NEGOTIATION AND AGREEMENT-MAKING: PROVIDING THE WAY FORWARD IN AUSTRALIAN NATIVE TITLE

Cathryn Timms *

> The legal advance that commenced with *Mabo v Queensland [No 2]*, or perhaps earlier, has now attracted such difficulties that the benefits intended for Australia's indigenous peoples in relation to native title to land and waters are being channelled into costs of administration and litigation that leave everyone dissatisfied and many disappointed.
>
> The only way to pass through the jungle is to retain one's bearings, as the explorers of Australia have traditionally done, by keeping the eyes fixed on clear sources of light – like the rising sun in the morning or, at night, the constellation we call the Southern Cross.[1]
>
> **Justice Kirby in *Wilson v Anderson* (2002) 190 ALR 313, [126]-[127].**

INTRODUCTION

Dissatisfaction with the development of the law of native title since it was laid down by the Australian High Court in *Mabo v Queensland (No 2)* ('*Mabo*')[2] has been widely documented.[3] As the first recognition of Indigenous rights to land at common law, *Mabo* shattered previous conceptions of property law and lay down a new set of principles by which native title may be claimed. Yet these rights were diminished and

---

* Cathryn Timms, BA (As St), Third Year Juris Doctor Student, College of Law, University of Notre Dame Australia.

1 *Wilson v Anderson* (2002) 190 ALR 313, [126]-[127] (Kirby J). The earlier legal approach Kirby J refers to is *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

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

3 See eg, Pearson, Noel 'Where We've Come From and Where We're at with the Opportunity that is Koiki Mabo's Legacy to Australia' (Speech delivered at the Native Title Representative Bodies Conference, Alice Springs, 3 June 2003); *Wilson v Anderson* [2002] HCA 29 at [126]-[127] (Kirby J); Robert Chambers, *An Introduction to Property Law in Australia* (Sydney: LBC Information Services, 2001); Kado Muir and Lisa Strelein (eds), *Native Title in Perspective: Selected Papers from the Native Title Research Unit 1998-2000* (Canberra: Aboriginal Studies Press, 2000); Maureen Tehan, 'A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*' [2003] *Melbourne University Law Review* 523; Katy Barnett, 'Western Australia v Ward – One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis' [2000] *Melbourne University Law Review* 17.

new barriers constructed in the cases that followed, to the extent that the doctrine of native title is now widely criticised for failing to deliver tangible results for Indigenous people.[4]

We are hence left with a pressing issue – how do we move forward from a case that promised the world, yet delivered a much bleaker reality for Indigenous people? How do we find a way to pass through the jungle? The need for coherent and effective native title law certainly existed at the time of the High Court's landmark decision, and still remains fourteen years later. The challenge today is to salvage what we can from the High Court's decision in *Mabo* in a manner which accepts the current state of the law, at least until further developments.

In light of Victoria's first consent determination late last year (the Wimmera determination[5]) and the inroads achieved through agreement-making,[6] the recognition and promotion of native title interests – the essence of *Mabo* – is increasingly being achieved through negotiation between parties rather than through the courts. This article argues that the way forward is through dialogue between Indigenous and non-indigenous groups in the community, in the form of negotiation and agreement, rather than litigation. Coming to terms with past discriminatory concepts of property law necessarily involves redressing past wrongs and promoting 'a just resolution to the relationship between Indigenous and non-indigenous Australia.'[7] However, on a practical level, negotiation and agreement-making provides for the resolution of native title issues in a way that can deliver tangible social, cultural and economic benefits to Indigenous people, and avoids lengthy and costly litigation in which neither party may be considered a 'winner.'

Contents

This article is divided into two parts. **Part I** discusses the deficiencies in native title law post *Mabo*, and the very different experiences of other common law jurisdictions, to introduce the context in which native title

---

4 Ben Golder, 'Law, History, Colonialism: An Orientalist Reading of Australian Native Title Law' [2004] *Deakin Law Review* 2, 2.

5 *Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupgulk Peoples v State of Victoria* [2005] FCA 1795 (Unreported, Merkel J, 13 December 2005) ('Wimmera determination', or '*Clarke*').

