THE NATIVE TITLE ACT IN PRACTICE

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Introduction

The *Native Title Act 1993* ("the Act") was designed to deal with the major legal and economic issues raised by common law recognition of native title. Opposition to the recognition of native title in Australia has manifested itself through criticism of the legislation. Among the criticisms were that the procedures provided for determination of native title and their implementation by the National Native Title Tribunal ("the Tribunal") established under the Act were too slow, leading to uncertainty and even hardship for pastoralists, miners and others with interests in the land over which claims to native title were made. These criticisms were loudest prior to the passage of amendments to the Act in September 1998. This article examines the factors contributing to the drawn out character of native title dealings by reference to the favourable determinations of native title that have been made since 1994. It concludes that while the number of determinations that native title exists will continue to grow slowly, there will be an increased use of agreements between native title claimants and other parties about the use and management of land.

The Act was passed following the 1992 decision of the High Court in *Mabo v State of Queensland*[1] that rights and interests in land under indigenous law are recognised under Australian common law. Those native title rights and interests exist today where an Aboriginal or Torres Strait Islander group has a continuing connection with the land in question and has rights and interests in that land under indigenous law and custom.[2] Native title is subject to existing valid laws. It has been extinguished by actions of the Crown since colonisation which indicated clear intention to do so and, once extinguished, cannot be revived.[3] But since the passage of the *Racial Discrimination Act 1975* (Cth) native title cannot be dealt with under State or Territory law in a way which would discriminate between indigenous and non-indigenous property holders.[4]

The Act provides a process by which native title rights can be established and compensation determined for loss or impairment of native title rights and interests. It provides for the validation of past acts which are invalid because of the existence of native title and also establishes a regime for determinations to be made as to whether future grants of interests can be made or acts done over native title land and waters. Certain future acts attract for the native title holders or claimants a 'right to negotiate' with both the government proposing to make the grant and the beneficiary of the proposed grant. Emphasis is placed in the Act on the use of negotiation, conciliation or mediation as the preferred methods of resolving native title claims and associated matters.

In 1996, the possibility of co-existence of native title with existing pastoral leases was recognised in *Wik Peoples v State of Queensland*.[5] This led, in part, to the amendment of the Act in September 1998.[6] It is now recognised that native title may exist over vacant crown land, some

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crown leases such as pastoral leases, national parks, public reserves, land held by government agencies, land held in trust for aboriginal communities, lakes, rivers, creeks, subterranean waters, beaches and foreshores, seas and reefs, and other places where extinguishment has not occurred.[7]

Impact of the Native Title Act

Over 700 native title claims have been placed on the Register of Native Title Claims established under the Act since its commencement on 1 January 1994. Many of the claims on the Register of Native Title Claims have been lodged in response to notices issued by State Governments announcing an intention to make grants of interests in land or to allow actions over native title land or land that could, in future, be subject to native title. These are known as 'future acts' They are sometimes acquisitions of land for the benefit of third parties, as is illustrated by the *Dunghutti* case which is discussed below,[8] but are more frequently the issue of mining or mineral exploration licences. The Act requires a government to issue a notice of its intention to do a 'future act'. Under the Act before it was amended, those who had become registered native title claimants within a certain period of the giving of the notice[9] acquired negotiation rights in relation to the proposed action. In practice some States did not issue 'future act' notices in relation to proposed actions on pastoral lease land, apparently on the assumption that pastoral leases extinguished native title. This assumption having been shown by the *Wik* judgment to be incorrect, provisions to validate those actions were included in the amendments to the Act. They are defined as 'intermediate period acts', the period being from the commencement of the Act on 1 January 1994 to the handing down of the High Court's *Wik* judgment on 23 December 1996.

When these mining related claims, mostly in Western Australia and usually over very small areas of land, are put to one side, the number of country claims is much smaller. For example, as at 30 September 1998 in Victoria there were 31 claims on the Register of Native Title Claims only 8 of which cover significant areas of land.[10]

Of the more than 700 claims lodged, in only four had native title been favourably determined at 30 September 1998 - Dunghutti in New South Wales, Hopevale[11] and Western Yalangi[12] in Queensland and Croker Island[13] in the Northern Territory. A further favourable determination, in the Miriuwung and Gajerrong case,[14] was made within two months of the amendments coming into effect. An examination of these quite different cases illustrates the application of many of the provisions of the Act, the work of the Tribunal as a mediator and the role of the Federal Court. It also provides some reasons for the apparently slow progress in finalising claims and demonstrates the desirability of reaching agreements that recognise the land management implications of a native title determination.

