Mabo, Native Title and Compensation: Or How to Enjoy Your Porridge*

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I INTRODUCTION

The Mabo judgments[1] especially *Mabo No 2* and the resulting *Native Title Act* 1993 (Cth)[2] (hereafter the *NTA*) have significantly changed, not only fundamental legal principles (at least for Australia) concerning the impact of British colonisation upon pre-existing indigenous rights to land, but also the working relationships between Aboriginal communities, governments, and third-party users. Generally speaking, as occurred in the Northern Territory with the passage of equivalent legislation, the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth), if Aboriginal communities can at least demonstrate that their native title claim is not 'frivolous or vexatious' or 'prima facie cannot be made out'[3] then they now have increased legal clout at the negotiating table. This should deliver improved prospects of preventing, or at least influencing, future activities on their traditional lands, and thus perhaps, a greater control over the direction and rate of change for their communities.

All the above is put in guarded language: the experience in Western Australia in 1984, with the rejection of the Seaman Aboriginal Land Report,[4] and in the Northern Territory since 1976, indicates that persistent and powerful opposition to the philosophy and policy underpinning such legislation (not to mention the rules of the game as laid down by the common law or statutes) is likely to continue. For some sectors of the Australian political and business community, statements by no lesser institutions than the High Court or the federal Parliament appear to change nothing. In the Northern Territory, since 1976, that entrenched opposition seems to have come mainly from government and some sectors of the mining industry. Today, in regard to the *Mabo* cases and the *NTA*, that history is being repeated: for example the consti-

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[1] The statement of claim was filed in the original jurisdiction of the High Court in 1982. The action eventually resulted in a ruling of Gibbs CJ remitting the case for trial to the Supreme Court of Queensland: (1986) 64 ALR 1; a judgment of the Full High Court on demurrer which declared invalid Queensland legislation enacted specifically to extinguish the claimed native title: *Mabo No 1* (1988) 166 CLR 186; a determination of facts (not law) following a lengthy trial by Moynihan J, thus discharging the remitter: see *Determination of Facts* (unreported, Qld Supreme Court, 16 November 1970); and the well-known final decision as to the substantive issues in *Mabo No 2* (1992) 175 CLR 1.

[2] Operative 1 January 1994.

[3] See *NTA* s 63(1), where this language is used.

[4] Note particularly that the Australian Mining Industry Council sponsored a television advertising campaign, where a black hand was depicted building a wall across WA. One can only assume that fair-minded members of AMIC did not know, or approve, of what their peak representative body was doing.

tutional challenge to the *NTA* initiated in 1994 by the state of Western Australia.[4a] It is difficult to understand why the simple proposition that some indigenous people in Australia may enjoy traditional rights to some areas of land (being mainly vacant Crown land) should generate such vehement opposition.

The facts are that all governments, to put it mildly, did not welcome the *Mabo* cases,[5] and that all governments have for 204 years failed to address the underlying injustices associated with the now rejected doctrine of terra nullius.[6] Even though the High Court in *Mabo No 2* broke through this impasse by, in effect, creating in two decisions a form of national land-rights scheme, all governments, and Parliaments, have had excruciating difficulty[7] fashioning a politically acceptable, constitutionally competent, yet fair and just legislative response. Overall, the Commonwealth government's generally positive response, of which the *NTA* is only the first of three instalments, is welcomed. The second and third instalments are mentioned below. Although significant gains have now been won, it is already apparent that there is a long and rocky road ahead in this rapidly changing field of policy, law, and race-relationships.

II THE COMMON LAW POSITION

(a) Mabo No 2

Whilst the *Mabo* judgments and the enactment of the *NTA* represent real gains for the Aboriginal community, and the nation, they also reveal significant legal impediments still confronting Aboriginals. As to the alleged 'revolutionary'[8] majority judgments in *Mabo No 2*, one ruling that reveals such an impediment, and is suggestive of the conservative nature of the decision, lies in the area of compensation. This is the finding by a slim majority, that the Crown may extinguish native title by valid exercise of prerogative or legislative power *without compensation.* In their short judgment Mason CJ and McHugh J emphasise this point, saying:

[4a] *Western Australia* v *Commonwealth* (1995) 69 ALJR 309.

[5] The Commonwealth, being the second defendant in the litigation, actively opposed the claim in so far as it touched upon its interests: ie, a claim to seas and reefs located solely within Commonwealth jurisdiction. This part of the claim failed at trial before Moynihan J in the Queensland Supreme Court, whereupon, the Commonwealth was dismissed from the action.

[6] Which is not to deny that much land-related beneficial legislation has been passed by some of the states and the Commonwealth, especially over the past 20 years.

[7] The Senate debate during December 1993 was, according to Senator Evans, 'the longest debate on any Bill in the history of the Australian Parliament' totalling 51 hours, 45 minutes. *Hansard*, Senate, 16 December 1993, 5500.

[8] See, amongst a welter of articles, books, conference papers etc, appearing since 3 June 1992, M A Stephenson and S Ratnapala (eds), *Mabo: A Judicial Revolution* (1993) UQP, and (1993) UNSWLJ 1–314, both being a series of essays; R Bartlett and G Meyers (eds), *Native Title Legislation in Australia*, (Centre for Commercial and Resources Law, Univ WA and Murdoch University, 1994) being proceedings of a conference held on 16–17 June 1994, Perth.

> Subject to the operation of the *Racial Discrimination Act* 1975 (Cth) neither of us, nor Brennan J,[9] agrees with . . . Deane, Toohey and Gaudron JJ[10] that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages.[11]

Mason CJ, McHugh, Brennan and Dawson JJ thus constitute the majority on this point.[12]

Toohey J added the rider that such a power may be exercised only with the *consent* of the titleholders.[13] True it is that in exercising its undoubted power to extinguish, the Crown 'must reveal a clear and plain intent to so do',[14] a requirement, according to Brennan J 'which flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land'.[15] Be that as it may, the common law imposes no *other* restriction upon the Crown's power — prerogative or statutory — to extinguish native title. As to ordinary title, Toohey J notes: 'the Crown has power, subject to constitutional, statutory or common law restrictions, to terminate any subject's title to property by compulsorily acquiring it'[16] and concludes:

> As I have said, the plaintiffs did not contest the Crown's power to extinguish traditional title by clear and plain legislation. That concession was properly made, subject to a consideration of the implications that arise in the case of extinguishment without the consent of the titleholders. Where the legislation reveals a clear and plain intention to extinguish traditional title, it is effective to do so. In this regard traditional title does not stand in a special position, although the canon of construction referred to by Lord Atkinson in *Central Control Board (Liquor Traffic)* v *Cannon Brewery Co Ltd* [1919] AC 744 at 752 is of equal application:
>
> > That canon is this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms.[17]

Counsel it appears should never make any concession lightly — and always in conservative terms!

[9] *Mabo No 2* (1992) 175 CLR 1, 64, 67–8 per Brennan J.
[10] Id 100–1 per Deane and Gaudron JJ, where the extinguishment was described as involving a 'wrongful infringement by the Crown of the rights of the Aboriginal title-holders'; see also 107, 110–11, especially 111.
[11] Id 15.
[12] Id 126–7 per Dawson J, and 138 describing native title as merely a permissive occupancy, which may be withdrawn at any time; see also 160.
[13] Id 192–6, especially 195.
[14] Id 64 per Brennan J.
[15] Ibid.
[16] Id 194, citing *Calder's* case (1973) 34 DLR (3d) 145, 210.
[17] Id 195.

(b) Mabo No 1

These well established common law principles were referred to by Deane J in *Mabo No 1* when seeking to construe the effect of a Queensland law which purported to arbitrarily deprive the plaintiffs of the claimed native title rights retrospectively and without compensation. Deane J stated:

> The general provisions of the Act should not, as a matter of settled principles of construction, be construed as intended to bring about such a compulsory deprivation of proprietary rights and interests without compensation if they are susceptible of (sic) some other and less burdensome construction; see eg *Clissold* v *Perry* (1904) 1 CLR 363 at 373; *Colonial Sugar Refining Co Ltd* v *Melbourne Harbour Trust Commissioners* (1927) 38 CLR 547 at 559.[18]

In supporting a restrictive reading of the 1985 Queensland Act, Brennan J further referred to 'a strong presumption against a legislative intent to confiscate or extinguish proprietary rights and interests without compensation';[19] and 'long established notions of justice that can be traced back at least to the guarantee of Magna Carta (25 Edw 1C 29) against the arbitrary disseisin of freehold: cf *Clunies-Ross* v *Commonwealth* (1984) 155 CLR 193, 201; and see more generally, *Australian Communist Party* v *Commonwealth* (1951) 83 CLR 1, 231'.[20] These 'presumptions involving fundamental principles of British law'[21] apply in full force to the exercise of the prerogative powers, as well as statutory powers.[22] Whilst the common law thus protected ordinary title from the depredations of the Crown, not so native title.

(c) Overseas Precedents

These findings in *Mabo No 2* that native title may be extinguished by the Crown without compensation are not 'revolutionary'; they follow (like much in the judgments) well established precedent in Canada, the USA and New Zealand.

The United States Supreme Court has held that there is no presumption that compensation is payable upon the extinguishment of native title[23] and has also required 'a clear and plain indication' of intention to extinguish.[24]

Canadian and New Zealand authorities in turn are founded upon the early landmark decisions of Marshall CJ in the US Supreme Court.[25] The Canadian

[18] *Mabo No 1* (1988) 166 CLR 186, 223.
[19] Id 226.
[20] Ibid.
[21] H V Evatt *The Royal Prerogative* (1987), 249 citing *Attorney General* v *De Keyser Royal Hotel Ltd* (1920) AC 508, 552, 562, 579.
[22] See also *Halsbury's Laws of England* (4th ed, Vol 8), paras 3, 908, 912.
[23] *Johnson* v *McIntosh* (1823) 8 Wheat 543; *Tee-Hit-Ton Indians* v *United States* (1955) 348 US 272, 279.
[24] *United States* v *Santa Fe Pacific Railroad Co* (1941) 314 US 339; see also R Bartlett 'The Aboriginal Land which may be claimed at Common Law: Implications of Mabo' (1992) 22 UWALR 272, 272–6.
[25] For Canada, see *Calder* v *Attorney-General of British Colombia* (1973) 34 DLR (3d) 145; *Simon* v *R* (1985) 24 DLR (4th) 390, 402, 405.