6 See eg, Marcia Langton and Lisa Palmer, 'Modern Agreement Making and Indigenous People in Australia: Issues and Trends' [2003] *Australian Indigenous Law Reporter* 1; Tehan, above n 3; 'VicRoads – Yorta Yorta Nation General Area Agreement' [2004] *Australian Indigenous Law Reporter* 21; PG McHugh, 'What a Difference a Treaty Makes – The Pathway of Aboriginal Rights Jurisprudence in New Zealand Public Law' (2004) 15 *Public Law Review* 87.

7 Laura Beacroft, Luke McNamara, Heather McRae and Garth Nettheim, *Indigenous Legal Issues: Commentary and Materials* (2nd ed, Sydney: Butterworths, 1997) 9.

issues must be considered. An understanding of the inherent limitations of native title is necessary before assessing the most viable alternatives given the current state of the law. With reference to some prominent literature on the topic, Part I assesses the impact of deficiencies in current native title law to demonstrate the need for alternative approaches to solve native title issues.

Part II examines consent determinations and Indigenous Land Use Agreements (ILUAs) as alternative approaches to the adversary system to demonstrate that the way forward is through negotiated agreement and avoidance of long and complex litigation. It explores the opportunities afforded through negotiation and agreement-making as a means to overcome the dismal remnants of the landmark *Mabo* decision. This part outlines a recent consent determination and examples of successful ILUAs. It is submitted that dealing with native title issues through negotiated agreement acknowledges the inherent limitations of current native title law, and adopts a forward-looking approach towards the tangible benefits such agreements can provide for Indigenous people.

PART I – FAILED PROMISES

A *The Mabo Decision*

Mabo was a watershed decision that unsettled the notions underpinning property law that had prevailed in Australia for two hundred years.[8] Prior to *Mabo*, it had been held that the doctrine of communal native title did not form part of the law in Australia.[9] As Australia was 'settled,' the doctrine of tenure applied, vesting title to all land not belonging to anyone in the Crown.[10] However, the *Mabo* decision constituted a shift 'away from what had been understood at federation.'[11] The High Court overruled both the concept that Australia was terra nullius or 'empty land' at the time of settlement,[12] and the proposition that full legal ownership of Australian land vested in the Crown, unaffected by claims of the Aboriginal people. Instead, the majority held that Aborigines had prior rights and interests in the land which had survived the change in sovereignty. If Indigenous people could show they exercised traditional rights over land since before British Colonisation, the law would

---

8 Cf *R v Murrell* [1836] Legge 72; *R v Wedge* [1976] 1 NSWLR 581.

9 See *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; *Coe v Commonwealth* (1979) 53 ALJR 403. Had Australia been treated as acquired by conquest or cession, the doctrine of tenure would not have applied.

10 *Attorney General v Brown* (1847) 1 Legge 317-318; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 245.

11 *Wik Peoples v Queensland* (1996) 187 CLR 1, 230 (Gummow J) ('*Wik*').

12 See eg, *Cooper v Stuart* (1889) 14 AC 284, 291 (Lord Watson).

recognise that their legal right to their land, their 'native title,' had survived.[13]

Therefore, as the 'first determination by the High Court of the rights of Aboriginal people to land at common law,'[14] *Mabo* promised to protect the:

> interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.[15]

B *Current Native Title Law*

Despite this 'remarkable'[16] step towards attaining land justice and righting past wrongs,[17] the common law doctrine of native title has not lived up to its promise since the *Mabo* decision in 1992. The failure of the law to serve Indigenous litigants is demonstrated in subsequent cases which have deviated from or even 'significantly diminished'[18] the principles set forward in Mabo. It is also seen in the *Native Title Act 1993* (Cth) ('*NTA*')[19] which has assumed greater force and effect than originally envisaged,[20] and the Federal Government's approach to the issues. New barriers have made native title increasingly difficult to prove, and created widespread dissatisfaction over the development of the law. The major deficiencies in native title law as it stands are the principles of partial extinguishment, the 'bundle of rights' theory (which increased requirements for proving connection to the land), subordination of native title to other rights, and the onerous requirements for making and registering a native title claim.