Native title mediation

The National Native Title Tribunal functions primarily as a mediation service, despite its name and structure, which included having a judge of the Federal Court as its first President and having other judicial appointees among its membership. These characteristics were recognised as leading to a misapprehension among many, particularly in the Tribunal's early days, that the Tribunal should be determining native title claims and making binding decisions. Although the Act did originally provide[15] for the Tribunal to make a determination of native title where parties reached agreement after mediation, the effect of the decision in *Brandy v Human Rights and Equal Opportunity Commission*[16] was that all native title

determinations must be made by the Federal Court, whether or not agreement has been reached. Amendments to reflect that reality came into effect on 30 September 1998. It is only in relation to 'future acts' that the Tribunal may exercise a determinative function. The Tribunal's 'future act' determinations are published and accessible on its website and are sometimes reported elsewhere.

An interesting element of the amendments allows the appointment by the President of the Tribunal of consultant mediators to work on native title claims. The role of the consultants will be almost indistinguishable from that of the members of the Tribunal when they mediate native title claims.[17] Members retain the statutory duty to undertake inquiries, either in relation to proposed future acts or otherwise,[18] but in the first years of the Tribunal's life conducting inquiries has not been the dominant role of Tribunal members. It will be interesting to see whether this change affects the way the Tribunal mediates claims in the future.

The amendments did not alter the Tribunal's objective in section 109(1) 'of carrying out its functions in a fair, just, economical, informal and prompt way.' This objective is similar to that of several Commonwealth administrative tribunals such as the Immigration Review Tribunal[19] and the Social Security Appeals Tribunal.[20] These are determinative Tribunals which consider individual claims for entitlements under legislation, and they finalise thousands of cases every year.[21] The use of similar language in the Native Title Act may reinforce the tendency for observers to have unrealistic expectations of speedy outcomes from the native title mediation process.

The Tribunal is required to identify and notify personally all those who have a proprietary interest in the claimed land. In practice the Tribunal notifies a wide range of interest holders including pastoral lessees, holders of mining tenements, fishing licences, bee-keepers' licences and those with rights to cut timber or use water. Only State Governments know the identity of proprietary interest holders in land. Even then this information is often not in any one register or place. In Victoria for example, it can take up to two years to get from the State Government tenure information to allow notifications of claims to proceed. The Wotjobaluk claim over 6,200 sq km in western Victoria was accepted by the Tribunal in October 1996 but notification could not commence until the middle of 1998. In that case some thousands of people have been notified, resulting in about 600 responses from people seeking to become parties to a mediation. In order to surmount this hurdle the Tribunal has entered into financial agreements with State Governments to provide the tenure information so that interest holders may be notified as required.

Mediation between hundreds of people is quite different from mediation in most other fields.[22] The Tribunal has had to deal with other factors, manifest to various degrees in different claims, such as pre-existing tensions between parties, power imbalances, lack of understanding and/or acceptance of the concept of native title, ignorance of the mediation process, and claims sometimes located in remote country where physical access is affected by seasonal conditions. The Tribunal developed an approach which it identified as 'interest based mediation'[23] and its mediation procedures, initially developed in 1994, were revised in 1996 following consultations with stakeholders.[24]

Native Title process: Case Studies

Case Study No.1 - Dunghutti

The claim of the Dunghutti people to 12.4 hectares of land near Crescent Head on the north coast of NSW was made in 1994[25] in the context of the planning and development of a subdivision to provide

additional residential land to the general community. The subdivision had been proposed prior to the commencement of the Act on 1 January 1994, but was only partly developed. A portion of the land proposed for subdivision remained crown land in the control of the NSW Government. Following the commencement of the Act, the NSW Government realised that it needed to deal with the possibility that native title existed on the land before it was relinquished for subdivision. The Government consequently lodged a non-claimant application with the Tribunal. A non-claimant application is made other than by persons claiming to hold native title (s.61). This form of application is usually made when a government, a mining company or other body wants to ascertain whether or not native title exists in an area. The application, having been lodged, was publicly notified as required by the Act and received a response. A claim for native title was made on behalf of the Dunghutti people of the Macleay Valley, with the help of the NSW Aboriginal Land Council's Native Title Unit. If no claim had been made within two months, the NSW Government would have been free to proceed with the alienation of the land, although compensation may have been payable if a subsequent claim of native title had been successful (s.24).