Supreme Court has also adopted the 'clear and plain intention to extinguish' criterion[26] and has further held that 'doubtful expressions' in treaties and statutes relating to Indians should be resolved in favour of Indians.[27] New Zealand courts have accepted the same principles of denying compensation since 1847.[28] The New Zealand High Court has recently also affirmed the requirement of a 'clear and plain intention' to extinguish, after citing Canadian and US decisions.[29]

III THE AUSTRALIAN RESPONSE

This being the 'revolutionary' common law position facing Australian governments as at delivery of judgment in *Mabo No 2* on 3 June 1992, how did the country respond? At first, save for the cognoscenti, with hardly a whimper. The 'revolution' if there was one, was a very quiet affair until the re-election of the Labor government in March 1993. Thereafter during 1993, there was a vigorous public debate of sorts, including amongst the legal profession,[30] characterised too often by an evident determination by many journalists not to read the actual judgments. Following intense lobbying from various interest groups and last minute compromises in the Senate, the Commonwealth Parliament delivered to the nation the first instalment in its overall three-pronged response (discussed below): the *NTA*. This (in Bill form) was described by one industry leader as akin to 'reading porridge'.[31] Meanwhile, the state Parliaments, quick to assert their own constitutional powers, continue to respond in dramatically different ways (discussed below) from recognising to extinguishing native title — but all in the best interests of both Aboriginals and the community at large!

(a) The Compensation Conundrum

On the particular topic of compensation, for some politicians (including many members of federal Cabinet, being legislators protective of the public purse and striving, on a cynical view, to find a minimal response consistent with these 'new' common law rules), *Mabo No 2* provided an escape route. That is, the provision of a statutory regime providing a right of compensation for Crown conduct throughout the nation since 1788 which had extinguished native title became optional. The provision of compensation was a matter of

[26] See *R* v *Sparrow* (1990) 1 SCR 1075, 1099.

[27] *Nowegijick* v *R* (1983) 1 SCR 29, 36 per Dickson J; *Delgamuukw* v *R* (1993) 104 DLR (4th) 470, 523 per McFarlane JA.

[28] See *R* v *Symonds* (1847) NZPCC 387; *Te Runangao Muriwhenua Inc* v *Attorney-General* (1990) 2 NZLR 641 (CA).

[29] See *Te Wuhi* v *Regional Fisheries Officer* (1986) 1 NZLR 680, 691–2. Cited by Brennan J in *Mabo No 2* (1992) 175 CLR 1, 64.

[30] See eg, S E K Hulme, 'Aspects of the High Court's Handling of Mabo' (1993) *Victorian Bar News* 29–46, which was highly critical; and R Castan and B A Keon-Cohen 'Mabo and the High Court: A Reply To S E K Hulme QC' Id 47–60, which was supportive.

[31] John Prescott, Chief Executive of BHP, quoted in *Financial Review*, 18 November 1993.

grace and favour, not legal entitlement. As Australian Aborigines have known for 206 years, such a basis to negotiate with governments usually delivers next to nothing. As negotiations waxed and waned late in 1993, many feared this would be the final result on this topic — next to nothing — except for two important restrictions on the legislative powers of the Commonwealth, states and territories to extinguish or diminish such common law native title which may survive. For the Commonwealth, there is the requirement of s 51(xxxi) of the Constitution that a law with respect to the acquisition of property must provide 'just terms'.[32] For the states and territories, the second and 'even more important restriction',[33] lies in the *Racial Discrimination Act* 1975 (Cth) (hereafter the '*RDA*').

This Act came into force on 1 October 1975, being Australia's domestic response to ratifying the *International Convention on the Elimination of All Forms of Race Discrimination.* Critical provisions of the *RDA* were held to be a valid exercise of the Commonwealth's 'external affairs' power (s 51(xxix)) in 1982;[34] had been tested in the area of discrimination arising from prohibiting entry to Aboriginal land on the basis of race;[35] and further tested in regard to legislative attempts by a state government to extinguish native title itself.[36] The *RDA* ss 9 and 10, coupled with s 109 of the Constitution, have the potential to render ineffective state laws (s 10) or actions (s 9) operating or occurring since 1 October 1975 which were discriminatory on the basis of race (eg by extinguishing native title without compensation, whereas other citizens enjoying ordinary title were, by force of the common law or statute, entitled to compensation). These Commonwealth laws thus protected native title holders from arbitrary extinguishment by state governments without compensation, where the common law did not.[37] One critical question late in 1993 was: would the Commonwealth not only not derogate from this protective impact of the *RDA* vis-a-vis the states, would it respect that position as applying to itself? In the event, it did, and it didn't. The negotiated solution lies in the legislative regime of 'validation' of past acts of all Australian governments, provision of a minimal right to compensation, and equivocation about the relationship between the *NTA* of 1993 and the *RDA* of 1975: see especially *NTA* s 7.

However, as is discussed below, the combination of the provisions of the *NTA* which 'validate' past Crown acts, which might have been rendered invalid by the then existence of native title in the relevant area of land or seas, but which, upon validation, extinguish native title to the extent defined by the *NTA*; native title; and the compensation provisions themselves, means that at

[32] In *Mabo No 2*, Deane and Gaudron JJ, at 111, stated clearly that 'any legislative extinguishment of native title rights would constitute an expropriation of property . . . for the purposes of s 51(xxxi)'.

[33] Ibid.

[34] *Koowarta* v *Bjelke-Peterson* (1982) 153 CLR 168.

[35] *Gerhardy* v *Brown* (1984) 159 CLR 70.

[36] *Mabo No 1* (1988) 166 CLR 186; *Western Australia* v *Commonwealth* (1995) 69 ALJR 309.

[37] See *Mabo No 1*, ibid, which struck down a Queensland enactment specifically designed to extinguish all the claimed rights without compensation on this basis.

least for acts done pre-1975, few Aboriginal communities are likely to achieve an order for compensation against the Crown for such past acts.[38] This result is achieved even where these past acts may be shown to be otherwise unlawful or ineffective, eg through administrative error, or limitation upon the legislative powers of colonial or state parliaments.[39]

Equally it must be said that the provision of this limited statutory right to compensation goes some way to redress the abovementioned common law imbalance, in that native title holders, under the *NTA*, have, at least in principle, the same right to compensation pursuant to statute as is enjoyed by ordinary title-holders under compulsory land acquisition legislation. This is particularly important for extinguishment of native title that occurred prior to 1 October 1975.

(b) The Commonwealth's Three Stage Response

Before explaining how the *NTA* achieves this minimal result, the broader picture of the total Commonwealth response to *Mabo* should be understood, for it is in the second and third instalments that the real 'compensation' package is provided. The second and third parts of the trilogy are the establishment of an indigenous land fund, and the announced 'social justice package'.

During the extensive lobbying and negotiating sessions between Aboriginal leaders and the Commonwealth officials late in 1993, it was recognised that the requirements of proof, the rulings about the nature of native title, and the manner of its extinguishment, as set out in *Mabo No 2*, meant that it would be extremely difficult, if not impossible, for the large number of Aboriginals who had born the greatest impact of colonisation, who had been dispossessed from their lands, who had (by reason of government policy and conduct) lost their traditional connection with the lands, to successfully claim native title to those original lands. To take an extreme example, a claim to the central business district of Brisbane (which has been made) would simply fail. This is not to say that claims with real prospects of success will not be made to closely settled regions of, for example, South East Australia. Such claims have already been made.[40] But vast areas of land (eg subject to a grant in fee-simple, land intensively used for cities, infrastructure, agriculture etc) will be unavailable for claim. Further, large numbers of Aboriginal people descended

[38] On 15 February 1995, French J, President of NNTT, delivered an initial response to the Yorta Yorta people's compensation claim. The Registrar had determined that prima facie the claim could not be made out and had referred the matter to the President under *NTA* s 63. His Honour issued 'Reasons for Opinion on Registrar's Referral of a Compensation Application' to the applicants in confidence, for their comment. See *In the Matter of the Yorta Yorta Murray Goulburn River Clans Group Inc. Compensation Application* VN94/2A French J 15 February 1995.

[39] Such issues have been argued before Drummond J as preliminary points of law in the *Wik* case. See for previous rulings in this case *Wik Peoples* v *Queensland* (1994) 120 ALR 465; 49 FCR 1.

[40] See eg, the Yorta Yorta land claim to large areas of Crown land around Echuca, central Victoria. This claim is completing (unsuccessfully) the mediation phase, and is likely to be referred for trial to the Federal Court as a contested matter (per *NTA* s 74) by July 1995.

from the original traditional owners of remote lands still not the subject of inconsistent Crown grants will, by reason of dispossession and the devastating impact of colonisation,[41] have lost all traditional connection, as required by *Mabo No 2*, with that (still available) Crown land — not to mention lost connection with their parents, communities, and cultural sources. All this was recognised in the development of the *NTA* and led, in part as a compensatory measure, to the adoption by the Commonwealth of further significant initiatives, such as the land fund.

(c) Indigenous Land Corporation and Land Fund

These initiatives are thus intended to purchase land and provide it to those Aboriginals who in reality, are unable to utilise the land claim or compensation regimes contained in the *NTA*. Delivery of such parcels of land, which in most cases will not be land located within a particular recipient's traditional country (assuming that individual or family knows from whence they come) can be seen as a laudable attempt to come to terms with, and attempt to compensate for 'the darkest aspect of the history of this nation'.[42] This was described by Deane and Gaudron JJ in *Mabo No 2* as:

> The conflagration of oppression and conflict which was, over the (19th) century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame . . . the nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices.[43]

These are powerful words, spoken by two judges from the highest court in the land. The Parliament (of the Commonwealth at least) has responded positively. The public debate of 1993 reveals that the nation, for some unfathomable reason, finds great difficulty in coming to terms with this shameful history. Meanwhile, the rest of us must now eat porridge!