---

13 *Mabo* (1992) 175 CLR 1 (Mason CJ, McHugh, Brennan, Deane, Toohey and Gaudron JJ, Dawson dissenting). Alternatively, the High Court said that if native title to the land had been extinguished, the Crown's radical title would become absolute beneficial title. See also, Justin Malbon, 'Mabo Perspectives: The Implications of *Mabo v Queensland (No.2)*' [1992] *Aboriginal Law Bulletin* 36, 36; Anne Twomey, 'A Guide through the Mabo Case Maze' in Department of the Parliamentary Library, *Mabo Papers: Parliamentary Research Service Subject Collection No 1* (Canberra: Australian Government Publishing Service, 1994) 95-116.

14 Tehan, above n 3, 526.

15 *Mabo* (1992) 175 CLR 1, 57 (Brennan J, with whom Mason CJ and McHugh J agreed). This statement was incorporated into the *Native Title Act 1993* (Cth) s223(1) ('*NTA*').

16 Brian Keon-Coen, 'Eddie Mabo and Ors v The State of Queensland' [2001] *Indigenous Law Bulletin* 65.

17 Golder, above n 4, 16.

18 Tehan, above n 3, 523.

19 The *NTA* was amended by the *Native Title Amendment Act 1998* (Cth) after *Wik*, which watered down the original intentions of *Mabo*. The amendments tightened the requirements for registering a native title claim – See eg, Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (3rd ed, Sydney: Lawbook Co, 2002) 284, discussion below.

20 See eg, Tehan, above n 3, 524.

1 *Partial Extinguishment*

The ability of native title law to provide justice for Indigenous people is impeded by the concept of partial extinguishment which has developed in the wake of *Mabo*. Although *Mabo* had recognised that native title could be lost in a number of ways,[21] it was held in *Ward*[22] that the common law would not recognise native title rights if they clashed with the common law objective to protect society as a whole,[23] or where they had been extinguished through Crown grants for mining, water rights or pastoral leases. The High Court ruled that there could be partial extinguishment of native title whenever there was inconsistency with non-indigenous rights[24] according to the 'inconsistency of incidents' test.[25] Where rights granted under a lease were consistent with native title, the lease prevailed over but did not extinguish native title rights.

The majority in *Ward* held that both the pastoral and mining leases had not entirely extinguished native title because they did not grant exclusive possession.[26] However, the leases did extinguish rights to control access and activities on the land. In this way, *Ward* overturned views about extinguishment from *Mabo*,[27] making native title a vulnerable right that exists only minimally, or not at all, over Crown land.[28]

This concept of partial extinguishment has attracted strong criticism. To Tehan, *Ward* demonstrates a narrow application of the *NTA*, with the inconsistency of incidents test allowing for the extinguishment of more native title rights than before.[29] She believes that applying the test in all

---

21 These include where Aborigines surrender land to the crown, abandon use of or cease traditional association with the land, or the last member of the group claiming native title dies. Native title is also lost through the grant of a freehold title (*Mabo* (1992) 175 CLR 1, 69, 110; *Fejo v Northern Territory* (1999) 156 ALR 721), leases granting exclusive possession (*Mabo* (1992) 175 CLR 1, 69 and 110), or if the Crown reserves land for its own purpose and carries out this purpose (*Mabo* (1992) 175 CLR 1, 68 (Brennan CJ); *Wik* (1996) 187 CLR 1, 86).

22 *Western Australia v Ward* (2002) 191 ALR 1 ('*Ward*').

23 See also *Mabo* (1992) 175 CLR 1, 61 (Brennan J). The Miriwung and Gajerrong community claimed a total of 7900 square kilometres of land and water – Katy Barnett, above n 3, 462.

24 *Ward* (2002) 191 ALR 1, 68-9. See also *Wik* (1996) 187 CLR 1, 171 (Gummow J).

25 *Wik* (1996) 187 CLR 1, 221 (Kirby J). On the application of the test, see generally Poh-Ling Tan, Eileen Webb and David Wright, *Butterworths Tutorial Series: Land Law* (2nd ed, Sydney: Lexis Nexis Butterworths, 2002) 51; Samantha Hepburn, *LBC Nutshell: Real Property Law* (2nd ed, Sydney: Lawbook Co, 2002), 72-3.

26 *Ward* (2002) 191 ALR 1, 68-9 and 121 (pastoral leases), 94, 97 and 105 (mining leases).