The claimant application, having been accepted by the Registrar (s.63), was also notified to all people with an interest in the land. Fortunately at Crescent Head there were fewer parties than in many other cases - the applicants, the NSW Aboriginal Land Council, the NSW State Government, the Shire Council and 23 residential land owners who shared a common boundary with the claimed land. The Tribunal was then responsible for mediating between the parties, but before this had advanced the Government turned to another provision of the Act to allow the sub-division to proceed more quickly. It lodged a notice of intention to do a future act to which the 'right to negotiate' applies (s.29). The proposed future act was acquisition by the Government of native title in the unsold allotments of land in the first part of the subdivision, covering about one third of the claimed area. This activated a different, more contained set of negotiations under the Act, in which only the native title claimants and the State Government could be parties.

The Dunghutti claimants were invited by the State to present evidence of their connection to the country they claimed and to estimate compensation which would be payable if the native title was acquired. Native title, usually thought of as a communal title, can be compulsorily acquired by a government, in which case compensation is payable. It can also be relinquished to government by agreement but it cannot otherwise be bought or sold. The documentation of the claimants' connection took six months to complete and included genealogies showing the claimants as the descendants of the original inhabitants of the Macleay Valley, together with anthropological, historical and linguistic evidence demonstrating their continuing connection over several generations. Legal issues were also addressed, for example whether an annual lease over part of the area granted between 1925 and 1928, or certain public works, had extinguished native title. At the end of this process, the State Government formed the view that the submission provided 'credible evidence' for the purpose of a settlement.

The terms of the settlement still took some time to work out and it covered both native title in the land to be acquired and in the remaining portion of the subdivision. Native title rights are property rights and, as with other forms of property right, financial compensation may be paid when those rights and interests are extinguished. Valuation of native title for the purposes of compensation is a difficult and relatively undeveloped field in Australia. The Tribunal has in two 'future

act' determinations expressed reservations about the use of the freehold value of the land as the basis of determining compensation for loss of native title.[26] In the Dunghutti claim compensation appears to have been awarded on the basis of market value plus an additional factor for special attachment.[27] A Deed of Agreement was signed recognising the Dunghutti people as the traditional owners of the land at Crescent Head, whilst guaranteeing future development. The Dunghutti were awarded compensation for the compulsory acquisition of native title in part of the land and they agreed to transfer their native title rights in the other part to the State in return for future compensation as the land is sold.[28] The money is to be held by a prescribed body corporate established in accordance with the requirements of Part 2, Division 6 of the Act.

This agreement, arising as it did from the future act compulsory acquisition proposal rather than directly from the earlier claim to native title, had been reached without the involvement of most of those who had become parties to the mediation of the claim. At each earlier stage of the process the Tribunal had conducted public education programs and held sometimes lively meetings with the residents to inform them about the nature of native title and the process of mediation. It became necessary at the final stage for those other parties to be informed of the agreement reached by the claimant and Government. Thus the Tribunal needed to conduct further discussions with the residential land owners who had been joined as parties to the original native title claim. In April 1997, a consent determination of native title was sought and granted in the Federal Court and a few hours later the Dunghutti people's native title rights and interests in the land were compulsorily acquired by the State with the consent of the native title holders.

Case Study No.2 - Hopevale

A claim to native title over 110,000 hectares of land and waters near Hopevale on the eastern Cape York Peninsula in Queensland was lodged by the Warra people in 1996. Like the Dunghutti claim, it involved coastal people and resulted in a consent determination. Otherwise it could not have been more different. The determination covered land which was the subject of a grant in 1986 by the Queensland Government to the Hopevale Aboriginal Council to be held in trust for the benefit of Aboriginal inhabitants.

Hopevale is the site of a mission established in 1887 for Aboriginal people and, as is common in such places, many of those who now live there are descendants not of the traditional owners but of people who were moved there and whose traditional country lies elsewhere. Such people are usually referred to as having an 'historical' as opposed to a 'traditional' connection with the country. The native title claim was made by thirteen clans with 'traditional' connection to the country. In pursuing their claim to hold native title over the Hopevale land, the claimants first negotiated with the other Aboriginal residents of Hopevale who have a 'historical' connection, but who were not claimants because they lacked the necessary 'traditional' connection. Negotiations with a range of other interest holders followed.