This 'land purchase' strategy has been tried before in Australia, at state[44] and Commonwealth level, initially by the establishment of the (Commonwealth) Aboriginal Land Fund Commission in 1974.[45] Its charter was similar — to buy land on the open market for Aboriginal purposes — and it has done so within its budgetary allocations.[46] That Commission, it seems, after

[41] For example, forcible removal of 'half-caste' children from their families and homelands to far-off institutions pursuant to a policy of assimilation. This continued into the 1950s in some parts of Australia. This 'stolen generation' is now considering legal action, presumably including claims for 'compensation': see *The Australian*, 5 October 1994, 5.

[42] *Mabo No 2* (1992) 175 CLR 1, 109 per Deane and Gaudron JJ.

[43] Id 104, 109.

[44] See *Aboriginal Land Rights Act* 1983 (NSW) ss 23, 28, 29 and Part 4. These provisions establish the NSW Aboriginal Land Council Account. Between 1984–9, this account received annual payments of monies equivalent to 7.5% of land tax paid under the *Land Tax Management Act* 1956 (NSW).

[45] See *Aboriginal Land Fund Act* 1974 (Cth).

[46] See ALFC *Annual Report* 1975–6, 76–8; *Hansard* House of Representatives, 26 October 1978, 2344–7. By 1979, six pastoral leases had been purchased in the Northern Territory.

various permutations,[47] has now been absorbed by the Aboriginal and Torres Strait Islander Commission ('ATSIC'), under its 'Land Acquisition and Maintenance' and 'Regional Land Fund' programmes. These activities will be significantly improved by the current initiatives. That 1976 land fund initiative, interestingly, was also triggered by another significant test case, the *Gove Land Claim* litigated in the Supreme Court of the Northern Territory.[48] That claim failed at trial and was not appealed, establishing significant rulings concerning the recognition of customary law which were built upon in *Mabo*, and triggered political responses from the incoming Whitlam Labor government in 1972. These were the Woodward Commission of Inquiry into Aboriginal land rights in the territory leading eventually to the 1976 Northern Territory *Land Rights Act*, as mentioned; the enactment of the *Councils and Associations Act* 1976 (Cth); and the creation of the abovementioned land fund. As to the courts leading the politicians, history has, it seems, now repeated itself.

As to ATSIC's land purchasing activities, details are difficult to obtain. Its annual reports do not indicate what properties have been purchased or how much was paid for them. However, in March 1995, one journalist reported:

> In the latest year 45 properties were acquired for $17.3 million, of which about 30% was spent on pastoral properties or farms. Another $750 000 was spent on maintenance of properties. The Regional Land Fund has allocated a further $14 million for acquisition of land in 1994–95. Since 1990–91 ATSIC has spent $60 million buying land. These programmes will be phased out when, or if, the Indigenous Land Corporation is created ... Aboriginal organisations now own ... 77 cattle stations around Australia.[49]

Legislation establishing two new entities — the new Land Fund and an Indigenous Land Corporation — was introduced into the House of Representatives, and had its second reading speech on 30 August 1994.[50] The Bill and explanatory memorandum indicate that taxpayers' monies will be paid from Consolidated Revenue into the Fund, being 'a trust account in the Public Account'. Monies will then be drawn down and provided to the Indigenous Land Corporation, a statutory body. Pursuant to policies and priorities yet to be detailed,[51] the Corporation will utilise these monies for three basic purposes: land acquisitions; land management; and servicing the Corporation's own running costs. Significant sums are involved. It is proposed that in 1994–5 the Corporation will be paid $25 million; in the following two years, $24

[47] The ALFC and the then Aboriginal Loans Commission were merged into the Australian Aboriginal Development Agency, announced on 26 October 1978. See *Hansard*, ibid; *Sydney Morning Herald*, 27 October 1978.

[48] See *Millirrpum* v *Nabalco* (1971) 17 FLR 141 (NT Sup Ct).

[49] See T Sykes, 'Black Money' *Australian Business Monthly* (March 1995) 39. Sources for these figures are not given.

[50] See ATSIC Amendment (Indigenous Land Corporation and Land Fund) Bill 1994.

[51] Real questions arise here, eg, who gets how much, for what, on what basis? How are these decisions made, and by whom?

million annually; in the following seven years $45 million annually.[52] Thereafter, the Corporation will be paid monies earned from the investments made by the Fund.[53] Further, for 1994–5, an extra amount of $200 million has been allocated to an interim fund established under the *NTA*; and from 1995–6 $121 million will be allocated.[54] According to press reports, the government has committed from $1.1 — 1.46 billion to the Fund over the next decade.[55] The sum of monies available for purchases, however, is hotly disputed, and some Aboriginal leaders have criticised the entire scheme. The specific objective is stated to be,

> to enable indigenous people to acquire land and to manage it in a sustainable way to provide economic, social and cultural benefits. The focus on land management extends to other indigenous owned land, as well as that acquired by the Indigenous Land Corporation. The establishment of a self sustaining capital fund will provide a secure and on-going source of funds to the ILC for expenditure on land acquisition and management. It is intended that the Corporation operate on the basis of regionally based strategies and involve regional representative interests. It will have the ability to operate on a commercial basis.[56]

The Bill generated substantial discussion in the public arena;[57] and was much amended after prolonged debate in the Senate.[58] These amendments were the subject of a Senate Select Committee Inquiry[59] and Report.[60] Thereafter the government abandoned the 1994 Bill (still in the Senate) and on 28 February 1995, the Prime Minister introduced a new Bill into the House of Representatives,[61] being a re-named Bill essentially the same as that originally presented in 1994. The new Bill rejected many of the Senate's key amendments made to the original 1994 Bill, especially those that sought to tie land acquisitions to education, health and housing issues; and those that favoured land

[52] All sums are indexed in terms of 1994–5 dollars.
[53] Land Fund Bill, Explanatory Memorandum, Part B, 2.
[54] Land Fund Bill, Explanatory Memorandum, Part A, 2.
[55] *The Age* 31 August 1994, 1, 6; cf T Sykes, 'Black Money' *Australian Business Monthly* (March 1995), 36.
[56] Land Fund Bill, Explanatory Memorandum, Part A, 1.
[57] For example, see *Lateline*, ABC TV, 6 October 1994.
[58] Approximately 30 hours debate, leading to 121 proposed amendments, 67 of which were adopted. See *The Age* 17 November 1994, 10; *Financial Review* 17 November 1994, 2; *The Australian* 17 November 1994, 2; *The Age* 1 March 1995, 3 and 2 March 1995, 3; Report of the Senate Select Committee on the Land Fund Bill *Land* (February 1995), 1–2.
[59] The Senate Select Committee on the Land Fund Bill was appointed on 28 November 1995 to consult widely with Aboriginals and Torres Strait Islanders about amendments made by the Senate to the Bill, and to report back to the Senate by 31 January 1995.
[60] After extensions, the Committee Report was tabled on 9 February 1995. See Report of the Senate Select Committee on the Land Fund Bill *Land*, (February 1995).
[61] The Land Fund and Indigenous Land Corporation (ATSIC Amendment) Bill 1995, which became Act No 20 of 1995. See *The Australian* 28 February 1995, 4; *The Age* 1 March 1995, 3. Twenty-eight minor amendments of the 67 agreed to by the Opposition and the Greens in the Senate were adopted. Pursuant to these changes, the ILC will not have compulsory powers over land-owners; communities may not mortgage or renovate land or buildings without ILC consent; and the ILC may make grants of monies for the management of land.

allocations to the most dispossessed Aboriginal communities.[62] Not to be denied, on 1 March 1995, the Senate passed the original Bill with its numerous contentious amendments and sent it back to the House of Representatives amongst much speculation of double dissolution triggers and constitutional crises.[63] On 2 March 1995, the fate of this troubled initiative was secured, when the federal opposition announced it would reverse its policy and support the new measure — thereby also removing the possibility of a double dissolution of the Parliament. The 1995 Bill was duly assented to on 29 March 1995 and commenced operation thereafter. The Land Acquisition Fund is expected to be 'up and running' by July 1995.

(d) Social Justice Package

Precisely what this third element in the federal government's *Mabo* response will contain has been the subject of nation-wide consultations during 1994 with Aboriginal communities and organisations. One objective of the consultations is to discover what Aboriginals want across a wide range of social, economic and cultural issues. The objective was to compile and deliver a submission to the Commonwealth government early in 1995, and for the government thereafter to respond. It is too early to indicate the likely outcome. However, discussion papers released to date[64] focus upon issues concerning cultural integrity and heritage protection;[65] economic development;[66] recognition and empowerment;[67] and 'getting a fair share'.[68] This agenda is very wide ranging and contains potential for significant change in working relationships between Aboriginals, governments, and the broad community. It also represents, in part, an expansive approach to righting past wrongs, not merely as 'compensation' but more creatively, as providing, along with the provision of land through claims (the *NTA*) or purchase (the Land Fund), a sound cultural and economic base upon which the Aboriginal community may better control its own future.

[62] See *The Australian* 1 March 1995, 3; *The Age* 1 March 1995, 3 and 3 March 1995, 12.

[63] See P McGuinnes, 'Keating risks crisis and defeat over Aboriginal Land Fund' *The Age*, 2 March 1995, 16. At this point, there were two Bills simultaneously before the House.

[64] See *Towards Social Justice: Compilation Report of First-Round Consultations* (1994) being a joint report of the Council for Aboriginal Reconciliation, ATSIC and the Office of the Aboriginal and Torres Strait Islander Social Justice Commission of the Human Rights and Equal Opportunity Commission.

[65] For example, protection of intellectual and cultural property, and customary law.

[66] For example, market access for indigenous products; promoting indigenous businesses and products overseas; tendering for government contracts.

[67] For example, constitutional reform; self-government; regional agreements; sea rights; English language use; flags and national day; land; compensation.

[68] For example, access and equity; reforming government-state financial relations; education; employment; health; housing; law and justice; governments; sport and recreation.

