Statutory Schemes of Native Title and Aboriginal Land in Queensland:

The Relationship of the Queensland *Aboriginal Land Act 1991* with the Commonwealth *Native Title Act 1993* and the *Native Title (Queensland) Act 1993*

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INTRODUCTION

Recognition, protection and grant of Aboriginal interests in land are affected by both Commonwealth and State legislation. Queensland legislation contained in the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld)[1] provides for the statutory grant of land to indigenous inhabitants. These Acts, together with the *Native Title Act 1993* (Cth) and the *Native Title (Queensland) Act 1993*, provide the legislative

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[1] The *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) are virtually identical in their terms. References in this article will be to the *Aboriginal Land Act 1991* (Qld) (hereinafter referred to as the *ALA*). Both Acts commenced operation on 21 December 1991. In relation to the ALA, see F. Brennan, 'The Queensland Aboriginal Land Act 1991' (1991) 50 *Aboriginal Law Bulletin* 10; J. Sutherland, 'Queensland Land Rights: A Derogation from Poor Standards Elsewhere?' (1991) 52 *Aboriginal Law Bulletin* 3; B. Miller, 'Claytons Land Rights' (1991) 52 *Aboriginal Law Bulletin* 10; F. Selnes, 'Aboriginal Land Rights in Queensland and their Impact on Natural Resources' (1993) 10 *Environmental and Planning Law Journal* 423; and J.R. Forbes, 'Statutory Land Rights in Queensland' (1995) 1(4) *Native Title News* 56.

schemes in Queensland involving Aboriginal interests in land. The Commonwealth and Queensland native title legislation[2] allow for the recognition and protection of native title to land. Rights and interests further granted or recognised under both legislative schemes are also subject to regulation by State and federal legislation.

The Queensland legislation, comprising the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991*, was enacted prior to *Mabo v Queensland (No. 2)*[3] and therefore prior to the recognition of Aboriginal title at common law. These Acts were introduced to provide for the granting of statutory title at a time when no avenue for the recognition of native title existed. The preamble to the *Aboriginal Land Act 1991* (Qld) recites that 'special measures' need to be enacted for the purpose of securing adequate interests and responsibilities of Aboriginal people in Queensland.[4] These Acts do not in themselves create rights to land but rather provide a framework by which Aboriginal people can obtain title to certain categories of land and can exercise control over the use and management of that land.[5]

The *Native Title Act 1993* (Cth) and the *Native Title (Queensland) Act 1993* were enacted by the Commonwealth Government and the Queensland State Government respectively to provide statutory recognition to common law native title as found to exist by the High Court in *Mabo*.[6] The constitutional validity of the Commonwealth legislation has now been upheld by the High Court in *Western Australia v The Commonwealth*.[7] The Commonwealth native title legislation is designed to establish a national scheme of native title which requires the States to comply with it in relation to both the validation of 'past acts' and in the regulation of future dealings with land. The Commonwealth *Native Title Act 1993* validates titles and acts which might have been invalid because of the existence of native title and which were granted or undertaken by the Commonwealth

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2 In relation to the native title Acts, see M.A. Stephenson (ed.), *Mabo: The Native Title Legislation* (Brisbane: University of Queensland Press, 1995); R. Bartlett and G. Meyers (eds), *Native Title Legislation in Australia* (Perth: Centre for Commercial and Resources Law, University of Western Australia and Murdoch University, 1994); and in relation to the *Mabo* decision, see M.A. Stephenson (ed.), *Mabo: A Judicial Revolution* (Brisbane: University of Queensland Press, 1993). See also P. Butt, 'The Native Title Act: A Property Law Perspective' (1994) 68(4) *Australian Law Journal* 285 and G. Neate, 'The Native Title (Queensland) Act 1993', in R. Bartlett and G. Meyers (eds), *Native Title Legislation in Australia* (Perth: Centre for Commercial and Resources Law, University of Western Australia and Murdoch University, 1994), 44.

3 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

4 *ALA* preamble, para. 9. See *Gerhardy v Brown* (1985) 159 CLR 70 for a discussion of the 'special measures' provision in the *Racial Discrimination Act 1975* (Cth).

5 The long title to the *Aboriginal Land Act 1991* (Qld) states that the Act is one 'providing for the grant, and the claim and grant, of land as Aboriginal land, and for other purposes'.

6 (1992) 175 CLR 1.

7 (1995) 128 ALR 1. The High Court in this case found s. 12 of the *Native Title Act 1993* (Cth) (hereinafter referred to as the *NTA*) (which provided that the common law of Australia in respect of native title had the force of a law of the Commonwealth) to be invalid and severable.

Government.[8] The Commonwealth Act permits titles granted and acts undertaken by State Governments to be validated by States.[9] The Act does not validate State-granted titles or acts. Complementary legislation by States is therefore necessary for validation of State-granted titles and acts.[10] The Commonwealth *Native Title Act 1993* further provides that a State may confirm existing rights of ownership of natural resources and existing rights of public access — for example, beaches[11] — and also provides that States may establish State-based mechanisms for deciding claims to native title that comply with the criteria in the Commonwealth Act and are consistent with the mechanisms established by the Commonwealth Act.[12] Extinguishment of native title cannot be contrary to the *Native Title Act 1993* (Cth),[13] and therefore States must ensure that any extinguishment of native title in the validation of past dealings or in the conduct of future dealings is in accordance with the Commonwealth legislation. Complementary legislation by States was therefore required[14] and for these reasons Queensland enacted the *Native Title (Queensland) Act 1993* which validates 'past acts', contains interim provisions for future dealings, confirms ownership of State resources and establishes the Queensland Tribunal.[15] This legislation has been passed, but only partially proclaimed

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[8] *NTA*, ss. 14(1) and 228. The *NTA* does not affect valid titles or legislation.

[9] *NTA*, s. 19(1).

[10] See *Native Title (Queensland) Act 1993* (hereinafter referred to as the *NTQA*), s. 8.

[11] *NTA*, s. 212(1) and (2). See *NTQA*, ss. 17(1), (2), (3) and 18.

[12] *NTA*, s. 251.

[13] *NTA*, s. 11(1).

[14] The High Court in *Western Australia v The Commonwealth* (1995) 128 ALR 1 found the Western Australian legislation, the *Land (Title and Traditional Usage) Act 1993* (WA), to be invalid as this legislation was inconsistent with the Commonwealth *Native Title Act 1993* and with s. 10 of the *RDA*.

[15] The main objects of the *Native Title (Queensland) Act 1993* are set out in s. 3(2):

'(a) in accordance with the Commonwealth Native Title Act, to validate past acts invalidated because of the existence of native title and to confirm certain rights; and

(b) to ensure that Queensland law is consistent with standards set by the Commonwealth Native Title Act for future dealings affecting native title; and

(c) to establish State-based mechanisms for deciding claims to native title that are complementary to, and consistent with the mechanisms established by the Commonwealth Native Title Act.'

The *NTQA* is divided into 13 Parts which are:

Part 1 — a preamble and definition;
Part 2 — validation of past acts and their effect;
Part 3 — confirmation of ownership of natural resources and public access;
Part 4 — the establishment of the Queensland Native Title Tribunal;
Part 5 — the recognition of the Tribunal and the Wardens Courts as 'recognised State bodies' and 'arbitral bodies';
Part 6 — native title to be held by prescribed body corporate;
Part 7 — scheme for applications to the Tribunal — *locus standi* and 'right to negotiate';
Part 8 — forms of inquiry to be undertaken and determinations by the Tribunal;
Part 9 — administration provisions of the Tribunal;
Part 10 — establishment of the Native Title Register;
Part 11 — compensation;
Part 12 — interim provisions for future dealings; and
Part 13 — amendments to other Acts.

to date.[16] The Queensland legislation complements, and is generally consistent with the scheme and substance of the Commonwealth *Native Title Act 1993*, but it is not intended to be comprehensive and where the State legislation is silent on any aspect concerning native title then reference to the Commonwealth Act is necessary.[17] It is therefore essential for certain purposes to read the Commonwealth and State native title legislation concurrently. If any inconsistency were found to exist between the two Acts, then by virtue of s. 109 of the Constitution the Commonwealth legislation would prevail.

The statutory scheme of title under the *Aboriginal Land Act 1991* (Qld) and the native title legislative scheme (comprising the *Native Title Act 1993* (Cth) and the *Native Title (Queensland) Act 1993*) are not complementary and do not interrelate. They are independent legislative schemes that create or recognise separate and independent rights. Rights granted under the native title Acts are not capable of being added to rights granted under the statutory land grant scheme. Thus, rights in relation to native title under either the *Native Title Act 1993* (Cth) or the *Native Title (Queensland) Act 1993* will not be available to Aboriginal people who have been granted land under the *Aboriginal Land Act 1991* (Qld), the only exception being where a grant under the *Aboriginal Land Act 1991* (Qld) does not extinguish existing native title rights.[18]

In this article, Aboriginal land grants and native title rights are compared and the basis for those rights is considered.[19]

BASIS OF CLAIM AND PROOF OF NATIVE TITLE

Under the *Aboriginal Land Act 1991* (Qld),[20] land may be claimed on the basis of traditional affiliation, historical association, or economic or cultural viability. Claims based on traditional affiliation require the claimant group to show a common connection with the land based on spiritual and other associations with rights in relation to, and responsibilities for

[16] *NTQA*, ss. 1 and 2 commenced on the date of assent. Part 1 (ss. 2(3)–6), Parts 2 and 3 (ss. 7–18), Part 11 (ss. 144–146) and Part 13 (Division 1, ss. 162A–162E, 163A and 164–164D, Division 2, ss. 170A–170E, 171A and 172–172D, and Divisions 4 and 5) commenced on 28 November 1994. Sections 106A–160M, 161A–161G, 168A–168N and 169A–169G commenced on 5 December 1994, ss. 157–162 and 165–170 commenced on 21 December 1994 and Part 12 (ss. 147–151 and 154–156) commenced on 1 June 1995. The *Native Title (Queensland) Amendment Act 1994* commenced operation on 24 November 1994.

[17] *NTQA*, s. 5 provides that the words and expressions used in the Commonwealth *Native Title Act* have the same meanings in the *NTQA* as they have in the Commonwealth *NTA*, unless the context or the subject matter indicates otherwise or unless a definition is given in s. 4 of the *NTQA*.

[18] *ALA*, ss. 33(1) and 5(1). See also Part 12, *infra*.

[19] This article does not address the legislative framework governing DOGIT (Deed of Grant in Trust) land in Queensland.

[20] *ALA*, s. 46.

the land under Aboriginal tradition.[21] To claim historical association, it must be shown that the claimants or their ancestors lived on, or used that land, or land in the district or region, for a substantial period.[22] Here the relevant Aboriginal elders of the claimant group must be consulted.[23] If the basis of the claim is economic or cultural viability, then it must be shown that the land will assist in restoring, maintaining or enhancing the capacity for self-development, and the self-reliance and cultural integrity of the claimant group. Regard must also be had for the proposed use of the land.[24] Neither National Parks nor Deeds of Grant in Trust (hereinafter referred to as DOGIT) lands[25] are claimable on the ground of economic or cultural viability.[26]

Under the *Native Title Act 1993* (Cth) and the *Native Title (Queensland) Act 1993*, the basis of a claim for the recognition of native title is proof of a connection with the traditional land or waters in accordance with the laws and customs of the Aboriginal group.[27] On the issue of proof, the native title legislation does not change the common law as established in *Mabo*.[28] It is not exactly clear what connection with the land will have to be shown. Is a spiritual relationship enough? Neither the *Native Title Act 1993* (Cth) nor the *Native Title (Queensland) Act 1993* excludes the possibility.[29] Proving a spiritual relationship would not be easy. In *Coe v Commonwealth*,[30] Mason CJ referred to native title holders maintaining a *physical* connection with the land in order to prove native title but did not clarify the extent of this connection.[31] This suggests that native title holders will have a better chance of success if a physical connection to the land is maintained. There must also be a substantial maintenance of that

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[21] *ALA*, s. 53(1). A claim under the *ALA* based on traditional affiliation with the land is most like a '*Mabo* claim'; however, it is not necessary to prove a continuous connection with the land. See the Land Tribunal's Report on *Aboriginal Land Claims to Cape Melville National Park, Flinders Group National Park, Clack Island National Park and Nearby Islands*, Queensland Land Tribunal Report (Brisbane: Government Printer, May 1994). To establish a 'connection' with the land it is not essential to be in occupancy (202–9). The tradition is the contemporary tradition as it exists in the Aboriginal community (223–65 and 775–9).

[22] *ALA*, s. 54(1).

[23] *ALA*, ss. 53(2) and 54(3).

[24] *ALA*, s. 55.

[25] DOGIT lands are granted in trust under the *Land Act 1994* (Qld), s. 451.

[26] *ALA*, s. 46(2) and (3).

[27] *NTA*, s. 223. The *Acts Interpretation Act 1954* (Qld) has been amended to reflect the definition in the *NTA*. Native title will not be recognised on the basis of economic or cultural need; however, such factors could possibly be taken into consideration in regional agreements pursuant to s. 21 of the *NTA*.

[28] (1992) 175 CLR 1.

[29] A requirement that a 'physical connection' be established was removed from an earlier draft of the *NTA* regulations (forms 1 and 3), indicating that a physical connection may not be essential.

[30] *The Wiradgerie Claim* (1993) 68 ALJR 110, 119; 118 ALR 193, 206.

[31] In *Clarkson Non-Claimant Native Title Application*, October 1994, Mr Flood of the National Native Title Tribunal stated that he disagreed that a physical connection with the land is required.

connection. Neither the native title legislation nor the High Court in *Mabo*[32] has specified a time frame for maintaining such connection. Certainly the implication is that recent occupation or modern usage will not qualify. In addition, this traditional connection must be maintained in accordance with the laws and customs of the community. The High Court in *Mabo*,[33] however, accepted that laws and customs can be those as currently observed providing that there is continuity in the use of the land or resources. Native title as a communal title requires the existence of an identifiable group or community. Applicants must prove membership of the group and this requires recognition of a person's membership by the elders in authority. Whilst communal groups may change over time, native title can be held only by indigenous groups and their biological descendants. These requirements remain unchanged by the native title legislation.

It will be much more difficult to establish proof of native title than it will be to satisfy the requirements for a claim under the *Aboriginal Land Act 1991* (Qld).

Who Can Claim?

A group of Aboriginal people may claim land under the *Aboriginal Land Act 1991* (Qld).[34] Applications under the *Native Title Act 1993* (Cth) for a determination of native title[35] can be brought by a person alone or by a group of people claiming to hold native title and also by non-claimants, either the holder of an interest in the entire area or a government.[36] Applications for a revised determination of native title can be commenced by the registered native title body corporate, the government or the Native Title Registrar.[37] Persons whose interests are affected are entitled to notification of the application and can choose to oppose the application.[38]

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[32] (1992) 175 CLR 1.

[33] (1992) 175 CLR 1, 58–63, 70, per Brennan J; 88–90, 99–100, 109–10, per Deane and Gaudron JJ.

[34] *ALA*, s. 45. Aboriginal people are defined as people of the Aboriginal race of Australia: *ALA*, s. 8. See the Land Tribunal's Report on *Aboriginal Land Claims to Cape Melville National Park, Flinders Group National Park, Clack Island National Park and Nearby Islands*, Queensland Land Tribunal Report (Brisbane: Government Printer, May 1994). The Tribunal noted that descendants include a descendant under Aboriginal tradition (199–201). No definition of Aboriginal is given in the native title legislation.