27 Tehan, above n 3, 563.

28 See eg, Tehan, above n 3, 563.

29 Tehan, above n 3, 560. See also *Wik* (1996) 187 CLR 1, 35-7 and 73. Cf Justin Malbon, 'Mabo Perspectives: The Implications of *Mabo v Queensland (No.2)*' [1992] *Aboriginal Law Bulletin* 36.

situations contradicts Justice Brennan's view in *Mabo,* that it is the use of land rather than its reservation for a purpose that causes extinguishment.[30] Basten believes the legal logic of the case is uncompelling, stating that it was 'a policy decision which could have gone the other way.'[31] The restrictions placed on native title are certainly disappointing in light of *Mabo's* promise to protect Indigenous land rights. As a watershed decision attempting to define a huge and varied area of law, it must be acknowledged that there were bound to be oversights and varied interpretations of the *Mabo* principles. Nevertheless, the principle of partial extinguishment does not appear to arise from or be justified by the *Mabo* decision.

2 *'Bundle of Rights' Theory*

The 'bundle of rights' theory approved by the High Court in *Ward* further diminishes native title rights by allowing those rights to be extinguished one at a time.[32] The High Court justifies partial extinguishment by pointing to the distinction in the *NTA* between complete extinguishment and extinguishment 'to the extent of any inconsistency.'[33] The decision overturns views about extinguishment deriving from *Mabo*,[34] with the result that native title will now not exist at all, or at best only minimally, on much Crown land. Barnett views the bundle of rights theory as particularly inappropriate in a native title context because it describes incidents of property from only one cultural perspective, allowing native title to be divided and extinguished accordingly.[35] In this way native title has the potential of becoming an 'impotent promise' which has little practical benefit for Indigenous people,[36] as extinguishment on a 'piecemeal basis' ensures non-indigenous interests will always prevail.[37]

3 *Proving 'Traditional' Connection to the Land*

The third major deficiency in Australian native title law is the additional requirements for proving Indigenous connection to the land which

---

30 *Mabo* (1992) 175 CLR 1, 68.

31 John Basten QC 'Beyond Yorta Yorta' (2003) 2(24) *Land, Rights, Laws: Issues of Native Title* 1, 6.

32 The bundle of rights theory was discussed by the Federal Court in *Ward v Western Australia* (1998) 159 ALR 483, and approved by the High Court in *Ward* (2002) 191 ALR 1, 35–37 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

33 *Native Title Act 1993* (Cth) s23A; *Ward* (2002) 191 ALR 1, 35–37.

34 *Mabo* (1992) 175 CLR 1, 69-70 (Brennan J).

35 Barnett, above n 3, 474.

36 Barnett, above n 3, 477. On the economic use of native title, see Richard Ogden, 'Wik Peoples v State of Queensland: Extinguishment of Native Title' [1998] *Victoria University of Wellington Law Review* 341, 367.

37 'Ruling on Yorta Yorta Claim Strikes Blow at Land Rights', *The Guardian* (Sydney), 5 February 2003, 5.

arose from *Yorta Yorta v Victoria*[38] and has made native title much more difficult to prove. In denying the Yorta Yorta people their claim, the High Court explained that the group's relationship to the area lacked the necessary 'traditional' character. 'Interruptions' to traditional life had severed the necessary connection between the original inhabitants and modern Yorta Yorta society.[39]

This approach placed severe demands on claimants. Proving a continued connection with the land was already a difficult task, and as the High Court noted, one which is 'likely to go beyond the resources of many would-be claimants.'[40] Following *Yorta Yorta*, to be successful in a native title claim, Aboriginal observance of traditional law and custom must have 'continued substantially uninterrupted since sovereignty.'[41] Furthermore, only those laws and customs which existed 'before the assertion of sovereignty by the British Crown' are regarded as authentically traditional.[42]

Proving a traditional connection to the land is now even more difficult under the amended *NTA* and the Liberal-National Coalition Government's infamous '*Ten Point Plan*' (devised under the leadership of John Howard). To register a claim, the Native Title Registrar must be satisfied of the existence of traditional laws, observance of traditional customs and the continued holding of native title in accordance with those customs.[43] At least one member of the claim group must have, or have had, a physical connection with the area.[44] Registration and the right to negotiate process only applies to those rights which according to the Registrar can be established and have not been extinguished.[45] This excludes situations where a previous exclusive possession act has taken place, as well as previous non-exclusive possession acts if *any* claim to exclusive possession or enjoyment is made.[46]

---

38 *Yorta Yorta v Victoria* (2003) 194 ALR 538 ('*Yorta Yorta*').