IV THE LEGISLATIVE SCHEME: THE PAST

(a) Claiming Native Title

Before any compensation issues can arise, native title must be declared to vest in the relevant Aboriginal group. The *NTA* establishes a claims process through a Tribunal — the National Native Title Tribunal (hereafter the 'NNTT'). Under the Act, speaking broadly, three types of claims may be made to the NNTT: for a determination of native title; for compensation; and for a determination that native title does not exist to an area of land (a 'non-claimant' application).[69] These significant new procedures are not discussed here, save to say that as at 30 June 1994, 30 such claims to various parts of Australia had been received by the Tribunal,[70] two only of which were for a determination of compensation.[71] A map (Appendix I) and chart (Appendix II) describing the status of these various applications as at 30 June 1994 are reproduced below. By 30 September 1994, 67 applications had been received;[72] by January 1995, a total of 92 had been received.[73]

(b) Extinguishment of Native Title

In order to succeed in a claim for a determination of native title the claimants must show in short: (1) that they enjoy a continuing traditional connection with the areas of land or waters claimed; and (2) that their title has not been extinguished by, for example, conduct of a state or Commonwealth government through making a Crown grant over the land in question when the terms of the grant, or the use made of the land, are inconsistent with the continuing enjoyment of native title rights or interests in the same land. Thus, the grant of a freehold title[74] and, more contentiously, the grant of a pastoral lease will, according to current legal wisdom, extinguish native title, since the exercise of the two sets of rights are inconsistent. In that circumstance, *Mabo No 2* and the *NTA* state that the native title gives way. However, the question of the impact of first, the mere grant of a pastoral lease and second, the exercise on the ground of rights under that lease upon native title, are questions currently

[69] See *NTA*, ss 13, 61.
[70] See *National Native Title Tribunal Annual Report 1993–1994* (1994), 57–8.
[71] The Yorta Yorta claim (Victoria and New South Wales) and the Wik claim (Queensland). See Appendices I & II, and fns 96, 97.
[72] See First Report of the Parliamentary Joint Committee on Native Title: *Consultations During August 1994* (October 1994) 19.
[73] Being 41 'claimant', 49 'non-claimant', 2 'compensation' and one 'future act'. Of these 4 non-claimant applications had been determined. See (1995) 1 *Native Title News*, 38.
[74] In a recent Canadian case, judges of the British Columbia Court of Appeal suggested that a fee-simple grant per se (let alone a lease) may not extinguish native title. The question of whether extinguishment has occurred is answered by reference to the actual use of the land. See *Delgamuukw* v *R* (1993) 104 DLR (4th) 470.

under consideration by the Federal Court,[75] and have been the subject of a determination by the NNTT.[76]

Alternatively, native title may have been extinguished (ie, the required traditional connection with the land may have been lost) because of the death of the traditional owners, or their (often forcible) removal or dispossession from their traditional lands or waters. Thus, if today's Aboriginal descendants of the original traditional owners have lost their traditional connection with the land, any claim by them for currently existing native title will fail, as will any claim for compensation under the *NTA*.

In some circumstances (eg, compulsory acquisition) the extinction of native title (assuming it still exists at the time of the acquisition) will arise not because of the mere operation of legal rights in theory, but due to actual use of the land in a manner inconsistent with the continuing enjoyment of native title rights and interests. Thus, if the Commonwealth Department of Defence, for example, acquires land from a state for defence purposes, and does not fence or otherwise use the land save for a two week long army exercise once per year, native title, it is suggested, will not be thereby extinguished. If, however, the Defence Department fenced some or part of the same land, built a township, an airstrip, conducted atomic bomb testing and the like, and constantly used and occupied the area for many years, then the practical reality is likely to be that native title rights cannot be enjoyed contemporaneously in those areas. Those rights will thus be impaired or extinguished within that fenced area — but not necessarily in the surrounding areas. Whether or not anyone wished to live there after atomic testing is another matter. Underlying this frivolous example is a serious message: despite all the claims of 'conflict' over land arising from *Mabo* and the *NTA*, much of that land, whilst of critical importance to the traditional owners, is of no interest to anyone else — save perhaps for mining exploration. Even then, mining exploration and any resulting resource exploitation projects are transient things. It is suggested that native title may continue well beyond such short term disruption.

(c) Past 'Acts' (eg Grants) and their Validation

A basic understanding is required of how the *NTA* deals with past Crown activities over areas of land or waters which may be the subject of native title. Basically, the *NTA* validates all those acts (called 'past acts') of the Commonwealth (s 14), categorises them into four classes, and declares that these classes have varying impact on any pre-existing native title. These categories are as follows:

[75] See the *Wik* case, now before the Federal Court (Drummond J). The issue is especially problematical when, as occurs in WA, SA, Queensland and NT, pastoral leases contain an Aboriginal access clause, pursuant to the relevant state land Acts.

[76] See French J, *In the matter of the Waanyi Peoples Native Title Determination Application*, 'Reasons for the Ruling on Acceptance of a Native Title Determination Application' (1995) 129 ALR 100; (1995) 129 ALR 118.

Category A: Freehold and certain leases; ie, commercial, agricultural, pastoral or residential lease (*NTA* ss 229, 246, 247, 248, 249) or the construction of a public work (defined at *NTA* s 253).
Category B: Leases not covered by Category A, other than mining leases (s 230).
Category C: Mining leases (s 231).
Category D: All other grants, including licences and permits (s 232).

Where the past act (eg, a grant) still exists (ie, was in force as at 1 January 1994), and would have been 'invalid' when it was granted due to the existence of native title, that invalid past grant, if it is or was a Commonwealth grant, is now validated by the *NTA* (s 14) and its impact upon native title is stated. Where the past act is historical only (ie, no longer in force as at 1 January 1994), the same principle of validation applies, but the impact of that act, where it is a Category A or B past act (eg, a 19th century pastoral lease), is not spelt out in the *NTA* but is left to the common law. Similarly, the *NTA* enables state and territory parliaments to pass complementary laws on native title generally, especially laws validating past grants made by those states (*NTA* s 19). This is, again, to ensure the security of the grantee where that past grant may have been rendered invalid by reason of the then existence of native title. Clearly, throughout Australia, land grants from earliest times have been overwhelmingly made by the executive of the colonies and states. The various states and territories (except for Western Australia) have now (ie, March 1995) enacted such legislation and, inter alia, validated their own past acts.[77]

(d) Effect of validation on native title

As mentioned, the *NTA* sets out the effect of validation under the Act on native title (s 15(1)) of all past acts except 'historical' Category A or B past acts.

First, the abovementioned validation of past acts will extinguish native title where there has been a Category A past act (ss 15(1)(a), (b) and 229), that is, a grant of a still current freehold, commercial, agricultural, pastoral or residential lease, or the construction of a public work.

Second, where there has been a grant of other still current leasehold interests, but not including a mining lease (a Category B past act), the validation will only extinguish native title to the extent of the leases' inconsistency with the continued existence, enjoyment or exercise of native title (ss 15(1)(c) and 230).

Third, the validation of all other past acts (historical or current), being Category C (mining lease, defined in s 245) and Category D (any other act, see ss 15(1)(d), 231 and 232), will not extinguish any native title. Rather native title will be subject to the 'non-extinguishment principle' (set out in s 238), ie,

[77] Discussed infra, fns 79ff.

it continues, but its enjoyment is suspended pending the expiration of the grant.

(e) Entitlement to Compensation for the Effect of Validated Past Acts

Broadly speaking, native title holders are entitled to compensation for the effect of validated past acts upon their rights and interests, as follows:

(1) Where native title has been extinguished (eg, by validation of a freehold grant) compensation is payable on just terms (ss 17(1), 20(1) and 51(1)).

(2) Where native title is impaired and the act validated could not have been done over freehold land, compensation is also to be paid on just terms (ss 17(2)(b), 20(1) and 51(1)).

(3) Where native title is impaired in relation to an onshore place (eg, by the validation of a mining lease over land), native title holders will be entitled to compensation where freeholders would have received compensation. This will be assessed under the same regime as for freeholders (ss 17(2)(c), 20(1), and 51(3)). The definition of the 'similar compensable interest test' (defined in s 240) applies to this situation.

(4) For past acts done since the enactment of the *Racial Discrimination Act* 1975 (Cth) (the '*RDA*') compensation is payable by reason of any contravention of ss 9 or 10 of that Act (*NTA* s 45(1)). For example, the grant of a pastoral lease or fee simple title made, say, in 1976 by a state Minister over Crown land which had never previously been the subject of such a grant (eg, on the fringes of a remote country town) may have been rendered invalid due to the provisions of the *RDA*. This is because the holders of native title to that area are likely to have been denied any compensation for the loss of their property rights at that time, since nobody then realised that native title existed as a property right at common law. These activities amount to a denial of a human right (to own or inherit property) on a racially discriminatory basis contrary to ss 9 or 10 of the *RDA* since ordinary title-holders would have enjoyed statutory rights of compensation. In that circumstance, if the past grant was made by the Commonwealth, the *NTA* (s 14(1)) validates that past act. If the past act was done by a state, that state may pass a law validating that past act (*NTA* s 19(1)). In both instances, the grantee's title is secure, and the traditional owners have a claim for compensation against the government which made the (invalid by reason of the effect of the *RDA* but now validated) grant.

As mentioned, the *NTA* provides Commonwealth rights to compensation, even for the effect of state and territory validations (s 20(1)). These Commonwealth rights may be pursued in the NNTT and the Federal Court. States and territories may also provide rights to compensation and a process for asserting those rights (s 20(4)).[78] There is no entitlement to multiple compensation (s 49). Critically, *NTA* s 20(2) provides that native title holders are entitled to compensation for past acts of a state or territory even when that past act has not been validated by the relevant government. In that circum-

[78] See state legislation discussed infra, fns 79ff.

stance, compensation is to be paid by the state or territory concerned (s 20(3)).

V THE LEGISLATIVE SCHEME: FUTURE ACTS

The *NTA* also controls how future activities by government (eg, Crown grants) may affect native title. To this end, the *NTA* defines 'past acts', 'future acts', 'permissible future acts', 'impermissible future acts', 'low impact future acts' and other delightful notions.

(a) The Future Regime Generally

The *NTA*, in short, allows future acts that affect native title where these are 'permissible future acts' (ss 23 and 235), and protects native title from future acts which are not 'permissible acts', and are therefore 'impermissible future acts' (ss 22 and 236).

Future acts are acts (s 226) which affect native title and which are not either past acts (s 233(1)) or the validation of past acts (s 233(2)). The requirement to satisfy the 'permissible future act' test began in relation to new legislation on 1 July 1993 and for other acts and grants on 1 January 1994.

