Indigenous people. In relation to the impact of these provisions for the Eulahaly – Dixon people, the grant of a lease under the *Western Lands Act 1901* (NSW) completely extinguished their native title. As set out in chapter 4 many other claimant groups can extrapolate from this decision a similar fate to their applications for native title.

The confirmation provisions also operated in the *Miriuwung Gajerrong* and *Wilson v Anderson* decisions to ensure extinguishment and partial extinguishment resulting from the creation of many tenures as set out in *Table No 1*.

64 *Wik Peoples v Queensland & o'rs* (1996) 187 CLR 1.
65 *Fejo v Northern Territory* [1998] HCA 58 (10 September 1998).

Table No 1 : Tenures specified in the confirmation provisions that the High Court has found, in both the *Miriuwung Gajerrong* and *Wilson v Anderson* decisions, to have an extinguishing effect on native title.

Tenure	Complete Extinguishment / Partial Extinguishment / Non-extinguishment	Basis for Extinguishment
Western Australia		
Pastoral Lease	Partial Extinguishment; loss of right to control access to, or the use to be made of, the land; further findings required by Federal Court.	*Land Act 1898* (WA); *Land Act 1933* (WA); NTA ss23F & 23G; *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA), ('State Validation Act'), s12M.
Resumption under *Public Works Act* 1902 (WA)	Complete Extinguishment	*Public Works Act* (s18); lands vest in Crown for an estate in fee simple in possession for the public work.[66]
Post RDA (1975) vesting	Complete Extinguishment	Previous exclusive possession act ('PEPA') vesting not invalid under RDA because other interests equally effected but RDA operates to extend compensation.
Vesting of Reserves	Complete Extinguishment	Vesting of legal estate in Crown, Land Act s33; NTA ss23B(2)(c), 23B(3), & s23B(9A).
Post RDA (1975) vesting	Complete Extinguishment	RDA not invalidate vesting, therefore validation provisions do not apply.
Rights in Water and Irrigation Act 1914 (WA):		
Vesting of control of waters in Crown, s4	Partial extinguishment – loss of right of exclusive possession over waters[67]	
Vesting in buffer and expansion areas under s3(2) where fit definition of 'Works'	Complete Extinguishment	Insufficient evidence that land fits definition of 'works' under *Water and Irrigation Act 1914* (WA).
Special Lease	Complete extinguishment	Land Act s116; NTA s23B(2)(c)(iv); Special lease for grazing amounts to exclusive pastoral lease under NTA.

66 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [203].
67 ibid., at [263].

Table 1 [continued]

Tenure	Complete Extinguishment / Partial Extinguishment / Non-extinguishment	Basis for Extinguishment
Lease of Reserves: Leases to Ivanhoe 1977 and 1992 (grazing)	Complete extinguishment	S32 Land Act RDA apply but not 'relevant interest' under State Validation Act. Subsequent lease extinguish, as exclusive pastoral lease, s23B(2)(c)(iv) NTA.
Pre RDA (1975) lease	Complete extinguishment	
Commercial leases to Harmon and Osborn 1990	Complete extinguishment	Post RDA; category A past act.
Northern Territory		
Pastoral leases (NT)	Partial extinguishment; loss of native title right to control access and to make decisions about the land	Non-exclusive pastoral lease a previous non-exclusive possession act; NTA Div 2B.
New South Wales		
Perpetual grazing lease under NSW Western Lands Act 1901	Complete extinguishment	Exclusive possession pastoral lease; NTA, Div 2B.

The validation provisions

The validation provisions of the NTA validate acts otherwise invalid as a result of the RDA and prescribe the effect that such discriminatory acts will have on native title. Annexure 3 sets out the regime that the NTA substitutes for invalidation under the RDA.

Table No 2 indicates the inadequacy of the protection of native title provided by the validation provisions of the NTA, by reference to specific tenures considered by the High Court in the *Miriuwung Gajerrong* and *Wilson v Anderson* decisions. It should be noted that, without the NTA, the RDA would have rendered each of these tenures invalid. Instead the NTA not only validates these tenures but ensures native title is either impaired or extinguished.

Table No 2: Tenures validated by the validation provisions of the NTA showing the effect that these provisions have on the extinguishment, partial extinguishment or non-extinguishment of native title.

Tenure	Complete Extinguishment / Partial Extinguishment / Non-extinguishment	Basis for Extinguishment
Western Australia		
Where reserve created after 1975 and no prior pastoral lease	Non-extinguishment	*Land Regulations 1882* (WA) regs 29 -34, *Land Act 1898* (WA), Part III (ss39-46); *Land Act 1933* (WA), Part III (ss29-37); NTA s19 NTA; State Validation Act s5; Category D past act.
Rights in Water and Irrigation Act 1914 By-laws after RDA	Non-extinguishment	Category D past act.
Lease of Reserves: Commercial leases to Harmon and Osborn 1990	Complete extinguishment	Post RDA; category A past act.
Northern Territory		
Keep River National Park	Non-extinguishment	Granted after 1975; Category D past act – NTA; not category B because Crown to Crown grant within s230(d)(i) NTA; special purpose and crown perpetual leases would otherwise extinguish native title completely.

Table No 2 shows the effect of the validation provisions where the creation of a tenure would otherwise be invalid under the RDA. However, as explained in the *Summary of the validation and confirmation of extinguishment provisions in the Native Title Act 1993*, Annexure 3, not all tenures created after 1975 are invalid under the RDA. The NTA does not address those tenures. The result is that the extinguishment which is effected by the creation of these tenures is not ameliorated by the regime put in place under the validation provisions. A striking example of this is demonstrated in the case study of the grant of a mining lease under the WA Mining Act. Because other titleholders affected by the creation of a mine were provided compensation, the RDA operates to extend that compensation to native title holders. Yet the extinguishing effect remains. Under the validation provisions however, a mining lease is a category C past act and enjoys the protection of the non-extinguishment principle. There is no reason why the non-extinguishment principle cannot be statutorily prescribed in relation

to the grant of all mining leases, not just those rendered invalid by the RDA and validated by the NTA.

Interaction of the validation and confirmation provisions

In respect of certain tenures granted after 1975, both the confirmation and validation provisions may apply. In such cases the NTA operates so that the harsher regime of extinguishment under the confirmation provisions prevails over the more lenient regime under the validation provisions.[68] An example discussed in *Miriuwung Gajerrong* is the grant of a mining lease defined by s245(1) NTA.[69] Where the grant takes place after 1975 the RDA would have operated to invalidate the grant. Under the validation provisions the lease is a category C past act and the non-extinguishment principle applies. However, this effect is taken over by the extinguishing effect of s23B(2)(c)(vii) of the confirmation provisions which provide for the complete extinguishment of native title.

The above analysis shows that the NTA fails to give native title adequate protection from extinguishment to ensure Indigenous people can enjoy their cultural rights and their property rights to the same extent as non-Indigenous people. Rather the approach has been to guarantee the extinguishment of native title, regardless of whether such extinguishment is discriminatory.

NTA Fails to Proscribe Extinguishment Resulting from the Application of General Principles

The NTA marks out a vast area in which State and Territory laws and the tenures they create will have full effect to completely or partially extinguish native title. *Table No 1* and *Table No 2* demonstrate the impact of this on the native title claims in the *Miriuwung Gajerrong* and *Wilson v Anderson* decisions. Similar mechanisms to those in the NTA which give State and Territory laws full effect can also proscribe discriminatory State and Territory laws that operate by their own force to either extinguish or impair the enjoyment of native title. Yet the NTA fails to take responsibility for common law extinguishment so as to limit the extinguishment of native title resulting from the creation of tenures other than those specified in the NTA. The effect of this on the native title claim of the Miriuwung and Gajerrong people is illustrated in *Table No 3*.

68 ibid., at [10].
69 Mining leases which involve the construction of private residences.

Table No 3: Tenures in *Miriuwung Gajerrong* which at common law extinguish native title and which the NTA fails to protect against

Tenure	Complete Extinguishment / Partial Extinguishment / Non-extinguishment	Basis for Extinguishment
Western Australia		
Reserves: Act of reservation on its own	Partial extinguishment; loss of right to be asked permission to use or have access to the land	*Land Regulations 1882* (WA) regs 29-34, *Land Act 1898* (WA), Part III (ss39-46); *Land Act 1933* (WA), Part III (ss29-37); common law
Resumptions	Non-extinguishment	Land Act, s109; common law
Vesting under Land Act for the purposes of creating a nature reserve	Complete Extinguishment	Vesting not amount to a PEPA but nonetheless valid and effective
Designating reserve for public purpose	Partial extinguishment of right to decide how land can be used and right to control access	Common law, creating a reserve neither a PEPA or previous non-exclusive possession act
By-laws before RDA under Part IV *Rights in Water and Irrigation Act 1914* (WA) – prohibiting removal of flora and fauna	Partial extinguishment of nt rights to hunt fauna or gather flora on making of laws	Inconsistency of incidents test
Mining leases	Partial extinguishment; loss of right to be asked permission to use or have access to area of lease; need further identification of native title rights to determine extent of extinguishment	Common law; mining lease grant right of exclusive possession for mining purposes; not category C act because no invalidity by RDA; in any case right to control access already extinguished by pastoral leases
Argyle Mining Lease	Need further identification of native title rights to determine extent of inconsistency with lease right to exclusive possession for mining purpose	Prior extinguishment over area because of vesting of reserve 31165
Permit to occupy	Complete extinguishment	Land Act s16
Mining Act 1904 (WA)	Partial extinguishment; loss of native title right to minerals or petroleum	Property in minerals vested in Crown; ochre not a mineral under WA Mining Act
Fishing	Partial extinguishment; loss of exclusive right to fish or control access to waters	Inconsistent with public right to fish

The case study on the effect of the creation of nature reserves in Western Australia on native title, at pages 56-57 above, demonstrates the layers of extinguishment that occur when the government fails to proscribe extinguishment under the NTA.

The High Court, in both the *Miriuwung Gajerrong* and *Wilson v Anderson* decisions, has clearly indicated that, since the enactment of the NTA, the common law no longer establishes the principles on which the recognition and extinguishment of native title is based but rather takes its lead from the legislation. As discussed earlier, the Court was of the view that the division between complete and partial extinguishment in s23A NTA, and the fragmentation of native title into legal rights in s223 NTA, mandated an approach in which native title was likened to a bundle of rights each of which could be extinguished separately, to the extent of the inconsistency.

The implication of the High Court prioritising the statute in this way is that responsibility for setting standards in native title clearly rests with the Government through its legislative arm. On this point, the Government submitted to the PJC in relation to its inquiry on the findings of CERD that the amended NTA was discriminatory:

> The confirmation regime provided no divestment of native title rights. The regime represents a recognition of the historical position that native title had been extinguished by grants of freehold and leasehold in Australia over the past 200 years on about 20 per cent of the Australian land mass and that it was not contrary to the Convention to confirm this historical position.[70]

In view of the High Court's recent decisions, the Government's response to CERD's concern in relation to the confirmation provisions, divesting itself of responsibility for the historical dispossession of Indigenous people, can no longer be sustained. It not only ignores the primary role that the High Court has bestowed on the legislation for the recognition and extinguishment of native title, it also misunderstands the ethical obligations of a Government bound by international obligations of equality and non-discrimination.

The NTA fails to proscribe the extinguishing effect of historic tenures

The general law principles, as well as the statutory principles determining the extinguishment of native title, operate over time to increasingly confine the enjoyment of native title as new interests are created, resumed and recreated over traditional land. Inevitably native title rights of control, such as the right to control access and make decisions in relation to the land, will be the first to be extinguished. In order to salvage some interests in the land, native title holders must describe their rights in terms of specific activities on the land, such as a right to hunt or fish or burn off or perform ceremonies. Subsequent tenures over the same land that are inconsistent with any remaining native title will operate to extinguish what relics remain.

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70 Commonwealth Attorney-General's Department, *Submission to the PJC Inquiry: Consistency of the Native Title Amendment Act 1998 with Australia's obligations under ICERD*, Submission 24, Part II, p21 at [91].

In *Miriuwung Gajerrong* it was clear that much of the land the subject of the claim had, for varying periods of time, been subject to the grant of a pastoral leasehold. While these leaseholds may have been resumed or expired, their extinguishing effect over native title rights to control access to the land remains. Where grants are subsequently made over the same land, such as a mining lease, the extinguishing effect of the new interest is stamped permanently onto native title, even though the interest itself may be short lived.

The process described above turns native title into an archaeological site of extinguishment. The Government's response to the entrenchment of historical dispossession through the native title process was put to CERD as follows:

> It is necessary to recognise that past acts, historical acts and the effects of these cannot be undone … Past acts, however discriminatory, which have resulted in dispossession of Australia's Indigenous people cannot be undone, though of course, present and future policies can remedy the effects, the current effects, of such acts.[71]

There are two distinct propositions in this response. First, the government cannot undo the past; and second, present and future policies can remedy the effects of past acts. In relation to the first, claiming the simple truism that 'what has occurred has occurred' and 'the past is the past' does not accurately describe the situation. The recognition of native title in 1992 as a pre-existing right means that, with every native title case, the court is required to insert into the history of land tenures affecting the claim area from sovereignty to the date of the claim a new element; native title. The recognition of native title requires the past to be retold so that what was done in silence, (without interpretation) is named appropriation or extinguishment or co-existence. Statements like 'we cannot undo the past' fail to take account of the reinterpretation of history that the recognition of native title has forced Australia, governments, courts and citizens alike, to face.

In relation to the second proposition the statement accepts that, with the new knowledge of the continuing relationship of Indigenous people to land, current policies can change the impact of the past for present and future Indigenous people. The High Court has handed the baton of native title back to the Government charging it with the responsibility of ensuring native title benefits Indigenous people. The Commonwealth can limit the extinguishment of native title just as it has confirmed it in the NTA. These are choices available to it. The Government, in line with its human rights obligations[72] could have chosen to proscribe extinguishment by tenures that have either expired or terminated through legislation ensuring that the native title process is focused on current and future dealings.

The effect of prohibiting the extinguishment of native title resulting from historic tenures was demonstrated to a limited extent by the *Titles (Validation) and Native*

71 Australian Representative, *Transcript of Australia's Hearing before the CERD Committee*, March 1999. For unofficial transcript of Australia's complete appearance before CERD, see: Foundation for Aboriginal and Islander Research Action, <www.faira.org.au/cerd/index.html>.

72 Article 2 of ICERD requires states to 'take effective measures to… rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists'.

Title (Effect of Past Acts) Act 1995 (WA). This was the complementary Western Australian legislation authorized by the confirmation provisions of the NTA. Rather than fully implement the extinguishing regime permitted by the NTA, it limited the effect of complete extinguishment from the creation of leases and scheduled interests identified in the confirmation provisions (excluding freehold) to those tenures still in force on 23 December 1996.

Another legislative tool directed at limiting extinguishment from historic tenures (other than freehold land or reserved land) is s47B of the NTA which excludes their extinguishing effect where the land is currently vacant Crown land and the native title claim group occupy the area. It does not, however, limit extinguishment resulting from historic tenures where there is a current tenure with which native title might co-exist.

The recognition of native title has required the courts to reinterpret history as if native title had existed from sovereignty. It is important that, as a result of this reinterpretation, native title is made meaningful to Indigenous and non-Indigenous people co-existing on country. Meaningful to Indigenous elders recognised as the owners of the land; meaningful to future Indigenous generations whose elders, grandparents and great grandparents have been recognised as the original owners of the land; meaningful to miners wishing to develop land which has significance to Indigenous people; meaningful to farmers who have historically lived beside Aboriginal people but never known their common connection.

It is clear from the decision in *Miriuwung Gajerrong* that the High Court has charged the Government with the responsibility of giving native title new meaning. There are legislative mechanisms available to the Federal and State governments to limit the accumulation of extinguishment that increasingly restricts native title. These mechanisms should apply to all historic tenures affecting native title.

Limited compensation for the deprivation of native title rights

The arbitrary deprivation of a property right belonging to a particular race or ethnic group is a breach of article 5(d) of ICERD. CERD makes it clear in General Recommendation 23 on Indigenous Peoples[73] that 'where [Indigenous Peoples] have been deprived of their lands and territories traditionally used or otherwise inhabited or used without their free and informed consent, [States are] to take steps to return these land and territories. Only where this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories'.[74]

The provision of compensation for extinguishment under the NTA and by the common law falls very short of this international standard. In relation to extinguishment under the confirmation provisions, NTA s23J has the effect of

73 (1997) in *Compilation Of General Comments And General Recommendations Adopted By Human Rights Treaty Bodies*, UN doc HRI/GEN/1/Rev.5, 26 April 2001, p192.

74 ibid., at paras 4–5.

conferring upon native title holders an entitlement to compensation only where the statutory extinguishment exceeds the extinguishment that would have occurred either at common law or where compensation would have been available by virtue of the RDA. The purpose of this provision was explained by the High Court in *Wilson v Anderson*:

> [The purpose] is to limit, so far as possible, the entitlement to compensation to cases where the 'act' is invalid by reason of the RDA and is subsequently validated by s14 of NTA or s8 of the State Act. However s23J may also be attracted in respect of a valid 'act' which, although satisfying the definition of 'previous exclusive possession act' would not completely extinguish native title at common law.[75]

In any other case there is no compensation for the extinguishment of native title by the confirmation provisions. Nor is there provision for compensation for the impairment of the exercise of native title rights where the non-extinguishment provisions apply under the confirmation provisions.[76]

Compensation under the validation provisions is also limited under s17 NTA to category A or B past acts. In relation to category C and D past acts, the effect of which is not to extinguish native title but may be to impair its exercise, compensation is only paid where, in relation to ordinary title, the act could not be validly done.[77]

Where complete or partial extinguishment of native title results from the common law and not the NTA, there is no provision for compensation to native title holders under the NTA. Nor is there provision for compensation for the impairment of the exercise of native title. In some cases, where a tenure is created after 1975, the RDA may operate to extend to native title holders the compensation provided under the particular statute to other titleholders.

The presumption that compensation is provided for the deprivation of property rights is a fundamental postulate of the legal system. It is provided for in section 51(xxxi) of the Commonwealth Constitution. The failure to provide this equally to Indigenous people whose property rights have been appropriated or extinguished attracted the opprobrium of Justice Kirby in *Wilson v Anderson*:

> [T]here is no reason why, in respect of indigenous Australians, McHugh J's dictum in *Marshall v Director-General, Department of Transport* should not be faithfully applied. His Honour there said that legislation empowering the deprivation of rights that an Australian would otherwise enjoy 'should be construed with the presumption that the legislature intended the claimant to be liberally compensated'. After so many legal injustices in the past, I cannot accept that presumptions such as this are available to the settlers and their descendants and successors but not to indigenous Australians.[78]

75 op.cit., per Gaudron, Gummow and Hayne JJ at [51].
76 NTA s23G(1)(b)(ii).
77 NTA s17(2).
78 *Wilson v Anderson*, op.cit., per Kirby J at [141].

The extinguishment of native title raises many concerns from a human rights perspective. The additional failure to compensate Indigenous people for this violation of their rights multiplies this injustice. The Federal Government has the legislative capacity to redress this injustice both as it occurs through the failure of the courts to apply a presumption in favour of compensation for the extinguishment of native title and as it occurs by its own hand.

Conclusion

Ten years after the *Mabo* decision was first handed down, the common law test for extinguishment is now crystallized in the inconsistency of incidents test. The most Indigenous people could have asked from the common law was that, where the NTA did not apply directly to effect extinguishment, the common law would adopt an approach which favoured non-extinguishment over extinguishment. That is, an expectation that Indigenous People would be able to enjoy their property rights to the same extent as that enjoyed by non-Indigenous People. Instead the High Court took its lead from the NTA as outlined in *Miriuwung Gajerrong*. The Court has based its approach on the dual concepts in the NTA of extinguishment and partial extinguishment. Sections 10 and 11 were also influential in its decision to emulate the NTA approach to extinguishment.

This decision is very unsatisfactory to Indigenous people. In addition to entrenching inequality, the decision provides an unstable and uncertain basis for traditional owners seeking to utilise the cultural, social and economic values of their land. Uncertainty about which tenures extinguish native title rights and to what extent can be added to the other uncertainties infusing the title; uncertainty about how traditions and customs translate into rights; uncertainty about the extent to which rights can evolve and change; and finally uncertainty at the layers of extinguishment that might have occurred since the assertion of sovereignty.

The only generalisation and certainty for native title holders is where a particular tenure is found to extinguish all native title rights, regardless of the nature of the rights asserted, as in the *Wilson v Anderson* decision. This is not the certainty that I am advocating. The human rights principles of equality and non-discrimination can offer a different type of certainty for native title holders, that is, that they are able to enjoy their property with the same protection offered to non-Indigenous title holders.

Chapter 3

Discrimination and native title

The resolution of the debate as to whether the extinguishment of native title by the common law and the *Native Title Act 1993* (Cwlth) ('NTA') is racially discriminatory, depends upon the interpretation given to its two essential components: extinguishment and discrimination. The interpretation that the High Court has given to the extinguishment provisions of the NTA and its relationship with the common law was the subject of the chapter 2. It is to the second of these components, the meaning of discrimination as it applies to the extinguishment of native title, that I now turn.

The law of discrimination is engaged when Indigenous people who hold native title enjoy their human rights in relation to land to a more limited extent than do other persons. In order to determine whether the extinguishment of native title is discriminatory the law has had to develop a response to the specific issues raised by the recognition of native title, a proprietary interest which is inherent to a particular racial group only: Indigenous people. The approach to equality based on a comparison of outcomes between Indigenous people and non-Indigenous people in relation to employment, home ownership, education and welfare, cannot be simply applied to native title. The recognition of a right inherent to a particular racial group requires a different approach. The courts have had to grapple with the meaning of discrimination in order to compare the treatment of an inherent and thus culturally unique property right with the treatment of other property rights.

The High Court's decision in *Miriuwung Gajerrong*[1] provides an insightful analysis of the *Racial Discrimination Act 1975* (Cwlth) ('RDA') as it applies to the extinguishment of native title. Ironically, in the context of native title law, this analysis goes to the question of how and in what circumstances the NTA nullifies the effect of the RDA so as to validate discriminatory laws that would otherwise be invalid under the RDA. Nevertheless the Court's consideration of the application of the RDA to laws that authorise dealings with land provides a useful guide to how the extinguishment or impairment of native title by such

1 *Western Australia v Ward & o'rs* [2002] HCA 28 (8 August 2002) ('*Miriuwung Gajerrong*').

dealings breaches the RDA and the *International Convention on the Elimination of All Forms of Racial Discrimination*[2] ('ICERD'), the treaty from which the RDA derives. While no domestic legal liability falls on the Government as a result of such a breach, international law requires Australia to account for its failure to abide by the human rights standards of equality and non-discrimination. This may occur through the periodic reporting mechanism (due under ICERD in October 2000 and expected to be provided in 2003), the individual complaint procedure, or the Urgent Action procedure.[3]

Principles of Discrimination under Australian Law

Miriuwung Gajerrong reiterates the principles which guide the High Court's interpretation of whether laws of the Commonwealth, State or Territory are discriminatory under the RDA, particularly as they apply to legislation which authorises dealings with land. These principles are based on the High Court's decisions in *Gerhardy v Brown*,[4] *Mabo (No 1)*,[5] and *Western Australia v The Commonwealth*[6] ('*Native Title Act Case*'). The key principles are set out below.

1 Section 10 of the RDA is the most appropriate section for determining whether legislative or executive acts that authorise dealings with Crown land are discriminatory. Section 10 provides:

> If, by reason of, or of a provisions of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour, or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

It is the application of section 10 that will determine whether the extinguishment or impairment of native title by dealings authorised by legislative or executive acts is discriminatory under Australian domestic law.[7]

2 Section 10 of the RDA is not merely concerned with matters of form but also with matters of substance; it is concerned with the enjoyment of rights. It involves looking at more than just the purpose or intention of the legislation and requires an analysis of the practical operation and effect of the legislation.[8] Where the effect of a statute is the unequal enjoyment of rights between racial groups, then s10 is engaged.

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2 660 United Nations Treaty Series 195 ('ICERD') (Australia joined 1975).
3 Evoked against Australia in March 1999.
4 (1985) 159 CLR 70.
5 *Mabo & ano'r v Queensland & ano'r* (1989) 166 CLR 186.
6 (1995) 183 CLR 373 ('*Native Title Act Case*').
7 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [103].
8 ibid., at [115].

3 The High Court's interpretation of the standard of equality required by the RDA is based on the definition of discrimination in Article 1(1) of ICERD which defines racial discrimination as:

> Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Significantly, the High Court in *Miriuwung Gajerrong* did not limit itself to Article 1 of ICERD in establishing a substantive approach to equality and non-discrimination under s10 RDA, but also referred to Article 2 of ICERD which requires a state party to ICERD to take effective measures to nullify laws which have *the effect* of creating or perpetuating racial discrimination.[9]

4 In determining whether the effect of legislative interference is the unequal enjoyment of rights, section 10 RDA requires a comparison of rights as defined in s10(2). This includes, but is not limited to, rights of the kind referred to in Article 5 of ICERD, such as the right to own property alone and in association with others,[10] a right to inherit,[11] and a right to be immune from the arbitrary deprivation of property (implied in other rights and specifically referred to in article 17(2) of the *Universal Declaration of Human Rights*[12] ('UHDR').[13] Property includes land and chattels and extends to native title rights and interests.[14]

5 The effect of RDA s10 upon discriminatory legislation is twofold. First, where a State law omits to make enjoyment of rights universal, s10 operates to confer that right on persons of the particular race deprived of the enjoyment of that right. The RDA does not invalidate the State law but complements it by extending rights equally.[15] Second, where the State law imposes a discriminatory burden or prohibition forbidding enjoyment of a human right or fundamental freedom enjoyed by persons of another race, s10 confers a right on the persons prohibited. This necessarily results in an inconsistency between s10 and the prohibition contained in the State law. Section 109 of the Commonwealth Constitution operates to invalidate so much of the State legislation that is inconsistent with the RDA.[16]

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9 ibid., at [105].
10 ICERD, op.cit., art 5(d)(v).
11 ibid., art 5(d)(vi).
12 United Nations General Assembly resolution 217A (III), United Nations document number ('UN doc') A/810 at 71, 10 December 1948.
13 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [116] & [119].
14 ibid., at [116].
15 ibid., at [106]; see also *Gerhardy v Brown*, op.cit., per Mason J at 98.
16 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [107].