[35] *NTA*, s. 13(1).

[36] *NTA*, ss. 61 and 67. The State Minister may make the application if the area is wholly within the jurisdictional limits of the State. See the wide definition of interest (either legal or equitable, or any right, power or privilege) in *NTA*, s. 253. *NTQA*, s. 29 correlates with the Commonwealth *NTA*.

[37] *NTA*, ss. 61 and 13(1).

[38] *NTA*, ss. 66 and 68.

Time Limits Regarding Claims

All claims under the *Aboriginal Land Act 1991* (Qld) must be initiated within 15 years of the commencement of the Act.[39] In contrast, both the *Native Title Act 1993* (Cth) and the *Native Title (Queensland) Act 1993* have no restrictions relating to the time within which a claim must be brought.

Onus of Proof

The required material to accompany claims under the *Aboriginal Land Act 1991* (Qld) is specified in s. 47 of that Act. For native title claims under the *Native Title Act 1993* (Cth) and the *Native Title (Queensland) Act 1993*, the requirements are listed in s. 62 of the Commonwealth Act and s. 32 of the Queensland Act.[40] Where the requirements in the above-mentioned sections are met, then the Registrar must accept the application unless it is frivolous or vexatious or where a *prima facie* case has not been made out.[41] A Presidential member of the Tribunal can override the Registrar's rejection but not the Registrar's acceptance.[42] In *Coe v Commonwealth*,[43] Mason CJ found that the onus of proving native title rests with the native title claimants. Aboriginal people seeking a determination of native title must establish that their connection with the land has been maintained and also must conduct tenure searches to prove non-extinguishment of that title.

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[39] *ALA*, s. 48. The *ALA* commenced on 21 December 1991.

[40] *NTA*, s. 62 and *NTQA*, s. 32. Section 30 of the *NTQA* provides that the application must contain information prescribed by regulation.

[41] *NTA*, s. 63 and *NTQA*, s. 33.

[42] *NTA*, ss. 169(2) and 63(3). President of the NNTT, Justice R.S. French, 'Discussion Paper on Proposed Changes to Native Title Act 1993', March 1995, wherein French J notes the statutory inconsistencies in the *NTA* in that a different test is applied when the question comes before a Presidential member and that is that a *prima facie* claim can be made out (*NTA*, s. 63(3)). An appeal lies to the Federal Court where the Registrar's rejection is confirmed by the Presidential member. *In re the Waanyi Peoples Native Title Determination*, unreported, National Native Title Tribunal, Application No. QN949/9 (14 February 1995), the Registrar of the National Native Title Tribunal rejected the claim as no *prima facie* case was made out. French J upheld the Registrar's decision. It was considered that a *prima facie* case involved the applicant making submissions showing the existence or availability of evidence to justify a finding that native title existed and that native title had not been extinguished by prior inconsistent dealings with the land. This question is on appeal to the Full Federal Court.

[43] *The Wiradgerie Claim* (1993) 68 ALJR 110, 119; 118 ALR 193, 206. See Neate, *supra* n. 2 at 64, regarding the current practice of the Land Tribunal on tenure history searches.

CLAIMABLE LAND

For the purposes of claims under the *Aboriginal Land Act 1991* (Qld), land is designated as either 'transferable' or 'claimable'.[44] Transferable land can be converted without a claim being made under the Act because in most cases this land has been designated or recognised for Aboriginal purposes and does not require a claim under the *Aboriginal Land Act 1991* for the continuance of the Aboriginal use.[45] Transferable lands are restricted to DOGIT land, Aboriginal reserve land under the *Land Act 1994* (Qld), Aurukun Shire and Mornington Island Shire lease land and, after the 1994 amendments to the Queensland *Aboriginal Land Act 1991*, available Crown land declared by regulation to be transferable land. If land is classified as 'transferable' land, then a deed of grant in fee simple will be issued to the grantees, appointed by the Minister, as trustees for the Aboriginal people of the land.[46] Transferable land after it becomes Aboriginal land under the Act is termed 'transferred' land.

Once land is designated as 'claimable' under the *Aboriginal Land Act 1991* (Qld), Aboriginal people may apply to the Land Tribunal which has the power to make recommendations to the Minister regarding the grant of land titles.[47] Claimable land is Crown land that is declared by regulation to be claimable (and this can be vacant Crown land or National Park land) or is 'transferred' land (apart from those areas designated as not to be claimable).[48] No claims can be initiated until land has been first declared as claimable by regulation. There is no requirement under this Act for the government to declare any land to be claimable land, nor is there any provision for Aboriginal peoples to request certain lands to be made available for claim. This is not to say that such requests are not made. Vacant Crown land that is currently free from all other interests, except native title interests, may be declared to be claimable. Prior tenures that may have existed over the land are irrelevant under this legislative scheme. Vacant Crown land is not claimable if, *inter alia*, it is in a city, town or township, is a road, is set aside for public purposes, or is a stock route, forest or timber reserve, or is subject to a special mining lease.[49] For example, the land on which the Weipa special bauxite mining leases were granted would not be available for claim. The *Aboriginal Land Act 1991*

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[44] *ALA*, ss. 11 and 17. For a discussion of the impact of the *ALA*, see Selnes, *supra* n. 1 at 425–8.

[45] *ALA*, ss. 28 and 30.

[46] *ALA*, ss. 11, 12 and 27–38.

[47] *ALA*, Part 2, Divisions 3 and 4. See s. 17.

[48] *ALA*, ss. 18 and 24. Section 18 states that a regulation may declare that an area of transferred land is not claimable land. Aboriginal holders of transferred land may wish to convert the land to granted land to obtain the benefits of the rights under Part 5, Division 2 of the *ALA*. The additional right that grantees may obtain in relation to granted land is the right to mortgage or sublease the land with the consent of the Minister. *ALA*, s. 76(4).

[49] *ALA*, s. 19. See also ss. 20–25.

(Qld) also stipulates that freehold land, leasehold land, sea waters, sea beds and most watercourses are not claimable.[50] Tidal land can be declared to be available Crown land.[51] If claimable land is granted, it will be held in fee simple by the grantees as trustees for the Aboriginal people and their descendants.[52]

In contrast, under both the *Native Title Act 1993* (Cth) and the *Native Title (Queensland) Act 1993* applications for a determination of native title can be made over vacant unallocated Crown lands but only where the native title holders have maintained the requisite connection with the land[53] and where native title has not been extinguished by prior inconsistent dealings with the land. Thus it is first necessary to undertake a tenure history search of any land proposed to be claimed to determine how the land has been dealt with in the past and if any prior grants or acts had the effect of extinguishing native title. The extinguishment of native title becomes complex because it is necessary to consider extinguishment of native title under three general time frames, as the law applies differently depending on when the grant of title was first made by government. Extinguishment will occur in the following time frames.

1. **Past extinguishment prior to 1975.** Past extinguishment prior to 1975 will be governed by the common law under *Mabo*.[54] The High Court in *Mabo*[55] found that the government's power to extinguish native title was subject only to the Commonwealth *Racial Discrimination Act 1975* (hereinafter referred to as the *RDA*) which commenced on 31 October 1975. Therefore, acts and grants made by the government prior to the passing of the *RDA* in 1975 would not be invalid simply because of the existence of native title and would not come within the definition of 'past acts' in the *Native Title Act 1993* (Cth).[56] The High Court in *Mabo*[57] found that native title could be extinguished by government action. All of the majority Judges found this would occur by legislation (and grants made under legislative action) which showed a clear and plain intent to extinguish native title. Thus, native title will be extinguished by a grant of freehold title that is an estate in fee simple, a grant of a lease[58] or a grant of interests in land that is inconsistent with native title. The majority in the High Court agreed that if the

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[50] *ALA*, s. 25. See also ss. 20–24.
[51] *ALA*, s. 21.
[52] *ALA*, ss. 63 and 65. See also s. 64 with respect to leases.
[53] Refer to the above discussion on Claim and Proof of Native Title.
[54] (1992) 175 CLR 1.
[55] *Id.* 68–73, per Brennan J; 110–12, per Deane and Gaudron JJ.
[56] However, this may not be the position if a court finds that the Crown (that is, the Government) had breached a trust obligation or a fiduciary duty it owed to the native title holders. See definition of 'past act' in *NTA*, s. 228.
[57] (1992) 175 CLR 1, 63–65, per Brennan J; 110–11, per Deane and Gaudron JJ; 192–8, per Toohey J.
[58] This is being challenged in the *Wik* and *Waanyi* claims.

Crown had granted an interest that was inconsistent with native title, then native title would be extinguished to the extent of the inconsistency.[59] Native title is a bundle of rights and not all rights of native title are necessarily lost. The extent of extinguishment must be determined in accordance with the facts of each case. Native title would not continue where the Crown has appropriated land to itself and dedicated the land as road,[60] or used the land for other permanent works. All native title rights would not necessarily be extinguished by declarations of land as State Forests, Timber Reserves or National Parks. If the Crown has reserved land or set aside land pursuant to the *Land Act 1994* (Qld) for future roads or for schools, railways or post offices, then native title may continue as both interests could exist concurrently. Conduct by the native title holders themselves may also extinguish native title where, for example, native title was surrendered to the Crown voluntarily or the native title holders ceased to acknowledge their laws and customs or lost their connection with the land, or on the death of the last member of the group or clan. Once native title has been extinguished or lost in the period prior to 1975, it cannot be revived.

2. **Past extinguishment between 1975 and 1994.** The *Native Title Act 1993* (Cth) validates 'past acts' which are attributable to the Commonwealth, and the *Native Title (Queensland) Act 1993* validates 'past acts' attributable to the State.[61] Why was it necessary to validate titles? What effect does the *RDA* have on grants of fee simple or leasehold land made after the enactment of the *RDA* on 31 October 1975? Sections 9 and 10 of the *RDA* provide in effect that if Aboriginal people are deprived of certain rights by discriminatory laws, then those rights are not lost. The right in question is the right not to be arbitrarily deprived of property. What rights are being denied to Aboriginal title holders because of discriminatory laws? Two possible answers could be given: first, the right not to be deprived of the land itself, in which case all title (that is freehold or leasehold) granted by government since 1975 over land in which native title exists would be invalid; secondly, the right not to be deprived without adequate compensation, in which case

[59] (1992) 175 CLR 1, 68–73.

[60] Under the *Land Act 1994* (Qld), s. 95, absolute property of a road is vested in the State. In relation to roads, see J. Simpson, 'The Implications of Native Title for Roads in Queensland' (1995) 14(1) *AMPLA Bulletin* 30.

[61] *NTA*, s. 14 and *NTQA*, Part 2. Section 8 of the *NTQA* validates 'past acts' pursuant to s. 19 of the *NTA*. To ensure that the Queensland legislation has the same effect as the Commonwealth sections, the *NTQA* in ss. 10, 11, 12, 13 and 14 contains provisions that correspond to ss. 15 and 16 of the *NTA*. The wide definition in *NTA*, s. 226, of 'act' includes virtually every activity. See *NTA*, s. 228 which defines 'past acts' as acts that are invalid to some extent because of the existence of native title. 'Past acts' include legislative acts between 31 October 1975 and 1 July 1993 and titles granted by the Crown between 31 October 1975 and 31 December 1993.

title granted by government since 1975 over land in which native title exists would be valid but subject to the payment of compensation. This issue of invalidity has yet to be tested before a court. The High Court in *Western Australia v The Commonwealth*[62] found it unnecessary to discuss this precise question but confirmed that invalidity could result from dealings inconsistent with the *RDA*.

'Past acts' are grouped into four different categories of grants for the purposes of validation and extinguishment of native title.[63] In the validation of past grants, native title will be extinguished in some cases and in other cases native title is merely suspended for the term of the grant and revives at the end of that particular grant.

Category A includes freehold estates, certain leases such as commercial, agricultural, pastoral or residential, and that part of a mining lease which forms part of a permanent city, town or private residence together with associated infrastructure, and certain public works on Crown lands.[64] Category A 'past acts', when validated, totally *extinguish* native title provided that the grants or leases were in force on 1 January 1994 or, if occurring after that date, are done pursuant to a pre-existing option or legal right, and in the case of public works provided they were constructed prior to 1 January 1994 and still exist on that date, or were commenced before 1 January 1994,[65] or were public works undertaken pursuant to an authority given during this period but commenced after 1 January 1994.[66]

Category B 'past acts' are leases that are not in Category A or C — that is, all other leases except mining leases. Category B leases would, for example, include leases for community groups that are non-commercial, such as for Girl Guides groups.[67] Category B 'past acts', when validated, extinguish native title to the 'extent of inconsistency'.[68] Exactly what this means will depend on the interpretation given to Brennan J's words in *Mabo*.[69] Arguably, this could mean total extinguishment where there is complete inconsistency.

Category C 'past acts' are the grant of a mining lease or licence.[70]

Category D includes any 'past act' not in the prior categories and includes other governmental acts such as licences for fishing and

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62 (1995) 128 ALR 1.

63 *NTA*, s. 15(1) and *NTQA*, ss. 8 and 10–13.

64 *NTA*, s. 15 and the definitions of 'past act' in s. 229 and mining lease in s. 245(2)(a). *NTQA*, ss. 10(1) and 11.

65 *NTA*, s. 15(1) and *NTQA*, s. 10(1). See also *NTA*, ss. 229(2)(a) and (3)(c), and 228(3) and (9). The definition of public works in *NTA*, s. 253 includes roads, railways, buildings or major earthworks. The definition of 'past act' in *NTA*, s. 229(2)(b) excludes grants to the Crown or a statutory authority of the Crown or grants made under legislation or of a prescribed kind for the benefit of Aboriginal or Islander peoples.

66 *NTA*, s. 228(9).

67 *NTA*, s. 230 and *NTQA*, s. 12.

68 *NTA*, ss. 15 and 230 and *NTQA*, s. 12.

69 (1992) 175 CLR 1, 68.

70 *NTA*, ss. 231, 245 and 242(2), and see the definition of 'mine' in s. 253. *NTQA*, s. 13.

pearling, tourism and transport, and for pipelines and power lines.[71] Categories C and D 'past acts' do not extinguish native title. Native title rights and interests have full effect after the Category C or D interest has come to an end. Thus, native title is suspended and revives on the expiry of the mining lease or other interest.[72] Thus, if a State Forest, Timber Reserve or National Park were declared during this period, the declaration, although previously potentially invalid to the extent that native title is affected, would be validated by the *Native Title (Queensland) Act 1993* as Category D acts. Any future use of such declared land would be restricted to the declared purpose, and if the land ceased to be used for such purpose native title would revive. The position would be similar for roads dedicated, and for land reserved by government during this period.