(b) Permissible Future Acts

Legislation is a permissible future act only if it affects native title holders in onshore places in the same way that it affects ordinary title holders or if it puts native title holders in no worse a position than ordinary title holders (s 235(2)). 'Ordinary title land' is defined to mean either freehold land or, in the case of the Australian Capital Territory and Jervis Bay, leasehold land (s 253). Acts other than legislation are permissible future acts in the following circumstances:

- In the cases of onshore land, where the act can also be done over ordinary title land (s 235(5)(b)(i));
- In the case of onshore waters (such as lakes, rivers and harbours), where the act could be done over the waters, on the assumption that the native title holders held ordinary title to the land adjoining or surrounding the waters (s 235(5)(b)(ii)).

In the case of offshore places, legislation and other acts can affect native title in any circumstances at all (s 235(8)(a)). In any event, the act is a permissible future act if it is:

- The renewal or extension of an existing commercial, agricultural, pastoral or residential lease (s 235(7));
- A low impact future act (ss 234 and 235(8)(b)); and
- Any act agreed to by the native title holders (ss 235(8)(c) and 21).

There are exceptions to the 'permissible future act' regime: see ss 24 and 25. In particular section 25 enables the renewal of existing interests pursuant to a

legally enforceable right created before 1 January 1994, notwithstanding the existence of native title.

(c) Future Extinguishment

In the future, native title may be extinguished only:

- By agreement with the native title holders (s 21);
- By giving effect to the purpose of an acquisition of native title under a *Compulsory Acquisition Act* (ss 23(3) and 253 and see s 11); or
- Pursuant to a 'non-claimant application' to the NNTT (s 24(1)).

In relation to all other future acts which affect native title the non-extinguishment principle applies, that is, the native title rights continue to co-exist in the land the subject of the Crown grant, but have only partial or no effect. They are subject to the act (eg, the Crown grant) for the period of the act, after which the native title rights revive and have full effect (ss 23(4)(a) and 238).

(d) Compensation for Future Acts

Given the above regime, the *NTA* provides for compensation for extinguishment or impairment of native title due to 'future acts' as follows:

- Native title holders are entitled to 'just terms' compensation for any future compulsory acquisition, or extinguishment of their rights and interests (ss 23(3)(c) and 51(1)). Where a state or territory statute does not provide just terms, the *NTA* does (ss 23, 51).
- Where an act only impairs native title rights onshore, native title holders are entitled to compensation only where ordinary title holders are entitled, and under the same (eg, state) regimes as are applicable to ordinary title holders (ss 23(4) and 51(3)). Again the *NTA* provides a Commonwealth right to compensation only where there is no right provided by a state or territory law (ss 23(3)(c), 4(b)(ii)(c)).
- For acts affecting native title offshore (other than low impact future acts) the native title holders are entitled to a Commonwealth right to 'just terms' compensation for impairment of their rights (ss 23(4)(b)(i) and 51(1)).

The *NTA* provides a *Commonwealth* right to compensation for extinguishment pursuant to a compulsory acquisition act, or for onshore impairment, only where there is no right provided by a state or territory law (ss 23(3)(c), 4(b)(ii)(c)). This right can be pursued in the NNTT and Federal Court. Where a state or territory right to compensation operates, it may be asserted in accordance with the state or territory law. To rephrase the above: the *NTA* compensation provisions in relation to future acts are, for the most part, top-up provisions only; ie, they (generally) operate only where state and territory regimes do not provide the relevant right.

VI 'COMPLEMENTARY' STATE LEGISLATION

It thus is necessary (unfortunately) to have some acquaintance not only with the *NTA*, but also any complementary state 'native title' legislation which may be enacted. As at March 1995 the various states and territories have responded as follows.

(a) Western Australia

As a matter of policy, it is probably well known that the current government of Western Australia strenuously rejects any statutory recognition of native title. The *Land (Titles and Traditional Usage) Act* 1993 (WA) was enacted and became operative, as from 2 December 1993. This Act purports to extinguish all native title throughout Western Australia and replace those extinguished rights with a so-called 'right of traditional usage'. This replacement right is akin to a usufruct, is subservient to all other legal and equitable interests in land, and does not reflect the incidents of native title at common law as set out in *Mabo No 2*. A scheme of compensation was provided.[79] That legislation has been challenged in the High Court since it is conceded to be inconsistent with the provisions of the *NTA*.[80] Under s 109 of the Constitution, a Commonwealth law prevails over any inconsistent state law, to the extent of that inconsistency. Wide-ranging argument was heard before the Full High Court in September 1994.[81] Judgment was delivered in April 1995.[82] On this point the only relevant question is: is the Commonwealth law within the legislative power of the Parliament?[83] The Court held unanimously that, save for s 12, the *NTA* was valid.[83a] This result will have significant impact especially in Western Australia, where thousands of (eg mineral) titles were issued during 1994 under the now invalid *Traditional Usage Act*.

(b) Northern Territory

The Northern Territory government also objects to any statutory recognition of native title; indeed, since 1976, it has persistently opposed land claims filed under the Commonwealth *Aboriginal Land Rights (Northern Territory) Act* 1976. The *Confirmation of Titles to Land (Request) Act* 1993 was enacted by the Northern Territory Parliament, assented to, and commenced operation

[79] See *Land (Titles and Traditional Usage) Act* 1993 (WA), ss 28–40.

[80] Conceded, that is, by counsel for WA in presenting argument to the High Court during the hearing of the 1994 constitutional challenge, mentioned below.

[81] Three actions raising these issues were heard together: *WA* v *The Commonwealth* P4 of 1994; *Wororra and Yawuru Peoples* v *WA* M147 of 1993; *Martu Peoples* v *WA* P45 of 1993.

[82] The reason for this deadline is that the Chief Justice of the High Court reaches the age of 70 on 21 April 1995, being the mandatory retiring age following an amendment to s 72 of the *Constitution Act* 1900 (Cth). See *Constitution Alteration (Retirement of Judges) Act* 1977 (Cth); *The Australian* 1 March 1995, 2.

[83] The major heads of power relied upon are ss 51(xxvi) race power and 51(xxix) external affairs, ie, as a 'special measure'. For a description of issues argued, see B A Keon-Cohen, 'The Constitutional Challenge to the Native Title Act' (1995) 1 *Native Title News* 28.

[83a] *Western Australia* v *Commonwealth* (1995) 69ALJR 309.

on 28 May 1993. The long title is useful. It states this legislation to be 'An Act requesting the Parliament of the Commonwealth to enact legislation relating to certain rights of Aboriginal inhabitants of Australia in or in relation to land in the Territory'. This law became inconsistent with the *NTA* upon its enactment in December 1993, and not surprisingly, the Commonwealth Parliament (ie, the Keating Government) did not respond to the Territory's request. Thereafter, the Northern Territory Parliament passed a second law: the *Validation of Titles and Actions Act* 1994 (NT).[84] This short Act of 13 sections is broadly consistent with the *NTA* and adopts the *NTA* validation scheme, ie, it validates past grants made by the Territory 'to the extent that there could be any doubt about (the grant's) validity because of the possibility of the existence of native title affecting the land at the time of the grant' (s 10(1)). This Act was proclaimed into law on 10 March 1994.

(c) Queensland

The Queensland government appears, at least, to not object to statutory recognition of native title. The *Native Title (Queensland) Act* 1993 was enacted and assented to but not proclaimed into law, on 17 December 1993, before the final passage of the *NTA*. The Queensland Act is a lengthy Act which introduces alternatives to the NNTT, validates past grants by the Queensland Crown, and is largely complementary to the *NTA*. There are significant provisions about compensation[85] which rely upon the relevant Queensland compulsory acquisition act. Such compulsory acquisition is to be in accordance with the criteria established in the *NTA*, ie, 'just terms' (s 150). During 1994, this Queensland *Native Title Act* 1993 was substantially amended,[86] since (for example) its drafters did not anticipate the many amendments made by the Senate to the *NTA*. Most of the amended *Native Title Act* was proclaimed to commence on 28 November 1994. Further amendments specifically declaring that pastoral leases extinguished native title came into force on 5 December 1994.[87]

(d) New South Wales

On 12 May 1994 the New South Wales Parliament enacted another lengthy statute; the *Native Title (New South Wales) Act* 1994. This Act adopts the *NTA* scheme. It validates 'past acts' (eg, past grants of interests in land) of the New South Wales Crown,[88] and provides for the same range of applications as the *NTA* (s 61) including for compensation.[89] The New South Wales Land and Environment Court and the Warden's Courts, established under the *Mining*

[84] Assented to 10 March 1994.
[85] See, eg, ss 148–51 dealing with compulsory acquisition, whereby per s 148(1) 'native title . . . may be acquired under a state Compulsory Acquisition Act in the same way that other interests in land may be acquired'.
[86] See *Native Title (Queensland) Amendment Act* 1994, assented to 24 November 1994.
[87] See *Native Title (Queensland) Amendment Act* 1994, inserting s 144B.
[88] See Part 2, ss 10–15.
[89] See *Native Title (NSW) Act* 1994, s 32.

Act 1922 (NSW), are to exercise similar functions to the NNTT.[90] This New South Wales *Native Title Act* was assented to on 2 June 1994 and its major provisions were proclaimed into force on 28 November 1994. Minor amendments were introduced in December 1994.[91]

(e) South Australia

Just to simplify matters, South Australia has chosen to both amend already existing statutes to take account of the *NTA*, and to enact the *Native Title (South Australia) Act* 1994. This substantial complementary Act was assented to and commenced operation on 15 December 1994, save for Parts 3, 4 and 5 which deal with inter alia, native title questions and making claims. In addition, at the date of writing, some relevant legislation has been amended[92] with more amendments in the pipeline.

(f) Victoria

The current Victorian government during 1993, strongly opposed the Commonwealth's draft native title Bill, and following a specially convened sitting of Parliament, enacted legislation, the *Land Titles Validation Act* 1993 (Vic). This was assented to on 17 August 1993, but (except for formal sections) was not proclaimed into law. This Act validated Crown grants of title made since 31 October 1975 (s 6(1)), created a statutory beast called 'customary title' which appeared to equate to common law native title (s 3), and allowed for a claim for compensation within 15 years from the date of commencement (s 7). The assumption underlying this legislation appeared to be that all native title had been extinguished in Victoria. Section 25 suggested that claims for a declaration of the existence of native title could not be made at common law, and no provision was made for any claims process, other than for compensation.