6 The twofold effect of the RDA on discriminatory State law also applies to discriminatory Territory laws. In relation to the second effect however this occurs, not through the invalidating effect of S109 of the Constitution, but because the Territory does not have the power to repeal Commonwealth legislation.[17]

7 Section 10 of the RDA is offended where a law purports to expropriate property held by a particular racial group for purposes additional to or on less stringent conditions (including lesser or no compensation) than those laws justifying expropriation of property held by members of the community generally.[18] The fact that land is ordinarily only acquired for a public purpose on payment of just terms sets a benchmark for the way in which expropriation of property should occur for all racial groups.[19] Expropriation of property belonging to a particular racial group for different purposes or on lesser terms is discriminatory.[20]

The way in which these domestic law principles are applied to determine whether the extinguishment or impairment of native title is discriminatory is also demonstrated in *Miriuwung Gajerrong*. The key principles on the application of the RDA to the extinguishment or impairment of native title are noted below.

8 It is because native title characteristically is held by members of a particular race, that interference with the enjoyment of native title is capable of amounting to discrimination on the basis of race colour or national or ethnic origin.

9 Native title is a property right and entitled to the protection of Article 5 of ICERD, which specifically protects the right to own property alone and in association with others,[21] a right to inherit,[22] and a right to be immune from the arbitrary deprivation of property (implied in other rights and specifically referred to in article 17(2) of the UDHR).[23]

10 Section 10 of the RDA is concerned with the equal enjoyment of human rights, not simply the enjoyment of legal rights. This distinction is important in determining the way in which the principles of equality and non-discrimination deal with property rights that are unique insofar as they emanate from a different system of law and custom.

The High Court confirmed that just because native title has different characteristics from other forms of title and derives from a different source, it does not mean it can be given less protection than other forms of title.

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17 ibid., at [133].

18 *Native Title Act Case*, op.cit., per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ at 437.

19 *Mabo & o'rs v Queensland (No 2)* (1992) 175 CLR 1 (*Mabo No 2*), per Toohey J at 214.

20 General laws guiding expropriation of property by Commonwealth, States and Territories includes *Lands Acquisition Act 1989* (Cwlth), Pt VII; *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), Pt 3; *Land Acquisition and Compensation Act 1986* (Vic), Pt 3; *Acquisition of Land Act 1967* (Qld), Pt IV; *Land Acquisition Act 1969* (SA), Pt IV; *Public Works Act 1902* (WA), Pt III; *Lands Resumption Act 1957* (Tas), Pt IV; *Lands Acquisition Act 1978* (NT), Pt VII.

21 ICERD, op.cit., art 5(d)(v).

22 ibid., art 5(d)(vi).

23 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [116].

The rights which the RDA protects, as identified in Article 5 of ICERD, do not provide a basis for distinguishing between ownership or inheritance of different types of property. The right to own and inherit property must be enjoyed equally regardless of the nature of the property concerned. Thus it is wrong to say that because native title is inherently fragile, or because it does not amount to freehold title, depriving people of the enjoyment of this right is not discriminatory.[24] It is.

11 Native title may include a group or individual right. The rights that the RDA protects extend to group rights emanating from a particular culture.[25]

12 Three applications for s10 in relation to native title might arise: (i) a State law forbids enjoyment of a human right or fundamental freedom, such as a right to property or freedom from the arbitrary deprivation of property, and the burden falls on all racial groups; (ii) a State law provides for extinguishment or impairment of land titles but provides for compensation only in respect of non-native title; (iii) a State law extinguishes or impairs only native title and leaves other land titles intact.[26]

In relation to (i) above, there is no discrimination upon which s10 would operate. In relation to (ii) above, s10 would operate to extend the compensation to native title holders but the extinguishment would remain valid. In relation to (iii) above ,s10 would operate to invalidate the State law. The Court in *Miriuwung Gajerrong* did not consider the situation where a law extinguishes only native title and leaves others intact but provides compensation to native title holders. Nor did the Court consider the situation where the law takes additional measures to protect native title rights and interests not available to other title holders.

13 Section 10 of the RDA is engaged by legislation that regulates or impairs the enjoyment of native title without extinguishing it.[27]

14 The fact that laws extinguishing or impairing native title are consistent with the common law which permits extinguishment or impairment of native title by a valid exercise of sovereign power, does not mean the RDA does not apply to those laws. In the *Native Title Act Case* the question was whether the WA legislation was inconsistent with s10(1) of the RDA regardless of whether it was inconsistent with the common law. The High Court said:

> At common law...native title can be extinguished or impaired by a valid exercise or sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title. But the Racial Discrimination Act is superimposed on the common law and it enhances the enjoyment of those human rights (earlier mentioned) which affect native title so that Aboriginal holders are secure in the possession and enjoyment of native title to the same extent as the holders of other forms of title are secure in the possession

24 ibid., at [120]-[121].
25 *Gerhardy v Brown*, op.cit., per Mason J at 105.
26 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [108].
27 ibid., at [123].

> and enjoyment of those titles. The question is whether the WA Act attempts to diminish that security to the comparative disadvantage of the Aborigines on whom s7 rights are conferred.
>
> …Those provisions [of the WA Act] may be consistent with the common law relating to native title but we are concerned with their consistency with s 10(1) of the Racial Discrimination Act.
>
> The fact that a particular statute is consistent with the common law does not exempt it from the RDA. [28]

Together these principles constitute a substantive notion of equality. The RDA is concerned with the enjoyment of human rights, not the treatment of legal interests. It fastens the notion of discrimination to the international standards from which the legislation originates. Equality is measured by the extent to which the laws allow rights and freedoms as defined in ICERD to be enjoyed.

A non-discriminatory approach to the protection of Indigenous rights does not inquire into the rights and interests by which the title is constituted, but measures the extent to which the law permits the Indigenous property right to be enjoyed against the extent to which the law permits other property rights to be enjoyed. Thus the law must provide native title with the protection necessary to ensure it can be enjoyed, according to its tenor, and to the same extent as non-Indigenous interests in land. Even where property rights like native title are unique in their origin and characteristics, discrimination is found not by comparing these characteristics with the characteristics of non-Indigenous property rights but by comparing the extent to which the property rights are able to be enjoyed, regardless of the characteristics of each. Constructed in this way, native title law should be a vehicle for the continued enjoyment and protection of Indigenous law and culture.

This non-discriminatory approach can be contrasted to the way in which the law operates in fact to extinguish native title.

Application of the *Racial Discrimination Act* to the Extinguishment of Native Title

The test on which the extinguishment of native title is based, the inconsistency of incidents test, like the test for discrimination, involves a comparison. Unlike the comparison which determines discrimination (i.e. a comparison of the enjoyment of human rights between native titleholders and other titleholders), the comparison which determines extinguishment is a comparison of the legal rights constituting native title with the legal rights constituting the tenure being created. Whenever the comparison draws an inconsistency, native title is extinguished (see pages 51-54 for the operation of the inconsistency test).

At this fundamental level of operation the inconsistency of incidents test can be seen as discriminatory. Pre-existing Indigenous rights and interests give way to newly created non-Indigenous rights and interests. However the focus of the test for discrimination under the RDA is not this comparison. Rather the RDA is concerned with the effect that the creation of an interest in land has upon native

28 *Native Title Act Case*, op cit., per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ at 439.

title when compared with the effect it has on other titleholders. The operation of the inconsistency of incidents test is determinative of the extinguishing effect that the creation of new interests will have on native title. This extinguishing effect on native titleholders is only discriminatory if, as a result of the creation of new interests, a similar effect is not imposed on other titleholders or is imposed on different conditions than the conditions applying to other titleholders. Thus the extinguishment of native title under the inconsistency test is integral to a finding of discrimination but is not, of itself, discriminatory under the RDA.

The role of the inconsistency test in determining whether State and Territory laws which authorise dealings in land have a discriminatory impact on native titleholders is illustrated in *Miriuwung Gajerrong*. While the legal context for determining the question of whether the extinguishment of native title by particular tenures is discriminatory provides no legal redress in the context of the NTA, the moral concerns remain. It is towards identifying this moral issue that the High Court's analysis gives insight.

As indicated in principle 12 above,[29] the RDA identifies discrimination in two ways; first where the law confers a benefit unequally and second where the law imposes a detriment unequally. The case studies on pages 56 and 58 of this Report in relation to the creation of a nature reserve under section 33 of the *Land Act 1933* (WA) ('Land Act') and the grant of a mining lease under the *Mining Act 1978* (WA) ('Mining Act'), demonstrate the way in which the High Court identifies the first type of discrimination. In each of these case studies, the creation of the non-Indigenous interests occurs after the enactment of the RDA (31 October 1975). In each, the application of the inconsistency test means that the effect of the grant is the extinguishment of some or all native title rights. Thus native titleholders suffer a detriment. The question under the RDA is whether that detriment is suffered at all or on different conditions by other titleholders. Thus, in each case, it is necessary to compare the effect of the vesting or the grant on native title with the effect on other forms of title.

In respect of the grant of a mining lease, it was found that, by applying the inconsistency of incidents test, the native title right to control access to the land was extinguished by the grant of a mining lease. There was no provision for compensation for this extinguishment. Owners and occupiers of the land on the other hand were entitled to compensation under the Mining Act 'according to their respective interests…for all loss and damage suffered or likely to be suffered by them resulting or arising from the mining'.[30]

The Court found that the discriminatory operation of the Mining Act lay in the failure in the legislation creating the rights to confer a right to compensation to native title holders for the appropriation of their property in the same way compensation was provided to other owners and occupiers of the land for the loss and damage they suffered as a result of mining. The RDA operated to extend this benefit to native titleholders to the equivalent of that conferred upon 'occupiers' as defined in s123 of the Mining Act.[31] Section 45 of the NTA further operated to ensure that compensation would be provided to native title holders

29 See page 75.
30 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [313].
31 ibid. at [320].

on just terms rather than the equivalent of that received by an occupier under the Mining Act.

Interestingly, in their identification of discrimination, the High Court did not consider the differential impact of the Mining Act whereby native title rights were permanently extinguished by mining while the rights of occupiers or owners were only impaired temporarily by mining. On this approach, native titleholders have suffered a detriment that is not suffered by any other titleholders; their rights are extinguished. The result of this type of discrimination is that the grant of the mining lease would be invalid as would its extinguishing effect on native title (see principle 5 above on page 75*)*. On the Court's limited reasoning, native title holders only have a right to compensation as a result of the operation of the RDA.[32]

In respect of the other case study, the creation of a nature reserve, the application of the inconsistency test means that the existence of any native title rights is inconsistent with the vesting of land for this purpose under s33 of the Land Act. Native title is thus completely extinguished. The vesting was found to be discriminatory in that it failed to confer compensation rights on native titleholders in the same way they were conferred on other titleholders.[33] The RDA operated to extend the right to compensation to native titleholders but did not invalidate the extinguishing effect of the grant.

Miriuwung Gajerrong also illustrates the second type of discrimination as it applies to native title; where the laws that create rights confer on native titleholders a detriment that was not conferred on other titleholders. In relation to native title, the detriment is extinguishment or impairment of rights following from the application of the inconsistency test. This occurred in *Miriuwung Gajerrong* in relation to those tenures listed at *Table No 2* at page 63 of this Report. In those tenures the effect of the RDA is to invalidate the particular grant. As demonstrated in *Table No 2*, the NTA reversed the operation of the RDA in this respect and in the case of commercial leases native title was extinguished in any case as a result of the application of the validation provisions.

Many of the tenures considered in *Miriuwung Gajerrong* occurred before the enactment of the RDA in 1975. Consequently, the Court had no need to consider whether the extinguishment of native title by these tenures was discriminatory. Yet it is clear that in such cases the statutes by which new interests in land were created had the same discriminatory impact on native titleholders as those tenures created after 1975; either to extinguish or impair only native title rights or, where other interests were affected, to fail to confer a right to compensation on native title holders only. In all such cases, whether before or after the enactment of the RDA or the NTA, the human rights guaranteed at international law to own property alone and in association with others, to inherit property and to be immune from the arbitrary deprivation of property, are violated. Yet it is within the power of the Federal Government, through its legislative arm, to limit or redress the discriminatory impact of these State and Territory laws through the NTA.

32 ibid. at [321].
33 ibid. at [253].

Extinguishment of native title by the creation of other interests in land, while obviously discriminatory in most instances, is not prohibited by the NTA. Rather, the NTA authorises States and Territories to confirm the effect of the creation of a vast range of tenures that extinguish native title in a discriminatory way. The operation of the NTA in this way is discussed in chapter 2. The question arises whether the mechanisms under the NTA by which the extinguishment of native title is either validated, confirmed or simply allowed to operate, are discriminatory according to the principles outlined above.

From the outset it should be noted that this question will only ever be answered hypothetically because of the NTA's immunity to discrimination law. As previously explained[34] the only relevance of the RDA to the NTA is to determine whether and in what way the validation provisions might apply. Otherwise the NTA is rendered immune from discrimination law.

Yet, despite this immunity, the principles of discrimination outlined above, and the illustration in *Miriuwung Gajerrong* on how these principles are applied to State and Territory laws, provide a sound basis on which to determine whether the NTA meets the standards of non-discrimination under the RDA. Failure by the Federal Government to abide by the standards of non-discrimination which it applies, through the RDA, to State and Territory legislation puts into question the moral integrity of this political entity. To many people this is a serious concern.

Inconsistency between the RDA and the NTA is important for another reason. If the inconsistency between the NTA and RDA is substantial it affects the constitutional basis of the RDA itself. That is because inconsistency between the RDA and NTA results in an implied repeal of the RDA to the extent of the inconsistency. If, as a result of this repeal, the RDA can no longer be said to be consistent with or an implementation of ICERD then the constitutional basis of the RDA under the external affairs power is put into question.

The previous chapter on extinguishment outlines the mechanisms by which the NTA controls the protection and extinguishment of native title. A summary of these mechanisms is provided in Annexure 3.

The two possible bases for a finding of discrimination in relation to the NTA are:

(a) The NTA provides for the extinguishment or impairment of native title in respect of a range of tenures, and either the conditions by which native title is extinguished are different to the conditions on which other titles are extinguished or no title other than native title is extinguished. In relation to the former category, the question is whether provision is made for other titleholders to receive compensation but no provision is made for compensation for native titleholders (see principle 5 on page 75).

(b) The NTA fails to limit the discriminatory extinguishment of native title resulting from the creation of tenures other than those specified in the NTA, even though mechanisms are available to control this at a legislative level.

34 Page 45, above.

In relation to (a) above, the mechanism by which the NTA prescribes the extinguishment or impairment of native title is by providing that the tenures created under State and Territory legislation or executive acts are valid and then assigning to the creation of these tenures an extinguishing or impairing effect on native title. The tenures that result in the extinguishment and impairment of native title under the validation and confirmation provisions are set out in the Annexure 3 *Summary of the validation and confirmation of extinguishment provisions in the Native Title Act*. The tenures the subject of this process must be created before or within specified dates. These prescribed dates are also set out in Annexure 3 where it can be seen that the latest cut off date for the prescription of extinguishment is where tenures are created before 6 December 1996. The NTA then authorises States and Territories to enact complementary legislation providing for the extinguishment or impairment of native title in relation to tenures created under the relevant State or Territory law.

The extinguishment and impairment of property rights arising out of the validation and confirmation provisions affects native title rights and interests only. There is limited provision for compensation as a result of the extinguishment described above.[35] Discrimination of this type comes within the second category of discrimination set out in principle 12 above[36] and results in the invalidity of the legislation perpetrating the discrimination.

The Government's response to the charge that the extinguishment or impairment of native title under the validation and confirmation provisions of the NTA is discriminatory was extensively aired in the majority's report in the Sixteenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund ('PJC').[37] The Government's arguments are directed to its understanding of international law standards rather than the standards of the RDA itself. This distinction is discussed below. However there are some aspects of their argument that are relevant to the domestic standards of discrimination when applied to the operation of the confirmation provisions.

The Government's primary argument is that, because the confirmation provisions are merely a codification of common law standards, the NTA does not perform any independent discriminatory operation.[38] Therefore the provisions are not in breach of the RDA. That the confirmation provisions are consistent with the way in which native title is extinguished and impaired under the common law test is certainly bolstered by *Miriuwung Gajerrong*. The High Court was clear that where there is any inconsistency between the rights and interests of non-Indigenous titles and native title, native title is permanently extinguished to that extent and is not suspended. The confirmation provisions are consistent with this finding.

My first response to the Government's argument is that it is irrelevant that the discriminatory operation of the NTA to extinguish and impair native title reflects

35 See *Limited Compensation for the Deprivation of Native Title Rights,* pages 69-71.

36 See page 77.

37 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Consistency of the* Native Title Amendment Act 1998 *with Australia's international obligations under the Convention on the Elimination of all Forms of Racial Discrimination*, Parliament of the Commonwealth of Australia, Canberra, 2001 ('PJC Report'), pp 38-48.

38 ibid., at p 46.

the discrimination contained in the common law test of extinguishment. Section 10 of the RDA seeks to determine whether laws are discriminatory. That the discriminatory effect of the law in question derives from or reflects the common law does not alter the fact that the law is discriminatory under the RDA. In fact, in relation to native title, the RDA enhances and provides further protection to the property rights held by native titleholders under common law so as to secure the same enjoyment of native title as that enjoyed by other titleholders.

This approach to the RDA is supported by the High Court's decision in the *Native Title Act Case*. In that case, the Western Australian Government argued that their legislation was not discriminatory because it was consistent with the extinguishment of native title at common law. The High Court said:

> At common law...native title can be extinguished or impaired by a valid exercise or sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title. But the *Racial Discrimination Act* is superimposed on the common law and it enhances the enjoyment of those human rights (earlier mentioned) which affect native title so that Aboriginal holders are secure in the possession and enjoyment of native title to the same extent as the holders of other forms of title are secure in the possession and enjoyment of those titles. The question is whether the WA Act attempts to diminish that security to the comparative disadvantage of the Aborigines on whom s7 rights are conferred.
>
> …Those provisions [of the WA Act] may be consistent with the common law relating to native title but we are concerned with their consistency with s 10(1) of the Racial Discrimination Act.[39]

The High Court in *Miriuwung Gajerrong* makes it clear that the discrimination of native title under the common law is discriminatory. The fact that the NTA enshrines in legislation the vulnerability of native title to extinguishment at common law does not exempt it from the RDA.

My second response to the Commonwealth Government's argument that the NTA is merely a reflection of the common law and thus not discriminatory in its own right, is that it denies the primacy that the High Court gave to the NTA in the *Miriuwung Gajerrong* and *Wilson v Anderson*[40] decisions. The Court made it very clear that the primary source for determining the extent to which the law protects and extinguishes native title is the NTA. The legislative control over the protection and extinguishment of native title occurs through section 10 of the NTA which states that native title is recognised and protected in accordance with the NTA, and section 11(1) which proscribes extinguishment that is contrary to the NTA. Far from the NTA merely reflecting the common law position, the Court pointed out how the common law test of inconsistency was based on the distinction between complete and partial extinguishment in the confirmation provisions themselves[41] (see page 55 for further discussion of this point). On this approach, the common law test for the extinguishment of native title is a reflection of the NTA rather than the other way round.

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39 *Native Title Act Case*, op cit., per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ at 439.

40 *Wilson v Anderson & o'rs* [2002] HCA 29 (8 August 2002).

41 See s 23A of the NTA; *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [76]

A second argument put by the Government that the NTA is not discriminatory is that native title's vulnerability to extinguishment does not emanate from the NTA but from the unique and inherent characteristics of the property right itself. Native title has different characteristics to other forms of title and derives from a different source. Consequently, it is argued, it can be treated differently from those other forms of title without offending the RDA.[42]

This argument was definitively rejected by the majority of the High Court in *Miriuwung Gajerrong*:

> Only if there were some basis for distinguishing between different types of ownership of property or different types of inheritance might it be correct to say, in the context of s 10(1) of the RDA, that to deprive the people of a particular race of a particular species of property or a particular form of inheritance not enjoyed by persons of another race is not to deprive them of a right enjoyed by person of that other race. No basis for such a distinction is apparent in the text of the Convention [ICERD]. Nor is any suggested by the provisions of the RDA.
>
> Because no basis is suggested in the Convention or in the RDA for distinguishing between different types of property and inheritance rights, the RDA must be taken to proceed on the basis that different characteristics attaching to the ownership of inheritance of property by persons of a particular race are irrelevant to the question whether the right of persons of that race to own or inherit property is a right of the same kind as the right to own or inherit property enjoyed by person of another race. In this respect the RDA operates in a manner not unlike most other anti-discrimination legislation which proceeds by reference of an unexpressed declaration that a particular characteristic is irrelevant for the purposes of that legislation.
>
> …As has been pointed out…the Court has rejected the argument that native title can be treated differently from other forms of title because native title has different characteristics from those other forms of title and derives from a different source. This conclusion about the operation of the RDA should not now be revisited.[43]

The Court's rejection of the argument that, under the RDA, native titleholders can be deprived of their right to property because of the different characteristics of their title, was based on the nature of the rights that the RDA protects. These are human rights defined under ICERD. They are not the legal rights or interests defined by the common law recognition of native title.

A third and related argument put by the Government, in response to the proposition that the NTA breaches the standards of non-discrimination contained in the RDA, is that the extinguishment that the validation and confirmation provisions prescribe has already occurred at common law before the NTA was implemented.[44] This argument is largely dealt with above. As indicated, the RDA focuses on the way in which legislation operates to secure the enjoyment of rights. If native title is extinguished prior to the enactment of the NTA this

42 PJC Report, op.cit., p9 at [3.10] and p11 at [3.17].
43 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [120]-[122].
44 PJC Report, op.cit., p47.

does not exempt the legislative confirmation of this extinguishment from invalidation under the RDA.

A further point may be made about this argument and the assumptions on which it rests. The recognition of native title as a pre-existing right in the *Mabo (No 2)*[45] decision has required the courts to reinterpret the history of land tenure in Australia with a new element inserted into it, the continuing relationship of Indigenous people to their land. Finding that this new element has been extinguished is not just affirming history, it is recreating it. It was open to the courts to recreate a different history; that the relationship of Indigenous people to their land continues to the present day and is not extinguished but rather suspended by the creation of new interests in land. That has not occurred. Yet it is still open to the Government to lay a different foundation for present and future generations of Indigenous and non-Indigenous people based on the equal enjoyment of rights to land. The failure of the Government to provide this foundation in the NTA returns me to the second basis on which the NTA might be found to breach the RDA: the failure of the NTA to limit the discriminatory extinguishment of native title resulting from the creation of tenures other than those specified in the NTA.

It is clear that the RDA does not require governments to proscribe the extinguishing effect of the common law. The RDA only captures the doing of activities (pursuant to section 9) or the enactment of laws (pursuant to section 10) that have a discriminatory effect. The impetus for governments to redress historical dispossession or nullify the effect of past discriminatory laws comes, not from domestic law, but from international human rights law.

Extinguishment of Native Title at International Law

The RDA, while consistent with ICERD, is not a complete response to a state's international obligation to guarantee racial equality. The focus of the RDA is on acts which *impair* the equal enjoyment of human rights, i.e. discriminatory acts. Section 10 is directed to the lack of enjoyment of a right arising by reason of a law whose purpose or effect is to create racial discrimination.[46] It does not address the state's broader obligation under ICERD to *achieve* equality.

The source of this broader obligation at international law in relation to Indigenous people is ICERD itself and the interpretation given to a state's obligations under this treaty. The Committee on the Elimination of Racial Discrimination ('CERD') has established clear standards to guide a state's policies and legislation in respect of Indigenous people so that they are consistent with the state's obligations under ICERD to achieve equality. CERD's General Recommendation 23[47] requires States to ensure that the unique cultural characteristics of Indigenous people are maintained and protected, as well as ensuring conditions

45 op.cit.

46 *Gerhardy v Brown*, op.cit., per Mason J at 99.

47 CERD, *General Recommendation XXIII – Indigenous Peoples*, (1997) in *Compilation Of General Comments And General Recommendations Adopted By Human Rights Treaty Bodies*, UN doc HRI/GEN/1/Rev.5, 26 April 2001, p192.

pertaining to their economic and social development are satisfied.[48] It provides that States will:

- recognise and respect indigenous distinct culture, history and language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
- provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- ensure that no decisions directly relating to the rights and interests of indigenous peoples are taken without their informed consent;
- ensure that indigenous communities can exercise their rights to practise and revitalise their cultural traditions and customs, to preserve and practise their languages; and
- recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands and territories and resources and, where they have been deprived of their lands and territories traditionally used or otherwise inhabited or used without their free and informed consent, to take steps to return these land and territories. Only where this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.[49]

In addition, Article 5(d) of ICERD specifies obligations to prohibit and to eliminate racial discrimination and to guarantee the right of everyone without distinction as to race, colour, or national or ethnic origin, to equality before the law, including in the enjoyment of, inter alia, the right to own property alone as well as in association with others;[50] and the right to freedom of religion.[51]

Finally, Article 2 of ICERD requires a state party to ICERD to take effective measures to nullify laws which have the effect of creating or perpetuating racial discrimination.