3. **Future extinguishment after 1994.** Future extinguishment concerns titles granted after 1 January 1994 and legislation after 1 July 1993. Here the *Native Title Act 1993* (Cth) and the *Native Title (Queensland) Act 1993* also apply.[73] The general rule for future dealings with land is described as the non-extinguishment principle.[74] Even if an act is totally or partially inconsistent with native title, native title will continue to exist and is merely suspended for the term of the interest. Once the interest expires, native title will revive and again have full effect. In the future dealings regime, native title will be able to be extinguished only by:

   (a) Agreement with the native title holders;[75] or
   (b) Action under compulsory acquisition Acts, together with the subsequent grant of an interest in the land.[76] Acquisition under a compulsory acquisition Act[77] alone will not extinguish native title, but any act done to give effect to the purpose of the acquisition may do so.
   (c) Action taken after an unopposed non-claimant application has been made[78] (that is, where no objection to the application is received within two months of the notice) will be valid if it is undertaken prior to a determination of native title. Any native title rights

[71] *NTA*, s. 232 and *NTQA*, s. 13.
[72] *NTA*, s. 15(1)(d) and *NTQA*, s. 13. Here the non-extinguishment principle applies. See the definition in *NTA*, s. 238.
[73] Part 12 of the *Native Title (Queensland) Act 1993*, an interim provision pending a full review of the Queensland law, is stated to be designed to ensure that future dealings affecting native title are consistent with the standards set by the Commonwealth Act.
[74] *NTA*, s. 238 definition. No definition is provided in the *NTQA*.
[75] *NTA*, s. 21.
[76] *NTA*, ss. 23(3) and 11 and *NTQA*, ss. 148 and 149.
[77] See definition in *NTA*, s. 253 and *NTQA*, s. 149.
[78] See *NTA*, s. 253: a non-claimant application has the meaning given in s. 67(1). See also *NTA*, ss. 61, 66 and 70 and *NTQA*, s. 39 *and* see s. 4 definitions of non-claimant and unopposed applications.

will effectively be extinguished or impaired, and rights will be converted to a claim for compensation.[79]

(d) Action by the native title holders themselves, such as by surrender of native title, or loss of connection with the land, or death of the last member of the group.

The purpose of these provisions in the future dealings regime is to protect and maintain existing native title interests in land. Thus if the government declared a National Park, dedicated a road, built infrastructure development, or granted a development lease or other interest in land after 1 January 1994 (or, in the case of legislative action, after 1 July 1993) in circumstances where no pre-existing option or legal right existed, native title would not be extinguished by such action alone. If a determination of native title is sought, all acts or grants undertaken in relation to the land must be closely examined in each time frame to ascertain if native title is extinguished.

HOLDERS OF NATIVE TITLE

Under the *Aboriginal Land Act 1991* (Qld),[80] trustees are appointed by the Minister to hold granted land for the benefit of the claimant group of Aboriginal people. The position under the Commonwealth and Queensland legislation is different.[81] Under the native title Acts, the relevant Tribunal or the Federal Court must make a determination as to who holds native title at the same time as a determination as to the existence of native title is made.[82] Native title holders have a choice under the native title legislation between vesting title in the common law holders themselves — that is, a prescribed body corporate (non-trustee) — or vesting native title in a prescribed body corporate acting as trustee for the common law holders.[83] A body corporate holding land as trustee will come within the definition of 'native title holder' and thus will hold native title for the purposes of the native title legislation and will have legal management of native title.[84] The body corporate trustee would be subject to the normal obligations of a trustee (presumably in accordance with the

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[79] *NTA*, s. 24(1). See also s. 28(1).

[80] *ALA*, s. 28. Trustees would be subject to the ordinary incidents of trusteeship. See *Trusts Act 1973* (Qld).

[81] *NTQA*, Part 6. Section 28 provides that the Queensland Tribunal must determine how native title is to be held in the same way as the National Native Title Tribunal (hereinafter referred to as the NNTT) does and that Part 2, Division 6 of the Commonwealth *NTA* applies to the Queensland Tribunal.

[82] *NTA*, ss. 55–57 and *NTQA*, s. 28(1).

[83] *NTA*, ss. 55–60. 'Prescribed' means as set out in the Regulations. See *NTA*, s. 59. *NTQA*, s. 28(4) provides that the prescribed body corporate has the same functions and powers as if a determination were made under Division 6 of the *NTA*, subject to regulation (*NTQA*, s. 28(5)).

[84] *NTA*, s. 224.

Trusts Acts 1973 (Qld))[85] to account to, and act in accordance with the wishes of the beneficiaries (here, the Aboriginal common law holders of native title).[86] Where a non-trustee body corporate is appointed, the common law native title holders themselves will hold native title and the non-trustee body corporate will act as a representative or agent and will be able to deal with the native title interest only where specific instructions from, and authorisation of the common law holders of native title are obtained.[87] Equitable duties of trustees and the remedies afforded in relation to trusts appear to offer greater protection and accountability to the common law holder where the body corporate is constituted as a trustee. The role of the body corporate is to represent the native title holders in dealings with native title under the native title legislation — for example, to take part in negotiations and compensation claims but not to be involved in the management of the land itself. The Commonwealth Act designates certain Aboriginal and Torres Strait Islander organisations to act as representatives to advise native title claimants in relation to the processes under the Act.[88]

RIGHTS IN RELATION TO LAND

Under the *Aboriginal Land Act 1991* (Qld), if the claim is successful on either of the first two bases — that is, traditional affiliation or historical association — then a freehold title (an estate in fee simple) will be granted.[89] If the land is granted on the basis of economic or cultural viability, then a lease will be granted. This lease may be granted in perpetuity or for a number of years and it may be subject to conditions.[90]

Under the *Native Title Act 1993* (Cth), an 'approved determination'[91] of native title formally acknowledges common law native title as recognised under *Mabo*.[92] Since the *Mabo*[93] decision, native title exists independently of any statute and does not depend on any claims process for its existence. However, it is preferable to obtain an approved determination of native title under either the State or federal native title Acts,

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[85] *Trusts Act 1973* (Qld), s. 5. Trustee is defined to include a corporation in which property subject to a trust is vested. Query, however, the effect of s. 65(4) of the *ALA*.

[86] For a detailed discussion of the issues involving body corporates, see J.S. Fingleton, 'Native Title Corporations', in M. Edmunds (ed.), *Land, Rights, Laws: Issues of Native Title* (Canberra: Native Title Research Unit AIATSIS, 1994). See also *infra* n. 85.

[87] *NTA*, s. 58. See also *NTA*, s. 224.

[88] *NTA*, s. 202.

[89] *ALA*, s. 60(1)(a).

[90] *ALA*, s. 60(1)(b).

[91] *NTA*, ss. 13 and 253. Determinations of native title by the NNTT, the Federal Court, the High Court or a recognised State or Territory body are 'approved determinations' of native title.

[92] (1992) 175 CLR 1.

[93] *Ibid.*

particularly in relation to future dealings affecting land and also for compensation claims.

Native title rights are defined in s. 223 of the Commonwealth Act which legislatively adopts the *Mabo*[94] decision but without codifying or specifying exactly what native title involves. This section provides that native title means the rights and interests of Aboriginal peoples in relation to land and waters where the rights and interests are possessed under traditional laws and customs. The section also requires that the rights and interests are recognised by the common law of Australia. As the common law changes, so will the definition of native title and it therefore remains necessary to refer to the common law concept of native title in *Mabo* and subsequent decisions.[95] The *Native Title (Queensland) Act 1993* amended the *Acts Interpretation Act 1954* (Qld) to include a similar definition of native title.[96] The rights or content of native title — that is, the rights which relate to the use of the land and its resources — are to be found in the traditional customs and practices of the native community. Although *Mabo*[97] did not deal with marine rights, in *Mason v Tritton*[98] it was found that a right to fish could be a right of native title. The actual content of native title is a bundle of rights which will vary from group to group depending on the traditional customs of the group. These rights would include traditional rights such as hunting, gathering and fishing rights; and as part of the continuing evolution and development of customs, this could possibly include rights to commercially develop land and resources.[99]

The precise content of native title rights will depend on the interpretation given to legislation purporting to vest ownership of resources in the Crown. Such legislation may have the effect of impairing or extinguishing native title rights. The Commonwealth *Native Title Act 1993* (Cth)[100] provides that a State may confirm ownership of natural resources; and in the *Native Title (Queensland) Act 1993*, State ownership of minerals, petroleum, quarry materials and fauna, together with the State's rights to use, control and regulate water, has been confirmed.[101] Existing fishing access rights are stated to prevail over private and public fishing rights, and public access has been preserved to beaches, coastal waters, waterways

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94 *Ibid.*

95 *Ibid.*

96 *Acts Interpretation Act 1954* (Qld), s. 36. The *ALA* was also amended to include a similar definition of native title in s. 5.

97 *Ibid.*

98 (1994) 34 NSWLR 572. However, the court found that Mr Mason had failed to establish evidence that taking abalone was an exercise of a native title right.

99 Courts have been reluctant to recognise commercial rights in other jurisdictions. See *R v Vanderpeet* [1993] 5 WWR 459 (BCCA). See also D. Sweeney, 'Fishing, Hunting, and Gathering Rights of Aboriginal Peoples in Australia' (1993) 16(1) *University of New South Wales Law Journal* 97, 135. Cf. Selnes, *supra* n. 2.

100 *NTA*, s. 212.

101 *NTQA*, s. 17(1) and (2).

and other public places in Queensland.[102] It is stated in the legislation that confirmation of ownership of resources will not of itself extinguish or impair native title rights and interests.[103] Legislation should therefore be examined for indications of a clear and plain intention to extinguish native title in accordance with the remarks of Brennan J in *Mabo*.[104] The date of the original appropriation will be significant, as any purported appropriation of resources after 1975 would have to treat native title land in the same way as freehold land to avoid infringement of the *RDA*. In examining possible legislative impairment or extinguishment of native title, it should be noted that State legislative power extends over the coastal waters three nautical miles seaward and Commonwealth jurisdiction extends beyond that.[105]

A detailed examination of native title rights in relation to natural resources, minerals, timber, wildlife, fishing and water rights is beyond the scope of this article, but reference will be made to the relevant legislation. Legislation with the potential to impact on native title rights includes the *Mineral Resources Act 1989* (Qld)[106] (its predecessor being the *Mining*

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[102] *NTA*, s. 212 and *NTQA*, ss. 18(1) and 17(3). If 'existing fishing access rights' means native title rights, the latter will prevail over public, commercial and private rights (including riparian rights). Since, however, Aboriginal fishing rights are for domestic purposes only, this would seem to be no greater than the right of the general public to fish in tidal waters. *Contra* if 'existing fishing access rights' refers to fishing rights by permit or licence, these rights prevail over native title rights. Contrast the Canadian decision in *R v Sparrow* [1990] 1 SCR 1075, 1116, in which it was found that, subject to valid conservation measures, Aboriginal domestic fishing needs must be met first, in priority to sport and commercial fishing interests.

[103] *NTA*, s. 212(3) and *NTQA*, s. 18A. Should s. 212(3) (non-extinguishment and non-impairment effect) be limited to s. 212(2) (public access rights) or does the section also limit s. 212(1) (confirmation of natural resources)? The heading of s. 212(3) suggests the former. For a detailed discussion of Aboriginal rights and resources, see D. Yarrow, 'The Regulation of Native Title Rights', ATSIC Workshop Conference, Cairns, 1995.

[104] (1992) 175 CLR 1, 64.

[105] In *New South Wales v The Commonwealth* (1975) 135 CLR 337 (known as the Seas and Submerged Lands case) the High Court had found that the jurisdiction of the State ended at the low-water mark. However, the *Coastal Waters (State Powers) Act 1980* (Cth), ss. 4 and 5 extends the legislative powers of States to make laws for coastal waters in relation to the seabed and subsoil beneath the coastal waters, including subterranean mining, and for fisheries legislative power has been extended beyond the outer limits of the coastal waters of the State. The *Coastal Waters (State Title) Act 1980* (Cth), s. 4 vests ownership (subject to certain reservations) of the seabed beneath the coastal waters (extending three nautical miles) in the State. No 'right to negotiate' under the *NTA* or *NTQA* exists in relation to *offshore* areas below the low-water mark.

[106] *Mineral Resources Act 1989* (Qld) (hereinafter referred to as the *MRA*), s. 8. This Act vests the exclusive right to grant mining leases in the Crown irrespective of the ownership of the minerals; thus neither the owner of the land nor the owner of the minerals has the capacity to authorise prospecting or exploration for minerals even if the minerals are not the property of the Crown. See *MRA*, s. 9. Aboriginal rights to the use of the soil are not affected by the mining legislation, only the right to extract minerals. This legislation applies to mining in coastal waters to three nautical miles in the territorial sea, and the Commonwealth *Offshore Minerals Act 1994* and the *Petroleum (Submerged Lands) Act 1967* deal with mining beyond the three-mile limit. See, generally, R.D. Lumb and G.A. Moens, *The Constitution of the Commonwealth of Australia* (Sydney: Butterworths, 1995), 168–73.

Act 1968 (Qld)) which vests ownership of minerals in the Crown and the *Petroleum Act 1923* (Qld) which vests petroleum products in the Crown.[107] The *Nature Conservation Act 1992* (Qld) vests ownership of protected animals and plants in the Crown (like its predecessor the *Fauna Conservation Act 1974* (Qld) which declared fauna to be the property of the Crown) and vests cultural and natural resources occurring in areas such as National Parks in the Crown.[108] The *Forestry Act 1959* (Qld) provides that forest products including vegetation, timber and quarry materials and, in certain areas such as National Parks and State Forests, the indigenous animals and birds, are the property of the Crown.[109] This legislation appears to exclude indigenous rights of property or ownership in relation to the products, wildlife and resources in the circumstances mentioned above.

The position at common law in relation to fishing was that public fishing rights existed in offshore waters and in tidal waters, but no public fishing rights existed in relation to non-tidal rivers.[110] Conversely, riparian ownership generally presumed an entitlement to fish in the non-tidal river.[111] Fishing, both offshore and onshore, is now subject to the *Fisheries Act 1994* (Qld) (previously the *Fisheries Act 1976* (Qld)) and licence requirements.[112] The common law right of the public and of the native title

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[107] *Petroleum Act 1923* (Qld), ss. 9 and 10.

[108] See *Nature Conservation Act 1992* (Qld) as amended by the *Nature Conservation Amendment Act 1994* (Qld) (hereinafter referred to as *NCA*), ss. 61, 83, 84, 85 and 86. Protected plants and protected animals are the property of the State under ss. 84 and 85 of the *NCA*. *'Protected plant'* is defined in s. 84 as a plant classified as threatened or rare and that is in the wild. *'Protected animal'* is defined in s. 7 as an animal classified under the Act as threatened, rare or common wildlife. See also the *National Parks and Wild Life Act 1975* (Qld) and the *Fauna Conservation Act 1974* (Qld), s. 7 which also had vested ownership of fauna in the Crown and which were repealed by the *NCA*. *'Fauna'* was defined to mean a mammal or bird, including wild animals. See also *Walden v Hensler* (1987) 163 CLR 561, 566–7 for the High Court's interpretation of the *Fauna Conservation Act 1974* (Qld). At common law there is no absolute property in wild animals: *Case of Swans* 77 ER 435, 438.

'Cultural resources' of the protected area are defined in s. 7 of the NCA to be objects that have anthropological, archaeological, historical, scientific, spiritual or sociological significance or value, including such significance or value under Aboriginal or Islander custom. *'Natural resources'* of a protected area or of a conservation plan area are defined in s. 7 to mean the natural and physical features of the area, including wildlife, soil, water, minerals and air.

[109] *Forestry Act 1959* (Qld), s. 45 and see s. 93(2). *'Forest product'* is defined in s. 5 to include all vegetable growth, including ferns and plants, growing or dead trees whether standing or fallen and any timber or other product thereof and any other vegetable growth whether alive or dead. In relation to State Forest, Timber Reserve, National Park or Scenic Area, forest product includes quarry material, earth, soil, honey, indigenous animals, birds including eggs and nests, and relics of every description. The term does not include indigenous or introduced grasses or crops grown by a tenant under a Crown holding.