Several sections set up a limited regime for Aboriginal persons claiming to hold 'customary title' (as defined by the Act) to seek compensation for loss or impairment of their title occurring since 31 October 1975 — the date of coming into force of the *RDA* (ss 7(1) and 8–24). There was no provision to make a claim for determination of native title itself. Compensation could only be claimed in accordance with the Victorian Act (s 26(1)). Compensation could be the subject of a negotiated 'deed of settlement' between the responsible Minister and Aboriginal claimants (s 14). If the claim was not settled, the matter was to be referred to the Supreme Court, which would admit or reject the claim in whole or part (s 20(1)). If the claim was admitted in any way 'the Court may make an award of monetary compensation' (s 20(2)). It seems the

[90] See Part 4, ss 19–24; Part 7 Div 1; ss 32–47; Part 8 ss 43–87. Consequential amendments were also made to the *Land and Environment Court Act* 1979 (NSW); *Mining Act* 1992 (NSW); *Petroleum (Onshore) Act* 1991 (NSW).

[91] See *Statute Law (Miscellaneous Provisions) Act* 1994 (NSW).

[92] For example, *Mining Act* 1971 (SA); *Environment Resources Development Court Act* 1993 (SA); *Lands Acquisition for Public Purposes Act* 1914 (SA); *Acts Interpretation Act* 1915 (SA).

Court, contrary to the *NTA*, was to be limited to *monetary* compensation.[93] As to principles governing the assessment of compensation, s 21 stated:

> The Court, for the purposes of the assessment of compensation under a claim under this Act -
> (a) must determine compensation which constitutes compensation on just terms in respect of the loss of, or diminution of, the rights under the customary title which is the subject of the claim; and
> (b) should have regard generally to the manner in which compensation in respect of the compulsory acquisition of land would be determined under the *Land Acquisition and Compensation Act* 1986 (Vic); and
> (c) must provide compensation for loss, or loss of enjoyment of, the rights under the customary title since 31 October 1975 —
> but must not award compensation in respect of minerals or petroleum.

This Act was clearly inconsistent with the *NTA*, subsequently enacted in December 1993.

Thus in 1994, the Victorian government (unlike the Western Australian government) tried again. It enacted the *Land Titles Validation Act* 1994 (Vic). This Act repealed the 1993 Act (s 17). Part I (Preliminary Matters) commenced on the day of Royal Assent, 20 December 1994, with the remainder yet to be proclaimed. This is a short Act (17 sections) which relies on the *NTA*. Past acts attributable to Victoria are validated (s 6) and compensation entitlements consistent with those spelt out in the *NTA* are provided (s 13).

(g) Tasmania

In early June 1994, the Native Title (Tasmania) Bill 1994 was introduced into the Tasmanian Parliament and read a first time. It then lay on the table pending discussions between the government and Aboriginal communities in Tasmania concerning, inter alia, the setting-aside of various areas of Crown land as Aboriginal land. The Bill was assented to on 16 December 1994 and commenced operation on 29 December 1994. This is a short Act which adopts and appears compatible with the *NTA*. It validates past acts, confirms certain existing rights, and provides entitlements to compensation for native title holders.

(h) Australian Capital Territory

On 21 April 1994 the Native Title Bill 1994 was introduced into the Legislative Assembly. This is a short Bill of five pages. In accordance with the *NTA*, it validates past acts (invalidated due to the existence of native title); continuing rights to material resources; and access to waterways and public places. The Bill was enacted, and thereafter commenced operation on 1 November 1994.

[93] Compare *NTA* s 51(6) which allows for the possibility of the 'transfer of property or the *provision of goods or services*'.

(i) Conclusion

Given that the High Court declared the *NTA* to be within power and valid, and the central provisions of the Western Australia Act to be inconsistent with the *NTA* and thus inoperative by reason of s 109 of the Constitution, legislation as broadly envisaged by the *NTA*, s 19(1) is currently operating in all the remaining states and territories.[94] The lengthy delay by the states appears to have arisen because those governments willing to pursue the matter became bogged down in negotiations with the Commonwealth over various aspects, especially financial, ie, who pays any award of compensation? Clearly, at the fiscal level, all governments — Commonwealth, territory or state — did not welcome the *Mabo* decisions. But the Commonwealth is not always stupid! It predicted difficulties with recalcitrant states, and built some gentle fiscal persuasion into the *NTA*. Thus, a significant financial impetus for the states to take the required initiatives is found in *NTA* s 20. This states that, as at the enactment of the *NTA*, compensation may be payable to native title holders for the past act of a state or territory even if that past act has not been validated by complementary state legislation.[95] As mentioned compensation is then payable by the recalcitrant state — not the Commonwealth.

VII ESTABLISHING AN ENTITLEMENT TO COMPENSATION

(a) The Elements to be Proven

In order to achieve a declaration of entitlement to compensation under the *NTA* due to the effects of a past act of the Crown, traditional owners must establish, in the Federal Court, the following:

- That native title existed and was vested in the claimants' ancestors, at the time of the first past grant that extinguished or impaired that title (which could be a grant, in Victoria, reaching back to the 1840s);
- That native title was extinguished or impaired by that past grant then or subsequently. This could involve mixed questions of law (inconsistent

[94] There are numerous outstanding difficulties, eg, South Australia's piecemeal response; and the impact in all states of miscellaneous legislation impacting upon native title land, seas or resources. See, eg, fishing legislation in Western Australia; and recent (1994) amendments to Victorian legislation providing for 99 year leases over land now the subject of the Yorta Yorta native title claims, being arguably an 'impermissible future act' under the *NTA*. See *Crown Lands Act (Amendment) Act* 1994 (Vic), especially ss 8, 10, amending *Land Act* 1958 (Vic), *Crown Lands (Reserves) Act* 1879 (Vic), and others.

[95] The Commonwealth has chosen, by force of its legislation, not to declare valid the past acts of a state. Rather than set out to 'cover the field' it has opted for a half-way house, and provided state Parliaments with the option of enacting their own 'validating' legislation but subject to 'minimal standards': *NTA* ss 15, 16, 19. This solution was strongly attacked by WA in the 1994 constitutional challenge as beyond power, on the basis that the Commonwealth cannot pass laws directing or seeking to control the exercise of legislative power of a state, ie, cannot seek, by a law of the Parliament, to usurp the function of s 109 of the Constitution. See *Victoria* v *Commonwealth* (1937) 58 CLR 618, 638; *Re Tracey; ex parte Ryan* (1988) 166 CLR 518, 547, 574–5; *R* v *Credit Tribunal; ex parte GMAC* (1977) 139 CLR 545, 563.

rights) and fact (increasingly intensive use of the land in a manner increasingly inconsistent, both as to geographical area and incidents of native title, with native title);

- That the grant was invalidated for some reason due to the then existence of native title (hard to prove, at least for a grant made prior to 1 October 1975 with the coming into force of the *RDA*);
- That the Crown's conduct has been validated by the *NTA* (for the Commonwealth Act) or relevant state or territory legislation, thus rendering the past (otherwise invalid but now secured) grant is a 'past act' founding an entitlement to compensation. As noted above, compensation is available from state governments in any event, despite there being (eg, in WA) no relevant state law validating its past acts (see *NTA* s 20(2));
- That the current Aboriginal claimants are the descendants, ie, inheritors of title pursuant to custom and tradition, of the original owners who suffered the extinguishment (whether or not the living claimants still enjoy native title). Alternatively that the current claimants continue to enjoy their surviving native title which was partly extinguished or impaired, or which is still being impaired;
- The history of the process of impairment and any extinguishment — from initial brief contact, to impairment, to final total extinguishment (a process which might embrace 150 years and involve constantly changing factual continuums of increasing areas subject to impact, lost rights and interests, reducing number of traditional owners, etc);
- Evaluation of quantum of compensation, for impairment and/or extinguishment.

None of the above is easy. As at March 1995 only two compensation claims had been filed with the NNTT, by Aboriginal claimants, being claims by the Yorta Yorta people[96] and the Wik people[97].

(b) Valuing Native Title for Purposes of Compensating Native Title Holders

We now come to the heart of this aspect of the matter: what is the value to be attributed to the various native title rights and interests that have been extinguished or impaired? In Australia today, there is no easy answer to this novel question. However, a number of factors will be relevant, including the following.

(i) *Commonwealth and State Statutory Criteria:* As mentioned, the *NTA* provides compensation on the basis of 'just terms' (past acts Category A and B); in accordance with the relevant (state) statutory regime (Category C), or generally on just terms (Category D). 'Just terms' is a familiar, although imprecise, concept originating from s 51(xxxi) of the

[96] See VN94/2A; and *Reasons for Opinion* delivered by French J (fn 38) supra.
[97] See QN94/6, accepted by the NNTT on 26 May 1994 — despite the claim embracing areas also subject to historical pastoral leases.

Commonwealth Constitution. The High Court has stated, amongst many cases[98] that:

> The just compensation to be paid to a person for compulsory taking of goods depends upon . . . particular circumstances which may vary in different cases. . . . 'Just terms' involve full and adequate compensation for the compulsory taking. There are cases in which the payment of a 'price' for goods . . . does not provide a just measure of compensation.[99]

Compensating native title holders, however, raises novel issues far removed from mere 'price'. Indeed, the *NTA* seems to accept this. Section 51(1) provides that this 'just terms' entitlement is to compensate,

> the native title holders for any loss, diminution, impairment, or other effect of the act on their native title rights and interests.

This suggests that it is the loss sustained by the native title holders, not the value of the land, which is the focus of assessment. Further, ss 51(2) and (4) require that in a variety of circumstances (eg, upon compulsory acquisition of native title land under a state Act):

> The court, person or body making the determination of compensation on just terms may . . . have regard to any principles or criteria set out in the (state) act.

Thus the relevant Commonwealth, state or territory Acts providing for compulsory acquisition may need to be consulted,[100] especially the various criteria or compensation bases set out therein.