39 *Yorta Yorta* (2003) 194 ALR 538. Indigenous people there had experienced seven or eight generations of intensive non-indigenous presence and activity. The High Court noted that an attempt by the Yorta Yorta people to revive laws and customs that had been effectively lost at some point in past was insufficient to establish native title.

40 *North Ganalanja Aboriginal Corp v Queensland* (1996) 185 CLR 595, 614; *Western Australia v Ben Ward* [2000] 170 ALR 159 (Lee J); *Coe v Commonwealth* (1979) 53 ALJR 403 (Mason CJ), *Mason v Tritton* (1994) 34 NSWLR 572 (Kirby J). See also Robert Chambers, above n 3; 'Ruling on Yorta Yorta Claim Strikes Blow at Land Rights', above n 37, 5; Bradbrook, MacCallum and Moore, above n 19.

41 *Yorta Yorta* (2003) 194 ALR 538, 562-3 (Gleeson CJ, Gummow and Hayne JJ).

42 *Yorta Yorta* (2003) 194 ALR 538, 552-3 (Gleeson CJ, Gummow and Hayne JJ).

43 *Native Title Act 1993* (Cth) s190B(5).

44 *Native Title Act 1993* (Cth) s190B(7).

45 *Native Title Act 1993* (Cth) s190B(6).

46 *Native Title Act 1993* (Cth) s190B(8); Richard Bartlett, *Native Title in Australia* (2nd ed, Sydney: LexisNexis Butterworths, 2004) 62.

The heightened requirements for proving connection to the land effectively imposes major barriers to achieving land justice[47] – indeed a step back for native title claimants. Under the amended *NTA*, much more detail is demanded with respect to the nature of interests affected and the basis of the claim.[48] This requires research into the pre-colonial relationship of the Indigenous people to the land and the impact of dispossession following British sovereignty.[49] Such research involves time and money, and is likely to go beyond the ability and possibly understanding of many Indigenous claimant groups seeking to register a valid native title claim. This is one way in which the Federal Governments' *Ten Point Plan* has been the subject of severe criticism from Indigenous groups,[50] commentators,[51] and the United Nations.[52]

Tehan criticises the discussion of this traditional requirement in *Yorta Yorta*, as the majority's judgments make almost no mention of the body of common law from *Mabo*, instead treating 'tradition' and 'connection to the land' as legislative concepts derived from the *NTA*.[53] Atkinson agrees, stating the interpretation of the *NTA* has set the Indigenous struggle for land rights back to the pre-*Mabo* era.[54] He further argues that the *Yorta Yorta* decision highlights the elusive nature of Indigenous land justice and 'strengthens the sense of betrayal that has been created in the post-*Mabo* era.'[55] Dissatisfaction with the application of such a requirement is also seen in the dissenting judgement of Gaudron and Kirby JJ.

---

47 See eg, Wayne Atkinson, '"Not One Iota" of Land Justice: Reflections on the Yorta Yorta Native Title Claim, 1994-2001' [2001] *Indigenous Law Bulletin* 12, 13-14.

48 Bartlett, above n 46, 62.

49 Bartlett, above n 46, 62.

50 See eg, the report of the Human Rights and Equal Opportunity Commissioner – Aboriginal and Torres Straight Islander Social Justice Commissioner, *Native Title Report 1997*, Human Rights and Equal Opportunity Commission, <http://www.austlii.edu.au/cgibin/disp.pl/au/other/IndigLRes/1997/4/5.html> at 12 Dec 2005.

51 See especially Bartlett, above n46, p53; Jennifer Clarke, 'The Native Title Act Amendment Bill 1997' (1997) 4(6) *Indigenous Law Bulletin* 4, 4.