[110] See *Blundell v Catterall* (1821) 106 ER 1190, 1199. At common law there was no absolute property in fish which were classified as wild animals.

[111] As to the presumptions that determine rights to fisheries, see *Halsbury's Laws of England* (4th ed., London: Butterworths, 1977), Fisheries, Vol. 18, 49, para. 601.

[112] *Fisheries Act 1994* (Qld), s. 11 provides that the Act applies to waters within the State and to the Australian fishing zone.

holders to fish could, in one view, be eliminated by this legislation, although this result would be surprising.[113] The position at common law in relation to a non-tidal river that flowed through the land of a riparian owner was that such owner had rights to use the water and exclusive fishing rights.[114] The *Water Resources Act 1989* (Qld) (previously the *Water Act 1926*) allows the Crown to control the use and flow of water[115] and vests the ownership of the bed and banks of a non-tidal watercourse in the Crown subject to statutory rights of access to the water by the adjoining land owner.[116] It is unclear whether all of the common law rights enjoyed by the riparian owner to the use of the adjoining waters (including the exclusive right of the riparian owner to fish) have been extinguished by the *Water Resources Act 1989* (Qld) or by prior legislation.[117] A grant of land to a riparian owner would impair or extinguish native title rights to the extent of inconsistency; and where native title holders have no access to the bed and banks, or have lost the connection with the land or waters, then such rights would also be lost. If Crown land abuts a waterway and there has been no creation of private rights, then native title rights in relation to water may continue. Under the *Harbours Act 1955* (Qld), all foreshores, lands lying under the seas, harbours and tidal navigable rivers in Queensland waters, including the bed and banks to the high-water mark, are the property of the Crown.[118]

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[113] See the discussion on regulation of rights — mere regulation by a licence requirement will not extinguish native title rights. See also *Harper v Minister for Sea Fisheries* (1989) 167 CLR 314, 332, where Brennan J commented by way of *obiter* that legislation which prohibited any person taking abalone without a licence effectively abrogated any pre-existing right of the public to fish for abalone in the State fishing waters. See also Yarrow, *supra* n. 103.

[114] At common law the land owner had no absolute ownership of the water *(Mason v Hill* (1833) 5 B & Ad 1, 24). See generally, in relation to rights to water, R. Megarry and H.W.R. Wade, *The Law of Real Property* (4th ed., London: Stevens and Sons Limited, 1975), 72–74 and K. Grey, *Elements of Land Law* (London: Butterworths, 1987), 31–32.

[115] The *Water Resources Act 1989* (Qld), ss. 36 and 34 allow a riparian owner to use the water for domestic purposes but a licence must be obtained for use of the water for commercial purposes.

[116] *Water Resources Act 1989* (Qld), Part 2, ss. 3, 4 and 5. This Act altered the common law position that the owner of land adjoining a non-tidal river also owns the bed and banks, or where two owners are separated by a watercourse each owns the bed of the river *ad medium filum aquae* — to the middle line. See *Water Act 1926* (Qld), ss. 4, 5 and 7.

[117] See *Beaudesert Shire Council v Smith* (1969) 120 CLR 145, 151 (riparian rights are extinguished by the legislation). This point is not affected by *Northern Territory of Australia v Mengle* (1995) 129 ALR 1.

The right to fish was originally vested in the Crown as the owner of the soil, and after the Crown granted an interest in the land the right to fish vested in the owner of the land. *Carlisle v Graham* (1869) LR 4 Exch 361. Fish are regarded as profits of the soil over which water flows, and title to the fish is based on rights to the soil. See *British Columbia v Attorney General for Canada* [1914] AC 153, 167. It is arguable that by vesting the ownership of the bed and banks in the Crown, rights to fish will also vest in the Crown. See Yarrow, *supra* n. 103.

[118] *Harbours Act 1955* (Qld), s. 77 continues to have effect despite the repeal of the *Harbours Act 1955* (Qld). See s. 103 of the *Transport Infrastructure Amendment Act 1994* (Qld). See also the *Land Act 1994* (Qld), s. 9.

New rights in addition to those identified by the High Court in *Mabo*[119] are recognised for native title holders in the native title legislation. These are the right to negotiate[120] and the treating of native title as having freehold status.[121] These new rights, which have been brought about because of the way the legislation deals with 'future acts', are considered below.

REGULATION OF RIGHTS

Traditional Aboriginal rights such as hunting and fishing are regulated in Queensland by a series of laws.[122] Grantees of land under the *Aboriginal Land Act 1991* (Qld) would possess the rights of a freeholder subject to such exceptions as are specified in legislation.[123] Quarry material and forest products must be reserved to the State if Aboriginal land was not transferred land. If the land was transferred, then forest products and quarry materials may be reserved only where the Governor in Council declares that these are of vital interest to, and are acquired by the State and where 'reasonable compensation' is paid.[124] Grantees' rights of use of such materials and products are restricted.[125]

To assess the impact of regulatory environmental legislation on native title rights, reference should be made to *Mabo*,[126] where the High Court approved Canadian authority to the effect that the mere regulation of native title rights would not extinguish traditional rights,[127] and to s. 8 of the *Native Title Act 1993* (Cth) which provides that 'this Act is not intended to affect the operation of any law of a State or a Territory that is capable of operating concurrently with this Act'. Laws merely regulating native title rights would be capable of operating concurrently with native title; however, where laws prohibit the exercise of any native title rights, the position is not clear and on one interpretation such laws may not apply to native title.[128] In accordance with the *Native Title (Queensland) Act 1993*, s. 13A, legislation enacted after the commencement of this section will

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[119] (1992) 175 CLR 1.

[120] *NTA*, ss. 26 and 31.

[121] *NTA*, ss. 23 and 235.

[122] For a detailed discussion, see M. Berry, 'Indigenous Hunting and Fishing in Queensland: A Legislative Overview' (to be published in 1995) 18(2) *University of Queensland Law Journal*. See also Yarrow, *supra* n. 103.

[123] *ALA*, s. 26. Refer to the discussion of s. 93 of the *NCA*.

[124] *ALA*, ss. 81 and 43.

[125] *ALA*, ss. 76 and 39.

[126] (1992) 175 CLR 1, 63–65.

[127] See *R v Sparrow* [1990] 1 SCR 1075. The requirement of a licence will not extinguish a native title right.

[128] On this question, see the discussion of laws applicable to lighting fires in National Parks. C. Hughes, 'One Land: Two Laws — Aboriginal Fire Management' (1995) 12(1) *Environmental and Planning Law Journal* 37, 42–43. Hughes noted that 'the greater the degree to which the provision impinges on a native title right, then taking the common law approach, the greater the presumption that the provision is not intended to apply to the right (in the absence of clear words to the contrary)'.

affect native title only if it is expressly stated to do so. Section 13A(2) defines acts affecting native title as acts that extinguish native title rights or are wholly or partially inconsistent with the exercise, enjoyment or continued existence of those rights. Thus, if Queensland legislation does not expressly deal with native title rights, then native title rights will not be subject to those laws. This will have to be exercised in accordance with the *Native Title Act 1993* (Cth) and in particular with s. 8 of that Act.

Native title holders under the *Native Title Act 1993* (Cth) may continue the pursuit of their traditional rights despite regulatory laws prohibiting or restricting such activities without a permit or licence. Section 211 of that Act provides that native title holders' rights of fishing, hunting and food gathering for non-commercial purposes, and cultural and spiritual activities, may be carried out, despite any law or regulation, except where a law confers rights and interests only on, or for, the benefit of the Aboriginal community. This section ensures that where Aboriginal people come within the definition of native title holders in the native title legislation, they may conduct activities in the exercise of their rights of native title and may use resources for domestic needs, but such protection does not extend to commercial undertakings. Unless a law provides that a permit is required by only Aboriginal or Islander people and that such regulation is for the benefit of indigenous people, then Aboriginal and Islander peoples are entitled to ignore that law and carry out their traditional activities. Two elements of any regulatory law require examination here. First, the Aboriginal activity must come within those listed in s. 211 — hunting, gathering, cultural or spiritual activities. Secondly, the activity must be restricted except by licence or permit. Section 211 may not be relevant if a total prohibition, where no licence or permit is available in relation to an activity, is proclaimed. It then becomes necessary to determine if the prohibitory law is capable of operating concurrently with the *Native Title Act 1993* (Cth) and thus applying to native title. Should Aboriginal communities be prevented from exercising traditional rights to light fires if a total fire ban is proclaimed at a time of high fire danger? Who will be liable for consequential damage caused by the traditional activity — for example, fire damage to private property or the destruction of a National Park? In some circumstances it would appear that total prohibitions should be applicable to all. An additional consideration is the extent to which consequential protection should be afforded to native title rights under s. 211. How far will recognition of a right give protection to preliminary activities? If, for example, hunting is recognised as a right of native title of a community whose traditional hunting practice includes a right to follow the game, will this right be protected to allow access over Crown land or private property where native title does not exist?[129]

[129] See Sweeney, *supra* n. 99 at 103. He notes that in other jurisdictions, indigenous hunting and fishing rights may occur independently of any association with the land that is subject to native title.

The following legislation is applicable to all indigenous people in Queensland, including the holders of land under the *Aboriginal Land Act 1991*, but has the potential to affect rights of native title despite the protection given by s. 211 of the Commonwealth Act. The *Nature Conservation Act 1992* (Qld) permits the taking, using or keeping of *protected* wildlife under Aboriginal tradition or Islander custom.[130] However, such rights are not permitted to be exercised in a *protected* area without a permit or an authority[131] and are subject to conservation plans directly regulating indigenous hunting and fishing activities.[132] All indigenous inhabitants in the State may exercise these rights subject to the restrictions mentioned.[133] This Act authorises the regulation of protected areas (which include National Parks) and conservation and management plans.[134] The *Fisheries Act 1994* (Qld) allows Aboriginal people a right to fish in offshore and onshore waters without the usual licence, and again Aboriginal rights may be subject to a management plan.[135] Legislation that has the potential to affect native title fishing or hunting rights includes the *Endangered Species Protection Act 1992* (Cth), which makes it an offence to take *listed native species* in a Commonwealth area without a permit but recognises that indigenous interests are to be considered in the granting of permits.[136] The *Great Barrier Reef Marine Park Act* 1975 (Cth) can further restrict and regulate fishing and hunting in certain zones

[130] *NCA*, s. 93(1). Section 93 has not yet been proclaimed. Protected wildlife includes endangered, common, rare, vulnerable and even presumed extinct wildlife but does not include international and prohibited wildlife. See s. 7 definition in the *NCA* and the *Nature Conservation (Wildlife) Regulations 1994* listing protected wildlife.

The rights of hunting and fishing of indigenous peoples provided under the *Community Services (Aborigines) Act 1984* and the *Community Services (Torres Strait Islanders) Act 1984* (Qld) mean that residents of reserved land or DOGIT (trust) land are exempt from prosecution for taking fish or fauna for consumption by members of the community. The rights under this legislation are governed by ss. 62 and 93 of the *NCA*.

[131] *NCA*, ss. 93(4) and 62. Section 62(4) allows non-commercial fishing in National Parks subject to any conditions in the Regulations. Protected areas are defined in s. 7 to include the areas specified in s. 14, including National Parks, Conservation Parks and Resources Reserves. See also *NCA*, s. 28. See Regulations 28, 29 and 31 and also 32–37 and 123–126 regarding permits for indigenous peoples.

[132] *NCA*, s. 93(2).

[133] Neither the rights of indigenous inhabitants under s. 93 nor the grant of a permit to take wildlife affords access or a right of entry on land without the land holder's consent: *NCA*, s. 98.

[134] See *NCA*, Part 4.

[135] *Fisheries Act 1994*, ss. 14, 11 and 5. See also s. 4 in relation to management plans. Fish is defined in s. 5 to exclude 'protected' animals under the *NCA*, which are defined in s. 7 of the *NCA* to include any animal that is prescribed as threatened, rare or common wildlife. Thus Aboriginal traditional fishing rights could be restricted if a species is declared protected.

[136] See *Endangered Species Protection Act 1992* (Cth), ss. 87 and 89. 'Listed native species' is defined in s. 4 as being those in Schedule 1. Native species are further defined as those indigenous to Australia. See s. 5 as to areas that constitute Commonwealth areas.

without a permit.[137] The *Wet Tropics World Heritage Protection and Management Act 1993* (Qld) provides for the implementation of a management plan that will regulate the use of land and the destruction of forest products in the Wet Tropics.[138] It is an offence under that Act to destroy a forest product; but any rights that Aboriginal people have in relation to forest products are excepted.[139]

Before native title holders would be forced to comply with any of the above permits, licences or management plans, such plans, permits or licences must be shown to confer rights or interests or a benefit solely on indigenous peoples. Native title holders with rights pursuant to s. 211 of the *Native Title Act 1993* (Cth) may therefore be able to avoid general legislation.[140] Alternatively, it is arguable that if the legislation provides for Aboriginal rights in a way that excludes native title rights and the protection of s. 211, then once the native title holders become subject to that legislation, any controls under that legislation such as the institution of a management plan, would require compliance by the Aboriginal native title holders although the management plan was one that did not provide solely for Aboriginal rights.[141] Under the *Nature Conservation Act 1992* (Qld), the protection of s. 211 of the *Native Title Act 1993* (Cth) may be lost as this law confers benefits solely on Aboriginal peoples. Consequently, native title holders' rights may be subject to a management plan. However, it is very arguable that s. 211(c) should be read inclusively and any subsequent management plans would also have to provide a benefit solely for Aboriginal rights before native title holders have to comply with the plan. Compliance by indigenous non-native title holders, including grantees under the *Aboriginal Land Act 1991* (Qld), would be necessary.

DEALINGS WITH ABORIGINAL LAND AND NATIVE TITLE LAND

Land granted under the *Aboriginal Land Act 1991* (Qld) is either granted in freehold or leasehold. The rights granted can be dealt with only in accordance with that Act or the terms of the lease.[142] Rights to use and deal with transferred land are restricted to those contained in Part 3, Division 2 and rights to granted land are restricted by Part 5, Division 2 of

[137] See *Great Barrier Reef Marine Park Act 1975* (Cth), s. 38A which prohibits the entry into zones other than for a permitted purpose. See also *Great Barrier Reef Marine Park Regulations*, s. 14, which restricts the taking of certain fish. See also the *Marine Park Act 1982* (Qld) under which zoning plans are also to be prepared.

[138] In the *Wet Tropics World Heritage Protection and Management Act 1993* (Qld), 'forest product' is defined as a native plant which is further defined to mean a plant that was not originally introduced to Australia by human intervention.

[139] *Wet Tropics World Heritage Protection and Management Act 1993* (Qld), s. 56.

[140] See Berry, *supra* n. 122 at 7.

[141] See Yarrow, *supra* n. 103.

[142] *ALA*, ss. 39 and 76.

the Act. The effect of the *Aboriginal Land Act 1991* (Qld) is to make the land inalienable or non-transferable and with restricted rights for the creation of new interests, such as subleases and mortgages (which are permissible only with the Minister's consent).[143] Leases over freehold land may be granted, but the land cannot be leased to a non-Aboriginal person for more than ten years except where the land is leased to the Crown and leases cannot be subleased without the consent of the Minister.[144] The creation of an interest that is not authorised under the Act is deemed to be void.[145] The grantees must explain to the Aboriginal people the nature, purpose and effect of any dealings with the land; a failure to comply does not invalidate the interest concerned,[146] but may render the grantees liable as trustees to the beneficiaries. Unlike the position under the native title legislation, no veto or negotiation regime exists under this legislation.