(ii) *Content of Native Title Rights:* The *NTA*, ss 223 and 225(b) require the NNTT, or the Federal Court, to spell out the incidents or content of native title. The corpus of native title may vary considerably from case to case. At one extreme, are the rights found in *Mabo No 2* to be vested in the Meriam people[101] being rights equivalent to a fee simple, including the right to exclude all others.[102] At the other extreme, the rights successfully proven may amount to merely a right (expressed in modern terms) to visit

[98] For a convenient introduction, see *The Australian Constitution Annotated* (1980) 116–23. See also four cases handed down by the High Court on 9 March 1994 exploring the scope of s 51(xxxi); *Mutual Pools* v *Commonwealth* (1994) 119 ALR 577; *Georgiadus* v *Australian & Overseas Telecommunications Corporation* (1994) 119 ALR 629; *Re DPP ex parte Lawler* (1994) 119 ALR 655; *Health Insurance Commission* v *Peverill* (1994) 119 ALR 675; discussed at M Cox, Case Note (1994) 19 MULR 768.

[99] *Johnson Fear* v *Commonwealth* (1943) 67 CLR 314, 322–3 per Latham CJ.

[100] See: *Lands Acquisition Act* 1989 (Cth); *Land Acquisition (Just Terms and Compensation) Act* 1991 (NSW); *Acquisition of Land Act* 1967 (Qld); *Land Acquisition Act* 1969 (SA); *Lands Resumption Act* 1957 (Tas); *Land Acquisition and Compensation Act* 1986 (Vic); *Public Works Act* 1902 (WA); and *Lands Acquisition Act* 1978 (NT).

[101] A community of 3000–4000 people only 300 or so of whom live on Murray Island at any one time.

[102] (1992) 175 CLR 1, 217, the majority declared 'that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands'. This is a right 'in rem', not just 'inter partes', and equates to rights enjoyed under fee simple title. See *Wik Peoples* v *Queensland* (1994) 49 FCR 1.

occasionally for recreational, cultural or educational purposes, or a right to fish in certain lakes or rivers.

(iii) *The Duration of Loss or Extinguishment:* Again, intriguing and unresolved questions arise. The native title of most Aboriginal communities, especially in South East Australia, may have been extinguished or impaired during the 19th century by the expansion of settlement, pastoral activities, creation of towns, roads, railways and infrastructure, and by activities associated with government acquired land. If today's living descendants of the traditional owners who suffered the impact of the original grant which, say, extinguished title are seen as inheriting rights to compensation, then compensation is payable to them today for past relevant loss, being loss suffered not only during their own lifetime, but also the lifetimes of their predecessors in title. This argument would seem appropriate when the title is determined to vest not in an individual, but in the original and on-going community. That community may be seen as a single continuing entity, but with a constantly changing membership. Such a 'communal' title was found to exist for Murray Island, and is the normal form of title described by anthropologists in various parts of Australia.

If title-holders are, however, considered to be individuals, clan or family groups (and not a single community entity) then a different set of difficulties arises. One presumes quantum of loss for denial of native title rights for a 60 year old traditional owner will be greater than for a teenager. Further, as with other areas of the law (eg, assessment of damages for personal injuries), age expectancy assessments for every title-holding individual, and actuarial calculations may be required to assist in quantifying expected future loss. For a claimant group numbering thousands, the calculations become complex.

(iv) *Impairment or Extinction?:* A series of situations can be imagined concerning the impairment-extinguishment continuum varying over time. Thus, typically, the first pastoral settlers in Victoria, who squatted without any lawful entitlement from the late 1830s, may have initially extinguished native title to the extent of the 'house' paddock only, and perhaps impaired native title to the balance of their runs. With each passing year, areas where native title was extinguished, and areas of impairment would expand, as would the corpus of native title rights and interests affected. These rights would be affected by expanding settlement over time in at least two ways. First, the bundle of rights would be increasingly affected due to more intense use of a given area of land. Second, the bundle of rights making up the content of native title would increasingly diminish, due to cultural impact, death, dispossession etc, and resulting loss of customs and practices. Ultimately, due to death, dispossession or loss of traditional connection with the land, the surviving remnants of native title rights may have diminished to a point of total extinguishment. Bearing in mind that *Mabo No 2* found that

custom and tradition are flexible, that it may change and evolve, yet continue, it cannot however be assumed that all traditional connection to, for example, state forests or Crown lands in Victoria is now lost. One may ask: how are these constantly changing components of the compensation package to be valued?

(v) *Applying Statutory Criteria:* The criteria set out for example, in the *Land Acquisition and Compensation Act* 1986 (Vic) (ss 40–5) provide a starting point. This sui generis property right, however requires some adjustments. For example, ss 40 and 41, dealing with the 'measure of compensation' refer to: (1) loss attributable to disturbance; (2) loss attributed to severance; (3) market value; and (4) special value. However, 'market value'[103] referring to the 'willing but not anxious seller', and a 'willing but not anxious purchaser' needs to be understood against a limited market for, at common law, native title may be alienated only to the Crown. Further, 'solatium' mentioned in s 44, which perhaps comes closest to, but does not adequately respond to, the unique spiritual and cultural relationship between native title-holders and their land, may need to be adjusted as a relevant criterion. Again, under s 44, the amount of compensation to be paid may be increased by an amount not exceeding 10% of the market value of the land by way of solatium. In assessing the amount of solatium, it is suggested that the following matters should be taken into account with reference to native title compensation claimants:

- *The interest* of the native title claimant in the acquired land. See the above discussion of fluctuating native title rights and interests which may be enjoyed;
- *The length of time* the claimant had occupied the land. See above concerning 'community' and individual claimants. Archaeological evidence suggests that Aboriginal communities have occupied Australia for up to 40 000 years before the present;
- *The inconvenience* likely to be suffered by the claimant by reason of removal. For native title-holders, such inconveniences can run the gamut from loss of enjoyment of minor recreational activity, to desecration of religious life, to starvation, even to death itself;
- *The period of time following acquisition* during which the claimant will be allowed to remain in possession. Again, factual situations can vary markedly. For intensively utilised land, the original occupants would have been driven off within months. By comparison, for pastoral leases issued in Western Australia, South Australia and the Northern Territory (which include an Aboriginal access clause), the native title-holders may have entered and utilised the lease area — albeit in an

[103] If relevant at all: see *NTA* s 51(1), discussed above.

impaired way — during the entire period of the lease (eg, 99 years) as of legal right;[104]

- *The period of time* but for which acquisition the claimant would have been likely to occupy the land. Another 40 000 years?
- *The age* of the claimant;
- If the claimant at the date of acquisition was occupying the land as the claimant's principal place of residence, *the number, age and circumstances of other people* living with the claimant. As mentioned above, such people may number several hundreds.

Considerations may differ depending on which state or territory governs the land in question. Compensation bases under the *Lands Acquisition Act* 1989 (Cth) include market value,[105] special value,[106] severance,[107] injurious affection,[108] reinstatement,[109] disturbance,[110] other costs,[111] and special compensation for the acquisition of a dwelling (ie, householder's solatium).[112]

(vi) *Some Precedents in Australia and Overseas:* To a limited extent in Australia, but particularly in North America, there is a body of experience to draw upon in this novel area of evaluating compensation for loss of native title. This large topic can only be touched upon here. The Privy Council,[113] the High Court[114] and the United States courts have considered that 'freehold' value should be the appropriate measure of compensation. In the United States, the Court of Claims, established in 1855, permitted many claims by Indian tribes against the United States. This scheme proved unsatisfactory and in 1946 Congress created the Indian Claims Commission.[115] This legislation established a three (later five) member Commission to adjudicate a range of Indian claims, including,

> claims arising from the taking by the United States, whether as the result of a treaty of cessation or otherwise, of lands owned or occupied

[104] Such access clauses are still found in pastoral leases in NT, WA, and SA. See *Pastoral Land Act* 1992 (NT) s 38; *Land Amendment Act* 1934 (WA) s 106(2); and *Pastoral Land Management and Conservation Act* 1989 (SA) s 47(1). The abovementioned WA Act s 106(2) reads: 'Aboriginal natives may at all times enter upon any unenclosed and unimproved parts of the land, the subject of the pastoral lease, to seek their sustenance in their accustomed manner'.

[105] *Lands Acquisition Act* 1989 (Cth) ss 55(2)(a)(i), 56 and 57.

[106] *Land Acquisition Act* 1989 (Cth) s 57.

[107] *Land Acquisition Act* 1989 (Cth) s 55(2)(a)(iii).

[108] *Land Acquisition Act* 1989 (Cth) s 55(2)(a)(iv).

[109] *Land Acquisition Act* 1989 (Cth) s 58, ie, where there is no general market.

[110] *Land Acquisition Act* 1989 (Cth) s 55(2)(c).

[111] *Land Acquisition Act* 1989 (Cth) s 55(2)(e).

[112] *Land Acquisition Act* 1989 (Cth) s 61(2)(b).

[113] *Amodu Tijani* v *Secretary Southern Nigeria* [1921] 2 AC 399, 405, 408.

[114] *Geita Sebea* v *Territory of Papua* (1941) 67 CLR 544 where the Court concluded at 555: 'the land should be valued on the footing that an estate in fee simple . . . was acquired by the government (from the traditional owners)'.

[115] *Indian Claims Commission Act* 1946, 25 USCA 70–70V.

by the claimant without the payment for such lands of compensation agreed by the claimant.[116]

This Commission eventually expired in 1978 and its remaining 102 cases were transferred to the US Court of Claims.[117] During its 32 years, a large body of jurisprudence was developed — much of it, however, criticised by Indian claimants as providing very inadequate compensation. For example, Commission monetary awards were valued at the date of the taking, and interest on awards was not generally available. As one commenter notes:

> Some tribes, therefore, were left with judgements — without interest — for one or two dollars per acre for takings of original Indian title when the land may be worth several hundred, or even thousand, times that much today.[118]

Doubtless Australian courts will be guided in large measure, by the terms of local legislation, case law and learned commentaries.[119] But it might be that this unhappy US experience — at least for Indian claimants — and fiscal sensitivities, contributed to *NTA*'s ss 51(5) and (6). These state:

> s 51 *Monetary Compensation*
>
> (5) Subject to subsection (6), the compensation may only consist of the payment of money.
>
> *Requests For Non-Monetary Compensation*
>
> (6) If the person claiming to be entitled to the compensation requests that the whole or part of the compensation should consist of the transfer of property or the provision of goods or services, the court, person or body:
>
> (a) must consider the request; and
>
> (b) may, instead of determining the whole or any part of the compensation, recommend that the person liable to give the compensation should, within a specified period, transfer property or provide goods or services in accordance with the recommendation.