52 The United Nations Committee on the Elimination of All Forms of Racial Discrimination expressed concern on 18 March and again on 16 August 1999 that the *Ten Point Plan* breached the International Convention on the Elimination of All Forms of Racial Discrimination – *Australia*, Decision of the Committee on the Elimination of Racial Discrimination, 54th Session, CERD/C/54/Misc.40/Rev.2, 18 March 1999; CERD/C/55Misc Rev.3, 16 August 1999; cited in Bartlett, above n 46, 64. In the Committee's opinion, the Plan appeared to 'create legal certainty for governments and third parties at the expense of Indigenous title.' The Committee noted in particular the provisions respecting validation, deemed extinguishment, the pastoral industry and the abolition and diminishment of the right to negotiate – Bartlett, above n 46, 63-4.

53 Particularly s223 of the *Native Title Act 1993* (Cth); Tehan, above n 3, 561.

54 Atkinson, above n47, 13.

55 Atkinson, above n 47, 12, citing *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2001] FCA 45 (Unreported, Black CJ, Branson and Katz JJ, 8 February 2001).

4 *Subordination of Native Title Rights*

Native title rights have over time been continually subordinated to other granted rights in a number of respects. Whilst expanding on *Mabo* principles by providing that claimants are only required to show an association with the original group in occupation at the time of sovereignty,[56] and ancestral connection[57] may be spiritual rather than physical,[58] *Wik*[59] also diminished native title rights.The Court held where there is inconsistency between the rights of a pastoralist and native title holder, the pastoralist's rights prevail, and native title is extinguished to the extent of the inconsistency.[60] Therefore, *Wik* can be said to have ultimately entrenched a limitation on native title in relation to pastoral leases.The decision effectively reinforced the superiority of granted rights over native title rights,[61] allowing pastoralists to receive a 'significant advantage' in gaining new rights whilst Indigenous people lost rights.[62]

Native title was further subordinated to perpetual leases in *Wilson v Anderson.*[63] The majority of the High Court held that perpetual leases granted exclusive possession to the lessee, thereby completely extinguishing native title[64] over forty-two percent of New South Wales.[65] Prior to this case, the common law had required a case by case approach to consider whether the substantive operation of a leasehold grant extinguished native title.This was indicated by the Full Federal Court in *Pareroultja v Tickner*[66]:

> the extent to which native title over land may co-exist with leasehold tenure is not a question fully explored in *Mabo (No 2)*. Much may depend on the nature and extent of the leasehold estate... and inconsistency, if any, between native title and the lessor's reversionary interest.[67]

---

56 Rather than establishing it was the exact group in occupation – *Wik* (1996) 187 CLR 1, 58 (Brennan J), 86, 88, 109 (Deane and Gaudron JJ), 186, 188 (Toohey J). See also *Ward* (2002) 191 ALR 1.

57 *Mabo* (1992) 175 CLR 1, 60 (Brennan J), 110 (Deane and Gaudron JJ).

58 *Wik* (1996) 187 CLR 1. See also *Native Title Act 1993* (Cth) s23C.

59 *Wik* (1996) 187 CLR 1.

60 *Wik* (1996) 187 CLR 1, 233 (Gummow J).

61 Tehan, above n 3, 557; *Wik* (1996) 187 CLR 1, 132-3 (Toohey J).

62 Olga Havnen,'The Native Title Amendment Act' in Muir, Kado and Strelein, Lisa (eds), *Native Title in Perspective: Selected Papers from the Native Title Research Unit 1998-2000* (Canberra:Aboriginal Studies Press, 2000) 17.

63 *Wilson v Anderson* (2002) 190 ALR 313.This decision was handed down on same day as *Ward*.

64 By operation of the *Native Title Act 1993* (Cth) s23B, and also the *Native Title (New South Wales) Act 1994* (NSW).The leases were created under the *Western Lands Act 1901* (NSW).

65 'Ruling on Yorta Yorta Claim Strikes Blow at Land Rights', above n 37, 5.

66 *Pareroultja v Tickner* (1993) 117 ALR 206.

67 *Pareroultja v Tickner* (1993) 117 ALR 206, 214 (Lockhart J).