Recognition is given to native title rights by the *Native Title Act 1993* (Cth). A significant issue is whether a determination of native title under the Act gives the native title holders the right to transfer or grant interests in the land. The transfer of rights is subject to the customs and traditions of the community, and tradition may not permit the community land to be sold or leased. Leasing by native title holders could be achieved under the Commonwealth Act by surrendering native title to the government and the native title holders being granted a freehold or leasehold title in exchange.[147] Here native title and the rights associated with it under the legislation would be lost. A possible alternative may be for the native title holders to enter into an agreement with the government for the granting of a Crown lease — for example, to either a commercial developer or a corporate entity comprising the native title holders.[148] It would be important for any such agreement to specify that on the termination of the lease, native title rights would fully revive and that the Crown would not become the absolute and beneficial owner of the land. However, where commercial development or exploitation of native title land is the objective, then the better solution may be to surrender the land in exchange for a grant in fee simple. Regulations made under s. 56(4)(c) of the *Native Title Act 1993* (Cth) may provide the circumstances in which the holding

[143] See *ALA*, s. 76 regarding dealings with granted land and s. 39 regarding dealings with transferred land. Transferred land is not able to be mortgaged, whereas granted land is able to be mortgaged with consent. See *ALA*, s. 76(4).

[144] *ALA*, ss. 76(2)(a), (3), (4) and 39(2), (3).

[145] *ALA*, ss. 77 and 40. These sections are stated to have effect despite any other Act. Thus even if Aboriginal land under the *ALA* is registered under Torrens title (*Land Title Act 1994* (Qld)), indefeasibility of title will not override interests preserved under the *ALA*, ss. 77 and 40.

[146] *ALA*, ss. 76(6) and 39(5).

[147] *NTA*, s. 21.

[148] Query whether this is legislatively possible under the Commonwealth legislation: *NTA*, s. 21. Could a State create such new interest not mandated by statute? Possibly a regional agreement under s. 21(4) of the *NTA* could be a vehicle for this.

in trust of native title rights and interests may be surrendered, transferred, or otherwise dealt with; however, the transfers appear to be in relation to a transfer from one body corporate to another or to a trustee. Further restrictions are imposed by s. 56 of the *Native Title Act 1993* (Cth) which provides that native title rights and interests held by the body corporate cannot be assigned, seized or sold or made subject to any charge or interest as a result of any debt or liability of, or any act done by the body corporate unless that debt was incurred in connection with dealings authorised by the Commonwealth Act or Regulations.[149] Thus, if native title land is pledged as security it cannot be forfeited for debts and cannot be seized under bankruptcy. Where rights to mortgage native title land as security for a loan are restricted (either because of the customs of the community or because of the terms of the Act), then the commercial development potential of native title land may also be limited. It has been suggested that financing commercial operations could be restricted to borrowing funds on the basis of the cash flow of the commercial operation.[150] Financiers involved with native title land should ensure their entitlement to obtaining notices issued under the *Native Title Act 1993*.[151] The *Native Title (Queensland) Act 1993* includes interim provisions in Part 12 (to be operational for a two-year period) providing that native title holders are entitled to the same rights and privileges as other owners of land. Does this empower native title holders in Queensland to transfer, lease or mortgage their lands as other owners of land are entitled to do?[152] If greater rights are given by the Queensland legislation, it would be inconsistent with the Commonwealth Act and the provisions may be invalid pursuant to s. 109 of the Constitution.

FUTURE DEALINGS WITH ABORIGINAL AND NATIVE TITLE LAND

Surrender of Native Title

It is possible for the Aboriginal grantees of land granted under the *Aboriginal Land Act 1991* (Qld) to surrender that land to the State Government.[153] Under s. 21(1) of the *Native Title Act 1993* (Cth), native title holders can also surrender native title to the Government — Commonwealth, State or Territory — for a consideration which includes the grant of a freehold estate in any land or any other interest in relation to land. The

[149] See *NTA*, s. 56(6) and (5).
[150] B. Horrigan, 'Mabo and Native Title — The Final Implications: Key Concerns for Miners, Developers, Investors, and Financiers' (1994) 13(4) *AMPLA Bulletin* 158, 167.
[151] *Ibid.* This is to ensure they are kept informed of possible future dealings with the land.
[152] *NTQA*, s. 154(2).
[153] *ALA*, ss. 76(4)(b) and 39(2)(d).

Native Title (Queensland) Act 1993 is silent on surrender, so the Commonwealth legislation will be applicable. Therefore, it is possible to exchange traditional native title land for a freehold or a leasehold interest or to acquire rights in land that would be more commercially viable. No machinery is provided in the legislation to ensure comparability of the value of the land exchanged. This has been left to the Executive's discretion.

Resumption of Aboriginal Land and Native Title Land

Land that has been granted under the *Aboriginal Land Act 1991* (Qld) cannot be resumed, taken or compulsorily acquired except by legislation that expressly provides for the resumption of the land; just compensation must also be paid before the government can grant any further interest in that land.[154] In accordance with the native title legislation, native title cannot be resumed by action under compulsory acquisition Acts.[155] As noted above, acquisition alone will not extinguish native title, but actions pursuant to the acquisition may do so — for example, if a freehold title is granted by the government. Compensation will be assessed on the basis of 'just terms' in accordance with Division 5 of the *Native Title Act 1993* (Cth).[156] The *Native Title (Queensland) Act 1993* contains similar provisions in Part 12 and in addition provides that all State compulsory acquisition Acts are taken to provide for the payment of compensation on 'just terms'.[157]

Future Regime for Native Title Dealings

A completely new regime governs future dealings with native title land under the Commonwealth native title legislation.[158] There is no equivalent regime under the *Aboriginal Land Act 1991* (Qld). The need to provide

[154] *ALA*, s. 41.

[155] *NTA*, ss. 23(3) and 11. See also, with respect to requests for non-monetary compensation, s. 79. State compulsory acquisition Acts are deemed to contain the same provisions as the *NTA*, s. 79; *NTQA*, ss. 151(1) and 148–150. See also the definition of *Compulsory Acquisition Act*, s. 253.

[156] *NTA*, s. 51(2). See M.A. Stephenson, 'Compensation and Valuation of Native Title', in M.A. Stephenson (ed.), *Mabo: The Native Title Legislation* (Brisbane: University of Queensland Press, 1995).

[157] *NTQA*, ss. 148–151. By inclusion of the 'compensation on just terms' sections, the Queensland legislation will be consistent with the Commonwealth legislation. However, the criteria in the *NTA*, s. 51 apply 'to the extent they are relevant' in determining compensation.

[158] The *NTQA* does not detail the future dealings regime for native title land except to provide that the object of Part 12, Interim Provisions, of the *NTQA* is to make Queensland law consistent with the standards set by the Commonwealth *NTA*. In Part 12, native title owners are stated to be entitled to all rights and privileges of other land owners (s. 154). If any inconsistency arises between the *NTA* and *NTQA* in relation to future acts, the provisions in the *NTA* will prevail — s. 109 of the Constitution.

for future acts under the Queensland *Aboriginal Land Act 1991* was obviated by reason that grants of Aboriginal land are given the status of freehold. One feature of the future dealings regime for native title is the freehold equivalent status of native title.

Under the Commonwealth native title legislation, 'acts' affecting native title are divided into two categories: 'past acts' and 'future acts'.[159] New titles granted after 1 January 1994 and legislation made after 1 July 1993 are designated as 'future acts'. An essential characteristic of a 'future act' is that it must impact on native title to some extent.[160] Acts are further categorised as onshore or offshore, a distinction based on States' boundaries. Different treatment is accorded to acts occurring in different places.[161]

In the new future dealings regime, the effect of the Commonwealth legislation[162] is first that native title is to be treated as equivalent to freehold for the purposes of determining if a State can take action relating to the land. The Crown can deal with native title land only in the same way that it can deal with 'ordinary title', which is freehold or leasehold land, and that is by formal acquisition procedures.[163] Consequently, land over which native title exists will now have to be formally acquired before a government can grant an interest in that land, such as a pastoral lease or a freehold grant of title, and native title holders will be entitled to the same procedural rights (that is, the same notifications and the same rights

[159] Existing titles granted between 31 October 1975 (the date of the enactment of the *RDA 1975*) and 1 July 1993 in the case of legislation and between 31 October 1975 and 31 December 1993 in the case of titles granted by the Crown are designated as 'past acts'. 'Past acts' in the *NTA*, s. 228 also include acts done after 1 January 1994 which:

> '(i) occur pursuant to a legally enforceable right created prior to 1 January 1994, such as an option to renew;
>
> (ii) give effect to an offer, commitment, arrangement or undertaking made before 1 July 1993 and where written evidence exists;
>
> (iii) create interests that permit activities similar to those allowed by a previous act (created prior to 1994 but after 1975) provided that: the interest is held by the same person, takes effect immediately the pre-1994 act ceases, and does not create a proprietary interest where none existed previously nor increase the extent of the pre-existing proprietary interest; or
>
> (iv) are the carrying out of a reservation, condition, permission, or authority (created prior to 1994 but after 1975) which allowed the use of the land for a particular purpose.'

See *NTA*, ss. 223 and 228–238.

[160] *NTA*, s. 233. 'Future act' is defined in s. 233 as an act that validly affects native title or is invalid to some extent because of its impact on native title.

[161] An *onshore* place is defined in s. 253 of the *NTA* to mean land or waters within the limits of a State or Territory to which the NTA extends, other than an offshore place. State sovereignty does not extend below the low-water mark. Thus an onshore place would include the area to the low-water mark, except where possibly an historical bay has traditionally been included within the limits of the State. *Offshore* place is defined to mean land and waters to which the *NTA* extends other than an onshore place. Section 6 of the *NTA* states that the Act applies to the land and waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973* (Cth). Commonwealth sovereignty extends from the low-water mark to 12 nautical miles over the territorial sea.

[162] *NTA*, ss. 233, 235, 23(1) and 11(2).

[163] See *NTA*, ss. 23(6) and 235(2).

of objection) as holders of 'ordinary title'.[164] The common law right to extinguish native title recognised by the High Court in *Mabo*[165] does not apply to 'future acts'.

Sections 23 and 235(2) of the *Native Title Act 1993* (Cth) detail the conditions for permissible future acts. Permissible future acts are defined in s. 235 to include:

1. Legislation that applies in the same way to native title holders as it does to the holders of ordinary title — for example, building laws, the *Environmental Protection Act 1994* (Qld) or the *Contaminated Land Act 1991* (Qld).[166] The legislation must not place the native title holders in a more disadvantageous position at law than if they had held ordinary title.[167]
2. *Acts* which can be done over *ordinary freehold* title land — for example, the grant of a mining lease.[168]
3. The *future renewal, regrant or extension* of the term of a commercial, agricultural, pastoral or residential lease. Where a legally enforceable right (that is, a right contained in the lease itself or in the legislation guaranteeing renewal) exists and was created before 1 January 1994, then renewal rights are protected.[169]
4. Acts defined in s. 234 as *low impact future acts*, such as minor licences and permits for activities such as bee-keeping or stock grazing, are permitted prior to a determination of native title being made. Such 'acts' could not be carried on after a determination of native title as they could not be granted over freehold land without the owner's permission.[170]
5. Acts pursuant to an *agreement* between the native title holders and the government under s. 21.[171]
6. Future acts in relation to an *offshore place* even if the offshore place is subject to native title.[172]
7. Future acts where there has been a determination on an *unopposed non-claimant application*[173] by a non-native title holder that no native title exists. Here, any future act will be valid even if native title is later found to exist and rights of native title are converted to rights to compensation.[174]

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[164] *NTA*, ss. 23(6) and 253. See the s. 253 definition of ordinary title.
[165] (1992) 175 CLR 1, 63–73, per Brennan J; 110–12, per Deane and Gaudron JJ; 192–8 per Toohey J.
[166] *NTA*, s. 235(2)(a).
[167] *NTA*, s. 235(2)(b).
[168] *NTA*, s. 235(5).
[169] *NTA*, ss. 235(7) and 25.
[170] *NTA*, s. 235(8)(b).
[171] *NTA*, s. 235(8)(c).
[172] See the definition in s. 253 of the *NTA*. See also the *NTA*, s. 235(8)(a).
[173] A non-claimant application is unopposed where no Aboriginal claimant appears and lodges a native title determination application within two months of the non-claimant application being lodged. (See ss. 61, 66(3)(a) and 67(2),(4).) See also *NTQA*, s. 39(1).
[174] *NTA*, s. 24(1)(c) and (d).

The second new right in the *Native Title Act 1993* (Cth) is that native title holders (where native title has been determined)[175] and registered claimants (where native title has been applied for but not determined)[176] have the right to negotiate with the government (and the proposed grantee party) prior to the government's carrying out certain permissible future acts.[177] While this right is not a veto, it does allow native title holders and claimants to have some influence and control over future developments of their lands. The right is restricted to native title in onshore places.[178] The right to negotiate could arise in the following circumstances:

1. Prior to the compulsory acquisition by governments of native title interests.[179] Thus, if governments propose to grant interests, which confer rights on third parties over native title, which could not be granted over freehold land (for example, a pastoral or tourism lease), the native title interest would have to be compulsorily acquired and this would invoke the negotiation process.
2. Prior to the granting of an interest over native title land by governments, such as a mining interest or an exploration permit.[180] No right exists for ordinary freeholders (and that includes freeholders under the *Aboriginal Land Act 1991*) to prevent the mining proceeding.
3. Where no legally enforceable right to renew or vary an existing mining interest in native title land exists, then renewal can occur only where the negotiation process has been complied with.[181]

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[175] See the definition of 'native title holder' in the *NTA*, s. 224 as including the prescribed body corporate, which is registered in the National Native Title Register, or the person or persons who holds native title.

[176] See the definition of 'registered native title claimant' in *NTA*, s. 253, meaning a person whose name appears in the entry on the Register of Native Title Claims.

[177] *NTA*, ss. 26 and 31. (See Subdivision B of Division 3 of Part 2.) See the *NTQA*, Part 7, Division 2 which generally corresponds with the 'right to negotiate' provisions in the Commonwealth *NTA*. *NTQA*, s. 44 states that an objection under s. 32 of the *NTA* in relation to an act attracting the expedited procedure and an application for a future act determination under s. 35 of the *NTA* are 'right to negotiate applications'.

[178] *NTA*, s. 23(6).

[179] *NTA*, s. 26(2)(d). The purposes for which land may be taken under the *Acquisition of Land Act 1967* (Qld) include 'any purpose declared by the Governor in Council by Order in Council to be a purpose for which land may be taken under and subject to the Act'. Thus the ambit of purpose appears to be very wide. Although the Act does not specifically allow for the acquisition of land by the government for the purpose of granting such land to a third party, this could be possible where it is so declared by the Governor in Council. See s. 5 and Schedule 2 to the *Acquisition of Land Act 1967* (Qld).

[180] *NTA*, s. 26(2)(a).

[181] *NTA*, ss. 26(1)(b), (c), 235(7) and 25(1). These sections apply to mining interests. However, if no legally enforceable rights exist to regrant, renew or vary any other type of existing lease (where native title was not extinguished), it appears that the right to negotiate would still be invoked as it would be necessary for the government to compulsorily resume the native title.