The international law obligation to achieve equality can be applied to both the recognition and extinguishment of native title. The first step in the recognition of Indigenous rights to land in Australian law was taken by the High Court in the *Mabo (No 2)* decision in 1992. Successive Australian governments, by failing to nullify the racially discriminatory operation of terra nullius, have been in breach of their international obligations since becoming a signatory to ICERD in 1975. In overturning terra nullius, the High Court commented that the discriminatory doctrine of terra nullius was contrary to international standards, the fundamental values of the common law, and the contemporary values of the Australian people.

48 ibid. para's 4-5.
49 ibid.
50 ICERD, op.cit., art 5(d)(v).
51 ibid., art5(d)(vii).

Subsequently the NTA has failed to nullify, in accordance with Article 2 of ICERD, the operation of State and Territory laws that have a discriminatory operation in the way in which they extinguish native title. As discussed earlier it is open to the Government to use the mechanisms of validity and invalidity to proscribe these laws. In this way the NTA could limit extinguishment to specific tenures only, or to current titles. Instead the NTA allows discriminatory State and Territory laws to have full effect, confirming and validating them in a vast range of tenures.

Comparing the Domestic and International Standard of Equality

There is no domestic mechanism to implement the international obligation on States to achieve equality. Even if the NTA were subject to the operation of the RDA, the failure of the Commonwealth to prohibit racially discriminatory laws under the NTA would not come within its purview.

As indicated, the focus of the RDA is on laws which differentiate on the basis of race in order to limit the equal enjoyment of rights. As a result there is a limited capacity within the RDA to distinguish between these types of laws and laws which differentiate on the basis of race in order to achieve the equal enjoyment of rights. The only category available under the RDA is that defined in s8 as special measures. This category does not accurately describe laws which seek to recognise and give equal protection to cultural differences within our society in accordance with our international law obligation to achieve equality.

This point can be illustrated in the decision of the High Court in *Gerhardy v Brown*. The law alleged to be discriminatory was one that restricted access to land vested in Pitjantjatjara people under land rights legislation to those people. The Court found that this law fettered the enjoyment of non-Pitjantjatjara people to the human right to freedom of movement and was consequently a breach of s10 of the RDA. Justice Mason identified the discriminatory aspect of the legislation 'because eligibility to enjoy the rights which the statute confers depends on the manner described on membership of the Pitjantjatjara people'.[52]

The Court then found that the provision restricting access was a special measure under s8 of the RDA in that it was taken for the sole purpose of securing adequate advancement of a racial group as set out in Article 1(4) of ICERD. Consequently, it was an exception to the discrimination found in s10 of the RDA which did not then apply to invalidate the provision.

The decision contrasts with *Mabo (No 2)* and the recognition of Indigenous people's inherent right to land. Thus, even though native title is a form of title that only Indigenous people can enjoy, legislation that ensures the equal enjoyment of this property right by Indigenous people is not discriminatory. Indeed, contrary to Justice Mason's concern that the eligibility of the group enjoying the right is restricted to one racial group, it is because native title characteristically is held by members of a particular race that interference with the enjoyment of native title is capable of amounting to discrimination on the basis of race, colour or national or ethnic origin.[53] The extinguishment of a right

52 *Gerhardy v Brown*, op.cit., at 103.
53 Principle 1, at page 66 above.

or interest emanating from native title, such as a right to control access, will itself be discriminatory if other titleholders are not deprived in the same way.

As stated, the RDA did not compel the Court in *Mabo (No 2)* to give recognition to native title. This stemmed from the international law standard of equality. But, once recognised, the RDA did operate to ensure that these inherent rights were given the same protection that non-Indigenous people enjoyed in respect of their property rights. Nor was this recognition a special measure, taken by government in a spirit of beneficence to redress the injustice of historical dispossession or to compensate for a lack of rights. It is recognition of the traditional rights of Indigenous people.

Applying this approach to the factual situation before the High Court in *Gerhardy v Brown,* the provision limiting access to Pitjantjatjara land would not be identified as discriminatory because it treats non-Pitjantjatjara people differently to Pitjantjatjara people, but non-discriminatory because it seeks to recognise and secure equal enjoyment for Pitjantjatjara people of the human right to own and inherit property. That is, it seeks to achieve equality. In my view this latter approach is consistent with a state's international law obligation not only to proscribe laws that limit the enjoyment of rights but also to promote laws that seek to achieve equality. On this view, differential treatment on the basis of race that seeks to achieve equality is not discriminatory.

This approach to differential treatment and equality can be distinguished from that taken by the Commonwealth in their submission to the Inquiry by the PJC into the CERD decision on native title.[54] Some aspects of the Commonwealth's approach have been discussed above. I also discuss it in my *Native Title Report 2000*.[55] In summary, the Government's approach seeks to include differential treatment that although invidious to Indigenous people, can be consistent with international law obligations if the distinctions are relevant or justifiable and adapted to the distinctive characteristics of the group or individual.[56]

Even though the High Court had rejected, in the *Native Title Act Case*, the argument that because native title has different characteristics from other forms of title and derives from a different source, native title holders can be deprived of their property rights, this argument was recouched as part of an international law notion of substantive equality.

As demonstrated in my *Native Title Report 2000* the differential treatment of Indigenous people in the validation and confirmation provisions was justified under this approach by reference to notions such as certainty, the unlikelihood of real harm occurring, balancing the interests of stakeholders and confirming the common law. They were not justified by reference to the achievement or enjoyment of equality.

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54 Commonwealth Attorney-General's Department, *Submission to the PJC Inquiry: Consistency of the Native Title Amendment Act 1998 with Australia's obligations under ICERD*, Submission 24.

55 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2000*, Human Rights and Equal Opportunity Commission, Sydney 2001, pp 7-15.

56 ibid., p10.

Under the Commonwealth's analysis of its international law obligations, differential treatment that results in the impairment of the enjoyment of human rights is allowed, so long as it can be justified and is legitimate. This approach sets the standard of equality and non-discrimination under ICERD lower than that set under domestic law. In my view such a proposition is patently absurd particularly since the RDA firmly fastens the rights it protects to the human rights defined under the treaty from which it emanates; ICERD.

The Commonwealth's proposition, that invidious differential treatment is allowed under a substantive approach to equality at international law, provides a warning to those monitoring laws which affect Indigenous people's human rights. While the formal equality plus special measures approach to equality demonstrated in *Gerhardy v Brown* can be seen to reflect a notion of equality which seeks to bring Aboriginal people up to the same level as and assimilate with non-Indigenous people, it at least ensures that invidious differential treatment is outlawed. The special measures category can then deal with any non-discriminatory differential treatment even if this treatment doesn't quite fit the description of a special measure. Seeking to move beyond this approach too quickly to include equal recognition of inherent rights, while consistent with developments in international human rights law, carries the danger that governments unsympathetic to these developments will exploit these categories of difference to justify treatment that on any other view undermines the fundamental and universal human rights of racial equality and non-discrimination.

In applying the domestic and international standard of equality, it is clear that both the statutory framework for native title and the common law operate in a discriminatory manner.

The prioritising of rights under the inconsistency tests, whereby Indigenous interests are either extinguished or partially extinguished wherever an inconsistency occurs, is a discriminatory treatment of Indigenous property rights. This discrimination is continued and entrenched in the NTA which not only prescribes extinguishment but fails to proscribe common law extinguishment. Native title, as it is framed within Australian law, will always give way to non-Indigenous rights. This legal framework needs to change to allow the human rights of Indigenous people to be equally enjoyed.

Chapter 4

Implications of *Miriuwung Gajerrong* and *Wilson v Anderson*

The reasoning of the High Court in *Wilson v Anderson*[1] and *Miriuwung Gajerrong*[2] provides a comprehensive analysis of the operation of the *Native Title Act 1993* (Cwlth) ('NTA'). It is detailed and legally complex. In discussing NSW crown land legislation, Justice Kirby made the following observation about the NTA and the native title system:

> The impenetrable jungle of legislation remains. But now it is overgrown by even denser foliage in the form of the Native Title Act...and companion State legislation… The legal advance that commenced with *Mabo v Queensland [No 2]*, or perhaps earlier, has now attracted such difficulties that the benefits intended for Australia's indigenous peoples in relation to native title to land and waters are being channeled into costs of administration and litigation that leave everyone dissatisfied and many disappointed.[3]

An analysis of international human rights standards to which Australia is a signatory reveal that recent findings of the High Court are likely to impede, if not wholly disrupt, the rights of Indigenous Australians to enjoy and practice their culture and exercise their right of self determination and effective participation. This chapter discusses mechanisms that, in accordance with human rights standards, may provide a level of recognition and protection to the rights and interests of Indigenous Australians, notwithstanding the failure of the native title system to do so. In doing so, this chapter discusses broadly the finding of extinguishment in *Wilson v Anderson* and more specifically an aspect of extinguishment within the *Miriuwung Gajerrong* decision that is expected to affect a significant area of land within Western Australia.

1 *Wilson v Anderson and or's* [2002] 29 (8 August 2002) ('*Wilson v Anderson*').
2 *Western Australia v Ward and or's* [2002] 28 (8 August 2002) ('*Miriuwung Gajerrong'*).
3 *Wilson v Anderson,* op.cit., at [126].

The *Wilson v Anderson* decision applies to leases throughout the Western Division and in those areas is likely to extinguish native title. In addition, other leases within the Western Division are specified in the NTA and will also extinguish native title. It is expected that these two mechanisms of extinguishment will affect most of the Western Division, covering 42 per cent of New South Wales.

In Western Australia, the *Miriuwung Gajerrong* decision addressed extinguishment and partial extinguishment over a range of different tenures. The wholesale extinguishment of native title on nature reserves, as in other findings of extinguishment, has important human rights implications. However, extinguishment on nature reserves is also at odds with contemporary conservation approaches, sustainability and even principles within the NTA.

As Justice Kirby stated, the native title system which followed the legal advance that began with *Mabo*[4] has disappointed many. Yet, the Commonwealth continues to defend the 1998 amendments and disregards calls for legislative change. Other strategies must be sought to address the failure of the NTA to provide adequate acknowledgement and application of the human rights of Indigenous Australians.

Miriuwung Gajerrong

The *Miriuwung Gajerrong* decision addressed significant native title issues relating to the recognition of rights and the process for determining extinguishment under the NTA. These issues have been comprehensively addressed in other chapters of this report and will not be re-examined here. The purpose of this section is to discuss the human rights implications of particular findings of extinguishment and some of the emerging implications for the administration of native title by agencies and governments following *Miriuwung Gajerrong*.

The long awaited *Miriuwung Gajerrong* decision has provided clear guidance as to the operation of the amended NTA and principles of extinguishment. The decision examined different tenures, a range of rights including fishing rights, the protection of culture and spiritual knowledge, and also provided guidance for the determination of partial extinguishment. The *Miriuwung Gajerrong* decision makes clear the operation of the native title system and in many respects is disappointing from a human rights perspective.

Human rights concerns regarding the amended NTA have been the focus of previous Native Title Reports and have also been the focus of criticism from international human rights committees. These concerns and criticisms have not led to any amendments to the NTA. Yet, despite the shortcomings of the NTA and the recurring failure of the native title system to recognise and protect Indigenous interests, Aboriginal and Torres Strait Islanders maintain their relationship to and identity with their traditional country. This is particularly true of nature reserves and national parks, where development of the land has been limited. It is within this context that I present a human rights framework, not directed to the Commonwealth seeking amendments to the NTA, but to the

4 *Mabo & o'rs v Queensland (No 2)* (1992) 175 CLR 1.

Western Australian Government seeking a policy response that is in accordance with human rights standards.

The finding of extinguishment on reserves in the *Miriuwung Gajerrong* decision, and in particular within those reserves created for the purpose of nature conservation, was unexpected. This finding is contrary to the principle of non-extinguishment in conservation areas within the NTA; contrary to human rights standards of cultural protection and self determination; and contrary to contemporary international conservation approaches and sustainability principles supported by the Western Australian Government. Yet the High Court found, in *Miriuwung Gajerrong*, that the operation of the NTA results in the extinguishment of native title in nature reserves.

Notwithstanding the incongruity of this finding, I believe it offers an opportunity to re-appraise and respond to the native title system in a way which provides for the genuine recognition and protection of Indigenous interests in Western Australia.

Extinguishment – Native Title in Nature Reserves

In *Miriuwung Gajerrong* the Court examined the effect of extinguishment arising from the creation of reserved areas. Under the *Land Act 1933* (WA) ('Land Act'), a reserve could be created for the conservation of indigenous flora and fauna. Under the *Wildlife Conservation Act 1950* (WA) 'nature reserve' means land reserved under the Land Act. Within the claim area a number of reserves had been gazetted for different purposes, including, public purposes, conservation, recreation, parkland, agricultural research, gravel, quarry and drainage purposes. Within the claim area nature reserves include:

- Wildlife sanctuary – Reserve 29541
- Conservation of flora and fauna – Reserve 31967, 34585 and 42155
- Mirima National Park – Reserve 37883

Each of the nature reserves is currently vested in the National Parks and Nature Conservation Authority.[5] The Court found that native title was extinguished on these areas.

The extinguishment reasoning focused on the legal mechanisms for creating and vesting a reserve. Much of the land within the claim area was or has been subject to a reserve under either the Western Australian *Land Regulations 1882*, *Land Act 1898* or Land Act. The High Court found that the making of a reserve did not wholly extinguish[6] all native title rights and interests. However:

> … the exercise of that power was inconsistent with any continued exercise of power by native title holders to decide how the land could or could not be used… this step was not, however, necessarily inconsistent with the native title holders continuing to use the land in whatever way they had, according to traditional laws and customs, been entitled to use it before its reservation.[7]

5 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [231].
6 ibid., at [221].
7 ibid., at [219].

That is, the making of a reserve did not extinguish all native title rights and interests but it was inconsistent with the right of native title holders to decide how the land could or could not be used.

While the creation of a reserve did not wholly extinguish native title rights and interests, the Court did find that the vesting of a reserve would wholly extinguish native title:

> …because the vesting under s33 of the Land Act 1933 of a reserve in a body or person vests the legal estate in fee simple to the land in that body or person and obliges the body or person to hold the land on trust for the stated purposes, rights are vested in that body or person which **are inconsistent with the continued existence of any native title rights or interests to the land**.[8]

That is, native title was extinguished on any reserved land that was **vested** in a body or person.

Effect of the Racial Discrimination Act 1975

The *Racial Discrimination Act 1975* (Cwlth) ('RDA') performs an important function in relation to the operation of the NTA. If, after the commencement of the RDA in 1975, the Crown has enacted or amended legislation, granted or varied licences, created or extinguished any interest in relation to land or waters or created a contract or trust in relation to land or waters[9] and this act discriminates against native title rights and interests under the RDA, these acts would be invalid. However, under the validation and confirmation provisions of the NTA, those acts that were invalid because of the operation of the RDA are validated. In some instances, this validation process allows for non-extinguishment of native title.

If a reserve were vested before the RDA came into operation, the vesting would be valid and native title extinguished. If the vesting occurred after the operation of the RDA, questions arise as to whether the act was invalid under the RDA and would be validated under the NTA.[10]

The Court found that on its face the vesting of reserves under s 33 of the Land Act did not single out native title rights and interests in a discriminatory manner. However, the Land Act did provide for compensation for loss of rights and interests of resumed land and so compensation for the loss of rights and interests under the Land Act is conferred on native title rights and interests.

The Court reasoned that 'at the time of vesting a reserve, the only interests in the land which could be affected by the vesting and the holder of which would not be entitled to compensation would be native title rights and interests'.[11]

8 ibid., at [249] (emphasis added).
9 Summary of s226 of the NTA – definition of an 'act'.
10 The summary of the effect of the RDA on the vesting of reserves, see *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [249]-[253].
11 ibid., at [252].

However, under the analysis of discrimination in *Gerhardy*[12] by Mason J, the vesting of a reserve after 1975 'would be **valid** but the RDA would supply to native title holders a right of compensation for that which is lost upon vesting'.[13]

Despite the High Court's finding that the extinguishment of native title by the vesting of reserves was valid and extinguished native title apart from the NTA, the Court gave consideration to the operation of the NTA. Section 23B of the NTA provides the mechanism for the confirmation of extinguishment.[14] Under this section a 'previous exclusive possession act' which wholly extinguishes native title covers a range of acts. Subsection 3 provides the definition for the extinguishment of native title by the vesting of a reserve:

> (3) If:
>
> (a) by or under legislation of a State or Territory, particular land or waters are vested in any person; and
>
> (b) a right of exclusive possession of the land or waters is expressly or impliedly conferred on the person by or under the legislation; the vesting is taken… to be the vesting of a freehold estate over the land or waters.

This analysis confirms the extinguishment of native title rights and interests over reserves. However the Court made some additional observations about the operation of the NTA, stating that in considering the operation of s23B attention must also be given to sub-sections 9A and 9C.

Sub-section 9A of NTA s23B allows that if a previous exclusive possession act is the grant or vesting for the establishment of a national, state or territory park for the purpose of preserving the natural environment of the area, then the vesting would **not** be a previous exclusive possession act. Yet following this analysis the Court concludes:

> Nevertheless, the vesting of a right of exclusive possession being valid, the vesting extinguished all native title rights and interests in the land.

Similarly, sub-section 9C of NTA s23B provides that if a vesting in relation to land or waters is to or in the Crown in any capacity or statutory authority, that act is not a previous exclusive possession act, unless apart from the NTA, it extinguishes native title. In relation to nature reserves, these areas were vested in the National Parks and Conservation Authority and it is likely that the Court would find that this Authority was an emanation of the crown and hence Sub-section 9C would apply. However, the Court found that because the vesting of a nature reserve was valid and extinguished native title apart from the NTA, vesting was valid and effective to extinguish native title.

The Court's finding that extinguishment arising from vesting of reserves was valid, in relation to nature reserves, ensures that two provisions within the NTA that would have protected native title from extinguishment could not be applied.

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12 *Gerhardy v Brown* (1985) 159 CLR 70.

13 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [253] (emphasis added).

14 For the Court's summary of the operation of s23B of the NTA, see ibid., at [254]-[261].

Within the *Miriuwung Gajerrong* claim area, vested reserves cover just over 30 per cent of the claim area.[15] Native title is now wholly extinguished in these areas. However, findings of extinguishment in *Miriuwung Gajerrong* are likely to apply to other reserve areas in Western Australia. This has significant implications for native title in conservation areas throughout Western Australia. Currently the conservation estate in Western Australia covers 22 million hectares, approximately 8 per cent of the State,[16] with most of the conservation estate being created by the reservation and vesting of land. Hence the extinguishment of native title over large areas within the conservation estate will result from the Court's decision.

In a recent analysis by the Ngaanyatjarra Council[17] two areas were identified as being affected by the findings of *Miriuwung Gajerrong* in relation to nature reserves, those of the Martu and Gibson Desert native title claimants.

Martu

The Martu native title claimants lodged a claim over an extensive area of land in the Eastern Pilbara. The claim covers an area of 250,000 square kilometers and within this area the Rudall River National Park covers an area of 25,000 sq kilometers. The National Park was created in 1977 and is of particular ecological, cultural, physical, ethnographic and practical significance to the Martu. Within the National Park are also two of the main communities for that area – Pangurr and Punmu. On Ngaanyatjarra's analysis, the affect of the *Miriuwung Gajerrong* decision will be the wholesale extinguishment of native title in the area covered by the National Park.

On 27 September 2002, the native title of the Martu people was recognised by consent determination. However, just prior to the determination being made by the Federal Court, the Rudall River National Park was excluded from the determination to take account of the *Miriuwung Gajerrong* decision. The Rudall River National Park is an area of special significance to the Martu. Prior to the *Miriuwung Gajerrong* decision it was included in the consent determination negotiated with the Western Australian government. Following its exclusion from the determination the parties intend to negotiate a mutually acceptable joint management arrangement for the national park outside of the native title process.[18]

15 Statistical information provided by the National Native Title Tribunal ('NNTT'): letter from NNTT to Human Rights and Equal Opportunity Commission, 8 November 2002.

16 Department of Conservation and Land Management (WA), Background to a draft policy statement on 'Aboriginal involvement in Nature Conservation and Land Management', August 2000.

17 D O'Dea, 'Post Determination Negotiations', paper for *Native Title Conference 2002: Outcomes and Possibilities*, Geraldton, 3-5 September 2002.

18 NNTT, *WA's Martu people achieve native title recognition in Western Desert*, media release 27 Sept 2002

It is likely that the Gibson Desert native title claimants will be similarly affected by the findings of the *Miriuwung Gajerrong* decision. Their claim is for an area of land to the south-west of Kiwirrkurra and west of the Central Reserves, close to the middle of WA. Unlike the Martu, the nature reserve comprises 65 per cent of the claim area of the Gibson Desert native title claimants and is likely to be extinguished following the decision in *Miriuwung Gajerrong*. This nature reserve was gazetted in 1977 without any consultation with the traditional owners for the area.

The Gibson Desert Nature Reserve: *Traditional Owners and Cultural Landscape*[19]

The lands of the Gibson Desert Nature Reserve lie within the wider Western Desert ethnographic area. Traditionally, people of this vast region, which stretches from as far as what now is Balgo in the north to Tjuntjuntjara and Yalata in the south, and from what now is Jigalong and Wiluna in the west to Amata and Indulkana in the east, spoke dialects of a single language, and shared a similar socio-cultural system.

The Western Desert as a whole, and the Nature Reserve more particularly, is an area of low rainfall and long summers. And while numerous species of plants and animals are adapted to the relatively harsh conditions, the overall biomass of the countryside is low. That people were able to get by at all on such limited water and food resources (and as it happens they seem to have done much better that might at first be expected) was because their numbers, like those of the plants and animals they relied upon, were relatively few – as low as one person per 100 square kilometres, or even lower still. They also for the most part lived in small groups, often consisting of no more than a man, his wife or wives and their children. More than this, the groups kept on the move. They frequently shifted camp, both because they had depleted resources in one area and to take advantage of resources in another area, and sometimes travelled across distances as great as 500 kilometres to escape extended drought conditions and food shortages.

However, although people were few on the ground and widely scattered, groups were never isolated. Kin (and affines) were found in neighbouring *and* more distant groups. In fact, people were surrounded by kin, and interacted with one another first and foremost as kinspersons. Beyond this, groups periodically came together to stage rituals, such as those to replenish species and initiate youths into manhood, believed to have been first performed, and then passed on to humans, by the great creative ancestors of the Dreaming.

It should not be thought that groups wandered aimlessly or randomly about the Western Desert. The evidence suggests that people saw themselves, and were seen by others, as linked to and responsible for somewhat limited stretches of countryside. They tended to frequent their own countries, or at least the more immediate areas of these countries.

19 *The Gibson Desert Nature Reserve: Traditional Owners and Cultural Landscape*, prepared by Dr Lee Sackett. Courtesy of Ngaanyatjarra Council.

There were a variety of reasons for this: some 'natural', some 'supernatural'.

People knew the location and availability of resources close to home; at the same time, they also knew the mythical landscape, so knew where they might freely venture, where they had to be cautious, where they must not go, etc. Moreover, it was their duty to look after their country in both its natural and supernatural guises. They had to protect sites, occasionally burn off country, perform necessary rituals, and so on. In 'stranger country' they would be less certain or even ignorant of where resources could be found. Not only this, they would be in country were they might very well inadvertently provoke supernatural powers and sanctions.

Some traditional owners and their ancestors began moving from the western and southern portions of the Nature Reserve in the 1940s and 50s, eventually arriving and taking up a more sedentary and certain lifestyle in and around Wiluna, Laverton and Warburton. In many cases, it is not clear exactly why these moves were made (those who recall making them were only children at the time). However, one family's decision to go into Warburton centred on the parents' desire to ensure their son's initiation in a world where neighbours further to the west and south already had gone into settlements.

At the same time, a number of traditional owners and their ancestors continued residing in and around the Nature Reserve well into the 1960s; a few continued a traditional subsistence existence in the area into the 1970s. These were some of the people who in the mid-1960s were met by Western Australian Native Welfare Officers and Native Patrol Officers working with the Woomera Weapons Research Establishment, recorded by the anthropologists Professor Robert Tonkinson and Professor Richard Gould, and filmed by the Commonwealth Film Unit for the *People of the Australian Western Desert* series. Indeed, these traditional owners, specifically some of the Campbells, Carnegies, Morgans and Wards, came to be held out as archetypical hunter-gatherers, widely depicted, described and discussed.

Some of these traditional owners vividly recall, and sometimes animatedly relate, the tales of their first encounters. These were not simply the moments when they first met non-Aborigines, these were the occasions when they did such things as ran screaming from the devil noise of Land Rovers, tried to use flour for body paint instead of food, put pants on backwards or, more laughably yet, slipped on dresses when they should have been putting on pants.

In the end, these people too went into settlements. Some of them say they, like some of those who preceded them, went in so initiations could proceed; others say they went in to find spouses; others still say they went in to visit kin and affines who had gone before them. Whatever the case, it was at this time that their lives began altering dramatically – certainly much more dramatically than they had prior to this point. But while traditional owners' lives, and their socio-cultural system, have undergone change, the lives of many of them remain heavily shaped and constrained by traditional beliefs and values, and acted out very much in line with traditional behaviours.

At a general level, most of the younger traditional owners are multi-lingual, speaking both English and the Western Desert language. At the same time, many of the older traditional owners have limited English, generally conversing in the Western Desert language. Young and old alike remain deeply embedded in what still is a largely kin-based society. They continue relating with and to one another as kinspeople, and marrying according to prescriptive rules. And while years of mission experience has imbued traditional owners with elements of Christian belief and practice, most traditional owners also hold the Dreaming, and its accompanying ritual system, as fundamental, both to their lives and the wellbeing of the ongoing socio-cultural order of which they are part. More than this, senior generation traditional owners are of the view that it is imperative their and their ancestors' beliefs and practices, particularly as these relate to 'public' *and* to gender based, i.e. men's and women's, knowledges of sites and Dreamings, be maintained and passed on to members of the younger generation.