In granting the determination in December 1997, the Federal Court responded to a Deed of Agreement entered into between thirteen Aboriginal clans, the State of Queensland, the Hopevale Aboriginal Council, Cape Flattery Silica Mines Pty Ltd, Cook Shire Council, Far North Queensland Electricity Corporation, Telstra Corporation Ltd, Queensland Commercial Fishermen's Organisation, the Australian Maritime Safety Authority, the Cape York Land Council Aboriginal Corporation and one individual, Gordon

Charlie. The determination identifies the native title holders and their native title rights and interests as required by the Act, including the right of access to and use of the natural resources, the right to determine the access of others to the land, and to discharge cultural, spiritual, and customary rights, duties and obligations in relation to the land, for example through the preservation of sites of significance and the maintenance of beliefs through ceremony. The document further recognises the limitations on the exercise of those rights and interests imposed by valid State and Commonwealth laws generally and in particular by the lawful exercise of powers and rights conferred on the Hopevale Aboriginal Council, on public authorities responsible for infrastructure or public works on the native title land, on the holders of registered leases within the area, and by certain other agreements annexed to the Determination. It foreshadows the establishment of prescribed bodies corporate as required by the Act. It also recognises the rights of members of other Aboriginal clan groups and of Aboriginal historical residents of Hopevale to travel over, hunt, camp, fish, and gather in accordance with their traditional laws and customs.

The determination and supporting documentation, including separate Deeds of Agreement between the native title parties and some other parties, have been compiled by the Tribunal into one document.[29] In the Foreword to the document, the then President of the Tribunal, Justice Robert French, wrote:

> The Hopevale Determination is Australia's third entry onto the National Native Title Register. It is the result of 16 months of intensive mediation involving the Aboriginal peoples of Hopevale themselves, and other non-indigenous interests including the State of Queensland, and Cape Flattery Silica Mines. The participants are to be congratulated for their constructive contributions during this time.
>
> The unity established within the claimant group was made possible through agreements signed in February 1996 and November 1996. These agreements established mechanisms for the management of issues between the area's traditional owners and indigenous people with historical affiliation with Hopevale. Agreements between the applicants and the non-indigenous interests then followed.
>
> The State of Queensland was a significant player in the final settlement of native title at Hopevale. The efforts of the State's negotiators and the genuine goodwill of other non-indigenous interests resulted in this determination of native title.
>
> The determination and associated agreements will stand as a guide and helpful precedent in other cases yet to be resolved. Their most important message is that co-existence of interests can be achieved.

Case Study No.3 - Yalangi

Hopevale was the first consent determination in Queensland, but within a year it was followed by another. The Western Yalangi claim, lodged in May 1995, covered 25,000 hectares north west of Cairns. Although it was referred to the Federal Court in October 1996 after many months of apparently unsuccessful mediation, negotiations were later resumed leading to an agreement which was submitted to the Federal Court, resulting in a consent determination of native title. Yalangi is notable for being the first inland claim to achieve entry on the National Native Title Register established under the Act. The earlier entries cover coastal areas or islands. The Western Yalangi determination illustrates the possibility of identifying the native title holders by descent group as opposed to the clan group method adopted in Hopevale. The identification of the holders of native title rights and interests is a live issue. In *Ward v Western Australia*[30] Lee J said that in all but exceptional cases, native title will be a communal title held by the community and not separate and

discrete vestings of native title in sub-groups such as 'estate groups'.

Case Study No.4 - Croker Island

Although the Meriam people whose native title rights and interests were recognised in the *Mabo* judgement live on the Murray Islands surrounded by sea, the extent to which native title may exist in offshore waters had not been judicially determined until the Croker Island case. Croker Island lies off the coast of the Northern Territory. Unlike Dunghutti and Hopevale, this was not a consent determination but was referred to the Federal Court by the Tribunal on the basis that mediation had not been successful. The Croker Island claim covered 3,257.83 sq km of waters. It was lodged at the end of 1994 and referred to the Court in May 1996. The island itself is identified as Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976 (C'th)* and it was not included in the application. In reality the case had always been seen, at least by the major parties, as a test case on the extent to which native title may exist in offshore waters, and as such not appropriate for mediation.