The negotiation process is *not* required in certain cases:

1. Before governments acquire native title land for public purposes such as *infrastructure development*, no negotiation is necessary.[182] If governments wish to use land for public buildings, roads and schools, then any native title interest must still be acquired in accordance with the relevant compulsory acquisition procedures and notifications. Where it is unclear whether native title exists over any Crown land in question — for example, where no past inconsistent dealings have taken place with the land — then a non-claimant application should be made.[183] (If it is clear that native title has been extinguished by past inconsistent dealings, such as the grant of a fee simple, then there will be no right to negotiate.)
2. Where licences are issued by governments for activities in *offshore waters* (such as fishing), no right to negotiate exists although native title holders may have an interest in these areas.[184]
3. Where the *expedited procedure* is applicable, the right to negotiate is not relevant. This procedure is available when a government gives notice under s. 29(4) of the *Native Title Act 1993* (Cth) that it intends to undertake a certain future act and where no objection is received within two months of the notice being given.[185] This process relates only to actions by governments and is available only if the future permissible act does not directly interfere with the community life of the native title holders, or interfere with areas or sites of particular significance, or involve any major disturbance to any land or waters concerned.[186] Native title holders can object to the use of the expedited procedure and a decision will be made by the Tribunal or arbitral body as to whether the act attracts that procedure.[187]
4. Where the government gives notice (under s. 29) of its intention to carry out a future act and *no objection* is made within two months after that notice has been given, then any interest granted by the government will remain valid.[188] On a *non-claimant application* for the determination of native title,[189] if no native title is claimed within two months in response to such an application there will be no right to negotiate.[190] Any future act will be valid and native title rights will be

[182] See *NTA*, s. 26(2)(d). Acts covered by the right to negotiate process pursuant to s. 26(2) are acquisitions where the purpose is to confer rights on non-government parties.
[183] *NTA*, ss. 24 and 67. Section 253 defines a non-claimant application as having the meaning in s. 67.
[184] *NTA*, s. 26(1) covers only onshore places; thus offshore places are outside the right to negotiate regime.
[185] *NTA*, ss. 32(2), 29(4) and 28(1)(b).
[186] See the definition of 'act attracting the expedited procedure' in s. 237 of the *NTA*.
[187] *NTA*, s. 32(3).
[188] *NTA*, s. 28(1)(a).
[189] *NTA*, s. 61.
[190] *NTA*, ss. 24, 26(3) and 67.

compensated.[191] If a government has initiated a non-claimant application, it may only withdraw the application in certain circumstances. The Tribunal has a discretion to refuse the withdrawal of applications and, therefore, the application may be forced to proceed.[192]

5. The negotiation process is not applicable in relation to *future renewals* where the renewal is undertaken pursuant to a legally enforceable right that was created before 1 January 1994.[193]
6. No right to negotiate is given in relation to *low impact future acts* because of the nature of such activities.[194]
7. Acts may be *excluded by the Commonwealth Minister* from the right to negotiate regime.[195] The *Native Title (Queensland) Act 1993* provides that State compulsory acquisition Acts could be excluded from the right to negotiate process in 'appropriate' cases because an alternative State regime may be established in accordance with the *Native Title Act 1993* (Cth).[196] It is also provided in the Queensland legislation that acts under the State mining Act may be excluded from the right to negotiate regime in 'appropriate' cases.[197]

To ensure that any proposed future act will be valid, the right to negotiate process must be complied with. This involves the following:

1. *Notice*: The government must give notice to the registered title holders or registered claimants, to any representative of an Aboriginal body in the area, to the person who requested the act and to the public of its intention to undertake the future act.[198]
2. *Agreement*: Native title holders, the government and the grantees must reach agreement within a compulsory negotiation period of six months, or four months in relation to a prospecting or exploration permit.[199]
3. *Mediation*: If a negotiating party so requests, then the arbitral body or the Tribunal must mediate among the parties to assist in obtaining an agreement.[200]
4. *Tribunal*: If no agreement is reached within the above-mentioned time frames, then the party wishing the matter to proceed can bring the

[191] *NTA*, s. 24(1)(c).
[192] *NTA*, s. 149.
[193] *NTA*, ss. 25(1), 235(7) and 26(3)(a).
[194] *NTA*, s. 234.
[195] *NTA*, s. 26(3) and (4). The *NTQA* does not contain a right by a State Minister to exclude acts from the right to negotiate process.
[196] *NTQA*, s. 148(3)(c) and *NTA*, s. 43.
[197] *NTQA*, s. 153(2)(b). Such acts would be excluded from s. 26(2) of the *NTA* which deals with the right to negotiate process. Presumably this would be in relation to low-impact future acts, as even exploration permits could be intrusive if seismic tests were to be conducted or areas of land bulldozed.
[198] *NTA*, s. 29(1).
[199] *NTA*, s. 35.
[200] *NTA*, s. 31(2).

matter before the Tribunal (or the State arbitral body) which determines whether the permissible future act may be done.[201] However, if an agreement is reached before the arbitral body or the Tribunal makes a determination, then no determination must be made.[202] In addition to the right to negotiate, the native title holders are entitled to request the Tribunal to make a determination in relation to the act.[203] The Tribunal must take into account the effect of the grant on certain stipulated criteria which include the effect on native title rights and interests, the way of life of native title holders, the culture and traditions of native title holders, significant areas and sites, the natural environment, the wishes of the native title holders, and the economic or other significance of the proposed act to the national interest.[204]

5. *The order*: The determination of the Tribunal or the agreement when given to the arbitral body will have effect as a contract between the parties. Agreements may cover royalty payments, income or profit-sharing.[205] However, the Tribunal cannot make orders regarding profit-sharing.[206]
6. *Ministerial override*: The federal or State Minister can override the determination of the Tribunal in the State or Territory interest, or in the national interest, within two months of the decision.[207]
7. *Appeal*: On a right to negotiate application before a Tribunal, a party may appeal to the Federal Court on a question of law, from any decision or determination of the Tribunal.[208] No other rights of appeal are provided here.

PASTORAL LEASES

Under the *Aboriginal Land Act 1991* (Qld), the fact that the land claimed was once subject to a pastoral lease is completely irrelevant. This position is different under the *Native Title Act 1993* (Cth) which designates pastoral leases as Category A 'past acts' that may extinguish native title. Grants of pastoral leases prior to 1975 will be subject to the *Mabo*[209] test of extinguishment and are generally considered as extinguishing native title, and thus no claims can be made over land that was once subject to a pastoral

[201] *NTA*, ss. 35 and 36.
[202] *NTA*, ss. 34 and 37.
[203] *NTA*, s. 38.
[204] *NTA*, s. 39.
[205] *NTA*, s. 33.
[206] *NTA*, s. 38(2).
[207] *NTA*, s. 42(1), (2), (3) and (4).
[208] *NTA*, s. 169(1).
[209] (1992) 175 CLR 1, 68–73, per Brennan J; 110–12, per Deane and Gaudron JJ.

lease no matter for how brief the term of the lease.[210] One issue that remains unclear is the question of whether a pastoral lease reserving traditional Aboriginal rights preserves native title itself.[211] While current pastoral leases in Queensland do not contain reservation clauses, some previous pastoral leases were issued with such clauses. If a lease with a reservation clause expired and the land reverted to the Crown and no other dealings were undertaken with that land, it is possible that native title as preserved by the reservation clause may continue. The *Native Title (Queensland) Act 1993* states that pastoral leases are examples of interests that are inconsistent with native title and would thus extinguish native title. This section is intended to be declaratory of the current law.[212] However, on one view,[213] if the scenario occurred where a pastoral lease with a native title reservation clause expired and the land reverted to the Crown, this declaratory section could be inconsistent with the Commonwealth *Native Title Act 1993* and therefore invalid.

The *Native Title Act 1993* (Cth) creates an exception to the extinguishment of native title by pastoral leases. Section 47 enables Aboriginal people who hold a pastoral lease to claim native title and receive the benefits of native title under the legislation. It remains necessary to prove the traditional connection with the land to establish native title rights and this may be a difficulty where a prior pastoral lease has been held by non-Aboriginal tenants. It would not be prudent for Aboriginal people who propose to seek a determination of native title pursuant to this section to abandon or forfeit a pastoral lease. This is because s. 47 of the *Native Title Act 1993* (Cth) requires Aboriginal people to hold a pastoral lease at the time of making application. After a determination of native title, the pastoral lease continues to operate as a contract between the tenant native title holders and the Crown. Tenant native title holders who attempt to avoid the terms and conditions of their pastoral lease could be in breach of the contractual obligations in the lease and liable for the consequences of any breach — possibly damages or forfeiture. The feasibility of financ-

[210] See *NTA*, s. 229 and *NTQA*, s. 10. The *National Native Title Guidelines in Relation to Claims* indicate that the Tribunal will not accept a claim over land that has been subject to a lease where the lease confers exclusive possession: one exception being leases containing reservation clauses. Consistent with this, the application in *Waanyi* was refused by the National Native Title Tribunal on the grounds that a pastoral lease unqualified by a reservation clause extinguishes native title. French J noted that it was common to the majority judgments in *Mabo* that the grant of a leasehold interest conferring rights of exclusive possession would extinguish native title and that this proposition is subject to the terms and conditions of particular leases that may negate the characterisation of the grant as intending extinguishment. (*In the Matter of Waanyi Application* No. QN94/9.) The question of leases extinguishing native title is the subject of argument in the *Wik* claim and the *Waanyi* appeal.

[211] See M.A. Stephenson, 'Pastoral Leases and Reservation Clauses', in M.A. Stephenson (ed.), *Mabo: The Native Title Legislation* (Brisbane: University of Queensland Press, 1995).

[212] *NTQA*, s. 144B. See also Explanatory Notes to the Native Title (Queensland) Amendment Bill, 2–3.

[213] C. MacDonald, 'A Guide to Native Title Legislation in Australia', *Real Property: Emerging Legal and Educational Issues Conference*, Bond University, July 1995, at 17.

ing the pastoral lease, or in fact any future development, after conversion to native title, due to restrictions in mortgaging and transferring native title land, should be a consideration in the conversion of a pastoral lease to native title.[214] Further advantages in continuing to operate the pastoral lease after a determination of native title should be considered, especially the possibility of conversion of the pastoral lease to freehold title under the *Land Act 1994* (Qld).[215] This would allow the land to be transferable and to be mortgaged. Conversion to freehold would, however, extinguish native title and the right to negotiate, the latter right not being extended to ordinary freehold land particularly with regard to mining. Recognition of native title on pastoral leased land may have implications for mining. For example, where a mining interest is currently undertaken on that pastoral lease, any renewal or variation could be subject to a right to negotiate.[216]

NATIONAL PARKS

Under the *Aboriginal Land Act 1991* (Qld), National Parks may also be declared as being available for claim.[217] Claims for National Parks can be made only on the basis of traditional affiliation or historical association.[218] No grant will be made unless the Aboriginal grantees have already agreed to lease back the National Park in perpetuity as a National Park subject to such conditions as stated by the Governor in Council.[219] Any rental would presumably be nominal and public rights of access are preserved.[220] The National Park should continue to be a National Park under the *Nature Conservation Act 1992* (Qld), but with Aboriginal representation on the Park's Board of Management and Aboriginal involvement in the preparation of a management plan for the Park land.[221] Although the Minister is required to consult Aboriginal people and act in a manner that is consistent with Aboriginal tradition in the preparation of the management plan, this obligation is also subject to the *Nature Conservation Act 1992* (Qld).[222] Section 93 of the *Nature Conservation Act 1992* (Qld) allows Aboriginal people to take, use or keep protected wildlife under Aboriginal custom, but this right is subject to any permit requirements or conservation plans or restrictions in designated 'protected areas'. Activities such as hunting, fishing or food gathering could be undertaken only in

[214] See *NTA*, s. 56(5) and Horrigan, *supra* n. 150.
[215] *Land Act 1994* (Qld), Chapter 8, Part 2 — Freeholding Leases.
[216] *NTA*, ss. 26 and 31.
[217] *ALA*, s. 24.
[218] *ALA*, s. 46(2).
[219] *ALA*, s. 83(1)
[220] *ALA*, s. 83(10).
[221] *NCA*, ss. 18, 40, 41 and 42; *ALA*, s. 83(1)–(9).
[222] *ALA*, s. 83(7).

accordance with the *Nature Conservation Act 1992* (Qld) and the Park's management plan. Mining is prohibited in National Parks.[223]

Native title, under the native title legislation (Commonwealth and Queensland), could also be claimed in National Parks except where that title has been extinguished by a prior grant of freehold or leasehold before the area became a National Park. The full extent of native title rights in National Parks is not clear. In accordance with s. 211 of the *Native Title Act 1993* (Cth), native title rights of fishing and hunting for non-commercial purposes may be carried out except where a law controls or regulates hunting and fishing solely in relation to the Aboriginal community. The exercise of native title rights in National Parks is not dependent on the *Nature Conservation Act 1992* (Qld). Arguably, native title rights may not be restricted by conservation or management plans in National Parks unless regulations governing such plans were directed specifically for the benefit of Aboriginal people. Camping[224] and lighting of fires[225] are also restricted in National Parks. Aboriginal burning off — for example, burning land to flush out small animals — could be part of the traditional hunting methods of some groups.[226] Aboriginal fires and occupation of native title land in National Parks may arguably be covered by one of the categories of activities (hunting, gathering, cultural or spiritual) in s. 211 of the *Native Title Act 1993* (Cth) that attract exemption from compliance with permit or licence requirements. However, if a total prohibition on fires is proclaimed, then it is arguable whether native title holders would be bound to comply, as the traditional right would be denied and not merely regulated.[227]

MINING

Under the *Aboriginal Land Act 1991* (Qld), a lease or grant of land must contain a reservation of minerals and petroleum to the Crown.[228] The *Aboriginal Land Act 1991* (Qld)[229] specifies that where the State receives royalties under the *Mineral Resources Act 1989* (Qld),[230] a percentage of

[223] *NCA*, s. 27.

[224] *Forestry Act 1959* (Qld), s. 73. Occupation of a State forest without a permit or licence is an offence.

[225] *Forestry Act 1959*, ss. 62–68. (Section 62 states that fires cannot be lit without a permit.) For a discussion of restrictions on the use of fire and traditional Aboriginal rights, see Hughes, *supra* n. 128 at 37.

[226] See Hughes, *supra* n. 128 at 45, citing Gould, 'Uses and Effects of Fire Among the Western Desert Aborigines' (1971) 8 *Mankind* 14, 19–20. See generally Haynes, 'Use and Impact of Fires', in Haynes, Ridpath and Williams (eds), *Monsoonal Australia: Landscape, Ecology and Man in the Northern Lowlands* (The Netherlands: Balkema (AA) Publishers, 1991), 61.

[227] See Hughes, *supra* n. 128, and see the above discussion regarding regulation of rights.

[228] *ALA*, ss. 80 and 42.

[229] *ALA*, s. 88.

[230] *MRA*, ss. 44, 115, 311 and Part 9.

mining royalties will be paid to the grantees of the land and a further percentage is to be used for the benefit of the Aboriginal people of Queensland.[231] A complex formula for ascertaining this is contained in the *Aboriginal Land Regulations*.[232] The *Mineral Resources Act 1989* (Qld) applies to Aboriginal land grants and, therefore, regarding mining most Aboriginal land would be treated as ordinary freehold; however, transferable land and certain claimable lands will be treated as a reserve for the purposes of the Act.[233] If the grantees of land under the *Aboriginal Land Act 1991* (Qld) come within the definition of 'owner' under the *Mineral Resources Act 1989* (Qld), this would entitle them to claim compensation under the *Mineral Resources Act 1989* (Qld) in addition to the entitlement to royalty payments.[234] Trustees holding the land for the benefit of the

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[231] *ALA*, s. 88.