At a more grounded level, when traditional owners moved to settlements they by no means severed their connections to their countries. Traditional owners who had been born and grew up in countries on and around the Nature Reserve under traditional circumstances identified, and were identified as, people from and for those areas – just as they had been in earlier years. It seems they regarded themselves and their families as always and continually connected to the countries of the Nature Reserve area. As far as they know, this is where their ancestors before them had been born and lived out their lives.

Even when they were not physically present on the lands of the Nature Reserve, they actively continued looking after them. They had with them sacred objects directly associated with Dreamings of the Nature Reserve, they performed rituals associated with Dreamings that cross the Nature Reserve, they passed on their knowledge of the secular and sacred landscapes of the Nature Reserve to their children and grandchildren.

By the late 1970s – early 1980s, some traditional owners were actively seeking the establishment an outstation in or near their homelands. In recent years, they have succeeded in developing a community at Karilywara (also known as Patjarr), and have re-formed the conditions for direct physical connections to the Nature Reserve. From here they, and fellow traditional owners visiting Karilywara, regularly access and interact with their traditional countries. On the one hand, they do such things as put in bush tracks, clean rockholes, visit "funeral" or burial places, burn off grassy areas, collect bush tucker, pursue game and share out the proceeds of the hunt, and sing the songs for the country. On the other hand, and most vitally, they show their descendants around the Nature Reserve area, teach them about its water and food resources, and introduce them to its Dreamings and Dreaming places. That is, through their visits to and presence and activities on the land, through their very real and ongoing engagements with the land, its places and its Dreamings, they at one and the same time look after the country and its sites and keep its Law alive.

> Senior members of this body of traditional owners indicate that it is not by accident that they approach, tap, monitor and in a sense transmit the country in this manner. As they see it, this is how they must relate to their countries. This, they say, is how their own parents and grandparents taught them to do things – this in their world view is how things always have been done.
>
> Although the lands of the Nature Reserve may appear to outsiders to be but a part of a wider, harsh, inhospitable, even frightening, landscape, traditional owners see them as welcoming, and speak of the Nature Reserve and its surrounds as 'good country', and as 'home'. They proudly and forcefully announce that it is their country (the expression ngayuku ngura ['my country'] being an often heard one), and that they are looking after it as they should and must do according to Aboriginal Law.

The effects of this aspect of the *Miriuwung Gajerrong* will not be confined to the Martu and Gibson Desert people. Reserves are scattered throughout Western Australia and the implications of this aspect of the *Miriuwung Gajerrong* decision are likely to be much wider than these examples reveal.

A Human Rights Appraisal

The exercise and enjoyment of culture

The findings of extinguishment in *Miriuwung Gajerrong* have serious implications for the enjoyment by Aboriginal people in Western Australia of rights under article 27 of the *International Covenant on Civil and Political Rights* ('ICCPR') and Article 1 of ICCPR and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').

Article 27 of ICCPR requires:

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion or, to use their own language.

Where land is of central significance to the culture of a group, then the right to enjoy and maintain a distinct culture includes the protection of Indigenous rights and interests in land. The protection of these interests also reflects the special value of an Indigenous culture to the broader society of which it is an important part. Such value is an intrinsic part of the conservation estate as many of these areas are protected not only for their environmental features but also for their cultural significance.[20]

Native title recognition provides an important mechanism for the exercise and enjoyment of culture. That is, the cultural characteristics of a native title holder

20 I note the WA Government has previously included land within a national park 'to protect Aboriginal heritage values', from <www.calm.wa.gov.au/forest_facts/rfafs_indigenous_new.html>, accessed 23 September 2002.

group are imbedded within native title recognition, as the traditional law and custom define the nature and extent of native title rights. Hence, the recognition and protection afforded by the NTA while constrained in many ways, provides an important legal measure for the protection and enjoyment of culture.

However, the extinguishment of native title withdraws the recognition and protection of cultural interests, which define the nature and extent of native title rights. The extinguishment of native title rights and interests has significant implications for the exercise and enjoyment of culture. Generally, the recognition of native title rights and interests ensures that native title holders are able to maintain and enjoy their cultural interests. That is, native title enables people to be on country, to conduct cultural activities including hunting, collecting bush tucker and ceremonies. It also provides mechanisms for the protection of these rights and interests from future development. Extinguishment of native title rights deprives native title holders of these rights of exercise and protection and consequently fails to satisfy the requirement under article 27 that Indigenous peoples have the right to enjoy their culture and all its elements, particularly those that relate to land. Such deprivation will not result in the 'extinguishment' of Indigenous cultures – Aboriginal people in Western Australia will continue to practice their law and custom, to the extent they are able without the recognition and protection of their cultural interests under the NTA.

However, article 27 also requires that States take positive measures to ensure people are able to exercise rights under this provision. The NTA was drafted in consideration of international human rights,[21] including the ICCPR, but in some instances has failed to uphold key provisions required by these standards. Yet the responsibility remains, despite the failings of the NTA, for states[22] in recognising the unique value and importance of Aboriginal people to implement positive legal measures of protection[23] to the extent that:

> … a State party is under an obligation to ensure that the existence and the exercise of this right is [sic] protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or

21 Preamble, NTA

22 Australia has agreed that the international treaties it joins, including human rights treaties, should be implemented throughout the nation and that the existence of different levels of government provides no reason for Australia's international obligations to be neglected in any part of the country (art 27 of the *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, Australia ratified 1974). Even though the primary responsibility for implementing treaties falls on the national government, every organisation within the nation must refrain from breaching the provisions of the two main human rights treaties (art 5(1) of ICESCR and ICCPR both state 'Nothing in the present Covenant may be interpreted as implying for any..group or person any right to .. perform any act aimed at the destruction of any of the rights and freedoms recognised herein'). Other international standards imply obligations directly on individuals or organisations ('Individuals, groups, institutions and non-governmental organizations have an important role to play and a responsibility in...promoting human rights and fundamental freedoms', article 18(2) of *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms*, UN General Assembly resolution 8 March 1999, UN doc A/RES/53/144).

23 Human Rights Committee, *General Comment 23, Article 27* (1994) para 7, in *Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies* UN doc HR/GEN/1/Rev.1, p147 ('HRC General Comment 23').

> administrative authorities, but also against the acts of other persons within the State party.[24]

Self determination

The right of self determination is required under Article 1 of the ICCPR and ICESCR, and the principle of effective participation emanating from this right is significant, particularly in relation to nature reserves. Article 1 states:

> All peoples have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The right of self determination supports and promotes the development of Indigenous communities. The recognition of native title rights and interests within nature reserves may have provided native title holders the opportunity to pursue their economic, social and cultural development. Conservation areas in particular, if appropriately managed, can be especially well suited to development that allows Indigenous peoples to build a stronger social and economic base through land and resource management, further develop communities through employment, training and education and enable the ongoing practice and exercise of cultural interests.

In the Northern Territory a number of examples exist of conservation areas that are currently administered through a joint management relationship. Broadly, this relationship is designed to enable Indigenous land holders to: participate in the management of the park; continue traditional activities and; provide for training and employment. While the shortcomings of this approach are increasingly becoming apparent[25] they are an important first model of the management relationship between Indigenous land holders and a conservation agency. Importantly, an analysis of existing joint management relationships can provide a useful guide to developing better and more equitable management arrangements between Indigenous land holders and conservation agencies.

Effective participation

An important feature of the right to self determination, which is also drawn from article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*[26] ('ICERD') and article 27 of ICCPR, is the principle of 'effective participation'. This requires that Aboriginal people have the right to determine their own status and to effectively participate in decisions relating to their traditional country. The Committee on the Elimination of Racial Discrimination

24 ibid. at para 6.1.

25 D Smyth, 'Joint Management of National Parks' in J Baker, J Davies, & E Young (eds) *Working on Country – Contemporary Indigenous Management of Australia's Lands and Coastal Regions*, Oxford University Press, South Melbourne, 2001.

26 660 UNTS 195 ('ICERD') (Australia joined in 1975).

('CERD') issued a General Recommendation on Indigenous Peoples, which recommends that States:

> …ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.[27]

This principle has two important implications for states. A human rights approach requires that policy and government decisions relating to the interests of Indigenous people be made only with their effective participation. And decisions directly affecting the traditional country and interests in that country of Indigenous people should be made only with their informed consent. Such an approach is not only appropriate from a human rights perspective but also assists in building a relationship of trust between Indigenous peoples and the state.

More specifically the Human Rights Committee has stated:

> With regard to cultural rights protected under [ICCPR] Article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting… the enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[28]

The NTA may be described as a 'positive legal measure of protection,' but failure to obtain this protection through either extinguishment or non-recognition, leaves the rights of many Indigenous peoples unprotected and without the opportunity to effectively participate in decisions relating to these interests. This is true of the rights and interests of Aboriginal people in Western Australia, to the extent that their land is covered by a vested reserve.

An opportunity exists for the Western Australian Government to respond to the findings of extinguishment in relation to nature reserves in a manner informed by a human rights approach. Such an approach is consistent with and required by principles of sustainable development.

Sustainable Development

In 1972 the *Declaration of the United Nations Conference on the Human Environment* presented principles for the preservation and improvement of the human environment. These principles promoted respect for fundamental rights of freedom, equality and adequate conditions of life, and improvement and preservation of the earth's natural resources. The 1972 Declaration initiated an ongoing assessment of international environmental and social issues, revealing worsening circumstances of environmental degradation and social instability throughout the 1970s and 1980s. In 1987, identifying the ongoing destruction

27 Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous people*, UN doc CERD/C/51/Misc.13/Rev.4 (1997) ('CERD General Recommendation 23') at para 4(d).

28 HRC General Comment 23, op.cit., para 7.

of eco-systems and acknowledging the implicit threat to world security arising out of an impending resource shortage and environmental degradation, the World Commission on Environment and Development[29] first phrased the term 'sustainable development'. Sustainable development was described as development which 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.[30]

In 1992 the United Nations Conference on Environment & Development was held in Rio de Janeiro. The Rio Conference, was driven by the 'sustainable development' principle and Agenda 21 was drafted to provide practical guidance for the implementation of sustainable development. Key Agenda 21 principles acknowledged:

> Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.[31]

And that:

> In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.[32]

Also declared was the importance of Indigenous peoples in the process of sustainable development and the requirement that the cultural interests and effective participation of Indigenous peoples be recognised:

> Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.[33]

The Rio Conference significantly acknowledged the paramount role of social and economic development in efforts to protect the environment. In its earlier form, sustainable development focused largely on conservation and environmental protection. Following Rio, there has been growing recognition that sustainable development relies on three interdependent and reinforcing 'pillars' – economic development, social development and environmental protection.[34]

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29 The World Commission on Environment and Development was established in 1983 by the United Nations. The purpose of the Commission was to re-examine critical environment and development problems and develop strategies to ensure future development would be at sustainable levels.

30 The World Commission on Environment and Development, *Our Common Future*, Oxford University Press, 1987.

31 *Rio Declaration on Environment and Development*, UN document A/CONF.151/26 (12 August 1992), endorsed by UNGA on 22 December 1992 (UN doc A/RES/47/190, para 2) ('Rio Declaration'), Principle 1.

32 ibid., Principle 4.

33 ibid., Principle 22

34 World Summit on Sustainable Development, *The Johannesburg Declaration on Sustainable Development*, 26 August – 4 Sept 2002, UN A/Conf.199/L.6/Rev.2, ('*Johannesburg Declaration*'), para 5.

> Since the Rio Earth Summit in 1992, sustainable development has emerged as a new paradigm of development, integrating economic growth, social development and environmental protection as interdependent and mutually supportive elements of long-term development. Sustainable development also emphasises a participatory, multi-stakeholder approach to policy making and implementation, mobilizing public and private resources for development and making use of the knowledge, skills and energy of all social groups concerned with the future of the planet and its people.[35]

In 2002, the World Summit on Sustainable Development was held in Johannesburg. The conference began with sobering statistics:

> … today, 80 countries have lower per capita incomes than they did at the time of the Rio conference. Threats are higher than ever to natural resources such as forests, fish, and clean water and air. The richest one-fifth of the population, including wealthy minorities in poor countries consume energy and resources at a rate that providing a comparable lifestyle to the rest of the world's population would require the resources of four planets the size of Earth.[36]

Secretary General of the United Nations, Kofi Annan also acknowledged that the results since the Rio Conference have been disappointing – 'in some respects conditions are worse than they were 10 years ago'. It was recognised that the approach to development had been piecemeal, with ongoing threats to the environment through unsustainable consumption and production.[37]

The *Johannesburg Declaration on Sustainable Development*[38] ('Johannesburg Declaration') declared that:

> … we assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection – at local, national, regional and global levels.[39]

And further:

> Recognising that humankind is at a crossroad, we have united in a common resolve to make a determined effort to respond positively to the need to produce a practical and visible plan that should bring about poverty eradication and human development.[40]

Clearly a key feature of the Johannesburg Declaration, and contemporary international analysis of sustainable development, is the eradication of poverty and the development of communities in conjunction with environmental

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35 UN Department of Economic and Social Affairs, *Global Challenge, Global Opportunity, Trends in Sustainable Development*, World Summit on Sustainable Development, Johannesburg, 26 Aug – 4 Sept 2002.

36 B Jones quoted in TW Kheel, 'Sustainability: Rio to Johannesburg, A Very Long Journey In Pursuit of A Still Elusive Goal' in *The Earth Times*, posted August 11, 2002 at <www.earthtimes.org/aug/sustainabilityriotoaug11_02.htm> accessed 10 December 2002.

37 ibid.

38 op.cit.

39 Johannesburg Declaration, op.cit., para 5.

40 Johannesburg Declaration, op.cit., para 7.

protection. This is reinforced in the Johannesburg Declaration and identified as one of the key challenges to the implementation of sustainable development.[41]

The Sustainable Development Conference also focused on the growing economic disparity between the rich and the poor. While its focus was largely directed towards developed and developing States, within Australia similar disparities exist. Indigenous Australians, living within a 'rich country', continue to suffer life chances equivalent to those living in 'poor countries'. At an international level, sustainable development is considered an approach that may address such disparities. It may also usefully inform strategies to address poverty eradication within Indigenous communities within Australia.

Sustainable development approaches rely also on respect for fundamental human rights[42] and recognise the vital role of Indigenous people in sustainable development.[43] Hence, a sustainable development approach within Australia requires respect for Indigenous rights as afforded under international law. The operation of the NTA in many ways fails to uphold international law principles and functions in a way which deprives native title holders of the enjoyment of their rights under international law.

Had native title holders rights not been extinguished in nature reserves in WA, these areas may have provided native title holders and conservation agencies an opportunity for the sustainable use of these areas and for the development of local communities. Rather, extinguishment of native title within these areas deprives native title holders of the protection and enjoyment of their cultural rights and the opportunity for meaningful participation in the sustainable development of their traditional lands and resources.

Sustainability[44] in Western Australia

In Western Australia, the current Government has pledged to embrace sustainability. In 'Focus on the Future: Opportunities for Sustainability in Western Australia', the consultation paper launching the State Sustainability Strategy, Premier Gallop stated:

> For many years we pursued economic, environmental and social goals in isolation from each other. We have come to recognise that our long-term well-being depends as much on the promotion of a strong, vibrant society and the ongoing repair of our environment as it does on the pursuit of economic development. Indeed, it is becoming obvious that these issues cannot be separated.
>
> The challenge is to find new approaches to development that contribute to our environment and society now without degrading them over the

41 ibid., para 11 and 12.
42 ibid., para 32.
43 ibid., para 25.
44 The Western Australian Government uses the term 'sustainability' in preference to 'sustainable development'. From the P Newman paper (infra.), sustainable development has been appropriated by some mining companies who use the term 'sustainable development' to advocate profits and energy growth with little regard for its true meaning.

> longer term… sustainability offers a process whereby these goals can be achieved simultaneously without trade-offs or compromise.[45]

As part of the sustainability strategy, a Sustainability Policy Unit was created within the Department of Premier and Cabinet. The Policy Unit is responsible for coordinating the development of the State Sustainability Strategy, increasing awareness of sustainability issues, and researching international sustainability strategies that may have relevance in Western Australia.[46] An important feature of the State Sustainability Strategy is the commitment to an integrative or holistic approach.[47] To facilitate a 'holistic approach', the Policy Unit has sought information on 'priority issues', ranging from sustainable building and construction methods to carbon emissions and ecotourism. Importantly, Indigenous Sustainability issues are also addressed.[48]

The key strategy set out in the Indigenous Sustainability paper emphasises the development of regional governance strategies.[49] While regional governance structures are fundamental to sustainability so too are inherent Indigenous rights, as expressed in international law and articulated within a human rights approach. It is therefore essential that Indigenous rights, particularly those associated with Indigenous peoples' relationship to land, be included within any strategy for sustainability in Aboriginal communities in WA. The paper acknowledges this importance:

> Central to any consideration of sustainability for Indigenous Western Australians is the recognition and determination of inherent native title rights, alongside negotiated capacity building programs, negotiated delivery of services, the building of infrastructure, and access to economic opportunities via universally recognised citizenship rights enjoyed by all Western Australians.[50]

Importantly, the Gallop Government has made a strong commitment to 'a new approach involving a partnership between governments and communities that will facilitate the development of self reliance for Indigenous Australians'.[51] The commitment of the Western Australian Government to sustainability in WA is an important first step. The findings of extinguishment of native title in *Miriuwung Gajerrong* present a significant challenge to this commitment.

Extinguishment and sustainability

The ongoing relationship of Aboriginal people in Western Australia to their traditional country is an important consideration for sustainability strategies within

45 Government of Western Australia, *Focus on the Future: Opportunities for Sustainability in Western Australia*, December 2001.
46 ibid.
47 P Newman, *Sustainability and Planning: A Whole of Government Approach, Institute for Sustainability and Technology Policy*, Murdoch University and Department of the Premier and Cabinet, Western Australia.
48 See S Kinnane, *Beyond the Boundaries: Exploring Indigenous Sustainability Issues,* August 2002.
49 S Kinnane, *Beyond the Boundaries, Exploring Indigenous Sustainability Issues*, Prepared for the Sustainability Policy Unit, WA Department of Premier and Cabinet, April 2002.
50 ibid., page 6.
51 WA Labour Party, *Indigenous Affairs Policy Statement*, page 1.

Indigenous communities. In fact, land has been the single most important feature of Aboriginal sustainability for tens of thousands of years.

> It is now thought that Aborigines have occupied Australia for at least 50,000 years.
>
> Yet, it is not widely acknowledged that they developed, adapted and refined their resource use and management skills over this time. Residence patterns, foraging practices and technology were key aspects of Aboriginal use and management of the landscape. The population density and distribution of Aboriginal groups continually changed, partially in response to ecological variations. Through these shifting settlement and mobility patterns, Aboriginal people managed the impact of their populations, therefore avoiding the over-exploitation of localised areas of the environment.[52]

Clearly, the sustainable use of land has been a concept familiar to Aboriginal communities for generations. Land provides Aboriginal people in Western Australia with the physical, religious, cultural, social and economic building blocks of their communities. To embark on a contemporary strategy of sustainability without this key component of Indigenous culture is unlikely to be successful.

The extinguishment of native title rights and interests in *Miriuwung Gajerrong* is in many ways incongruous with strategies of sustainability within Aboriginal communities in Western Australia. Extinguishment of native title within the conservation estate of Western Australia, in particular, deprives Aboriginal people of a meaningful opportunity for the sustainable development of their communities through the use of their traditional lands.

Land and resource management provide an important opportunity for the development of Aboriginal communities in Western Australia. While not a panacea for Aboriginal disadvantage, these opportunities arising from traditional country present a legitimate and meaningful source of development for Aboriginal communities.

The opportunity exists for the Western Australian Government to respond to the extinguishment findings in *Miriuwung Gajerrong* in a way which accords with human rights standards and principles of sustainability. Given the existing commitment of the Western Australian Government to sustainability and a realisation of the relationship between sustainability and human rights, I am hopeful that a fair and just outcome may be achieved within the conservation estate of Western Australia.

The Western Australian Conservation Estate – a Human Rights Framework Approach

Human rights standards, principles of sustainability, and contemporary conservation approaches require a response to findings of extinguishment over

52 FJ Walsh, 'The relevance of some aspects of Aboriginal subsistence activities to the management of national parks: with reference to the Martu People of the Western Desert', in J Birckhead, T De Lacy & L Smith, L (eds) *Aboriginal Involvement in Parks and Protected Areas*, Australian Institute for Aboriginal and Torres Strait Islander Studies Report Series, Aboriginal Studies Press, Canberra, 1992.

conservation areas. Outlined below is a framework for negotiations between the Western Australian Government and Aboriginal stakeholder groups. The framework incorporates key human rights standards and may provide a basis for negotiated outcomes. Further development of this framework is dependent upon its appropriateness and utility in an Indigenous context in Western Australia and the active participation of Indigenous stakeholder groups.

Recognition and protection of traditional interests in conservation areas

In accordance with article 27 of ICCPR which requires the protection and recognition of Indigenous interests in land and with the effective participation and informed consent of Aboriginal traditional owners, a human rights approach supports:

The conditional grant of freehold title on areas within the conservation estate to the Aboriginal traditional owners for the area

The principles of effective participation and informed consent emanate from a number of international human rights standards. These standards require that Indigenous participation within decision-making processes occur at two levels. First, the *Minorities Declaration*[53] provides that:

> Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.[54]

And the *Vienna Declaration*[55] calls on states to 'ensure the full and free participation of Indigenous people in all aspects of society, in particular in matters of concern to them'.[56] These standards require that Indigenous peoples 'effectively participate' generally in public life and particularly in 'matters of concern' to them. Second, international standards require that Indigenous people are able to effectively participate and provide their informed consent to decisions which affect them. In particular, States should ensure that:

> …no decisions directly relating to the rights and interests of Indigenous people are taken without their informed consent.[57]

And that:

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. ... The enjoyment of those

53 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, adopted by the UN General Assembly in 1992, UN doc A/RES/47/135, 18 December 1992.
54 ibid., art 2(2).
55 *Vienna Declaration and Programme of Action,* UN document A/CONF.157/23, 25 June 1993: endorsed by United Nations General Assembly on 20 December 1993 (UN doc A/RES/48/121, para 2).
56 ibid., part I para 20 (also part II para 31).
57 CERD General Recommendation 23, op.cit., para 4(d).

> rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. [58]

In accordance with international human rights standards, it is vital that negotiations relating to the rights and interests of Aboriginal people in Western Australia occur only with their effective participation and that negotiated outcomes are only determined with their informed consent. Of note, international human rights bodies have been particularly concerned with the Commonwealth Government's failure to ensure the effective participation and informed consent of Indigenous people in the 1998 amendments to the NTA.[59]

Conditional terms

The grant of freehold should be on terms negotiated between the Western Australian Government and key Aboriginal stakeholder groups. However, in consideration of key human rights principles, contemporary Indigenous land management approaches and current international conservation strategies, conditional terms may include:

- the establishment of Aboriginal traditional interest and relationship to country and;
- the negotiation of a management agreement between conservation agencies and traditional owners or their appropriate corporate body.

- **Traditional interest and relationship to country**

In particular instances, the native title recognition process fails to recognise and protect Indigenous cultural relationships with land in accordance with article 27 of the ICCPR. A new mechanism should be developed to determine traditional interest and relationship to country. This relationship should not be narrowly confined to heritage values and sites of cultural significance but should incorporate the full meaning of relationship to country.

In accordance with principles of effective participation and informed consent, this mechanism must be developed with the active participation of Aboriginal people whose interests will be affected by the new mechanism. It may be that this process of negotiation could usefully begin from the basis of the procedures used for the registration of native title applications, as administered by the National Native Title Tribunal. That is, the registration test may provide a useful starting point for the development of a more appropriate mechanism to determine traditional interest in country.

58 HRC General Comment 23, op.cit., para 7.

59 CERD, *Concluding observations by CERD: Australia,* UN doc CERD/C/304/Add.101, 19 April 2000, para 9; CERD, *Decision 2(54) on Australia*, UN doc A54/18 para 21(2), 18 March 1999, para 9.

- Management agreement

A management agreement would establish the ongoing conservation interest in the land and establish an appropriate management structure. Key human rights standards and sustainability principles can provide an important guide for the development of management agreements. These include:

  - *Protection and recognition of culture*; the grant of freehold in acknowledgement of cultural interests should not be unnecessarily confined by mechanisms that act to reinstate the conservation management structure.[60]
  - *Cultural appropriateness*; management structures need to function in a way which supports and effectively interacts with the culture of traditional owner groups.
  - *Effective participation and informed consent*; decision making and management structures must be determined only with the informed consent of traditional owners.
  - *Enjoyment of culture*; the balance between traditional use and conservation must be negotiated to ensure provisions for traditional land use practices, e.g., hunting and collecting bush food and medicine.
  - *Self determination*; the establishment of an equitable relationship and one that promotes and assists in the increased participation of Aboriginal traditional owners in all levels of management. In negotiation with the traditional owners this may lead to full management responsibilities over freehold areas.
  - *Funding*; adequate funding to ensure Aboriginal traditional owners can make informed decisions and management structures are culturally appropriate.

A number of management models exist, for example, the commonly used joint management model or the Indigenous Protected Area approach. A human rights approach supports a model that ensures: the protection of Indigenous rights and interests in land; the effective participation and informed consent of Aboriginal traditional owners; the implementation of culturally appropriate management structures; and opportunities for self determination and social, economic and cultural development within traditional owner communities. Within these parameters it is likely that a range of different management models will be required to satisfy the distinct social and cultural identities of Western Australia's Aboriginal traditional owner groups.

60 Earlier grants of freehold to Aboriginal traditional owners on conservation areas have been made on the condition of a leaseback arrangement. Such a practice is unnecessary to ensure the ongoing conservation interest in the area. Indigenous Protected Areas or other management mechanisms, can be employed to maintain the ongoing conservation role without undermining the grant of freehold. For example, the Gurig National Park in the Northern Territory.