Kirby J on the other hand found there was no exclusive possession in *Wilson v Anderson*, strongly warning:

> This Court should be slow to reverse the steps, taken by *Mabo [No 2]* and *Wik*, in the recognition of the native title..... there are already enough legal and practical impediments to the attainment of legal protection for native title rights without now eroding the principles accepted by the majority in those two cases.[68]

We have seen further subordination of native title rights and interests under the *Ten Point Plan* and amended *NTA*.[69] The Federal Government proposed to substantially diminish any native title rights on current or former pastoral leases, reserves, towns, cities, and over water, as well as introducing limits on how and when claims may be made and the level of compensation allowed.[70] This has certainly been achieved in the amended legislation. Deemed extinguishment provisions[71] ensure that the interests of security of tenure for non-native title holders prevail over native title rights (although compensation is possible, as required constitutionally).[72] Native title rights are also subordinated to pastoral 'aspirations'[73] by the operation of sections 24GA-24GE, which provide for primary production activity on non-exclusive pastoral leases to override native title, irrespective of the rights originally granted.[74] Native title is further overridden or even extinguished through the validation of all grants made between 1 January 1994 and 23 December 1996 (the date of the *Wik* decision) over land which was formerly the subject of a freehold estate or lease (except mining leases).[75] Finally, native title will be overridden by any legislation or grant relating to the management or regulation of water, 'living aquatic resources,' airspace, or future grants of leases, licences, permits or authorities regarding those resources.[76]

5 *Onerous Requirements for Application and Registration*

The fifth major deficiency in current native title law is the extremely onerous requirements for application and registration of a native title

---

68 *Wilson v Anderson* (2002) 190 ALR 313, 355–6 (Kirby J).

69 See eg, Bartlett, above n 46, 53.

70 Under the *Ten Point Plan*; See Bartlett, above n 46, 53.

71 *Native Title Act 1993* (Cth) Part 2, Div 2B.

72 Bartlett, above n 46, 56.

73 Bartlett, above n 46, 58.

74 The only limitation is that the expansion or activity could have been authorised as at any time before 31 March 1998.

75 *Native Title Act 1993* (Cth) ss21-22H. The validation was justified on the suggested pre-*Wik* assumption that native title had been extinguished on pastoral leases – *Native Title Amendment Bill 1997*, Explanatory Memorandum, 1996-97-98, para 4.3-4.5; cited in Bartlett, above n 46, 55.

76 In this regard, Bartlett notes that the government offered no justification why all non-indigenous interests should necessarily prevail over native title rights beyond the assertion that governments need the ability to regulate and manage such resources – Bartlett, above n 46, 58; citing *Wik: The Ten Point Plan Explained*, 9.

claim under the *Ten Point Plan* and amended *NTA*. For example, future acts undertaken pursuant to a non-claimant application (which has not been withdrawn or dismissed) will be valid and extinguish or override native title unless a native title claim is registered within three months.[77] This requires swift action from native title parties, who may face great difficulty in meeting the requirements for application and registration. In contrast, non-claimant applicants are not subject to such onerous requirements. They are not required to provide details of how native title has been extinguished for instance.[78]

These requirements stem from the approach of the *NTA* in presuming native title not to exist. This presumption is overturned not through registration, but only through determination or the withdrawal or dismissal of an application.[79] Similarly, the onus is on the native title party to prove a negotiating party has failed to negotiate in good faith under the right to negotiate provisions.[80] This is despite the fact that the amended *NTA* has already limited the area subject to the right to negotiate. The legislation has also removed the right completely on reserved land,[81] most exploration tenements, and for acts or grants over land or waters within towns or cities.[82] Further, past acts are now deemed to have extinguished native title.[83] These requirements do not assist Indigenous litigants, but rather reduce the number of native title claims.

C *Implications*

The implication of these developments has been enormous. Native title is becoming increasingly difficult to prove in Australia, with new barriers for Aborigines to pass. As expressed by Justice Michael Kirby in an address in September 2004, despite *Mabo*, and the efforts of many parliaments, governments and of the courts, the law in Australia has often failed the Aboriginal people.[84] Although Aborigines have enjoyed some successes since *Mabo*,[85] recent cases, the amended *NTA* and implementation of the

---

77 Bartlett, above n 46, 58; *Native Title Act 1993* (Cth) ss24DJ, 24CH, 29(4), 30.

78 Bartlett, above n 46, 58.

79 See Bartlett, above n 46, 58.

80 *Native Title Act 1993* (Cth) s36(2).