[232] *Aboriginal Land Regulations 1991*, ss. 55 and 56.

[233] *ALA*, s. 87. The *MRA* applies to:

1. *Transferable* land
   — as if it were a *reserve* within the meaning of the *MRA*.
2. *Transferred* land, and *claimable* land (that was not transferred land) which was *not subject to a mining interest* at the time of the claim, except:
   (a) land subject to an Aboriginal (non-transferred) lease, or
   (b) where all interests were acquired by, or on behalf of the Crown before the land became claimable land (other than interests in favour of the Crown), or
   (c) a National Park,
   — as if it were a *reserve and the grantees were the owners* of the land within the meaning of the *MRA*. Here in relation to land in subs. (2), the holders of a mining lease don't have to comply with the *MRA*, ss. 316 and 317.
3. *Claimable* land (that was not transferred land) and is:
   (a) land that is subject to an Aboriginal (non-transferred lease), or
   (b) where all interests were acquired by, or on behalf of the Crown before the land became claimable land (other than interests in favour of the Crown),
   — as if that land were *not Aboriginal land.*

   Although not stated in the legislation, this subsection presumably applies to land subject to a mining interest.
4. *Claimable* land (that was not transferred land) where the land was *subject to a mining interest* at the time when the relevant claim for the land was made:
   (a) the *MRA* applies to *the mining interest* and associated interests as if the land were *not Aboriginal land*, and
   (b) the *MRA* applies to other mining interests (presumably subsequently created mining interests) as if the land were a *reserve and the grantees of the land were the owners* of the land within the meaning of the *MRA*. Here in relation to land in subs. 4(b), the holders of a mining lease don't have to comply with the *MRA*, ss. 316 and 317 (*ALA*, s. 87(6)).

[234] *MRA*, s. 28 entitles owners to compensation for damage or injury in relation to a prospecting permit. Under *MRA*, s. 85, a mining claim shall not be granted or renewed unless compensation has been determined (either by agreement or by the Wardens Courts) between the applicant and each person who is the owner. Compensation under this section will take into account the following: deprivation of possession of the surface area of land, diminution of the value of land and improvements, severance of any land, any surface rights of access and all loss or expense that arises, but will not cover an allowance for any minerals that are, or may be, on or under the surface of the land. Relocation costs and the current use of the land will be considered. A party may apply under this section to have the Wardens Court determine compensation. Under the *MRA*, s. 279, a mining lease shall not be granted or renewed unless compensation has been determined. Compensation will be determined by the Wardens Court if no agreement is reached: *MRA*, s. 281. Similar criteria to those for assessing compensation in s. 85 apply in s. 281.

Aboriginal people would, once registered as proprietors of the land under the *Land Title Act 1994*, come within the definition of owner under the *Mineral Resources Act 1989* (Qld).[235] Miners have an automatic right to lodge an application for a mining claim, interest or permit under the *Mineral Resources Act 1989* (Qld) without the permission of the owner of land. The grantees of Aboriginal land held in a deed of grant in fee simple *may consent* to the creation of a mining interest over land granted or transferred under the *Aboriginal Land Act 1991* (Qld).[236] 'May consent' could be interpreted as permissive and enabling consent to be given to a pre-mining compensation agreement under the *Mineral Resources Act 1989* (Qld) provided that adequate explanation and opportunities are offered to the Aboriginal grantees in accordance with the terms of the *Aboriginal Land Act 1991* (Qld).[237] 'May consent' could also allow the refusal of consent and this view is very arguable as the *Aboriginal Land Act 1991* (Qld) is a latter specific statute. However, the consent requirement's potential to be interpreted as a veto could be limited as neither the Mining Warden's nor the Minister's jurisdiction to determine an application is excluded. No formal consultation or negotiation process in relation to mining has been set out in the *Aboriginal Land Act 1991* (Qld), and no provision has been made in the legislation if the Aboriginal owners fail to consent. If consent for a mining lease is not given where the land is treated as reserve under the *Mineral Resources Act 1989* (Qld), then the Governor in Council may waive this requirement.[238] There is also a requirement for the holder of a mining lease to consult with, and endeavour to reach agreement with, Aboriginal people in relation to access routes and variations.[239]

In contrast, under the *Native Title Act 1993* (Cth) the creation, variation, renewal and extension of rights to mine and explore on native title lands are subject to the native title holder's right to negotiate.[240] This is

[235] 'Owner' is defined in the *MRA*, s. 5 as the registered proprietor of fee simple land. Land granted or transferred under the *ALA* is registered under the *Land Titles Act 1994* (Qld) and the trustees become the registered proprietors of the land. Where land under the *ALA* is to be treated as a reserve under the *MRA*, then the owner is the trustee: *MRA*, s. 5.

[236] *ALA*, ss. 76(2)(b) and 39(2)(b).

[237] *MRA*, ss. 85 and 279.

[238] In the case where Aboriginal land is treated as reserve under the *MRA* (see s. 87 of the *ALA*), s. 54 provides that the consent of the owner or the consent of the Governor in Council is required before a mining claim will be granted. If the owner of the reserve does not consent to the mining claim, the matter can be referred to the Mining Wardens Court: *MRA*, s. 76. Pursuant to s. 79 of the *MRA*, after a hearing in the Mining Wardens Court the Minister, after considering the court's recommendation, shall instruct the Mining Registrar to reject the application or recommend to the Governor in Council to consent to the grant of the mining claim.

[239] *ALA*, s. 87(6). Such consultation must occur before a mining lease is applied for under s. 316 of the *MRA* or a variation applied for under s. 317 of the *MRA*.

[240] *NTA*, s. 26. See generally J.R.S. Forbes, 'Mabo and the Miners — ad infinitum?' and H. Fraser QC, 'Native Title Legislation and Mining', in M.A. Stephenson (ed.), *Mabo: The Native Title Legislation* (Brisbane: University of Queensland Press, 1995).

not a right that Aboriginal freeholders under the *Aboriginal Land Act 1991* (Qld), or any freeholders in Queensland, enjoy. While the right to negotiate does not necessarily mean a right to a percentage of the royalties,[241] it would allow native title holders to negotiate for joint ventures with a mining company or it could facilitate agreements for the building of facilities that would benefit the whole community, such as hospitals, clinics, schools or housing. It could also encourage agreements for job training or employment of local people. As noted above, Queensland has confirmed the ownership of minerals by the Crown.[242] The *Native Title (Queensland) Act 1993* allows the State mining Act to be amended by regulation with the general objective of ensuring consistency with the Commonwealth native title legislation and to ensure that Mining Wardens Courts become recognised State bodies.[243] Mining Acts in Queensland now deem that the owners of land include the holders of native title.[244] Native title holders will therefore receive notices to which owners are entitled,[245] and compensation for mining in accordance with the statutory provisions will also be available to native title holders. Until that compensation is agreed between the parties or is determined by a Mining Wardens Court, mining over a surface area cannot proceed.[246] The Queensland Act allows application to be made to the Commonwealth Minister to exclude an exploration permit from the 'right to negotiate regime to minimise delays during the pre-mining stage.[247]

CAN NATIVE TITLE SURVIVE THE GRANT OF AN INTEREST UNDER THE *ABORIGINAL LAND ACT 1991* (QLD)?

Section 71 of the *Aboriginal Land Act 1991* (Qld) provides that pre-existing interests continue in force. Interests are defined to include native title

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[241] *NTA*, s. 38(2) provides that the arbitral body must not determine that the doing of a future act is subject to a condition that has the effect that native title parties are to be entitled to payments worked out by reference to the amount of profits made, income derived, or things produced. However, parties may reach agreement on such basis.

[242] *NTQA*, s. 17.

[243] *NTQA*, s. 153.

[244] *NTQA*, s. 152. *MRA*, s. 5 and the *Petroleum Act 1923* (Qld), s. 3. See also K. McDonald, 'Mabo and Native Title — The Final Implication: Past and Future Titles — Their Validity and Effect' (1994) 13(2) *AMPLA Bulletin* 71, 85.

[245] *MRA*, ss. 31 and 32.

[246] *MRA*, ss. 279 and 281. No allowance is made for minerals in, or on the ground in assessing compensation: *MRA*, s. 281(4)(b).

[247] *NTQA*, s. 153(2)(b). The Commonwealth Minister can exclude acts from the 'right to negotiate' procedure under the *NTA*, s. 26(3) if the criteria in (4) are satisfied. See J. Forbes, 'Queensland's Native Title Act' (1994) 13(3) *AMPLA Bulletin* 98. See also McDonald, *supra* n. 244 at 84 and 89.

interests.[248] Consequently, in Queensland native title (if it has not already been extinguished) may not be extinguished by a statutory grant of a fee simple for the benefit of Aboriginal people under the *Aboriginal Land Act 1991*.[249] The Full Federal Court in *Pareroultja v Tickner*[250] found that a freehold land grant to an Aboriginal Land Trust under the *Aboriginal Land Rights (Northern Territory) Act 1976* did not extinguish native title, although the usual position is that a grant of a fee simple extinguishes native title. After considering certain statements in *Mabo*,[251] the Federal Court found that the grant under the Northern Territory legislation was consistent with native title as it was intended to preserve native title. The High Court has refused special leave to appeal in this case, but the issue is still arguable.

Native title in the *Native Title Act 1993* (Cth) includes those interests which have been compulsorily converted or replaced by statutory rights and interests held by Aboriginal or Islander people.[252] The effect is that native title interests would not necessarily be lost by *Aboriginal Land Act 1991* (Qld) grants.[253] Such statutory grants made prior to 1994, if they were invalid because of the existence of native title, would be validated as 'past acts' under the *Native Title (Queensland) Act 1993*.[254] Freehold or leasehold titles that benefit Aboriginal or Islander peoples are excluded from Category A 'past acts', which extinguish native title interests on validation,[255] and such titles will presumably be classified as Category D 'past acts' to which the non-extinguishment principle applies. Native title would therefore be suspended, reviving only if the freehold or leasehold title was surrendered or compulsorily acquired by government.[256] On this interpretation, native title rights would not be able to be exercised while the statutory grant existed. However, it is arguable that s. 71 of the *Aboriginal Land Act 1991* (Qld) ensures the survival of (unextinguished) native title, together perhaps with rights under the native title legislation, despite the

[248] Interests are defined in s. 5(1) of the *ALA* to include the rights and interests possessed under Aboriginal tradition and recognised by the common law of Australia. See G. Nettheim, 'The Relationship between Native Title and Statutory Title under Land Rights Legislation', in M.A. Stephenson (ed.), *Mabo: The Native Title Legislation* (Brisbane: University of Queensland Press, 1995), 183. See also R. Bradshaw, 'The Relationships of Native Title and Native Title Legislation to the Land Rights Legislation', in R. Bartlett and G. Meyers (eds), *Native Title Legislation in Australia* (Perth: Centre for Commercial and Resources Law, University of Western Australia and Murdoch University, 1994).

[249] Most claims under the *ALA* are expressly made 'without prejudice to any common law native title in the area'. See, for example, *Aboriginal Land Claims to Cape Melville National Park, Flinders Group National Park, Clack Island National Park and Nearby Islands*, Queensland Land Tribunal Report (Brisbane: Government Printer, May 1994). See also Queensland Land Tribunal Report No. 1, May 1994, paras 85–101.

[250] *Pareroultja v Tickner* (1993) 42 FLR 32.

[251] (1992) 175 CLR 1, 111, per Deane and Gaudron JJ; 196, per Toohey J.

[252] *NTA*, s. 223.

[253] *ALA*, s. 71. The position would be similar in relation to the creation of reserves for the benefit of Aboriginal people, or DOGITs under the *Land Act 1962* (Qld).

[254] *NTQA*, s. 8. The definition of 'past act' in the Commonwealth *NTA* applies to the Queensland legislation — s. 5 of the *NTQA*. See Nettheim, *supra* n. 248 at 194–5.

[255] *NTA*, s. 229(2)(b)(ii) and (iii). Similar exclusions exist in relation to Category B lease 'past acts': *NTA*, s. 230.

[256] *NTA*, s. 238. See Nettheim, *supra* n. 248 at 194–5.

above analysis. It is unlikely that an *Aboriginal Land Act* statutory grant made after 1 January 1994 would be classed as a 'future act' under the *Native Title Act 1993* (Cth), as such grant would allow the land to be held for Aboriginal benefit.[257] In any case, native title would have to be treated in the same manner as freehold because of the *RDA* and if the native title holders objected to a statutory grant then their native title interest could be acquired under the *Acquisition of Land Act 1976* (Qld) after the 'right to negotiate' process has been conducted.[258]

TRIBUNAL HEARINGS

After a claim is made under the *Aboriginal Land Act 1991* (Qld), it will be examined by the Land Claims Registrar who decides if it is duly made. If it is, the claim is referred to the Land Tribunal.[259] Public notice of claims is made and any person whose interests are affected is able to apply to the Tribunal to be made a party to the action.[260] Generally, lawyers would not be able to represent parties at the proceedings unless the Tribunal otherwise orders.[261] The Tribunal, when making a recommendation in relation to a grant of land, must advise the Minister on the following: the number of Aboriginal people advantaged by a grant, the detriment that might result to other Aboriginal parties, the responsibilities that the claimant group has agreed to assume in relation to the land and the effect of the grant on the existing and proposed patterns of land usage in the area.[262] It is not necessary for the Tribunal to take these matters into account; simply to give advice on them.[263] The Tribunal must also recommend the persons who should be appointed to be the grantees of the land as trustees.[264] The Tribunal makes a recommendation only. The Minister has the ultimate discretion whether to make the grant or not. Any appeals or questions of law are to be referred by the Land Tribunal for determination by the Land Appeal Court.[265]

The establishment of a Tribunal to deal with native title issues is provided for in both the *Native Title Act 1993* (Cth) and the *Native Title*

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[257] *NTA*, ss. 233(3)(a) and 235. See Nettheim, *supra* n. 248 at 195–6.

[258] See Nettheim, *supra* n. 248. Land under the *ALA* is in practice registered under the *Land Title Act 1994* (Qld). Normally, indefeasibility of title would extinguish prior unregistered interests, but the *NTA*, s. 11, provides that native title is not able to be extinguished contrary to this Act; therefore, native title will be preserved despite registration.

[259] *ALA*, s. 49. For a detailed discussion regarding Tribunals, see Neate, *supra* n. 2.

[260] *ALA*, s. 105.

[261] *ALA*, s. 107.

[262] *ALA*, s. 60.

[263] See Neate, *supra* n. 2 at 62. See *Aboriginal Land Claim to the Simpson Desert National Park* (Brisbane: Government Printer, 1994), paras 145–50. See Queensland Land Tribunal Report No. 2, December 1994.

[264] *ALA*, s. 60.

[265] *ALA*, ss. 117 and 118. Aboriginal claimants do not have to pay stamp duty or any survey costs associated with the transfer.