Prior to the *Miriuwung Gajerrong* decision, the rights and interests of native title claimants within nature reserves were protected by the future act provisions of the NTA. As a result of findings of extinguishment, right and interests under the future act regime are at risk. To ensure the protection of rights and interests and the opportunity of traditional owners to effectively participate in decisions relating to their land, a human rights approach requires that the Western Australian Government act to protect Indigenous rights and interests in land until the resolution of traditional owner interests in conservation areas and appropriate negotiations can commence.

Wilson v Anderson

The *Wilson v Anderson* case was heard by the High Court on appeal from the Full Federal Court. The central argument of the case was whether native title was extinguished by the grant of a lease in perpetuity for grazing purposes under the *Western Lands Act 1901* (NSW) ('WLA'). For the purpose of the case, it was assumed that native title rights and interests existed in the area.

The High Court's reasoning in *Wilson v Anderson* included a detailed analysis of the legislative history of the WLA. This analysis mapped the amendments to the 1901 WLA that resulted in the form of land ownership current on the claim area. It revealed the historic context of the amendments and to some extent the impetus for these amendments. Of significant influence in the ongoing amendments to the WLA were the difficulties encountered by pastoralists in the Western Division, difficulties which were not unlike those affecting pastoralists in the Western Division today. That is, key amendments to the WLA occurred as a result of difficulties affecting pastoralists in western New South Wales, including drought conditions and economic downturn. Also of significant influence were the policy and ideology of land settlement in Australia.

Following this analysis, the High Court found that the amendments to the WLA resulted in a type of land ownership that wholly extinguished native title – the perpetual grazing lease.[61]

What is also made apparent by the Court's reasoning in *Wilson v Anderson* is the absence of an Aboriginal history or experience. This is partly as a result of the structure of the appeal, in that it was assumed that native title rights and interests existed and did not need to be identified. For the most part, the absence of Aboriginal history or experience within the Court's description of land settlement in the Western Division is a result of the terra nullius rationale that justified the process of colonization in Australia. This rationale declared an empty land and justified the exclusion and incremental dispossession of Aboriginal traditional land in western New South Wales.

61 *Wilson v Anderson,* op.cit., at [92]

The Preamble to the NTA acknowledges that Aboriginal and Torres Strait Islanders:

> … have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.

It was hoped that the spirit and purpose of native title recognition in *Mabo* and the enactment of the NTA would stem the dispossession of Indigenous rights and interests in land and provide a lasting agreement concerning the use of those lands. The finding of extinguishment in *Wilson v Anderson* ends these expectations and renews the dispossession of Aboriginal people in western New South Wales. In this instance, the NTA does not offer a 'lasting and equitable agreement' with the Aboriginal people in this region.

However, an opportunity exists at this time for the NSW government to consider Aboriginal interests in land in the Western Division and provide a 'lasting and equitable agreement'. Importantly, findings of extinguishment under the native title legal regime do not mean the 'extinction' or end of Aboriginal people's relationship to and ownership of their traditional country. These things continue.

The Western Lands Act

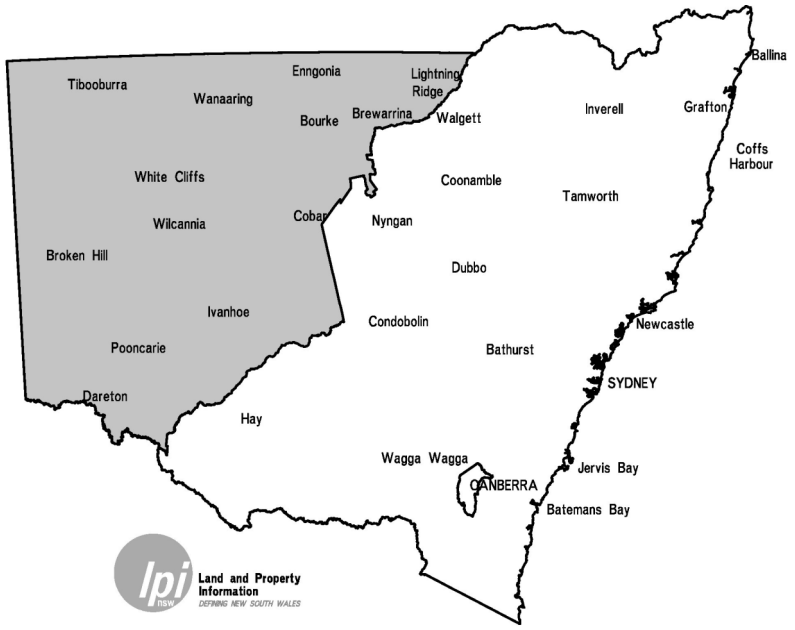
The High Court decision provides a detailed history of the WLA and the nature of the interests created as part of its inquiry into whether the perpetual leases confers a right of exclusive possession. It is useful to highlight the key features of this history to understand the context and affects of land administration in the Western Division.

In 1884, New South Wales was divided into three areas of land administration under the *Crown Lands Act 1884* (NSW) – the Eastern, Central and Western Divisions. The Western Division, covering nearly 80 million acres, or more than one third of New South Wales, is often described as the 'dry-western fringe'[62] and is largely a semi-arid to arid landscape. The environmental conditions in the Western Division made the area seem best suited to pastoral rather than agricultural industry.[63]

62 CJ King, *An outline of closer settlement in New South Wales*, Sydney, New South Wales Department of Agriculture, 1957, at 164.

63 New South Wales, *Parliamentary Debates*, Legislative Assembly, First Series, Session 1883-1884, at 351-52.

Figure 1: New South Wales – Western Division shaded



In the years following the establishment of the Western Division, the pastoral industry in the region became unprofitable due to frequent periods of drought, sandstorms, rabbit plagues and the destruction of vegetation caused by over grazing. This led to the widespread abandonment of pastoral properties in the region.[64] In 1900, a Royal Commission was appointed by the NSW parliament to report on the difficulties facing pastoralists in the Western Division. The Royal Commission revealed 'that there is hardly a solvent man in the western division'[65] and made recommendations to allow for increased acreage and longer terms for leases and the establishment of a government management board to oversee the pastoralists' use of the land.[66]

The NSW legislature's response to the recommendations was the enactment of the WLA. The WLA was intended to provide greater security of tenure to enable pastoralists to obtain loans against the leases. During the Second Reading Speech in the Legislative Assembly on the Bill for WLA, the Secretary for Lands said:

> … to bring the western division into a state to carry stock, there must be money expended upon it whether in water conservation, clearing, or scrubbing, and if these men [the present settlers] have no money, they

64 *Anderson v Wilson* [2000] FCA 394 (5 April 2000), per Beaumont J at [169].
65 *Wilson v Anderson*, op.cit., per Gaudron, Gummow and Hayne JJ, at [71].
66 *Anderson v Wilson,* op.cit., per Beaumont J at [176].

> must borrow to enable them to carry on. When a man lends money he naturally asks upon what security he is making the loan, and if the applicant can say, 'Here I have an absolute lease for forty-two years…,' then the man who contemplates lending the money can calculate his security. That is an absolute security, and the man who has money to lend knows what he is lending upon.[67]

Despite the enactment of the WLA, financial difficulties continued for pastoralists in the Western Division. In response, amendments were made to banking legislation in 1920 and the WLA in 1930 to address the difficulties. With regard to banking legislation, the *Government Savings Bank (Rural Bank) Act 1920* (NSW) was passed, which enabled Commissioners of the Bank to conduct the work of a Rural Bank and to offer loans against leases granted under the WLA and other Crown lands legislation. Amendments to the WLA involved the extension of term leases granted under the WLA. Those terms due to expire in 1943 were extended to 30 June 1968.[68]

However, these efforts were not enough: ongoing drought and the onset of the Great Depression in the 1930s caused greater hardship. In 1934 the WLA was amended to allow for holders of existing leases and leases subsequently granted to be made in perpetuity. The grant of a lease in perpetuity was intended:

> ... to enabl[e] holders to obtain the necessary finances to carry them on. At present, as these are merely leases, it is impossible obtain advances on them, but if they are converted into perpetual leases, advances will be made upon the security of the holding.[69]

Initially, leases in perpetuity were only granted over 'home maintenance areas'. These were areas 'which when reasonably improved will carry in average seasons and conditions a sufficient number of stock to enable the holder to reasonably maintain an average family'.[70] This was intended to prevent lessees of large pastoral holdings obtaining leases in perpetuity, particularly as large lease holdings covered 57 per cent of the Western Division at the time.[71] However problems in the Western Division remained, particularly for pastoralists on small leaseholdings.

The legislature then sought to reduce larger leaseholdings areas to supplement smaller areas in the hope that small leaseholders 'may be placed in a position to increase their flocks, and consequently their incomes'.[72] This approach was consistent with the strategy that had commenced with WLA – to withdraw land from large pastoral leaseholdings and make it available for smaller lease areas and, later, to satisfy the Government's commitment to returned soldiers.[73]

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67 *Wilson v Anderson*, op.cit., per Gaudron, Gummow and Hayne JJ, at [71].
68 ibid., at [72].
69 ibid., at [73].
70 *Western Lands (Amendment) Act* 1932, s 3 quoted in *Anderson v Wilson*, op.cit., per Beaumont J at [177].
71 *Anderson v Wilson*, op.cit., per Beaumont J at [179].
72 Minister for Lands (New South Wales, Parliamentary Debates, Legislative Assembly 17 May 1934 at 401) quoted in *Anderson v Wilson* op.cit., per Beaumont J at [180].
73 See generally, Parliament of New South Wales. *First Report of the Joint Select Committee of the Legislative Council and Assembly to Enquire into the Western Division of New South Wales*, Parliamentary Paper No 151, Government Printer 1983, at 297-301.

Following the Second World War, the NSW government enacted the *War Service Land Settlement Act 1941*, which enabled land to be granted under a number of statutes, including the WLA, to discharged members of the forces. The High Court noted that the perpetual lease considered in *Wilson v Anderson* was granted under the *War Service Land Settlement Act*, to Ross Patrick Smith in 1953.[74]

The effect of land administration in western New South Wales

The High Court's examination of the WLA is a legal history in which significance is given to changes in legislation and the effect of these changes of legal interests. Very little is said about the way in which this history affected Aboriginal people living on their traditional country.

In the 1820s and 1830s, squatters began following the routes of explorers such as Mitchell, Sturt and Oxley into western New South Wales. Driven by the expanding colony's growing demand for beef and a developing economy of wool, squatters began illegally grazing new lands outside the 'limits of location'. The 'limits of location' were defined by the colonial government in 1826 and only included settled districts around major centres such as Sydney.[75] The purpose of the order was to contain the spread of settlement. Under this policy, land outside the limits of location could not be sold or leased and pastoral occupation was prohibited.[76]

This prohibition was ineffectual – squatters continued to push the boundaries of settlement. Unable to prevent the illegal occupation of these lands the colonial government introduced a system of annual occupation licences, allowing squatters to legally graze stock on land outside the limits of location. The incursion of early squatters into the areas outside the limits of location and unsettled by colonists resulted in violent clashes with Aboriginal traditional owners. The period between the 1840s and 1860s saw significant resistance by Aboriginal people and it appears during the 1840s that Aboriginal resistance around the Barwon River near Warrego temporarily prevented the intrusion of squatters and stock.[77]

The gold boom of the 1850s ushered in a new relationship between Aboriginal people and the squatters. Many of the European workers employed by squatters left the area to try their luck on the gold fields. As a result, Aboriginal people were able to successfully resist the further incursion of squatters into unestablished areas. Also, a new relationship emerged between Aboriginal people and squatters as established grazing areas required a new source of

74 *Wilson v Anderson*, op.cit. per Gaudron, Gummow and Hayne JJ at [75].

75 L Godden, 'Wik: Feudalism, Capitalism and the State. A Revision of Land Law in Australia?' in *Australian Property Law Journal*, 5 (2&3), 1997, page 176.

76 CJ King, *An Outline of Closer Settlement in New South Wales: Part 1, The Sequence of the Land Laws 1788-1956, Division of Marketing and Agricultural Economics*, Department of Agriculture, NSW, 1957, pp 39-40.

77 RL Heathcote, *Back of Bourke*, Melbourne University Press, 1965.

labour. This labour shortage resulted in the 'dual occupation'[78] of large holdings.[79] Aboriginal people began to fill the labour shortage caused by the gold boom. This relationship provided squatters with labour and enabled Aboriginal people to continue to live on their traditional country and continue to engage in cultural activities. The dual occupation of land continued, with the establishment of large scale pastoralism in western New South Wales.

Further consequences of the gold boom were the increased levels of immigration to Australia and migration to remote areas. These areas had previously been dominated by squatters and large pastoral holdings. As a result, demand increased in remote areas for smaller holdings and the 'unlocking of land' held by pastoralists. This demand was consistent with the popular 'closer settlement' ideology:

> What we want to do is to put people upon the land to make it productive …. I have patriotism enough in me to desire a better state of things for my country, and I think the time has come when steps should be taken to prevent the wholesale alienation of the land, and when every acre sold should represent population and productiveness. That is the way to make a nation. Do you think we shall ever make a nation with sheep-walks? I admit that sheep-walks are all very well; but they ought to give way to population, and those who occupy them must recede and give way when the land is required for *bona fide* occupation. I am not the only one who says that. That statesmen of England have said the same, for it is laid down in the old orders-in-council that the pastoral tenants or the squatters of those days – for squatters they really were then – might occupy the lands and make the best use they could of them; but that they must give way before the advancing tide of population.[80]

However, such an approach was inconsistent with the interests of squatter-pastoralists who were a wealthy and influential political force; and inconsistent with land use requirements in the Western Division, which determined that large scale pastoral leases were more able to sustainably support stock to operate a viable property.

Despite these issues, the Colonial Government began to legislate for the creation of smaller lease holding areas. However, it was not until the 1930s, under the WLA that the government began to succeed in reducing the majority of large pastoral holdings to small lease holding areas in western New South Wales.

In 1934, 57 per cent of the Western Division was held in large holdings; by 1941 only 37 per cent was covered by large holdings.[81] This approach continued throughout the 1940s and in 1949 an act was passed specifically to create

78 H Goodall, *A History of Aboriginal Communities in New South Wales, 1909-1939*, Phd Thesis, University of Sydney, 1982.

79 H Allen, *Where the Crow Flies Backwards: Man and Land in the Darling Basin*, Phd Thesis, Australian National University, 1972.

80 Secretary for Lands, Mr Farnell, Legislative Assembly Debate 7 November, 1884, *New South Wales Parliamentary Debates,* First Series, Session 1883-84, pp.331-332.

81 CJ King, *An Outline of Closer settlement in New South Wales*, op.cit.

home maintenance areas for returned soldiers settlement. By 1956, 83 per cent of the Western Division was held under the smaller perpetual lease.[82]

The widespread establishment of smaller lease holding areas in the Western Division had a significant impact on Aboriginal communities. Previously, the dual occupation relationship had allowed Aboriginal people to live on or near their traditional country. Following the establishment of the smaller lease holding area, Aboriginal people for the most part were unable to remain living on their traditional country and began to live on the fringes of townships.[83]

Consequently, the grant of perpetual leases created greater difficulties for the exercise and enjoyment of culture by Aboriginal people in the Western Division. However, these difficulties did not result in the end of Aboriginal culture and identity in these areas. Rather, Aboriginal cultural tradition and identity has adapted and evolved but continued[84] despite profound challenges. Within such survival are stories of resilience and strength that were not heard in the *Wilson v Anderson* decision and are unlikely to be heard in any of the other native title claims outstanding in the Western Division.

However, the non-recognition of Indigenous connection to country in the Western Division is not a result of a version of history that favours dispossession over resilience but as a result of the legal operation and effect of creating non-Indigenous interests on traditional land.

Extinguishment of Native Title in the Western Division

Following its analysis of the history of land administration in the Western Division, the High Court found that perpetual grazing leases could be classified as 'freehold estate' under s23B(2)(c)(ii) of the NTA and that they wholly extinguished native title.[85] The Court reasoned that the lease in perpetuity as developed within NSW land law was similar in most instances to freehold, 'with all the advantages and essence of freehold'[86] – except for the performance of tenurial requirements imposed by the grant.[87]

Native title in the Western Division had been considered prior to the Court's examination of perpetual leases in *Wilson v Anderson*. The WLA was included in the amendments to the NTA. In those amendments, specific leases granted under s23 of the WLA and granted for the purpose of 'agriculture, or any similar purpose; agriculture (or any similar purpose) and grazing combined; mixed

82 *First Report of the Joint Select Committee of the Legislative Council and Legislative Assembly to Enquire into the Western Division of New South Wales*, Parliament of New South Wales, 1983.

83 JR Beckett, 'Kinship, mobility and community in rural New South Wales', in I Keen (ed), *Being Black, Aboriginal Cultures in 'settled' Australia*, Aboriginal Studies Press, Canberra, 1988, page 122.

84 ibid.

85 *Wilson v Anderson*, op.cit., per Gaudron, Gummow and Hayne JJ at [92].

86 ibid., at [116].

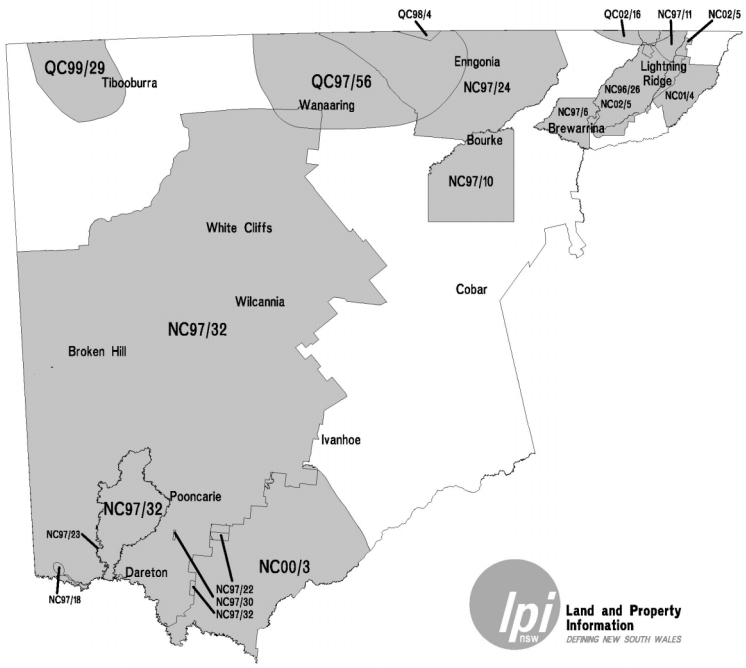
87 Tenurial requirements ensured that retention of title was dependent on the lessee satisfying certain requirements. In relation to the WLA leases these requirements included; requirement of residence on the lease area, that the lease be used for the purpose of grazing stock and that the lease not be transferred, conveyed, assigned or sub-let without the consent of the Minister: ibid., at [112]-[113].

farming or any similar purpose other than grazing' were scheduled as a previous exclusive possession act under NTA s23B(2)(c)(i) with the effect that native title was extinguished in these areas. Significantly, the Commonwealth did not include perpetual grazing leases for extinguishment as a Scheduled interest. The Court noted this exclusion but found that the perpetual grazing lease was an exclusive lease and thus a previous exclusive possession act under NTA s23B(2)(c)(iv) or (viii) which also extinguished native title.

In a previous report by the Aboriginal and Torres Strait Islander Social Justice Commissioner the Schedule provisions of the NTA were described as the 'blanket extinguishment' of native title.[88] It would now appear that this was a compelling forecast of the findings in *Wilson v Anderson*, which not only acknowledged extinguishment under the NTA, but added leases not included in the Schedule to the breadth of extinguishment.

The Western Division covers approximately 43 per cent of New South Wales and of this area over 96 per cent is held under Western lands leases.[89] The remaining 6 per cent is freehold, national parks, reserves, vacant crown land and other types of leases.[90] This is expected to have significant implications for native title in the area.

Figure 2: Western Division of NSW – Current Native Title Applications shaded



88 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* 1996-97, Human Rights and Equal Opportunity Commission, Sydney, 1997, p78.

89 *Anderson v Wilson*, op.cit. per Beaumont J at [159].

90 NNTT, 'Native Title and the Western Division of New South Wales', 16 August 2002.

Figure 2 shows the location of the, currently, 20 native title applications in the Western Division filed in the Federal Court. The National Native Title Tribunal expects that 15 of these applications will be affected by the findings in *Wilson v Anderson*.[91] In addition to these findings, Western lands leases included as Scheduled interests under the NTA extinguish native title. As a result it is likely that native title will be extinguished over a significant area of the Western Division.

The Human Rights Implications of Extinguishment in the Western Division

The findings of extinguishment in *Wilson v Anderson*, the likely extent of these findings, and the effects of the NTA Schedule, have profound implications for the recognition and exercise of the human rights of Aboriginal people in the Western Division. Broadly, the extinguishment of native title in the Western Division impedes the right of Aboriginal people to enjoy their culture and exercise interests arising from the right of self determination, in particular the principle of effective participation in decision making as it relates to their traditional country. While successive New South Wales Governments have legislated to protect Indigenous interests, these measures do not comprehensively address the particular interests of Aboriginal people in western New South Wales.

Native title

Native title is defined by the traditional law and custom of a particular native title group – it is given specificity by the culture of the group. *Wilson v Anderson* was decided in the absence of evidence presenting native title rights and interests. That is, it was contended that the existence of the lease provided a complete answer to the native title claim and the court agreed to decide this preliminary point on the assumption that native title rights and interests existed.[92] Accordingly, evidence to establish native title was not required. The absence of evidence detailing connection and the content of native title rights and interests is reflected in the High Court's judgment which is silent on the presence of Aboriginal people in the Western Division or the Euahlay-I Dixon people of the area under claim.

The absence of specified native title rights and interests in *Wilson v Anderson* limits the extent to which a discussion of the implications of the Court's decision on the exercise of culture can be made. That is, without the specific rights and interests of the Euahlayi native title claimant group being known, it is difficult to discuss specifically how extinguishment will diminish the exercise and enjoyment of the claimants' culture. However, by relying on generalised common law expressions of native title rights and interests, it is possible to identify significant implications for the exercise and enjoyment of culture arising from the extinguishment of native title rights.

91 NNTT, *Talking Native Title in NSW*, September 2002.

92 *Anderson v Wilson*, op.cit. per Black CJ, Beaumont and Sackville J, Explanatory Statement.

Rights and interests recognised within native title processes and based on a particular claimant group's traditional law and customs commonly include the right to:

- possess, occupy use and enjoy the area claimed;
- be acknowledged as the traditional owners for the application area;
- speak for and make decisions about the use and enjoyment of the application area;[93]
- reside upon and otherwise have access to and within the application area;
- use and enjoy the resources of the application area;
- maintain and protect areas of importance under traditional law and customs; and
- determine and regulate membership of, and recruitment to, the landholding group.

Broadly, these rights enable native title holders to be on the land under claim for the purpose of conducting activities on the land including; hunting, collecting bush foods and medicine and caring for places of importance. And the orders also allow for the recognition of native title holders as the traditional owners of the land with rights to make decisions about the use of the land.

Enjoyment of culture

The extinguishment of native title in western New South Wales and the subsequent failure to recognise and protect traditional rights and interests as provided by the mechanisms of the NTA impair the rights of Aboriginal people to enjoy their culture as required by article 27 of the ICCPR. This article states:

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion or, to use their own language.

Within international jurisprudence, this right also applies to Indigenous minorities.[94]

The NTA was intended to provide for the recognition and protection of the unique rights and interests of a native title holding group in relation to land and the use of land, and in doing so be guided by the standard of protection conferred by

93 The right to make decisions about the use of the land has been recognised in a number of native title determinations, including *Mualgal People v State of Queensland and Ors* [1999] FCA 157, *Hayes v Northern Territory* [2000] FCA 671 and *Wandarang, Alawa, Marra & Ngalakan Peoples v Northern Territory of Australia* [2000] FCA 923. However, the reasoning in *Miriuwung Gajerrong* questions the appropriateness of a right to make decisions about the use of the land in a non-exclusive context. See *Miriuwung Gajerrong*, op.cit. per Gleeson CJ, Gaudron, Gummow and Hayne JJ, at [49] & [417].

94 HRC General Comment 23, op.cit., para 3.2.

international covenants of ICERD, ICCPR and ICESCR.[95] However, there has been much commentary by Indigenous leaders and academics on the failure of the native title process to adequately recognise and protect traditional law and custom. Yet the recognition of native title rights and interests continues to be important in the exercise, recognition and protection of culture. In principle, the NTA is in accord with article 27 in that it provides for the recognition and protection of native title rights and interests and thereby supports the exercise and enjoyment of culture. However, the limitations of recognition and the extinguishment or non-recognition arising under the NTA or the common law are powerful blows to such enjoyment.

Following *Wilson v Anderson* many Aboriginal people in western New South Wales do not have rights under the NTA to go on to country and collect food, look after areas of importance, or just be on country. They are not acknowledged as the native title holders of country, based on their traditional law and custom and do not have rights to talk about the future of their country or to participate in caring for country.

However these findings of extinguishment or non-recognition under the NTA will not, in practice, result in the extinguishment or non-recognition of Indigenous laws and customs, within an Indigenous framework.

> Indigenous law… continue[s] to operate regardless of the intrusions of Australian law. It continues to allocate rights and interests in country, dictate the nature of social interactions and acts as the basis of Indigenous social, cultural and political identity.[96]

That is not to say that extinguishment or non-recognition arising from the NTA does not impact or impair the enjoyment of culture. On the contrary, it can significantly disrupt, prevent and undermine cultural interests particularly as they relate to the practice of culture in relation to land – the core feature of the native title system. Yet Indigenous cultural traditions will continue with or without statutory recognition and protection under the NTA. This is consistent with the history and experience of Indigenous Australians prior to *Mabo* and is likely to be consistent with the experience of Aboriginal people in western New South Wales following *Wilson v Anderson*.