In *Yarmirr v Northern Territory*[31] the Federal Court had to consider native title in respect of the sea and sea-bed and sub-soil under the sea-bed and with respect to waters beyond the territorial limit of Australia. It took evidence from the claimants about their traditional laws and customs concerning the waters and also considered whether extinguishment of any rights had occurred through legislative or administrative acts which apply, or have applied in the past, to the subject area. The claim was resisted by the Commonwealth and Northern Territory Governments and others parties with fishing and pearling interests.

In its July 1998 decision, the Court found that members of five clans have native title rights and interests in relation to the seas and sea bed but not to the subsoil or resources. But their native title rights and interests must yield to, if inconsistent with, all rights and interests which exist pursuant to valid laws of the Commonwealth and the Northern Territory. The claimants' non-exclusive communal native title right allows free access to the waters for the purposes of travel, fishing, hunting and gathering for personal needs and in order to observe traditional laws and customs, to visit places of cultural and spiritual importance and to safeguard their spiritual and cultural knowledge.

Yarmirr v Northern Territory has been appealed. Depending on the outcome of that appeal, the case may provide guidance in the mediation a number of other claims which include off shore waters. Similarly, it had been hoped that the outcome of the long running *Yorta Yorta* case would clarify the position of native title rights and interests in respect of inland waters. That hope was not realised. The claim by the Yorta Yorta people to 1,130 sq km in Victoria and New South Wales in the region of the Barmah Forest straddled the States' borders and included portion of the Murray River and other waterways. The Yorta Yorta claim was referred to the Federal Court by the Tribunal in May 1995. In a judgment handed down on 18 December 1998 Justice Olney determined that native title does not exist in the land and waters claimed. He wrote of the claimants: 'The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their customs'.[32] That judgment has been appealed.

Case Study No.5 – Miriuwung and Gajerrong

Ben Ward and Ors v the State of Western Australia and Ors took native title determination to a new plane. The claim covered 7,800 sq km in the Kimberley region of Western Australia, extending into the Northern Territory. It had been

lodged with the Tribunal on 6 April 1994 and was referred to the Federal Court on 7 February 1995 after a lack of progress in mediation. There were three groups of applicants and over 100 respondents as well as the State and Territory Governments and various other government parties.

In considering the claims, the Court examined the historical, linguistic, anthropological and genealogical evidence and the 'primary' evidence of the applicants concerning the observance of traditional laws, customs and practices which maintained connection with the land and with those who occupied the land before and after sovereignty. It looked at whether extinguishment of native title had since occurred over the land claimed by reference to the legislative basis on which other interests in the land had been granted and the character of the leases which had been issued.

On 24 November 1998, the Court determined that common law native title is held by the Miriuwung and Gajerrong people and also by the Balangarra peoples in respect of Boorroonoong (Lacrosse Island), off the Western Australian coast. Further, it determined that the Miriuwong and Gajerrong peoples hold native title over large areas including a national park (Keep River National Park), land flooded to create artificial lakes (Lake Argyle and Lake Kunnunurra), land covered by pastoral leases, mining leases (including the Argyle and Normandy diamond mining leases) and some other leases, and various reserves established for particular purposes such as conservation, recreation, irrigation and grazing, particularly where the land was used only partially or temporarily for its dedicated purpose. It confirmed that native title had been extinguished over places such as properly dedicated roads or streets and freehold grants. It further found that native title had been extinguished over that part of a pastoral lease on which a homestead had been built and where public works of a permanent nature such as a power station had been constructed.

As the exercise of native title rights to possess, occupy, use and enjoy the land by the common law native title holders is constrained by the vesting of concurrent rights in other parties in the same land or water, Lee J observed:

> How concurrent rights are to be exercised in a practical way in respect of the determination area must be resolved by negotiation between the parties concerned. It may be desirable that the parties be assisted in that endeavour by mediation, a course contemplated, perhaps, by ss.86B(5), 86A(1)(b)(iv) of the Act.[33]

An appeal had been lodged against the decision.

Agreements

Hopevale was the first claim to have been registered following negotiations leading to agreement as to the future management of land over which native title exists. As Justice French suggested, it was seen as a signpost to the future. A court can determine that native title exists, but its role does not extend to determining the arrangement whereby that land is to be managed subsequently. For example, issues which need to be worked out in relation to co-existing rights over pastoral lease land include arrangements for access, water use, site protection and liability for personal injury or damage.[34] For those closely involved with native title, it is the ongoing relationship between the exercise of native title rights and of other rights and interests which is seen as the central issue.