(Queensland) Act 1993. The Commonwealth *Native Title Act 1993* provides for an 'arbitral body',[266] either the National Native Title Tribunal (hereinafter referred to as the NNTT) or a corresponding State body, to deal with a variety of applications by the native title claimants, non-claimants and governments.[267] A State body will correspond to the NNTT only if the Commonwealth Minister determines that the State body meets Commonwealth criteria.[268]

The NNTT has several functions. It will handle claims involving the existence of native title;[269] it will determine applications in relation to carrying out permissible future acts — for example, whether a government may grant an interest in land held under, or claimed for, native title; and it will deal with issues involving the right to negotiate process and the expedited procedure process.[270] The NNTT will also deal with compensation questions[271] and applications for the revocation or variation of approved determinations of native title,[272] and also has the power to conduct special inquiries and undertake determinations in relation to matters arising under the Commonwealth *Native Title Act 1993*.[273] A significant limitation on the NNTT is that it is able to make determinations only where the application is unopposed[274] or if the parties agree.[275] If the application is opposed and the parties disagree, the NNTT is required to order a mediation conference[276] and if agreement is reached at the conference an order is then made by the NNTT.[277] All determinations of the NNTT must be registered with the Federal Court and are stated to have the effect of an order of the Court.[278] Opposed applications, including applications where no agreement is reached, and contested claims for compensation are heard by the Federal Court.[279] If the determinations of the NNTT are challenged, then these will be reviewed by the Federal Court.[280] The Federal Court will hear appeals on questions of law in rela-

[266] *NTA*, s. 27 and Part 6.

[267] *NTA*, ss. 61 and 67 and *NTQA*, s. 29. The non-claimant must hold an interest in the entire area for which the determination is sought. Either the State or Commonwealth Minister may make the application.

[268] *NTA*, s. 251.

[269] *NTA*, ss. 13, 61 and 225.

[270] *NTA*, ss. 32, 35 and 75.

[271] *NTA*, ss. 50 and 61.

[272] *NTA*, ss. 13 and 61.

[273] *NTA*, Part 6, Division 5.

[274] *NTA*, s. 70.

[275] *NTA*, s. 71.

[276] *NTA*, s. 72.

[277] *NTA*, s. 73. The matter must be referred to the Federal Court if the Tribunal could have, but did not make a determination under ss. 70, 71 or 73: *NTA*, s. 74.

[278] *NTA*, ss. 166 and 167. These provisions would probably be invalid as they involve an exercise of judicial power. See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 69 ALJR 191; *infra* n. 292.

[279] *NTA*, s. 81.

[280] *NTA*, ss. 169, 167 and 168. Any party to the proceedings, or any party whose interests are affected, may apply to the Federal Court for a review of the Tribunal's determinations: *NTA*, s. 167(4).

tion to the right to negotiate applications[281] and the NNTT may refer questions of law to the Federal Court.[282]

The *Native Title (Queensland) Act 1993* establishes the Queensland Native Title Tribunal (hereinafter referred to as the QNTT) with the intent that such Tribunal will qualify as a recognised State body and an arbitral body under the *Native Title Act 1993* (Cth).[283] It also intended that the Queensland Mining Wardens Courts be recognised State bodies for the purposes of compensation and other matters arising in relation to the mining Acts in Queensland.[284] The QNTT is not an arbitral body for matters arising in relation to a State mining Act and therefore will not deal with mining issues legislatively provided for under the State mining Acts.[285] The functions of the Queensland Tribunal are those prescribed under both the Queensland and Commonwealth native title legislation and thus its functions will be similar to the NNTT.[286] The QNTT must hear applications and make determinations in relation to contested disputes, unlike the NNTT which refers opposed matters and unsettled matters to the Federal Court.[287] Inquiries must be conducted by the QNTT regarding unopposed applications, right to negotiate applications and special issues.[288] Appeals may be made to the Land Appeal Court from decisions of the QNTT on questions of law or fact.[289] Questions of law may be referred to the Land Appeal Court by the QNTT.[290] Determinations of native title made by the QNTT would be subject to review by the NNTT only in the circumstances provided by s. 13(5) of the Commonwealth *Native Title Act 1993*. Provision is made in the State legislation for joint appointments to the NNTT and the QNTT and the Land Tribunal.[291] While the State Tribunal and the NNTT parallel each other in most respects,

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[281] *NTA*, s. 169. The Full Federal Court may exercise jurisdiction on appeals.

[282] *NTA*, s. 145.

[283] *NTA*, ss. 27 and 251 and *NTQA*, ss. 19, 25 and 26.

[284] *NTQA*, s. 26(3).

[285] *NTQA*, ss. 27, 26 and 29(7).

[286] *NTQA*, ss. 20 and 29 and also ss. 30–44. The functions of the QNTT include hearing: applications for a determination or a revised determination of native title, compensation claims (s. 29) and 'right to negotiate' applications (s. 44) including objections to the expedited procedure and applications for a future act determination.

[287] *NTQA*, ss. 43 and 72. Under *NTA*, s. 70 and *NTQA*, s. 39 if the application is unopposed (that is, where the only party is the applicant), the Tribunal may make a determination consistent with that sought provided the Tribunal is satisfied that the applicant has made out a *prima facie* case and the Tribunal finds that it is just and equitable to do so. Where the parties to a matter before the Tribunal reach agreement (including post-mediation agreement), the powers of the two Tribunals differ slightly. Under the *NTA*, ss. 71 and 73, the Tribunal can make a determination provided it is within the powers of the Tribunal and where it would be appropriate to do so. Under the *NTQA*, s. 40, the Queensland Tribunal must in addition be satisfied that a *prima facie* case has been made out. However, where agreement is reached after a mediation conference, it is not necessary under s. 42 of the *NTQA* that the Queensland Tribunal be satisfied that a *prima facie* case has been made out.

[288] *NTQA*, ss. 52 and also 50, 51 and 53–71.

[289] *NTQA*, s. 78 and refer ss. 79, 80, 87 and 88.

[290] *NTQA*, s. 58.

[291] *NTQA*, s. 95.

significant differences are, first, that the QNTT's functions are not restricted by constitutional limitations, thereby allowing the State Tribunal to determine applications which determinations are directly enforceable, unlike those determinations of the NNTT.[292] Secondly, the QNTT does not have to refer contested matters to a court, as occurs with the NNTT.

CHOICE OF FORUM

What forum would be most appropriate in which to bring a claim? Aboriginals commencing a claim pursuant to the *Aboriginal Land Act 1991* (Qld) must bring the matter before the Land Tribunal, but native title claimants have a choice of forum. Existing courts are not deprived of jurisdiction to deal with native title matters; but only the NNTT, a recognised State or Territory body,[293] or the Federal Court or High Court can make an 'approved determination' of native title.[294] Thus, in Queensland if Aboriginal people wish to seek a determination of native title, or if other applicants seek orders or relief pursuant to the native title legislation, then there is a choice of forum. Proceedings may be commenced in the QNTT, the NNTT, the Federal Court of Australia, the Supreme Court of Queensland or the High Court of Australia. In relation to issues under the State mining Acts, the Wardens Courts will exercise jurisdiction. Various factors which must be taken into consideration when deciding where to commence an action have been identified. These include the cost of proceedings, applicable procedures and rules of evidence, membership of the Tribunal or court, the likely expediting of the hearing, the possible avenue of appeals, and the form of relief or order being sought.[295] Although an action is commenced in one forum, it is possible that the court will remit the matter to another forum or that proceedings will be adjourned awaiting the determination of the Tribunal.[296] Commencing an action before a Tribunal has the advantage that both the NNTT and the QNTT are capable of determining their own procedures which are generally informal, and that legal forms and strict rules of evidence are not binding.[297] In relation to applications involving native title lodged by the

[292] See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 69 ALJR 191 for a discussion of the powers of federal tribunals. Since the *Brandy* case, the NNTT cannot exercise judicial power of the Commonwealth and is therefore unable to make binding determinations. State constitutions contain no such restrictions. See *supra* n. 278. See also Justice R.S. French, President NNTT, 'Discussion Paper on Proposed Changes to Native Title Act 1993', March 1995. See also G. MacIntyre, 'Brandy: Against the Spirit of our Laws' (1995) 73(3) *Aboriginal Law Bulletin* 20.

[293] *NTA*, s. 251.

[294] *NTA*, ss. 13 and 253. See, in relation to the choice of forum, Neate, *supra* n. 2 at 58.

[295] Neate, *supra* n. 2 at 58.

[296] *NTQA*, s. 22.

[297] *NTA*, ss. 109 and 251(2)(d) and *NTQA*, s. 21. See also Neate, *supra* n. 2 at 55.

Registrar of the NNTT with the Federal Court, virtually identical provisions apply.[298] Similarly, the Land Tribunal under the *Aboriginal Land Act 1991* (Qld) is not bound by strict rules of evidence.[299]

In Queensland, the choice of the QNTT appears to have certain advantages. First, the functions of the QNTT do not suffer from the constitutional limitations that afflict the NNTT and the determinations of the QNTT are enforceable.[300] Secondly, the QNTT is able to hear contested matters and thus the costs and formality of a contested Federal Court hearing are avoided. Thirdly, while the Land Tribunal and the QNTT are separate bodies, there can be a transfer of evidence between them.[301] Provision is also included in both the Commonwealth and State legislation for an exchange of evidence between tribunals and courts.[302] The Land Tribunal can receive into evidence the transcript of evidence and other evidence accepted by the NNTT or the QNTT, and a similar provision is contained in the *Native Title (Queensland) Act 1993* allowing for the transfer of evidence given in a proceeding before the Land Tribunal to be admitted as evidence in the QNTT.[303] The *Aboriginal Land Act 1991* (Qld) is to be amended to provide that if a native title issue arises — that is, if native title interests are claimed to exist or if native title interests arise in relation to an area claimed under the Act — the matter must be referred to the QNTT and the QNTT is deemed to be the Land Tribunal with all of its powers for the purposes of the *Aboriginal Land Act 1991* (Qld).[304] This would facilitate the transfer of any native title issues arising from a claim under the *Aboriginal Land Act 1991* (Qld) to the QNTT. No legislative provision is made for the transfer of a claim under the *Native Title (Queensland) Act 1993* to the *Aboriginal Land Act 1991* (Qld) if during the hearing it became obvious that the claimant could not meet the requirements to establish native title (where, of course, the land was declared as claimable by the government pursuant to the *Aboriginal Land Act 1991* (Qld)). Here, it appears the action would need to be recommenced in the correct jurisdiction. Finally, it should be remembered that the government's power to override the determination of an arbitral body in the State or national interest depends on which body made the determination. Thus, the Queensland Government would have the power to overrule the QNTT's decisions.

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[298] *NTA*, s. 82 and see also ss. 74, 81, 86, 146, 213, 219 and 220.
[299] *ALA*, ss. 108 and 115.
[300] See *supra* n. 292.
[301] *ALA*, s. 119 and *NTQA*, s. 59.
[302] *NTA*, ss. 86 and 146 and *NTQA*, s. 59.
[303] *NTQA*, s. 59 and *ALA*, s. 119.
[304] Amendment to be inserted by *NTQA*, s. 163, as amended by the *Native Title (Queensland) Amendment Act 1994*, s. 40. See Neate, *supra* n. 2.

REGISTRATION OF ABORIGINAL LAND AND NATIVE TITLE

Where claimable land or transferred land is granted in fee simple under the *Aboriginal Land Act 1991* (Qld), a deed of grant is issued in fee simple; and where land is granted by lease under the *Aboriginal Land Act 1991* (Qld), a lease of transferred land will be registered under the *Land Title Act 1994* (Qld).[305] These dealings gain the protection of the Torrens system of title. If the leased area was claimable land, the lease will be recorded in the register under the *Land Act 1994* (Qld).[306] The *Native Title Act 1993* (Cth) establishes two registers, one for recording native title claims, the Register of Native Title Claims, and another for recording determinations of native title, the National Native Title Register.[307] Public inspection is available of both registers except where the Registrar considers that it is not in the public interest.[308] The cultural and customary concerns of the indigenous community will be relevant. Upon a determination of native title, the Registrar is to notify the Land Titles Office of the relevant State.[309] The *Native Title (Queensland) Act 1993* establishes one register, the Native Title Register, for details of both claims and determinations of native title[310] but in other respects follows the Commonwealth Act.

CONCLUSION

A claim under the *Aboriginal Land Act 1991* (Qld) would be made when native title has been extinguished over traditional lands, where the native title holders are unable to prove a continuous connection with the land to establish proof of title or where a claim is sought on the basis of economic or cultural viability. A claim under the native title legislation could only be initiated where tenure searches show that native title has not been extinguished, as this information is required by the Registrar before the claim is accepted. Proof of continuous connection would also have to be established during the hearing to have native title recognised under the native title legislation.

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[305] *ALA*, ss. 63, 64 and 69 and also ss. 27, 28 and 30. Land granted or transferred under the *ALA* is registered under the *Land Titles Act 1994* (Qld) in the names of the trustees to be held 'in trust for the benefit of the Aboriginal people under the *Aboriginal Land Act* 1991 (Qld)'. No other notation is made on the title deed to indicate the restrictions on dealings with the land in ss. 76 and 39 of the *ALA*. Prior interests are to be endorsed on the deed of grant and have effect as registered interests under the *Land Titles Act 1994* (Qld): s. 34 of the *ALA*.

[306] *ALA*, ss. 64 and 69.

[307] *NTA*, Parts 7 and 8.

[308] *NTA*, ss. 187, 188 and 195.

[309] *NTA*, s. 199.

[310] *NTQA*, Part 10. Section 143 of the *NTQA* provides for co-operation by the Queensland Registrar in informing the National Registrar of claims and determinations of native title.

The significant differences between the Commonwealth and the Queensland native title Acts and the *Aboriginal Land Act 1991* (Qld) are these:

1. The *Aboriginal Land Act 1991* (Qld) grants an actual freehold title, subject to restrictions, while the native title Acts recognise a title equivalent to freehold for the purposes of determining whether the State can take action relating to the land. Native title land will now be treated in the same way as ordinary freehold, and native title holders will be entitled to the same procedural notices prior to resumptions.
2. The native title Acts grant a right to negotiate with government in relation to compulsory acquisition and other future dealings with native title land. Native title land can be resumed under the State or Commonwealth acquisition Acts, but such acquisition alone will not extinguish native title. Native title can be extinguished by an act giving effect to a resumption. The *Aboriginal Land Act 1991* (Qld) provides that the government cannot resume land granted under the *Aboriginal Land Act 1991* (Qld) without special legislation and without fair compensation.
3. Native title legislation grants a right to negotiate in relation to the mining of the land but not a right to mining royalties. While there is no right to negotiate regarding mining in the *Aboriginal Land Act 1991* (Qld), there is a right to a limited percentage of mining royalties.
4. There is no interrelationship between the native title legislation scheme and the statutory scheme of title under the *Aboriginal Land Act 1991* (Qld). The only possible exception is where a statutory grant has been made under the *Aboriginal Land Act 1991* (Qld) over land where rights of native title have not been extinguished. The rights granted under the native title legislation are stronger rights, especially the right to negotiate. However, proof of native title is more onerous under the *Native Title Act 1993* (Cth) and if the criteria cannot be met — that is, if native title has been extinguished in the past or if the connection with the land is lost — then the only option available for many groups is a claim under the *Aboriginal Land Act 1991* (Qld). The native title legislation protects non-extinguished native title rights and provides a regime in which native title can operate but offers little to those whose traditional rights and interests in relation to land have been lost, and that may well be the majority of Australia's traditional inhabitants. The *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* (Cth) is designed to provide financial assistance for the dispossessed to acquire land. Its resources, comprising annual grants from consolidated revenue, will not be infinite and it is unlikely to assist in the acquisition of land for all in the foreseeable future. For these reasons, it is appropriate at this time to maintain two different regimes for claiming and recognising Aboriginal interests in land in Queensland.