Since the early 1990s there has been greater acknowledgement of the unique status and special value of Indigenous culture to Australia's national identity. The decision in *Mabo*, the enactment of the NTA, the establishment of ATSIC, and the Reconciliation movement, have provided a greater acknowledgement and respect for the special value of Indigenous culture. Accompanying this recognition has also been a growing awareness of the need to redress Indigenous disadvantage.

95 Preamble, NTA.

96 K Muir, 'This Earth Has an Aboriginal Culture Inside', in AIATSIS, *Land, Rights, Laws: Issues of Native Title*, Issues Paper No. 23, July 1998.

The recognition of the special value of Indigenous culture within the Australian national identity accords with human rights standards which observe the special contribution of minority cultures to the cultural identity of the state, advising that:

> [ICCPR] Article 27 is directed to ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.[97]

It requires that:

> States should recognise and duly support the identity, culture and interests of Indigenous people and their communities.[98]

These standards also require that the enjoyment of culture, religion and use of language as required by article 27 may require positive legal measures of protection[99] to the extent that:

> … a State party is under an obligation to ensure that the existence and the exercise of this right is [sic] protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.[100]

The failure of the native title system to recognise and protect Indigenous rights and interests in western New South Wales and secure the protection of cultural interests requires a response. From a human rights perspective, an appropriate response may be one that seeks to ameliorate and negotiate findings of extinguishment and provide a level of protection to Indigenous interests in the Western Division.

Self determination and effective participation

The recognition of native title rights and interests not only affords native title holders the protection and recognition of traditional rights and interests but also provides for the opportunity to participate in decision making in relation to their land and negotiate in relation to future acts on their country.[101] Broadly, the future act provisions and rights of decision making allow for the opportunity of native title holders to exercise rights of self determination and effective participation.

The right of self determination and principle of effective participation are founded in article 1 of ICCPR and ICESCR. These conventions state:

> All peoples have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

97 HRC General Comment 23, op.cit. at para 9.
98 Rio Declaration, op.cit., principle 22.
99 HRC General Comment 23, op.cit., at para 7.
100 HRC General Comment 23, op.cit., at para 6.1.
101 NTA, Preamble and Part 2, Division 3 of which sets out the procedures for the administration of future acts under the NTA.

The principle of effective participation is also drawn from article 27 of ICCPR and article 5 of ICERD. Article 5 of ICERD requires that all peoples have the right to equal treatment before the law[102] and the right to participate in the conduct of public affairs.[103] CERD's General Recommendation on Indigenous Peoples recommends that States:

> Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.[104]

In an Australian context, the right of self determination is controversial. The Commonwealth Government maintains that a right of self determination for Aboriginal peoples is symbolic and distracts from the need to overcome Indigenous disadvantage.[105] It appears the Commonwealth also views a right of self determination as a possible basis on which Indigenous Australians could seek to establish a separate state.[106] However, this approach disregards international discussion on the right of self determination, specifically as it applies to the rights of Indigenous peoples in colonized states.

> There is a strong presumption against secession or independence flowing from the right of self determination in the colonial setting. The United Nations is strenuously opposed to any attempt to disrupt territorial integrity. The principle of *uti possedetis* (the respect for colonial boundaries) is stated in the General Assembly Resolution on the Granting of Independence to Colonial Countries and Peoples.[107]

Importantly, the right of self determination is broad in its application and meaning. Contemporary analysis of the right supports the recognition of external and internal self determination but also emphasises that it is an ongoing process of participation rather than a one time choice.[108] There are two types of self determination that are often described, internal and external. External self determination refers to the right to determine the political status of a people and its place in the international community, including the right to establish a separate State. Internal self determination is broadly described as 'participatory democracy'.[109] For minority groups within States, including Indigenous groups, it can refer to cultural, linguistic, religious or political autonomy. Hence internal self determination, in particular, is focused on participation as opposed to outcome focus – enabling peoples to participate and determine their political,

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102 ICERD, op.cit., art 5(a).
103 ibid., art 5(c).
104 CERD, General Recommendation 23, op.cit. at para 4(d).
105 The Hon. J Herron, Minister for Aboriginal and Torres Strait Islander Affairs, *Statement on behalf of the Australian Government at the 17th session of the United Nations Working Group on Indigenous Populations*, Canberra, 29 July 1999, p7.
106 A Crabb, 'Stand-off on indigenous rights' in *The Age*, 26 December 2002.
107 J Debeljak, 'Barriers to the recognition of Indigenous peoples' human rights at the United Nations' (2000) 26 *Monash University Law Review* 159, p171.
108 M Praag, C Van Walt, 'Report to the International Conference of Experts held in Barcelona from 21-27 November 1998', *The Implementation of the Right to Self-Determination, as a contribution to conflict prevention*, UNESCO, Division of Human Rights, Democracy and Peace, UNESCO, Centre of Catalonia.
109 ibid., p26.

social, cultural and economic status, with the focus of this participation being the opportunity to 'live well'.[110]

The role and purpose of self determination in Australia should, therefore, be directed to the full participation of Indigenous Australians in determining their political, economic, cultural and social status:

> The right of self determination of Indigenous peoples should ordinarily be interpreted as their right to negotiate freely their status and representation in the State in which they live. This might best be described as a kind of 'belated State-building', through which Indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed and just terms, after many years of isolation and exclusion. This does not mean the assimilation of Indigenous individuals as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.[111]

However, in relation to the rights of Aboriginal people in the Western Division to effectively participate in decisions affecting their traditional lands, the native title system has failed in two respects. First, the 1998 amendments to the NTA were drafted with little participation of Indigenous peoples. Rather the Commonwealth's approach was that of 'balancing interests' which in effect has balanced the interest in land against Indigenous peoples. The second failure arises from the amendments to the NTA which result in the wholesale extinguishment of rights and interests as occurred in *Wilson v Anderson*. The extinguishment of native title ensures that Aboriginal people in western New South Wales are denied the opportunity to effectively participate in decisions relating to their traditional country. The deprivation of these rights has important implications for the opportunity of Aboriginal people in the Western Division to determine their economic, social and cultural future.

The extinguishment of native title has a twofold effect in relation to a right of self determination and the principle of effective participation. First, findings of extinguishment or non-recognition are applied to Aboriginal traditional owner communities, essentially without their participation. This was clearly demonstrated in *Wilson v Anderson*. The findings of extinguishment were determined by the legal implications of the land administration process. Indigenous rights and interests as recognised under the NTA are determined not by Indigenous people but by the operation of the NTA.

In some instances, Indigenous rights and interests are not recognised under the NTA because their culture and community identity fail to satisfy the definitions of traditional law and custom determined by the NTA. Such a process fails to instill Aboriginal communities with a sense of empowerment and self determination but can easily disempower and further dispossess. Conversely, recognition of Indigenous rights and interests, under the NTA, lays an important foundation for the exercise of self determination by Indigenous communities.

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110 For further discussion on self determination as the opportunity to 'live well' see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, chapter 2.

111 E Daes, *Discrimination against Indigenous people – Explanatory note concerning the draft declaration on the rights of Indigenous peoples*, UN doc E/CN.4/Sub.2/1993/26/Add.1, 19 July 1993, para 21.

Secondly, extinguishment deprives Indigenous people the opportunity to effectively participate in decisions affecting their traditional country. Recognised native title rights and interests commonly include a right which enables native title holders to 'care for country'. This right clearly has a cultural foundation and from a human rights perspective allows for the effective participation of native title holders in 'caring' for traditional land. Within 'caring for country' and effective participation, the future act provisions within the NTA also ensure that native title holders have important procedural rights in relation to acts that may affect their rights and interests in land. Procedural rights under the future act regime have provided native title holders in a number of Aboriginal communities throughout Australia with the opportunity to benefit culturally, socially and economically through the negotiation of agreements between native title holders and developers. However, extinguishment under the *Wilson v Anderson* decision deprives Aboriginal people in the Western Division of access to the future act provisions of the NTA and of the right to 'care for their country'.

Response to a Human Rights Approach

The findings of *Wilson v Anderson* deny Aboriginal people in western New South Wales the recognition and protection of rights and interests under the NTA. This denial has implications for the human rights of Aboriginal people in western New South Wales to practice their cultural traditions and exercise self-determination. The opportunity to exercise a right of self determination is undermined by the extinguishment of rights determined by traditional law and custom and the opportunity to negotiate meaningful agreements based on those rights. In consideration of human rights standards, and in acknowledgement of the ongoing relationship of Aboriginal people in the Western Division to their traditional country, it is incumbent upon the New South Wales government to offer a meaningful response to the extinguishment of native title in the Western Division.

Outstanding issues remain following the findings of extinguishment in *Wilson v Anderson*. While some of these may be addressed by other state-based legislative structures, they may be more appropriately and effectively addressed within a comprehensive framework. Some of these issues include: land access for traditional purposes, site and heritage protection, land and water management arrangements, governance structures and service delivery, and economic development opportunities that may have arisen from rights arising from native title recognition.

This range of issues can equitably and effectively be addressed through the negotiation of regional agreements. Endorsed by ATSIC, regional agreements are defined as:

> … a way to organize policies, politics, administration and/or public services for or by an Indigenous people in a defined territory of land or land and sea.[112]

Based on, but not limited to the legal requirements of the NTA and the *Aboriginal*

112 Quoted in Aboriginal and Torres Strait Islander Comission ('ATSIC'), *Regional Agreements Manual*, 2001.

and Torres Strait Islander Commission Act 1989 (Cwlth), agreements may be negotiated on a broad range of issues, including:

- Land access
- Exploitation of land resources
- Co-management of land/marine resources
- Service delivery agreements
- Self government or local government

However, it is anticipated that regional agreements will not only deal with specific issues but will adopt a holistic approach and address broader issues that may affect a community or region, including land, the economic base and the social and political infrastructure.

Regional agreements and regional governance have been identified as a way in which Indigenous disadvantage may be addressed through the recognition of Indigenous rights and the capacity building of communities.[113]

> The development of governance structures and regional autonomy provides the potential for a successful meeting place to integrate the various strands of reconciliation. In particular, it is able to tie together the aims of promoting recognition of Indigenous rights, with the related aims of overcoming disadvantage and achieving economic independence.[114]

The Commonwealth Government has also supported the role of regional agreements and capacity building in addressing Indigenous disadvantage.[115] However, there are growing concerns that the type of regional agreements and governance structures endorsed particularly by the Commonwealth Government will fail to deliver meaningful recognition of Indigenous rights, effective community capacity building and meaningful governance structures.

The Harvard Project on American Indian Development in North America[116] is recognised as providing an important analysis of strategies to overcome Indigenous disadvantage. The project concludes that good governance structures and genuine self rule for Indigenous communities are fundamental in overcoming Indigenous disadvantage. The Project identifies five main features of good governance: real self determination or sovereignty; the building of effective governing institutions; an effective cultural match between these institutions and Indigenous traditions; long-term strategic thinking; and leadership from individuals or groups, in the community's interest.

While the findings of the Harvard Project are frequently referred to by Government

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113 See Commonwealth Grants Commission, *Report on Indigenous Funding 2001*, Canberra, 2001; ATSIC, *Resourcing Indigenous development and self-determination – a scoping paper*, ATSIC, Canberra 2000.

114 Aboriginal and Torres Strait Social Justice Commissioner, *Social Justice Report 2000*, Human Rights and Equal Opportunity Commission, Sydney, 2000, p107.

115 The Hon. P Ruddock, Minister for Immigration and Multicutural and Indigenous Affairs, *Agreement making and sharing common ground*, speech at ATSIC National Treaty Conference, 29 August 2002, <www.minister.immi.gov.au/atsia/media/transcripts02/treaty_conf_0802.htm>.

116 For a detailed discussion on the findings of the Harvard Project and the Commonwealth Government's interpretation of these findings see *Social Justice Report 2002*, op.cit., pp 41-44.

as an effective model for overcoming disadvantage, such references are made in a way which re-defines a key feature of good governance – self determination. Based on the findings of the Harvard Project it is unlikely that agreements and governance structures that fail to support genuine self determination and governance will be successful in overcoming disadvantage.

The negotiation of regional agreements within the Western Division could provide an opportunity for the New South Wales Government to respond to findings of extinguishment in a spirit of reconciliation. Meaningful regional agreements are capable of addressing many of the outstanding land issues following the decision and provide a foundation for the economic and social development of Aboriginal communities in western New South Wales.

Chapter 5

Native title: the way forward

In the past 12 months the High Court has handed down several significant decisions which clarified the principles upon which the recognition and extinguishment of native title are determined. These principles are set out and discussed in the first three chapters of this report. In clarifying these principles, some of the Judges of the High Court have been mindful of their effect on Indigenous people.

Justice Callinan expressed the view in *Miriuwung Gajerrong*[1] that the law of native title fails to resolve, and thus continues to be flawed by, the incommensurability between Indigenous relationships to land and the common law concepts of property to which it is compared and subjected. The resolution of this paradox in the current law of native title means native title gives way to non-Indigenous interests every time.

> I do not disparage the importance to the Aboriginal people of their native title rights, including those that have symbolic significance. I fear, however, that in many cases because of the chasm between the common law and native title rights, the latter, when recognised, will amount to little more than symbols. It might have been better to redress the wrongs of dispossession by a true and unqualified settlement of lands or money than by an ultimately futile or unsatisfactory, in my respectful opinion, attempt to fold native title rights into the common law.[2]

Justice McHugh also commented in that decision upon the injustice of a system in which the comparison of competing legal rights inevitably results in the further dispossession of Indigenous interests.

> The dispossession of the Aboriginal peoples from their lands was a great wrong. Many people believe that those of us who are the beneficiaries of that wrong have a moral responsibility to redress it to the extent that it can be redressed. But it is becoming increasingly clear – to me, at all events – that redress can not be achieved by a system that depends on evaluating the competing legal rights of landholders and native title

1 *Western Australia & o'rs v Ward & o'rs* [2002] HCA 28 (8 August 2002) ('*Miriuwung Gajerrong*').
2 ibid., per Callinan J at [970].

> holders. The deck is stacked against the native title holders whose fragile rights must give way to the superior rights of the landholders whenever the two classes of rights conflict. And it is a system that is costly and time-consuming. At present the chief beneficiaries of the system are the legal representatives of the parties. It may be that the time has come to think of abandoning the present system, a system that seeks to declare and enforce the legal rights of the parties, irrespective of their merits. A better system may be an arbitral system that declares what the rights of the parties ought to be according to the justice and circumstances of the individual case. Implementing such a system in the federal sphere may have constitutional difficulties but may not be impossible. At all events, it is worth considering.[3]

These calls from the bench for legal reform occur within a decision which marks the end of the development phase of native title law. The way in which the legislation and the common law apply to extinguish native title is clearly explained and the consequences for Indigenous people are starkly apparent. It is thus appropriate that in such a decision, and at such a juncture in the development of the law, members of the bench express their considered views on the system and evaluate it against a broader notion of justice.

It is also appropriate, now that the law has been crystallised, that a similar process of evaluation take place at the political level. This is particularly pressing in view of the Court finding in *Miriuwung Gajerrong* that the *Native Title Act 1993* (Cwlth) ('NTA') rather than the common law directs the native title processes of extinguishment and recognition, confirming the primary role of the Commonwealth in the protection of native title. Thus the decision brings to a close a period of ten years, in which the responsibility for the protection of native title was conveniently shifted between the legislature and the common law.[4] The Commonwealth must now accept responsibility for the law as it stands and, equally importantly, re-evaluate the means by which the law can be changed to make it consistent with Australia's international law obligations.

From a human rights perspective there are two factors which must direct the reform of the native title system. First, all decisions affecting native title must be taken with the free and informed consent of Indigenous people. This requires the establishment of a process for the effective participation of Indigenous people as part of the broader reform process. Negotiation with Indigenous people must occur at all levels. Where the capacity of Indigenous people to participate is hampered, either through limited resources or limited decision-making structures, provision must be made to address these deficiencies to enable genuine negotiation to take place.

Second, the benchmarks for reform must be the human rights of Indigenous people. A non-discriminatory approach to protecting Indigenous people's

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3 ibid., per McHugh J at [561].

4 See, e.g. Commonwealth of Australia, *Additional Information pursuant to Committee Decision: Australia,* UN doc CERD/C/347, 22 January 1999; and Commonwealth Attorney-General's Department, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund Inquiry: Consistency of the Native Title Amendment Act 1998 with Australia's obligations under [ICERD]*, 29 February 2000.

inherent right to land is one guided by the principles set out on pages 74-78, above. General Recommendation 23 of the Committee on the Elimination of Racial Discrimination (discussed at pages 85-86, above) provides a useful guide for a human rights approach to policy or legislative initiatives concerning Indigenous people.

A non-discriminatory approach to the protection of native title measures the extent to which the law permits Indigenous property rights to be enjoyed against the extent to which the law permits the enjoyment of other property rights. Thus the law must provide native title with the protection necessary to ensure it can be enjoyed, according to its tenor, to the same extent as non-Indigenous interests in land. Constructed in this way, native title law should be a vehicle for the continued enjoyment and protection of Indigenous law and culture.

The High Court decisions that this Report considers squarely raise the effect on native title of past legislative and executive acts that took place before the NTA. Clearly these acts continue to have an effect on the present and future enjoyment and protection of Indigenous rights. The effect of these past acts, and the means by which law reform can redress this effect, is the focus of this chapter. In addition, the enjoyment of native title rights are affected by future dealings on traditional land. The NTA establishes the framework by which native title is afforded protection from these dealings. While the procedural rights of native title holders in respect of future dealings on native title land was dealt with extensively in my 2001 report[5] it is not the focus of the reform process posited in this section.

Levels of Reform

There are various levels at which reform of the native title system can take place. The most obvious level is the legislative one, given that the NTA controls the level of protection afforded native title. Clearly changes would have to occur at this level although the recognition and protection of native title may not ultimately depend on legislation. For instance, the recognition and protection of Indigenous rights to land may be enshrined in a treaty or agreement which supersedes statutory rights.[6] Alternatively, rights might be protected on a number of levels with ultimate protection residing in the constitution.

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5 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, Human Rights and Equal Opportunity Commission, Sydney, 2002.
The *Native Title Report 2001* commented on procedures adopted by the National Native Title Tribunal ('Tribunal') (pp16-24). During 2001, the Aboriginal and Torres Strait Islander Social Justice Commissioner had written to the Tribunal regarding its procedures. The Tribunal responded to the Commissioner but the Tribunal's letter was not received in time to be incorporated in the *Native Title Report 2001*. The Tribunal's letter, together with other relevant material, is available on the website of the Human Rights and Equal Opportunity Commission <www.humanrights.gov.au/social_justice/native_title/index.html#expedited>.

6 For discussion of a treaty, see various documents produced by the Aboriginal and Torres Strait Islander Social Justice Commissioner:
- *Native Title Report 2000*, Human Rights and Equal Opportunity Commission, Sydney, 2001, pp29-46;
- *Native title Report 2001*, op.cit., pp1-10; and
- *Recognising Aboriginal sovereignty – implications for the treaty process*, speech at presented at ATSIC National Treaty Conference, Tuesday 27 August 2002.

Whatever the final outcome, a human rights approach to the reform process must consider whether, and in what way, the present native title system could be changed to make it consistent with Australia's international human rights obligations. In considering reform at this level I do not seek to map out every possible or preferred legislative amendment to the NTA. Rather I seek to identify the broad areas in which reform is required and the underlying mechanisms by which injustices can be redressed. Against this approach of reforming the present system must be weighed the benefits of enshrining Indigenous rights to land in a completely different protective system to that which presently exists, such as an arbitral system suggested by Justice McHugh.[7] While consideration of such alternative systems is beyond the scope of this Report, they must be seriously considered in view of the legal tests established to gain recognition of native title and the difficulty of changing the fundamental assumptions of these tests within the current system as it is governed by the NTA.

Mechanisms of Change

The High Court has made it clear that the NTA now directs the native title processes of extinguishment and recognition through s10 and s11 of the NTA.

The chief mechanism by which the NTA effects both the protection of native title and its extinguishment is through prescribing what State and Territory laws are valid and the conditions and effect of their validity. State and Territory Governments are then authorised to enact legislation which extinguishes native title in accordance with the NTA. Thus there are two tiers by which the extinguishment of native title takes place: first at the level of Commonwealth legislation and the nature of the authority that this legislation gives to State and Territory governments; and second at the level of State and Territory legislation and the enactment of legislation that extinguishes native title. There is a third tier by which the extinguishment of native title may take place; through agreements between stakeholders. These three tiers need to be addressed in any reform process.

Tier one: amending Commonwealth legislation

The process of amending the NTA to make it consistent with human rights principles must utilise the mechanisms of 'validity' and 'invalidity' to redress the balance between protection and extinguishment controlled by the NTA. These mechanisms determine the nature and extent of the laws that can have an extinguishing effect on native title. As the High Court said in *Western Australia v The Commonwealth*,[8] a law protecting native title from extinguishment must either exclude the application of State and Territory laws or prescribe the areas within which those laws may operate.

The way in which the NTA addresses legislative and executive acts that took place before the NTA's enactment, is to either confirm their validity and extinguishing effect under the confirmation provisions, or validate their extinguishing effect (for acts otherwise invalid because of the *Racial*

7 In *Miriuwung Gajerrong*, op.cit., at [561].
8 (1995) 183 CLR 373.

Discrimination Act 1975 (Cwlth) ('RDA')) under the validation provisions. The common law continues to operate without legislative interference, through the application of the inconsistency of incidents test, to extinguish, either completely or partially, native title interests. NTA section 47B then operates to exclude from this umbrella of validation and extinguishment an exception where connection can be shown on vacant crown land currently occupied by members of the claimant group.

The decisions in *Miriuwung Gajerrong* and *Wilson v Anderson*[9] have established the common law tests for extinguishment and the ease with which native title rights and interests can be permanently extinguished by the creation of other interests on traditional land. It is now necessary that the mechanisms available under the NTA be utilised to redress the wholesale extinguishment of native title. In chapter 2, I set out my concerns with the limited extent to which the mechanisms available for the protection of native title are utilised in the NTA. These can be summarised as follows.

- **The criteria for determining the relationship between Indigenous and non-Indigenous interests on the same land at common law fail to provide for the co-existence of these interests**

The mechanism available to provide for co-existence of native title and non-Indigenous interests, and already utilised in relation to future acts in the NTA, is the non-extinguishment principle. The elements of the definition of the principle of non-extinguishment are identified in s238 of the NTA as: native title is not extinguished; where other interests are inconsistent with the continued existence and enjoyment of native title rights and interests, the native title rights and interests have no effect in relation to the other interests, and; where the other interest or its effects cease to operate, native title rights and interests have full effect.

Thus the non-extinguishment principle may be seen to represent a compromise between two competing interests, allowing non-Indigenous interests to be given full enjoyment and Indigenous interests to be suspended where their enjoyment is inconsistent with the creation or enjoyment of non-Indigenous interests and then to resume on their cessation. While the non-extinguishment principle still prioritises non-Indigenous interests over Indigenous ones, it is nevertheless far preferable to the permanent extinguishment of native title. It is a principle that, in my view, should replace the finality and permanency of extinguishment for the majority of tenures.[10]

The High Court in *Miriuwung Gajerrong* said that the non-extinguishment principle had no place in the common law of extinguishment.[11] Thus the possibility, extant in the NTA, that the grant of a non-exclusive pastoral lease would not extinguish native title but that 'the native title rights and interests are suspended while the lease … is in force'[12] was given limited application. The Court thought it might

9 *Wilson v Anderson and or's* [2002] HCA 29 (8 August 2002).

10 Tenures would need to be considered on a case by case basis. An example of a tenure where extinguishment rather than non-extinguishment might apply is the grant of freehold title.

11 Per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [82].

12 s23G(1)(b)(ii).

apply to 'a post-1975 grant which, by operation of the RDA, was ineffective to extinguish native title rights and interests'[13] but did not see the non-extinguishment principle in the NTA as mandating a similar approach in the common law.

The effect of the finding that the non-extinguishment principle has no operation in the common law is that many tenures, in addition to those specified in the NTA, extinguish native title rights and interests permanently, and that this extinguishment has a cumulative effect as new tenures are created over the same land. Thus, as discussed in chapter 2,[14] the enjoyment of native title is impaired by layers of extinguishment over the entire history of colonisation, each tenure permanently affecting the title and diminishing its content progressively.

The non-extinguishment principle, on the other hand, allows the enjoyment of native title rights to be completely restored once a non-Indigenous tenure ceases to exist. It is within the power of the Commonwealth to inscribe this more equitable principle into native title law.

In order to do this the NTA would need to stipulate that the extinguishment principle, as applied by the common law to past tenures, no longer applies and is replaced by the non-extinguishment principle. This could be done through stipulation in the NTA that the non-extinguishment principle applies, either by a general provision to this effect with particular exceptions identified, or by identifying tenures the creation of which would have a non-extinguishing effect. In relation to non-exclusive leases for instance, the NTA would need to stipulate that the non-extinguishment principle applied rather than leaving this to the common law. Another tenure that would require identification in this way is a mining lease, which in the *Miriuwung Gajerrong* decision was found to extinguish some native title rights and interests, even though, in the validation provisions of the NTA, the non-extinguishment principle applies. This disjuncture could be resolved through legislative amendment in the way suggested.

The example of nature reserves in Western Australia, which, at common law, are found to extinguish native title completely raises the concern that for some tenures, stipulating the non-extinguishment principle would not be sufficient to allow the full potential of co-existence to be realised. As discussed in chapters 2 and 4 both these interests can be fully enjoyed without impairment of the Indigenous interest. Consequently the non-extinguishment principle, which allows non-Indigenous interests to prevail over native title, may not be appropriate to promote the full enjoyment of native title rights. Interests that complement each other in this way must be identified and specifically addressed to ensure full enjoyment of the traditional connection that Indigenous people have with the land. In chapter 4, I suggest a particular way in which this might be achieved,[15] although other options could also be consistent with human rights principles and negotiated with the traditional owners concerned.