Source: ***National Native Title Tribunal Annual Report 1993–1994*** (1994), 57

[116] 25 USCA 70a, s 2. See S C Danforth 'Repaying Historical Debts: the Indian Claims Commission' (1973) 49 *N Dak L Rev* 359, 388–94.

[117] H B Holt and G Forrester, *Digest of American Indian Law* (1990), 7.

[118] D N Getches, et al *Federal Indian Law: Cases and Materials* (1978), 156. See also F S Cohen, *Handbook of Federal Indian Law* (1982) 160–2; 562–74.

[119] See eg, Australian Law Reform Commission Report No 14 *Lands Acquisition and Compensation* (1980); A Hyam, *The Law Affecting the Valuation of Land in Australia* (1983); D Brown, *Land Acquisition* (1991).

VIII CONCLUSION: EAT MORE PORRIDGE!

The 'compensation' provisions of the *NTA*, whilst providing minimal redress for historical extinguishment or impairment of native title through acts of the Crown, should be seen in their full legislative and policy context. However, an examination of the detail of the *NTA* underscores, in the author's view, the abovementioned common law position. Very few communities are, as best as one can predict, likely to achieve an order for compensation through the mediation or Federal Court processes provided for in the *NTA*. Put another way, 'security' of Crown grants — the need to remove any threat to the continuing validity of past grants which extinguished native title — has, as might be expected, clearly prevailed over the protection of native title and provision of compensation. This is especially so for those past acts of the various Crowns which occurred prior to 1 October 1975 — the date of coming into force of the *Racial Discrimination Act* 1975 (Cth).

Mr Prescott has a point when he complains that reading the *NTA* is like 'reading porridge',[120] and one may agree with him that the *NTA* is 'too complex' and 'far too difficult to understand'.[121] However, this author begs to differ from his assessment that the *NTA* is 'leading us into additional uncertainty and unnecessary conflict'. Frankly, reading the purple prose of the majority judgments in *Mabo No 2*, is a much more pleasurable experience than reading either the *NTA* or porridge! Whilst the author adores porridge and resents the gratuitous insult, it may be said with confidence that few lawyers have any affection for the *NTA*. However, the *NTA*, like porridge, represents a good start to a new day. Whilst the ingredients are somewhat murky, whilst its consumption will not solve overnight, all the conflicting problems of its many and varied consumers, its rationale and objectives are sound, its complexity will clarify, and over time, the entire nation will be nourished as we learn to both eat our porridge, and recognise, rather than seek to distort, the benefits. As Deane and Gaudron JJ correctly stated, the alternative — the unjust pre-existing law and government policy and practice founded thereon — leaves the nation diminished. Such a position in a civilised society is clearly intolerable.

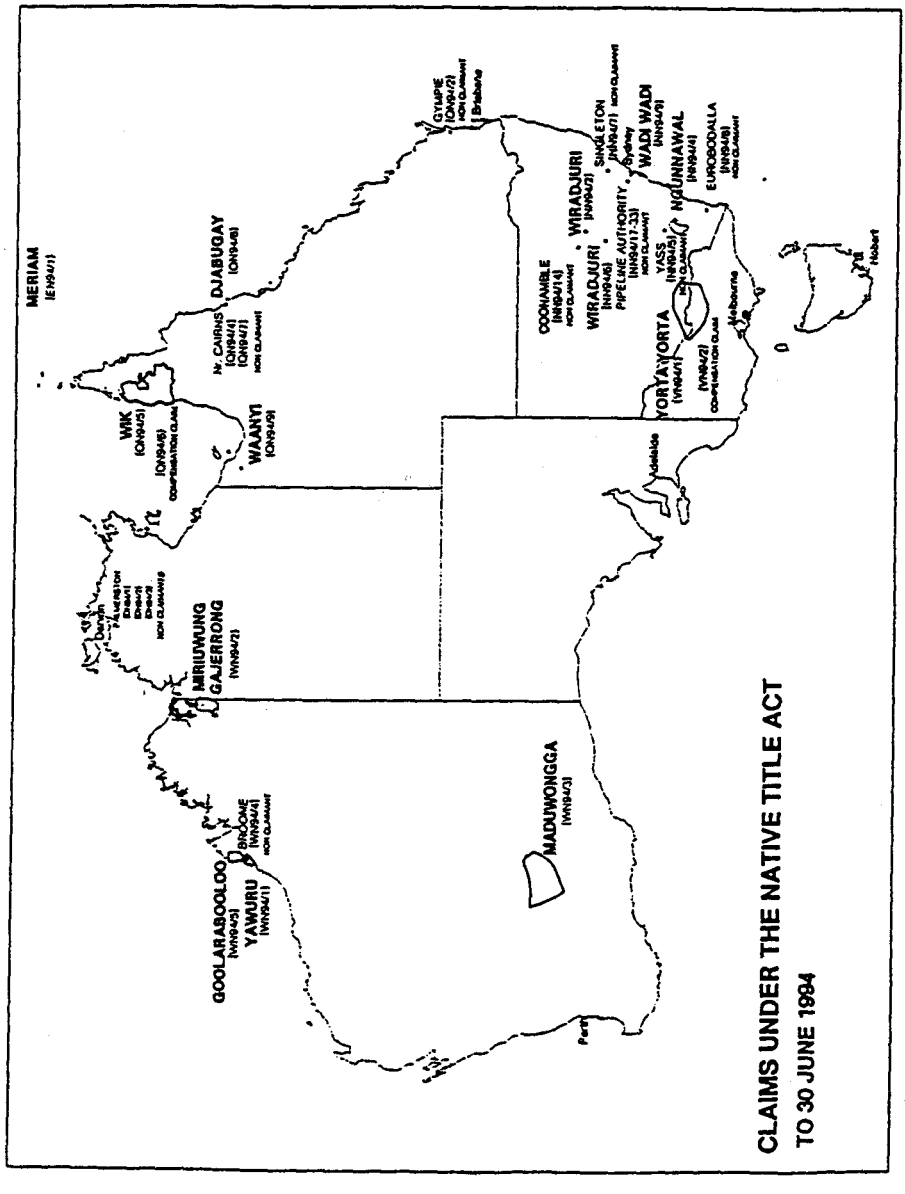
Part of the pain of 'eating porridge' — especially for those in the community who prefer a former, more palatable or more accommodating legal menu — is to accept the changed fare, and learn to work with it. As the Northern Territory and Western Australian land rights experiences demonstrate, vested interests, be they government or private, all too often direct their considerable energies and lobbying power into crying disaster, and attempting to change the rules, rather than learning to live and work in the real world. Unfortunately, that attitude remains alive and well in Australia today.

However, a growing consensus is emerging that *Mabo No 1* and *No 2*, and the *NTA* can represent a positive result for all involved. Proof of that, how-

[120] As quoted in *Financial Review* 18 November 1993.
[121] Ibid.

ever, must await some real results, ie, the effective delivery of a land-base and social justice to the first Australians; respect for fundamental human rights for all citizens; and a viable basis for economic development to benefit the entire nation. Involved in that mix is the proposition, increasingly accepted by the community, that miners do not enjoy a God-given right to dig anywhere in this country, at any time; and that there are (rare) moments in the history of a nation when the protection of human rights and cultural interests must take priority over directly conflicting economic imperatives — accepting for the moment (which is firmly rejected) that these matters are necessarily in conflict. The delivery of judgment in *Mabo No 2*, and the passage of the *NTA* represent such moments. Hopefully, the community at large is increasingly comprehending that this new relationship between Aboriginals, government and third-party users benefits all. There are also indications, especially through its work on the Aboriginal Reconciliation Council, that significant sectors of the mining industry are, despite the rhetoric of 1993, increasingly accepting these principles. So let us all EAT MORE PORRIDGE!

APPENDIX I:
Map showing Location of Claims at 30 June 1994



Source: *National Native Title Tribunal Annual Report 1993–1994* (1994), 58

APPENDIX II:
Status of Applications Received By the National Native Title Tribunal at 30 June 1994

	Native Title Applications	Non-claimant Applications	Compensation Applications
QLD	QN94/1 Doomadgee (7) QN94/3 Mt Isa (8) QN94/5 Wik (1) QN94/8 Barron Falls (1) QN94/9 Carpentaria (2)	QN94/2 Gympie (1) QN94/4 Cairns (1) QN94/7 Cairns (1)	QN94/6 Wik (1)
NSW	NN94/2 Wellington (1) NN94/4 Queanbeyan (1) NN94/6 Peak Hill (1) NN94/9 Port Kembla (_)	NN94/3 Molong (8) NN94/5 Yass (1) NN94/7 Singleton (1) NN94/8 Eurobodalla (1) NN94/10 Pipeline Auth'ty (9) NN94/14 Coonamble (2)	
VIC	VN94/1 Barmah Forest (1)		VN94/2 Barmah Forest(2)
SA TAS ACT			
WA	WN94/1 Broome (1) WN94/2 Kununurra No. 1 (1) WN94/3 Kalgoorlie (2) WN94/5 Broome (2) WN94/9 Kalgoorlie (2)	WN94/4 Broome (1)	
NT		DN94/1 Palmerston (1) DN94/2 Palmerston (1) DN94/3 Palmerston (1)	

INDEX
(1) Accepted and on Register of Native Title Claims
(2) Being assessed by NNTT
(3) Awaiting search material
(4) Awaiting further material from applicant.
(5) Referred to President under s64
(6) Awaiting response from applicant (s.64 matter)
(7) Not accepted by the Registrar under direction of the President
(8) Withdrawn by applicant
(9) Superceded on 21 / 7 / 94 by 17 separate applications (NN94/17 - NN 94/33) NN 94/10 subsequently withdrawn

Source: *National Native Title Tribunal Annual Report 1993-1994* (1994), 57