In two recent Federal Court cases, the Court has commented favourably on the use of negotiation for dealing with native title matters. As well as the comments of Justice Lee quoted above, there are also relevant comments by Justice Olney in the *Yorta Yorta* judgment. Although that case

produced a quite different outcome, Justice Olney nevertheless noted:

> The time and expense expended in the preparation and presentation of large parts of the evidence has proved to be unproductive, a circumstance which calls into question the suitability of the processes of adversary litigation for the purpose of determining matters relating to native title.[35]

The history in *Delgamuuk v British Columbia* demonstrates the desirability of agreement. That claim, over 58,000 square kilometres of the Canadian Province of British Columbia, progressed through a trial in the Supreme Court,[36] to the Court of Appeal of that Province[37] and thence to a full appeal in the Supreme Court of Canada. The process took 11 years, but resulted in a recognition under Canadian common law of a form of native title derived from occupation of the land prior to European settlement, and which is unalienable except by surrender to the Crown. The Supreme Court then remitted the matter, with a plea to the parties to negotiate, expressed by Lamer CJ as follows:

> Finally, this litigation has been long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed in litigation and to settle their dispute through the courts.....Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgements of this Court, that we will achieve the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.....[38]

Many agreements which allow negotiations to proceed and which may one day form the basis of a native title determination have been reached or are being discussed under the oversight of the Tribunal. An audit of agreements by the Tribunal indicated that at 10 September 1998 there had been over 1200 agreements[39] struck between native title parties and others, said to indicate a growing culture of mediation and negotiation. While the majority of the agreements were mining related, several hundred were agreements leading to native title. An important example is a framework agreement between the Spinifex people and the Western Australian Government. Their claim relates to 50,000 square kilometres of desert country abutting the South Australian border south east of Warburton. After two years of mediation by the Tribunal, the agreement signed by the Western Australian Premier anticipates further negotiations on a permanent and secure form of land tenure for the Aboriginal claimants and their involvement in environmental management and economic development.[40]

Other well known agreements involve local governments. The agreement between native title claimants in the Broome area in Western Australia and the Shire of Broome is one example, the Redland/Quandamooka Agreement between the Redland Shire Council in Queensland and the Quandamooka Land Council Aboriginal Corporation, covering North Stradbroke Island and the surrounding seas, is another. As land use and management is a major task of local governments throughout Australia, much work has been done by the Australian Local Government Association (AGLA) to provide guidance to their members in negotiating agreements with Aboriginal residents.[41]

The amended Act provides an improved capacity for parties to enter into Indigenous Land Use Agreements (ILUAs).[42] The original Act provided for agreements to be reached between native title holders and the Commonwealth or a State or Territory. While a worthy concept, it proved in practice to be of limited use. The amended Act expands the provisions into a new scheme for setting up binding ILUAs. There are now three types of such agreements possible under the Act, differentiated by whether there has been

an approved determination of native title over the whole of the area covered by the agreement, the identity of the parties to the agreement, the effect of the agreement and the registration requirements.[43] A Register of ILUAs is established and a registered ILUA has effect as if it were a contract among the parties. The Register is maintained by the National Native Title Registrar, but the function may be delegated to a State body or office holder.

The possibility that an ILUA Register might be maintained by a State authority is but one small example of the potentially larger role for the States and Territories under the amended Act. The original Act allowed the States to establish parallel regimes for the arbitration of future act matters. Only South Australia did so, placing the responsibility on its Environment and Resources Development Court.[44] From 30 September 1998 equivalent state bodies recognised by the amended Act may exercise wider powers.

Conclusion

Regardless of the manner in which a final outcome has been reached in those places now on the National Native Title Register, they had in common relatively well represented and cohesive applicant groups. Even so, the Dunghutti claim took over two years and Hopevale about one and a half years of intensive mediation. The Croker Island claim was with the Tribunal and then the Court for about three and a half years in all while Yalangi also took about three years. The Miriuwung and Gajerrong claim, with even more parties involved, took longer. The experience over twenty years in the Northern Territory under the *Aboriginal Land Rights (Northern Territory) Act 1976* demonstrates that an outcome in these matters cannot be achieved speedily, as does the history in Canada and in other countries grappling with native title.

There will often be complex anthropological, archaeological, historical and linguistic evidence and land tenure information to be gathered and assessed. Some State governments have recognised the need to provide claimants and others with an indication of the material, which, in the view of that State, will provide a basis on which mediation of a claim will progress. But many parties come to the negotiating table burdened by ignorance and antagonism.