13 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [82].
14 See particularly pages 67-69.
15 See particularly pages 108-112.

- **The NTA prescribes the extinguishment of native title in respect of an extensive range of tenures**

In addition to the extinguishment principle applying through the common law, it is also given operation in the confirmation and validation provisions of the NTA, which stipulate this as the effect of creating specified tenures and classes of tenures.[16] Again, the non-extinguishment principle should replace the extinguishment principle for the majority of these tenures.[17]

- **The NTA fails to adequately provide for compensation for the extinguishment of native title in the majority of cases**

Even on the basis that the non-extinguishment principle applies to ensure recognition of the ongoing relationship between Indigenous people and the land, impairment of native title rights will occur where a non-Indigenous interest is created on traditional land. As discussed in chapter 2, the present provisions of the NTA limit compensation for the extinguishment and impairment of native title rights to those situations where statutory extinguishment or impairment exceeds that which would have occurred either at common law or where compensation would have been available by virtue of the RDA. It makes no provisions for compensation for extinguishment or impairment by the common law or under the confirmation provisions. The Commonwealth Government has the legislative capacity to redress this injustice. Protection against the arbitrary deprivation of property is a fundamental tenet of our legal system and should be available to Indigenous as well as non-Indigenous titleholders.

Before leaving the sphere of Commonwealth legislation, and the possibilities for change within it, it is necessary to include one specific amendment to the NTA that requires immediate attention. In Chapter 1, I note the comments of the High Court in relation to section 82 of the NTA and the effect of the amendment to this section which gave greater emphasis to the rules of evidence in native title cases.[18] The Court noted:

> It may be accepted that demonstrating the content of that traditional law and custom may very well present difficult problems of proof. But the difficulty of the forensic task which may confront claimants does not alter the requirements of the statutory provision. In many cases, perhaps most, claimants will invite the Court to infer, from evidence led at trial, the content of traditional law and custom at times earlier than those described in the evidence. Much will, therefore, turn on what evidence is led to found the drawing of such an inference and that is affected by the provisions of the Native Title Act. ... It may be that, under [the original NTA]... a rather broader base could be built for drawing inferences about past practices than can be built since the 1998 [NTA] Amendment Act came into operation. By that Act a new s 82 was enacted [stating]...that the Court is bound by the rules of evidence "except to the extent that the Court otherwise orders".[19]

16 Also see *Summary of the Validation and Confirmation of Extinguishment Provisions in the Native Title Act 1993*, annexure 3.

17 A grant of freehold is an obvious exception.

18 Pages 30-31.

19 *Members of the Yorta Yorta Aboriginal Community v Victoria & o'rs* [2002] HCA 58 (12 December 2002) ('*Yorta Yorta')*, per Gleeson CJ, Gummow & Hayne JJ at [80]-[81]

In view of the almost insurmountable barrier that this provision erects to Indigenous claimants seeking to prove the content of laws and customs based on an oral tradition, section 82 should be amended and the original provision reinstated.

Tier two: amending State and Territory legislation

The NTA, through the validation and confirmation provisions, stipulates that the effect of creating specified tenures or classes of tenures is to extinguish native title either completely or partially. Under this authority, State and Territory Governments are left to enact legislation which extinguishes native title in respect of these tenures. Without this authority, State and territory legislation extinguishing only native title interests would be discriminatory and invalid under the RDA.

While States and Territories are given immunity from the operation of the RDA by the NTA, they are not required by the NTA to enact discriminatory legislation extinguishing native title in respect of the tenures specified therein. Thus they have capacity to control whether, or the extent to which, native title is extinguished or impaired by the creation of these specified tenures. For example, the complementary Western Australian legislation authorized by the confirmation provisions of the NTA, the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995*, rather than fully implementing the regime permitted by the NTA, limited the extinguishing effect of creating leases and scheduled interests identified in the confirmation provisions (excluding freehold) to those tenures still in force on 23 December 1996.

There is an enormous capacity for State and Territory Governments to redirect native title law towards a non-discriminatory goal. A framework for negotiations between the Western Australian Government and Aboriginal stakeholders in relation to conservation estates, including nature reserves, is proposed in chapter 4. Importantly any such negotiation process, whether it involves amending State and Territory legislation or reaching an agreement, requires the effective participation of Indigenous stakeholders and, through this process, their informed consent.

Tier three: agreements

A concept which appears to be given general support from government, industry and Indigenous parties alike, is the benefit of negotiating native title, its recognition and its relationship to other interests on the land, through agreement rather than litigation. This process can include the making of a native title determination by the Federal Court with the consent of the parties. My *Native Title Report 2001* discusses the need to ensure agreements are framed by human rights principles rather than discriminatory principles contained in the NTA.[20] Thus framed, regional agreements are seen as an important tool for providing a stable and enduring basis for a dynamic and long term relationship between Indigenous and non-Indigenous people over land.

20 *Native Title Report 2001*, op.cit., pp87-105.

In chapter 4, I discuss the utility of a regional agreement in the Western Division of NSW where traditional interests in land have been found, by the High Court in *Wilson v Anderson*, to be extinguished.

Agreements are also a useful tool, either at a regional level or between specific claimant groups and other stakeholders, in overcoming the almost insurmountable difficulties of proving the elements of a native title claim to a court. Agreements can proceed from a less technical and onerous test than that established by the courts in the *Yorta Yorta*[21] and *De Rose*[22] decisions as discussed in chapter 1. A looming difficulty with this alternative approach to recognition is the monitoring role that the Commonwealth Government is increasingly assuming in consent determination proceedings with a view to ensuring that the orders made by a court are not inconsistent with the legal standards proposed in the NTA as interpreted by the High Court.[23] It would be unfortunate if, through such interference, technical and discriminatory standards were injected into a process aimed at avoiding lengthy and costly litigation.

Beyond Native Title

The recognition of native title came from an acknowledgement of important truths about our past and the need to reconcile these truths with contemporary notions of justice. But it also brought to the fore a fundamental conflict arising at the time of the establishment of Australia as a colony; that is the conflict between the assertion on the one hand that the settlement of Australia gave rise to exclusive territorial jurisdiction by the colonial power and, on the other hand, the illegality and immorality of asserting this right without an agreement from those who previously occupied that land and who continue to maintain their deep spiritual economic and social connection to the land. *Miriuwung Gajerrong* confirms that native title, while valuable in first giving recognition to inherent rights, is not able to resolve this conflict.

The *Yorta Yorta* decision demonstrates how the High Court's construction of sovereignty continues to limit the recognition that native title is able to give to the profound relationships between Indigenous people and their land. This is not a just resolution of our nation's fundamental conflict. Rather, it must be resolved through a process which emphasises co-existence and mutual benefit. Negotiation based on consent and equality can transform what was a contradiction at the foundation of our nation between the conflicting claims of Indigenous and non-Indigenous people to the jurisdiction of traditional lands, into an agreement as to the basis of our coexisting sovereignty. Within the framework of such an agreement native title can break out of the shackles that continue to restrain its evolution.

21 op.cit.

22 *De Rose v State of South Australia* [2002] FCA 1342 (1 November 2002).

23 The Hon. D Williams, Attorney-General, 'Native title: the next 10 years', Address to *Native Title Conference 2002: Outcomes and Possibilities*, Geraldton, 4 September 2002, para's 38-40.

Annexures
Resources

Annexure 1

Principles of Discrimination and Native Title

Miriuwung Gajerrong[1] reiterates the principles which guide the High Court's interpretation of whether laws of the Commonwealth, State or Territory are discriminatory under the *Racial Discrimination Act 1975* (Cwlth) ('RDA'), particularly as they apply to legislation which authorises dealings with land. These principles are based on the High Court's decisions in *Gerhardy v Brown*,[2] *Mabo (No 1)*,[3] and *Western Australia v The Commonwealth*[4] (*'Native Title Act Case')*. The key principles are set out below.

1 Section 10 of the RDA is the most appropriate section for determining whether legislative or executive acts that authorise dealings with Crown land are discriminatory. Section 10 provides:

> If, by reason of, or of a provisions of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour, or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

It is the application of section 10 that will determine whether the extinguishment or impairment of native title by dealings authorised by legislative or executive acts is discriminatory under Australian domestic law.[5]

1 *Western Australia v Ward & o'rs* [2002] HCA 28 (8 August 2002) ('*Miriuwung Gajerrong*').
2 (1985) 159 CLR 70.
3 *Mabo & ano'r v Queensland & ano'r* (1989) 166 CLR 186.
4 (1995) 183 CLR 373 ('Native Title Act Case').
5 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [103].

2 Section 10 of the RDA is not merely concerned with matters of form but also with matters of substance; it is concerned with the enjoyment of rights. It involves looking at more than just the purpose or intention of the legislation and requires an analysis of the practical operation and effect of the legislation.[6] Where the effect of a statute is the unequal enjoyment of rights between racial groups, then s10 is engaged.

3 The High Court's interpretation of the standard of equality required by the RDA is based on the definition of discrimination in Article 1(1) of the *International Convention on the Elimination of All Forms of Racial Discrimination*[7] ('ICERD') which defines racial discrimination as:

> Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Significantly, the High Court in *Miriuwung Gajerrong* did not limit itself to Article 1 of ICERD in establishing a substantive approach to equality and non-discrimination under s10 RDA, but also referred to Article 2 of ICERD which requires a state party to ICERD to take effective measures to nullify laws which have *the effect* of creating or perpetuating racial discrimination.[8]

4 In determining whether the effect of legislative interference is the unequal enjoyment of rights, section 10 of the RDA requires a comparison of rights as defined in s10(2). This includes, but is not limited to, rights of the kind referred to in Article 5 of ICERD, such as the right to own property alone and in association with others,[9] a right to inherit,[10] and a right to be immune from the arbitrary deprivation of property (implied in other rights and specifically referred to in article 17(2) of the *Universal Declaration of Human Rights*[11] ('UHDR').[12] Property includes land and chattels and extends to native title rights and interests.[13]

5 The effect of RDA s10 upon discriminatory legislation is twofold. First, where a State law omits to make enjoyment of rights universal, s10 operates to confer that right on persons of the particular race deprived of the enjoyment of that right. The RDA does not invalidate the State law but complements it by extending rights equally.[14] Second, where the

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6 ibid., at [115].
7 660 United Nations Treaty Series 195 ('ICERD') (Australia joined 1975).
8 ibid., at [105].
9 ICERD, op.cit., art 5(d)(v).
10 ibid., art 5(d)(vi).
11 United Nations General Assembly resolution 217A (III), United Nations document A/810 at 71, 10 December 1948.
12 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [116] & [119]
13 ibid., at [116].
14 ibid., at [106]; see also *Gerhardy v Brown*, op.cit., per Mason J at 98.

State law imposes a discriminatory burden or prohibition forbidding enjoyment of a human right or fundamental freedom enjoyed by persons of another race, s10 confers a right on the persons prohibited. This necessarily results in an inconsistency between s10 and the prohibition contained in the State law. Section 109 of the Commonwealth Constitution operates to invalidate so much of the State legislation that is inconsistent with the RDA.[15]

6 The twofold effect of the RDA on discriminatory State law also applies to discriminatory Territory laws. In relation to the second effect however this occurs, not through the invalidating effect of S109 of the Constitution but because the Territory does not have the power to repeal Commonwealth legislation.[16]

7 Section 10 of the RDA is offended where a law purports to expropriate property held by a particular racial group for purposes additional to or on less stringent conditions (including lesser or no compensation) than those laws justifying expropriation of property held by members of the community generally.[17] The fact that land is ordinarily only acquired for a public purpose on payment of just terms sets a benchmark for the way in which expropriation of property should occur for all racial groups.[18] Expropriation of property belonging to a particular racial group for different purposes or on lesser terms is discriminatory.[19]

The way in which these domestic law principles are applied to determine whether the extinguishment or impairment of native title is discriminatory is also demonstrated in *Miriuwung Gajerrong*. The key principles on the application of the RDA to the extinguishment or impairment of native title are noted below.

8 It is because native title characteristically is held by members of a particular race, that interference with the enjoyment of native title is capable of amounting to discrimination on the basis of race, colour or national or ethnic origin.

9 Native title is a property right and entitled to the protection of Article 5 of ICERD, which specifically protects the right to own property alone and in association with others,[20] a right to inherit,[21] and a right to be immune from the arbitrary deprivation of property (implied in other rights and specifically referred to in article 17(2) of the UDHR).[22]

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15 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [107].
16 ibid., at [133].
17 *Native Title Act Case*, op.cit., per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ at 437.
18 *Mabo & o'rs v Queensland (No 2)* (1992) 175 CLR 1 (*Mabo No 2*), per Toohey J at 214.
19 General laws guiding expropriation of property by Commonwealth, States and Territories includes *Lands Acquisition Act 1989* (Cwlth), Pt VII; *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), Pt 3; *Land Acquisition and Compensation Act 1986* (Vic), Pt 3; *Acquisition of Land Act 1967* (Qld), Pt IV; *Land Acquisition Act 1969* (SA), Pt IV; *Public Works Act 1902* (WA), Pt III; *Lands Resumption Act 1957* (Tas), Pt IV; *Lands Acquisition Act 1978* (NT), Pt VII.
20 ICERD, op.cit., art 5(d)(v).
21 ibid., art 5(d)(vi).
22 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [116].

10 Section 10 of the RDA is concerned with the equal enjoyment of human rights, not simply the enjoyment of legal rights. This distinction is important in determining the way in which the principles of equality and non-discrimination deal with property rights that are unique insofar as they emanate from a different system of law and custom.

The High Court confirmed that just because native title has different characteristics from other forms of title and derives from a different source, it does not mean it can be given less protection than other forms of title. The rights which the RDA protects, as identified in Article 5 of ICERD, do not provide a basis for distinguishing between ownership or inheritance of different types of property. The right to own and inherit property must be enjoyed equally regardless of the nature of the property concerned. Thus it is wrong to say that because native title is inherently fragile, or because it does not amount to freehold title, depriving people of the enjoyment of this right is not discriminatory.[23] It is.

11 Native title may include a group or individual right. The rights that the RDA protects extend to group rights emanating from a particular culture.[24]

12 Three applications for s10 in relation to native title might arise: (i) a State law forbids enjoyment of a human right or fundamental freedom, such as a right to property or freedom from the arbitrary deprivation of property, and the burden falls on all racial groups; (ii) a State law provides for extinguishment or impairment of land titles but provides for compensation only in respect of non-native title; (iii) a State law extinguishes or impairs only native title and leaves other land titles intact.[25]

In relation to (i) above, there is no discrimination upon which s10 would operate. In relation to (ii) above, s10 would operate to extend the compensation to native title holders but the extinguishment would remain valid. In relation to (iii) above, s10 would operate to invalidate the State law. The Court in *Miriuwung Gajerrong* did not consider the situation where a law extinguishes only native title and leaves others intact but provides compensation to native title holders. Nor did the Court consider the situation where the law takes additional measures to protect native title rights and interests not available to other title holders.

13 Section 10 of the RDA is engaged by legislation that regulates or impairs the enjoyment of native title without extinguishing it.[26]

14 The fact that laws extinguishing or impairing native title are consistent with the common law which permits extinguishment or impairment of native title by a valid exercise of sovereign power, does not mean the RDA does not apply to those laws. In the *Native Title Act Case* the question was whether the WA legislation was inconsistent with s10(1) of the RDA

23 ibid., at [120]-[121].
24 *Gerhardy v Brown*, op.cit., per Mason J at 105.
25 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [108].
26 ibid., at [123].

regardless of whether it was inconsistent with the common law. The High Court said:

> At common law...native title can be extinguished or impaired by a valid exercise or sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title. But the Racial Discrimination Act is superimposed on the common law and it enhances the enjoyment of those human rights (earlier mentioned) which affect native title so that Aboriginal holders are secure in the possession and enjoyment of native title to the same extent as the holders of other forms of title are secure in the possession and enjoyment of those titles. The question is whether the WA Act attempts to diminish that security to the comparative disadvantage of the Aborigines on whom s7 rights are conferred.
>
> …Those provisions [of the WA Act] may be consistent with the common law relating to native title but we are concerned with their consistency with s 10(1) of the Racial Discrimination Act.
>
> The fact that a particular statute is consistent with the common law does not exempt it from the RDA. [27]

Together these principles constitute a substantive notion of equality. The RDA is concerned with the enjoyment of human rights, not the treatment of legal interests. It fastens the notion of discrimination to the international standards from which the legislation originates. Equality is measured by the extent to which the laws allow rights and freedoms as defined in ICERD to be enjoyed.

27 *Native Title Act Case*, op cit. per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ at 439.

Annexure 2

Table of Tenures and Interests and their Affect on Native Title

It is important to note that most tenures and interests continue to affect native title even after they have ceased. So, for instance, an area of land may currently be unallocated crown land, but all previous tenures/interests in that land will have permanently affected, and possibly extinguished, native title rights (unless the land comes within the few exceptions under the *Native Title Act 1993* (Cwlth) ('NTA') – sections 47, 47A & 47B). The following table summarises tenures examined in *Miriuwung Gajerrong*[1] and *Wilson v Anderson*.[2]

Abbreviations:

Land Act	– *Land Act 1933* (WA)
NTA	– *Native Title Act 1993* (Cth)
PEPA	– Previous Exclusive Possession Act (s23B, NTA)
RIWIA	– *Rights in Water and Irrigation Act 1914* (WA)
RDA	– *Racial Discrimination Act 1975* (Cth)
State Validation Act	– *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA)

1 *Western Australia v Ward & o'rs* [2002] HCA 28 (8 August 2002) ('*Miriuwung Gajerrong*').
2 *Wilson v Anderson and or's* [2002] 29 (8 August 2002).

Tenure or interest	Extent of Extinguishment	Basis for Extinguishment
Western Australia		
Pastoral Lease	Partial extinguishment – loss of right to control access to land,[3] right to control use of land also extinguished,[4] right to burn off the land probably extinguished[5], and other rights may be extinguished (further findings required by Federal Court).[6] Where native title rights are not inconsistent with rights under pastoral lease, the pastoral lease rights prevail over, but do not extinguish, the native title rights.[7]	Common law (inconsistency of incidents test).[8] *Land Act 1898* (WA); *Land Act* s106; *State Validation Act* s12M.
Reserves		
Crown's designation of land as a reserve for a public purpose, before 1975 (RDA)	Partial extinguishment – loss of right to make decisions about the use of land,[9] right to control access to land also extinguished,[10] but not necessarily extinguishing of any other native title rights.[11]	Common law (inconsistency of incidents test).[12] *Land Regs 1882* (WA) rr29-34, *Land Act 1898* (WA) ss39-46; *Land Act* ss29-37; *Permanent Reserves Act 1899* (WA).
Crown's creation of a reserve for 'conservation of indigenous flora & fauna' under *Land Act* s29, before 1975 (RDA)	Partial extinguishment – loss of right to hunt or gather over land in reserve,[13] loss of right to make decisions about the use of land,[14] right to control access to land also extinguished,[15] but not necessarily extinguishing of any other native title rights.[16]	common law (inconsistency of incidents test).[17] *Land Act* s29.

3 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [192], [219].
4 ibid., at [468(10)].
5 ibid., at [194]
6 ibid., at [195].
7 ibid., at [193].
8 ibid., at [78] & [82].
9 ibid., at [219].
10 ibid., at [468(12)].
11 ibid., at [220]-[221].
12 ibid., at [78] & [82].
13 ibid., at [246].
14 ibid., at [248].
15 ibid., at [468(12)].
16 ibid., at [220]-[221].
17 ibid., at [78] & [82].

Tenure or interest	Extent of Extinguishment	Basis for Extinguishment
Where reserve designated/created after 1975 (RDA) but before 1 Jan 1994[18]	Non-extinguishment – the rights created by the reserve prevail over, but do not extinguish, inconsistent native title rights which have full effect when the reserve ceases.[19]	RDA, s10. NTA Div 2 Part 2, ss19 (category D past act) & 238 *State Validation Act* s5.
Construction or establishment of 'public work' on reserve commenced before Dec 1996	Complete extinguishment – of native title in relation to the land/waters on which the public work situated at completion.[20]	NTA s23B(7). *State Validation Act* s12.
Vesting of reserve under *Land Act* s33, before Dec 1996[21]	Complete extinguishment.[22] Vesting after 1975 (RDA) still results in complete extinguishment but possible right to compensation may remain.[23]	Common law (vesting of fee simple extinguishes all native title).[24] *Land Act* s33; *State Validation Act* s12I. NTA ss23B(2)(c), 23B(3) (vesting is a PEPA) RDA not invalidate vesting.[25]
Vesting for the purposes of preserving the natural environment: NTA s23B(9A)	Complete extinguishment.[26]	Common law (vesting of fee simple extinguishes all native title).[27] *Land Act* s33; *State Validation Act* s12I. NTA s23B(9A) (protection from extinguishment by conservation reserves is annulled common law prior extinguishment).[28]
Vesting of reserve under *Land Act* in crown body ('crown to crown grant')	Complete extinguishment.[29]	Common law (vesting of fee simple extinguishes all native title). NTA s23B(9C)(a) (protection from extinguishment by 'crown to crown grants' is annulled by common law prior extinguishment).[30]

18 ibid., at [222].
19 ibid. at [222] & [247]-[248].
20 ibid., at [223].
21 ibid., at [256].
22 ibid., at [249], [256].
23 ibid., at [253].
24 ibid., at [256].
25 ibid., at [253]-[254].
26 ibid., at [248], [256] & [258]
27 ibid., at [258].
28 ibid., at [258].
29 ibid., at [261].
30 ibid., at [260]-[261].

Tenure or interest	Extent of Extinguishment	Basis for Extinguishment
Lease of Reserves under *Land Act* s32		
Leases of reserve for 'public utility' or 'tropical agriculture'	Depending on the rights created in the lease, complete extinguishment: – where the lease gave party rights equivalent to lessee of land at general law, that extinguished native title[31] – where the lease qualifies as a PEPA under the NTA that extinguished native title.[32]	*Land Act* s32. RDA applies (but not PEPA because not 'relevant interest' under *State Validation Act*); NTA ss19 & 23B(2), Div 2 of Pt 2 *State Validation Act* s12I.
Commercial leases in form of 21st schedule to *Land Act*	Complete extinguishment.[33]	Common law (terms of lease have lessee exclusive possession and thereby extinguished native title) Post RDA; category A past act.
Resumptions		
Resumption of land under *Land Act* s109	No extinguishment.	Common law (resumption does not give Crown any greater title than radical title imposed by British sovereignty)[34] *Land Act* s109.
Resumption of land and then vesting under *Public Works Act* 1902 (WA)	Complete extinguishment of all native title.[35] Vesting after 1975 (RDA) still results in complete extinguishment[36] but possible right of compensation remains.[37]	Common law. *Public Works Act 1902* (WA) ss18 & 34(2). Vesting not invalid under RDA because other interests equally effected but RDA operate to extend compensation (RDA s10; NTA ss23B, 23E, PEPA) *State Validation Act* s12I.[38]
Rights in Water and Irrigation Act 1914 (WA) ('RIWIA')		
Vesting of control of waters in Crown, RIWIA s4	Partial extinguishment – loss of right of exclusive possession over waters.[39]	Common law (inconsistency of incidents test).

31 ibid., at [369].
32 ibid., at [372].
33 ibid., at [374]
34 ibid., at [208].
35 ibid., at [204].
36 ibid., at [278].
37 ibid., at [278]-[279].
38 ibid., at [279]-[280].
39 ibid., at [263].

Tenure or interest	Extent of Extinguishment	Basis for Extinguishment
By-laws before 1975 (RDA) under Part IV prohibiting removal of flora and fauna	Partial extinguishment – loss of right to hunt fauna or gather flora.[40]	Common law (inconsistency of incidents test).
By laws after RDA	Non-extinguishment principle – where by-laws inconsistent with right to hunt fauna or gather flora those rights suspended while by laws are current.[41]	By laws validated by NTA s19 and *State Validation Act* ss5&9 NTA s238 (native title rights protected from extinguishment by non-extinguishment principle).
Land reserved for requirements connected with 'works' as defined under RIWIA s2	Complete extinguishment.[42]	RIWIA s3(2) all land dedicated for purposes of RIWIA shall vest in Minister.
Mining		
Mining Act 1904 (WA) *Petroleum Act 1936* (WA)	Court did not decide[43] but indicated partial extinguishment – loss of native title right to any minerals or petroleum as defined under those statutes.[44]	Common law *Mining Act 1904* (WA) s117; *Petroleum Act 1936* (WA) s9; *Western Australia Constitution Act 1890* (Imp) s3; property in minerals and petroleum vested in Crown which extinguished native title.
Mining Lease	Partial extinguishment – loss of right to control use of or access to land,[45] and other rights may be extinguished (need further identification of native title rights to determine extent of extinguishment).[46]	Common law (mining lease grant right of exclusive possession for mining purposes). NTA, not category C act because no invalidity by RDA.
General Purpose Lease	Partial extinguishment – loss of right to control use of or access to land, and other rights may be extinguished (need further identification of native title rights to determine extent of extinguishment).[47]	

40 ibid., at [265].
41 ibid.
42 ibid., at [273] & [468(15)].
43 ibid., at [382] & [468(22)].
44 ibid., at [377],[384] & [385], but no final decision on this point because native title rights not established.
45 ibid., at [308]-[309], [468(17)].
46 ibid., at [296].
47 ibid., at [340], [468(18)].

Tenure or interest	Extent of Extinguishment	Basis for Extinguishment
Argyle Mining Lease	Undetermined – not necessarily inconsistent (and therefore extinguishing of) all native title interests,[48] mining lease does extinguish right to control use of and access to land, and other rights may be extinguished (need further identification of native title rights to determine extent of extinguishment).[49]	*Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981* (WA). Prior extinguishment over area because of vesting of a reserve.[50]
'Designated Area' under Governor's orders for control of access in diamond mining, *Argyle Mining Lease, Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981* (WA) ss15&17	Complete extinguishment[51]	*Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981* (WA), ss15&17.
Land Act		
Permit to occupy under *Land Act 1898* (WA) s16	Complete extinguishment[52]	Common law (permit holder gained right to exclusive possession of land in perpetuity). *Land Act 1898* (WA) s16.
Special Lease under *Land Act* ss 62 & 116	Complete extinguishment[53]	Common law. *Land Act* s116 (granted lessee right of exclusive possession.[54] NTA s23B(2)(c)(iv) NTA (special lease for grazing amount to exclusive pastoral lease under NTA).
Conditional purchase lease under *Land Act 1898* (WA) s62	Undetermined – Full Federal Court found complete extinguishment on basis that the conditional lease was expected to pass into fee simple. The High Court disagreed[55] but ruled that native title on the particular land had been resolved because of a later tenure and so didn't consider the effect of conditional purchase lease.[56]	

48 ibid., at [333]
49 ibid., at [308]-[309], [328] & [468(18)].
50 ibid., at [324].
51 ibid., at [328].
52 ibid., at [349]
53 ibid., at [357]
54 ibid., at [357].
55 ibid., at [346].
56 ibid., at [350].

Tenure or interest	Extent of Extinguishment	Basis for Extinguishment
Public right of fishing	Partial extinguishment – loss of exclusive right to fish or control access to waters.	Inconsistent with public right to fish.
Northern Territory		
Pastoral leases	Partial extinguishment – loss of right to control access and to make decisions about the land,[57] other rights may be extinguished (further findings required by Federal Court)[58]	Common law (inconsistency of incidents test).[59] Non-excl pastoral lease a previous non-exclusive possession act; Div 2B NTA.[60]
Keep River National Park	Non-extinguishment[61] – the rights created by the national park prevail over, but do not extinguish, inconsistent native title rights which have full effect when the park ceases	Granted after 1975; Category D past act; Not category B because Crown to Crown grant within s230(d)(i) NTA; special purpose lease and crown lease perpetual would otherwise extinguish native title completely.
New South Wales		
Perpetual grazing lease under *Western Lands Act 1901* (NSW)	Complete extinguishment.[62]	Exclusive possession pastoral lease; NTA Div 2B.

57 ibid., at [417] & [468(24)].
58 ibid., at [425].
59 ibid., at [422].
60 ibid., at [417].
61 ibid., at [448]
62 *Wilson v Anderson*, op.cit., per Gaudron, Gummow & Hayne JJ at [119].

Annexure 3

Summary of the Validation and Confirmation of Extinguishment Provisions in the *Native Title Act 1993*

In the High Court's formulation of native title in *Mabo (No 2)*,[1] delivered on 3 June 1992, it was made clear that in the past, governments could validly grant interests in land that would extinguish native title. These grants could be made without payment of compensation to native title holders.[2] At least that was as far as the common law was concerned. The Court did not need to consider the effect of the *Racial Discrimination Act 1975* (Cwlth) ('RDA') on laws and grants after the RDA came into force on 31 October 1975. Laws and grants after that date may have been invalid if, for example, the grant extinguished native title in a discriminatory way. The effect of invalidity would have been quite dramatic: in some cases the holders of government-issued titles would not own the land they thought they owned.

In theory, the Government could have left these issues for the courts to decide on a case-by-case basis or, at the other extreme, legislated for blanket validation of all past government acts to do with land. The purpose of validation is to correct the legal effect of invalidity by reversing it in legislation. Another possible approach, although cumbersome and time-consuming, would have been to list all the laws and grants of interests in land made prior to the *Mabo (No 2)* decision, and explicitly validate them. Instead, the Labor government of the day decided to focus on the potentially invalid acts, defined in a general way, and leave any unresolved questions about the effect of valid acts on native title to the courts to resolve. The *Native Title Act 1993* (Cwlth) ('NTA'), gave effect to this broad policy approach and came into force on 1 January 1994. At a political level, this allowed the Government to calm anxiety about potentially invalid grants, but not resolve all outstanding legal questions against Indigenous interests.

1 *Mabo and or's v Queensland* (No 2) ('*Mabo No 2*') (1992) 175 CLR 1.
2 *Mabo (No 2)*, op.cit., per Mason CJ and McHugh J at 15.

One of the critical outstanding legal questions was whether any native title rights survived on pastoral leases that covered approximately 40% of the Australian land mass. That question was resolved in favour of Indigenous interests in the *Wik* decision, delivered on 23 December 1996.[3] The High Court deciding that the grant of a pastoral lease did not necessarily extinguish all native title rights.

Following the *Wik* decision, the new Liberal-National Party coalition government, extended the validation provisions to the date of the *Wik* decision, arguing that the original NTA had been passed on the mistaken assumption that pastoral leases extinguished native title.[4] It also added a fairly comprehensive codification of what past government actions extinguish native title.[5] This new approach represented a reversal of the policy of leaving most unresolved questions to the courts to decide and, in effect, moved the government response closer to the blanket validation approach.

This history resulted in the present complexity of the provisions in the NTA that try to address historical legal uncertainties arising from Australia's belated recognition of native title. The provisions are organised into three divisions:

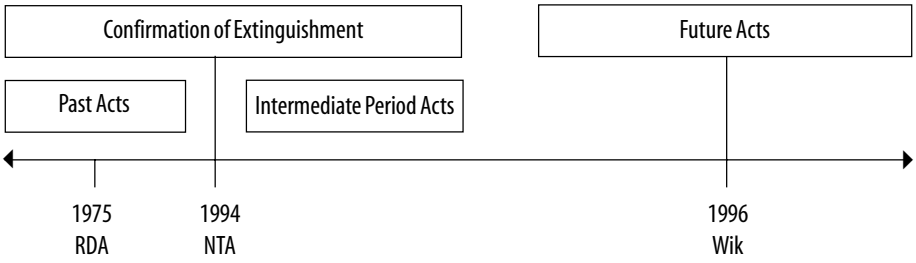
1. The Past Act Validation Regime mainly dealing with invalid acts before the commencement of the NTA on 1 January 1994;[6]
2. The Intermediate Period Act Validation Regime, mainly dealing with invalid acts between the commencement of the NTA and the *Wik* decision on 23 December 1996;[7] and
3. The Statutory Extinguishment (Confirmation of Extinguishment) provisions dealing mainly with valid acts prior to the *Wik* decision on 23 December 1996.[8]

Note: the word 'regime' is used to indicate that the validation provisions try to deal comprehensively with the whole range of different government acts that might have different effects on native title from non-extinguishment to partial extinguishment to complete extinguishments. The Confirmation of Extinguishment provisions focus exclusively on partial or complete extinguishment.

3 *Wik Peoples v Queensland & o'rs* (1996) 187 CLR 1.
4 *Native Title Amendment Bill 1997 Explanatory Memorandum*, chapter 4; House of Representatives *Second Reading Speech*, 4 September 1997 at p 7886-7888. *Native Title Act 1993* (Cwlth) ('NTA'), Part 2 Division 2A.
5 NTA, Part 2 Division 2B.
6 ibid., Part 2 Division 2.
7 ibid., Part 2 Division 2A.
8 ibid., Part 2 Division 2B.

This could be represented as follows:[9]

Figure 1: Validation Timeline



The significance of the Valid/Invalid Distinction and the RDA

Only invalid acts are drawn into the validation regimes to be codified into non-extinguishing, partially extinguishing or completely extinguishing acts.[10] Although it is widely acknowledged that the only reason a government act may have been invalid is a breach of the RDA, the RDA is not specifically mentioned in any of the relevant definitions of 'past acts' or 'intermediate period acts'. This is no doubt an example of cautionary drafting just in case there is some other, yet to be formulated, legal argument that would result in invalidity apart from the RDA. But, for practical purposes, to find the scope of the validation regimes, breaches of the RDA must be considered.[11]

The relevant provision of the RDA states that if a particular race does not enjoy certain rights because of a particular law, the RDA will override that law so that the persons of the affected race will enjoy those rights to the extent that other races enjoy them.[12] The wording of this key provision has a number of consequences in relation to the extinguishment of native title under a law.[13]

The first is that laws that extinguish native title are not necessarily discriminatory if other peoples property rights are also extinguished to the same extent. It also means that some laws which have a discriminatory effect on native title rights will not become invalid, but will simply be supplemented by the RDA to bring them up to a non-discriminatory standard. An example of this is a law that allows for the extinguishment of land titles but only provides compensation for non-native title interests. The RDA has the effect of adding a right of

9 Note: for simplicity some 'past acts", like certain lease renewals, that extend beyond 1994 have been omitted and likewise with 'intermediate period acts': see ss228, 232A.. Also, some 'future acts' can occur on or after 1 July 1993: see s 233.

10 NTA, s228(2)(b) (in the definition of 'past act') and s232A(2)(c) (in the definition of 'intermediate period act').

11 See for example discussion of this point in *Western Australia v Ward & o'rs* [2002] HCA 28 (8 August 2002) ('*Miriuwung Gajerrong*'), per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [98]-[135].

12 *Racial Discrimination Act 1975* (Cwlth), s10(1).

13 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [104]-[134].

compensation for native title holders. But the extinguishment of native title is still valid.

These conceptualisations introduce some difficult questions for judges, for example how to choose the most appropriate non-native title property rights for the purposes of comparison with native title rights to see whether they have been treated equally or not. It may also be difficult to distinguish between those laws that can effectively be supplemented by the RDA to bring them up to standard, and those laws that simply do not have the mechanisms within them to make this kind of supplementation effective.

The clearest example of a law that cannot be supplemented by the RDA to bring it up to non-discriminatory standard, is a law that specifically targets native title rights and attempts to extinguish them or alter them in some way. The *Queensland Coast Islands Declaratory Act 1985*, which sought to outlaw native title claims,[14] and the Western Australian *Land (Titles and Traditional Usage) Act 1993*, which sought to replace native title with traditional usage rights, are two examples of this.[15]

The end result of these distinctions is that extinguishment of native title by legislation or acts done under legislation do not necessarily lead to invalidity. Further questions need to be asked and relevant comparisons need to be made before invalidity can be conclusively established. Thus it is probably true to say that the number of invalid acts is probably smaller than may have been originally imagined.

How do Validated Acts Affect Native Title?

Despite the uncertain scope of invalid acts, the validation regimes provide a reasonably comprehensive codification of what the legal effect of validation is on particular kinds of acts. This codification was based on legal opinion at the time, usually extrapolating from the reasoning of the *Mabo (No 2)* and *Wik* decisions, but it was also based on negotiations between the various interested parties during the political process leading to the original NTA and the 1998 amendments. From the perspective of the effect on native title, the codification in the Past Act Validation Regime could be represented broadly as follows:

14 *Mabo v Queensland* (1988) 166 CLR 186. Also see discussion in *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [110]-[112].

15 *Western Australia v The Commonwealth* (1995) 183 CLR 373.

	Examples	Relevant Definition in the NTA
Complete extinguishment[16]	• Freehold • commercial lease • agricultural lease • pastoral lease • public works	Category A Past Act[17] Category B Past Act that is totally inconsistent with any continuing native title rights.[18]
Partial extinguishment[19]	Other leases (not included above or below)	Category B Past Act that is inconsistent with some but not all native title rights.[20]
Non-extinguishment[21]	Mineral exploration and mining leases	Category C Past Act[22] Category D Past Act[23]

One curiosity in this initial codification was the inclusion of pastoral leases in the category of acts that completely extinguish native title.[24] Subsequently, the High Court came to a different conclusion in the *Wik* decision. This means that there is a technical anomaly in relation to the survival of residual native title rights on pastoral leases. If the pastoral lease was invalid because of native title, the validation process extinguishes all native title. However, if the pastoral lease remains valid despite native title, the residual native title rights survive.

This assessment in 1993 about pastoral leases was less beneficial to Indigenous interests than the subsequent *Wik* decision. Other assessments have proven to be more beneficial in the light of subsequent judicial decisions. One is having a catch-all category (Category D) to which the non-extinguishment principle applies.[25] This means that all those acts which are not specifically identified in other categories will fall into category D. The non-extinguishment principle preserves native title to the maximum extent possible while allowing the exercise of competing rights granted under statute.[26] The other beneficial aspect is the list of exceptions to extinguishment. As would be expected, these included land granted to Indigenous people under land rights and other legislation designed to benefit Indigenous people. Another exception is known as 'Crown to Crown grants', that is land transferred from one arm of the government to another arm of the government, whether it be another department or a separate statutory authority.[27] Land in this category was dubbed 'fake freehold' by

16 NTA, s15(1)(a) – (c), s19(1).
17 ibid., ss288, 229.
18 ibid., ss15(1)(c), 228, 230.
19 ibid., s15(1)(c).
20 ibid., ss15(1)(c), 228, 230.
21 ibid., ss15(1)(d), 238.
22 ibid., ss228, 231.
23 ibid., ss228, 232.
24 ibid., s229(3)(a) and s248.
25 ibid., ss15(1)(d), 232, 238.
26 ibid., s238.
27 ibid., ss229(3)(d)(i), 230(d)(i).

Indigenous interests who saw it as allowing governments to illegitimately extinguish native title even though no third party interest would be affected.

So far, no distinction has been made between past acts and intermediate period acts. While the codification of extinguishing effects in the two regimes is broadly similar, it should be noted that the scope of invalid acts subject to the intermediate period acts regime is somewhat narrower than the past acts regime, and there are some differences in the codification of extinguishing effects that would be significant in a particular case.[28] For example, the Intermediate Period Acts Validation Regime does not apply to acts that took place on unallocated Crown land[29] and, following *Wik*, it provides that non-exclusive pastoral leases did not completely extinguish native title.[30]

An invalid act that is validated under either of the two validation regimes, and as a consequence completely or partially extinguishes native title, entitles the relevant native title holders to compensation.[31] The principles for calculating compensation vary. Depending on how the extinguishing act is characterised, the principle could be 'just terms'[32] or equating the lost native title rights with freehold title[33] or some other principle.[34]

Statutory Extinguishment of Certain Valid Acts

As explained above, the 1998 amendments to the NTA saw a move beyond concern with invalid acts to the much bigger project of codifying the extinguishing effect of most valid government acts prior to the *Wik* decision. The title of the new provisions, "confirmation of past extinguishment", indicates a government intention not to legislate beyond existing legal principles. Inevitably, however, the codification involved finely balanced assessments and extrapolation from the few Court decisions then available, principally *Mabo (No 2)*, *Wik* and the *Fejo*[35] decisions. This extrapolation from existing decisions became one of the most contentious aspects of the 1998 amendments.

The Government apparently adopted the view that the *Wik* decision had introduced a new distinction into Australian law: a lease granted under a statute that did not grant exclusive possession and, therefore, did not extinguish all native title rights, as opposed to a lease granted under statute that did grant exclusive possession and did extinguish all native title rights. Thus in the confirmation of extinguishment provisions there is a broad distinction made between 'previous exclusive possession acts' and 'previous non-exclusive possession acts'.[36]

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28 See NTA s22B (the effect of validation of intermediate period acts on native title) and s232A (the definition of 'intermediate period act').
29 ibid., s232A(2)(e).
30 ibid., ss22B, 232B(3)(c), 248A.
31 ibid., ss17, 18, 20, 22D, 22E, 22G.
32 ibid., ss18, 22E, 51(1) – (2).
33 ibid., ss20, 22G, 51(3), 240 (the definition of the similar compensable interest test). Note: strictly speaking the comparison is to 'ordinary title' which is defined in section 253 to include leased land in the Australian Capital Territory and the Jervis Bay Territory where residential blocks are typically leasehold interests
34 ibid., s51(4).
35 *Fejo v Northern Territory* (1998) 195 CLR 96.
36 NTA, op cit, ss23B, 23F.

Some of the acts included in the definition of 'previous exclusive possession acts' were consistent with existent legal authority such as the extinguishing effect of a grant of a freehold estate (from the *Fejo* decision) and the extinguishing effect of the construction of public works (from the *Mabo (No 2)* decision).[37] Others were drawn from the previous codification embodied in the past act validation regime and included commercial leases, exclusive agricultural leases, exclusive pastoral leases, and residential leases.[38]

But the list went further. It included:

- an exhaustive list of leases from all major States and Territories that were said to grant exclusive possession.[39] The list was compiled by negotiation between Commonwealth and State officials. None had been subject to any judicial consideration of their effect on native title. The government officials based their assessment principally on an extrapolation from the *Wik* decision.
- community purpose leases;[40]
- the vesting of exclusive possession of land to a person under legislation, whether exclusive possession is expressor implied;[41] and
- a definition of public work that extended the area of the public work to include any adjacent area that was necessary or incidental to the construction of the public work.[42]

As with the validation regime, there are some important exceptions made to these extinguishing acts, including beneficial land grants to indigenous people and the 'Crown to Crown grants'.[43] A further exclusion from the definition of exclusive possession acts is areas established as parks for the preservation of the natural environment.[44]

Compensation to native title holders is limited to those cases where it could be demonstrated that the native title rights involved would not have been extinguished apart from the NTA, that is when assessments made in extrapolating from the *Wik* decision prove to be incorrect.[45]

The second major category in the confirmation of past extinguishment provisions, "previous non-exclusive possession acts", concerned those agricultural and pastoral leases, like the lease in the *Wik* decision, that did not grant exclusive possession.[46] These provisions appear to be an attempt to codify the *Wik* decision. However, at the time these provisions were formulated there was a

37 ibid., s23B(2)(c)(ii)-(3).
38 ibid., s23B(2)(c)(iii)-(v). Compare s229.
39 ibid., ss23B(2)(c)(i), 249C and Schedule 1.
40 ibid., ss23B(2)(c)(vi).
41 ibid., s23B(3).
42 ibid., s251D.
43 ibid., ss23B(9) and 23B(9C).
44 ibid., s23B(9A).
45 ibid., s23J.
46 ibid., s23F.

major dispute between Indigenous interests and the Commonwealth Government about the meaning of the *Wik* decision. The government was convinced that, according to *Wik*, native title rights that were inconsistent with the rights granted to the pastoralists under the lease would have been permanently extinguished leaving only some residual native title rights (the partial extinguishment view). Indigenous interests argued that the question of permanent extinguishment had not been resolved in *Wik* and that it was still open to view the inconsistent native title rights as being merely suspended for the duration of the pastoral lease (the suspension view). The final form of the relevant provisions, negotiated between the Government and Senator Harradine, seemed to suggest that this issue was left open for the courts to decide in future cases.[47] But in the *Miriuwung Gajerrong* decision the High Court seemed to interpret the provisions as a codification of the partial extinguishment view.[48] Thus, whatever the intention of the drafters of the relevant provisions, the effect of a "previous non-exclusive possession act" is to permanently extinguish inconsistent native title rights.

Accordingly, the confirmation of extinguishment provisions could be summarised as follows:

	Examples	Relevant Definition in the NTA
Complete extinguishment[49]	• Leases listed in Schedule 1 • freehold • commercial leases • exclusive agricultural leases • exclusive pastoral leases • residential leases • community purpose leases • public works and some adjacent land • other exclusive possession interests	Previous exclusive possession act[50]
Partial extinguishment[51]	• Non-exclusive pastoral leases[52] • Non-exclusive agricultural leases[53]	Previous non-exclusive possession act[54]

47 For example, the relevant paragraph of s23G(1) states:
'…(b) to the extent that the Act involves the grant of rights and interests that are inconsistent with native title rights and interests in relation to the land or waters covered by the lease concerned: (i) if, apart from this Act, the Act extinguishes native title rights and interests – the native title rights and interests are extinguished; and (ii) in any other case – the native title rights and interests are suspended while the lease concerned, or the lease as renewed, re-made, re-granted or extended, is in force...'.

48 *Miriuwung Gajerrong*, op.cit., per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [4]-[13], [24], [41]-[45], [76], [190]-[195].

49 NTA, s23C.

50 ibid., s23B.

51 ibid., s23G.

52 ibid., s248B

53 ibid., s247B

54 ibid., s23F.

As outlined above, it is difficult, if not impossible, for the States to pass legislation effecting the extinguishment of native title without breaching the RDA. Accordingly, they must rely upon the NTA, a Commonwealth Act passed after the commencement of the RDA, to override the RDA. Both in relation to the validation regimes and the confirmation of extinguishment provisions, the NTA authorises the enactment of such legislation provided that it is drafted to the same effect as the Commonwealth provisions. In relation to validation and confirmation of extinguishment, the NTA makes a distinction between acts attributable to the Commonwealth and acts attributable to the States and Territories.[55] The provisions relating to Commonwealth acts take effect immediately; however, the validation of acts attributable to States and Territories and the confirmation of the extinguishing effects of State and Territory acts is only effected when particular States and Territories pass their own legislation in line with the requirements set out in the NTA. Typically, these requirements are that the key provisions are to the same effect as the provisions applicable to Commonwealth acts.[56] Most States and Territories have passed such legislation.[57]

Conclusion

The belated recognition of native title rights in Australia means that most government acts affecting native title have already taken place over the 200 years of colonial settlement prior to the *Mabo (No 2)* decision. Initially, the Government decided to focus on validating any invalid grants of land, but a subsequent Government expanded this approach to include a codification of all those government acts in the past that extinguished native title. This resulted in a complex, difficult to summarise, set of provisions in the NTA specifying the effect on native title of various past government acts. To find out the effect of any particular act, a checklist of enquiries has to be made to see which provisions of the NTA, if any, are engaged.

Assuming the relevant subsidiary legislation has been enacted by the particular State or Territory responsible for the act, the checklist of enquiries is as follows:

1 Did the act have a racially discriminatory effect on native title rights?

2 If so, is the consequence that the act is invalid by virtue of the RDA?

3 If it is an invalid act, does it fall within the past act regime or the intermediate period act regime?

55 See NTA., ss19, 22F, 23E, 23I.

56 ibid., ss19, 22F, 23E, 23I.

57 See for example: *Native Title Act 1994* (ACT); *Native Title (New South Wales) Act 1994* (NSW); *Validation of Titles and Actions Act 1994* (NT); *Native Title (Queensland) Act 1993* (Qld); *Native Title (Queensland) State Provisions Act 1998* (Qld); *Native Title (South Australia) Act 1994* (SA); *Native Title (Tasmania) Act 1994* (Tas); *Land Titles Validation Act 1994* (Vic); *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA).

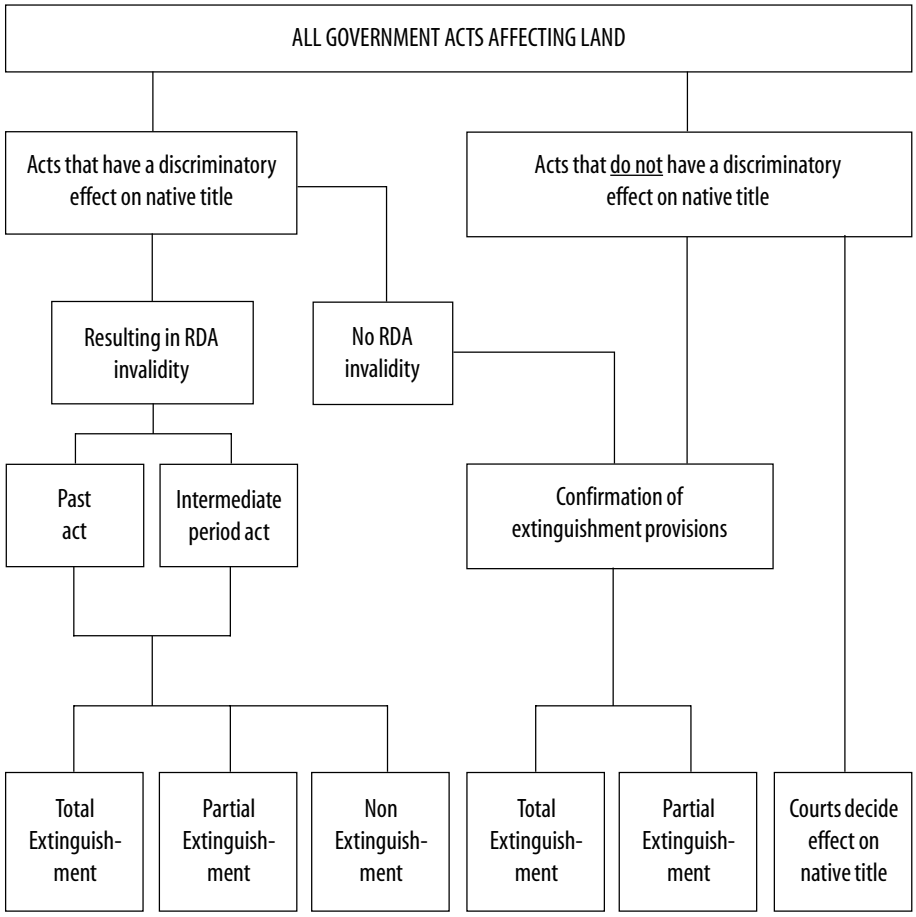
4 Under either validation regime, is the act covered by any exception. If not, is it a Category A, B, C or D act? This categorisation will indicate whether the effect of the act on native title rights is to completely extinguish them, partial extinguish them or not extinguish them.

5 If the act is not invalid, and is not covered by any relevant exception, does it fall within the definition of a "previous exclusive possession act" or "previous non-exclusive possession act" in the confirmation of extinguishment provisions. The consequences are total extinguishment or partial extinguishment respectively.

6 If the act does not fall within the validation regimes or the confirmation of extinguishment provisions, the effect of the act on native title rights would have to be decided by the courts on general principles.

This could be represented as follows:

Figure 2: The scheme of the validation/statutory extinguishment regime



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