Working against speedy finalisation of claims are factors such as large numbers of parties, multiple industry interests, on-going resistance to the reality of native title (especially among many farmers and pastoralists, some of their industry bodies and the towns and communities they influence), disputes between claimant groups leading to overlapping claims, and sometimes ineffectual representation of the parties.

The administration of the Act by the Tribunal, and thus its capacity to efficiently manage the claims, had also been impeded by the revealed inadequacy of some legislative provisions such as those relating to acceptance and registration. While the need to fix those practical problems has been widely accepted, amendments to achieve that end were caught up in the political process by being included in the same Bill as more contentious proposals. Bills to amend the Act have been before the Commonwealth Parliament since the Keating Government's Native Title Amendment Bill 1995 was introduced in November 1995, but only in the latter half of 1998 was an amending Act passed.

Implementing the extensive amendments to the Act, especially the complex new registration test, will further slow down the process in the short term. The Federal Court has a larger role to play in the new scheme and it may be that oversight of the mediation process by the Court will help parties focus on the need to be seen

to advance the negotiations. In the longer term, agreements will continue to be reached allowing the relationship between native title and other rights and interests to be managed effectively. The outcome of the mediations already conducted by the Tribunal will inevitably lead to the recognition of native title in more parts of Australia. There are now numbers of cases which are not far from finalisation.[45] If State Governments move successfully to establish 'equivalent bodies' as the new law allows we may see registration of native title by State as well as Commonwealth authorities. Whichever path is chosen and however long the process takes, native title remains a reality in Australian law.

Endnotes

1 *Mabo v State of Queensland [No.2]* (1992) 175 CLR 1
2 Justice RS French *'Wik and Beyond – An Overview of the Proposed Amendments to the Native Title Act 1993'* November 1997
3 *Jim Fejo and David Mills on behalf of the Larrakia people v Northern Territory of Australia and Oilnet (NT) Pty Ltd* (1998) 156 ALR 721
4 *Mabo v State of Queensland [No.1]* (1988) 166 CLR 186
5 *Wik Peoples v State of Queensland (1996)* 187 CLR 1
6 *Native Title Amendment Act 1998*
7 E Wensing *'Native Title: Can it be Regulated?'* Keeble Lecture, Royal Australian Planning Institute Queensland Division, August 1997
8 *Buck v The State of New South Wales*, (Federal Court of Australia, Lockhart J, 7 April 1997, unreported)
9 *Native Title Act* s30 (unamended)
10 The 'NNTT Timeline' provides details of all claims, listed by region. It can be accessed on the Tribunal's website http://www.nntt.gov.au.
11 *Erica Deeral (on behalf of herself and the Gamaay peoples) & Ors v Gordon Charlie & Ors,* (Federal Court of Australia, Beaumont J, 8 December 1997, unreported)
12 *Western Yalanji or "Sunset Peoples" v Alan and Karen Pedersen & Ors*, (Federal Court of Australia, Drummond J, 28 September 1998, unreported)
13 *Mary Yarmirr & Ors v Northern Territory Australia & Ors* (1998) 156 ALR 370
14 *Ward v Western Australia* (Federal Court of Australia, Lee J, 24 November 1998, unreported)
15 *Native Title Act* (unamended) s 73
16 *Brandy v Human Rights & Equal Opportunity Commission* 183 CLR 245
17 *Native Title Act* Part 6 Division 4A
18 *Native Title Act* Part 6 Division 5
19 *Migration Act 1958* s 353
20 *Social Security Act* s 1246
21 See IRT and SSAT Annual Reports 1996-1997
22 See Lane, Patricia *Mediation Under the Native Title Act* AMPLA 1998 Vol.17 No.3
23 Justice RS French 'Introductory Notes to Mediation Conferences' in Meyers G(ed) *Implementing the Native Title Act: First Steps, Small Steps*, NNTT 1996
24 Justice RS French 'The National Native Title Tribunal and the Native Title Act; Agendas for Change' in *Implementing the Native Title Act* NNTT, 1996
25 NNTT Timeline
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44 The *Environment, Resources and Development Court (Native Title) Amendment Act 1994* No. 93 of 1994 (SA) came into effect on 17 June 1996

45 Consent agreements in two Torres Strait Island claims covering Moa and Sabai Islands were announced on 12 February 1999.