81 Including Aboriginal reserves – *Native Title Act 1993* (Cth) s43A.

82 *Native Title Act 1993* (Cth) s26(2)(f); *Ten Point Plan*, points 3 and 7; Bartlett, above n 46, 60.

83 *Native Title Act 1993* (Cth) Part 2, Div 2B and 3, Subdivs I and J.

84 Justice Michael Kirby, 'Law and Justice in Australia: Room for Improvement' (Speech delivered at the Queensland University of Technology Law Students Society Annual Dinner, Brisbane, 3 September 2004).

85 See eg, *Commonwealth v Yanmir* (1999) 168 ALR 426, where native title rights were extended to the sea and seabed in the Northern Territory (although not exclusively); *Yanner v Eaton* (1999) 166 ALR 258 where the High Court protected traditional hunting and fishing rights; and *Lardil Peoples v Queensland* [2004] FCA 298, where

Commonwealth Government's *Ten Point Plan* have effectively reduced the numbers of Indigenous people able to successfully claim native title,[86] making native title rights highly vulnerable.[87] Pearson claims that in applying the amended Act, the Court has discarded the spirit of *Mabo*, *Wik,* and parliamentary intent, instead producing decisions that fail to take account of the fundamental principle of prior Indigenous occupation of land.[88] In this way, although constituting valid legislation,[89] it has been argued that the amended *NTA* holds potentially 'tragic consequences' for both Aborigines and the nation as a whole,[90] if its effect is not reconsidered.[91] This may need to occur through further amendments which concentrate on the *NTA*'s application to Indigenous land claims,[92] and seek to again implement the *Mabo* promise. Presently, the watering down of native title principles since *Mabo* has forced Aboriginal people to look elsewhere for justice.[93]

D *Experiences in Other Jurisdictions*

A comparison of native title law in other common law jurisdictions puts into context Australia's treatment of Indigenous people under Australian native title law. Experiences in other common law countries have been very different to those in Australia, as the law relating to Indigenous peoples' rights over traditional lands has developed through the common law over a significantly longer period of time. Native title was accepted much earlier than Australia in New Zealand, Canada, and the

---

the Federal Court found native title to be held by the Lardil peoples over some areas in the sea of Queensland (although again not exclusively).

86 Tehan, above n 3, 563.

87 *Fejo v Northern Territory* (1998) 195 CLR 96, 155 (Kirby J) (citations omitted). See also, Samantha Hepburn, 'Disinterested Truth: Legitimation of the Doctrine of Tenure Post-Mabo (2005) *Melbourne University Law Review* 1.

88 Tehan, above n 3, 564, citing Noel Pearson, 'The High Court's Abandonment of "The Time-Honoured Methodology of the Common Law" in Its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*' (Paper presented at the Sir Ninian Stephen Annual Lecture, University of Newcastle, 17 March 2003).

89 The High Court has upheld the validity of the Act in *Western Australia v Commonwealth* (1995) 183 CLR 373. See also, *Biljabo v WA* (1995) 128 ALR 1.

90 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report – 1997: Bucket-loads of Extinguishment* (Human Rights and Equal Opportunity Commission, 1997) 23.

91 See also McHugh, n 6, 92; Lisa Strelein, 'Conceptualising Native Title' (2001) 23 *Sydney Law Review* 95, 95; Justice Robert, French, 'The Role of the High Court in the Recognition of Native Title' (2002) 30 *Western Australian Law Review* 129, 159; Father Frank Brennan, 'Native Title and Property Law' (Lecture delivered at the University of Notre Dame Australia, Fremantle, 14 August 2005).

92 See especially, Pearson, above n 88. Please note, detailed discussion of the *NTA* provisions, its amendments and its current effects are outside the scope of this article – see especially Justice French, above n 91,159; Pearson, above n 88.

93 Noel Pearson, Noel, 'Land is Susceptible of Ownership' (Speech delivered at the High Court Centenary Conference, Canberra, 9-11 October 2003).

United States.[94] In the US, a form of title was recognised as far back as 1823.[95] Other seminal cases were delivered by the US Supreme Court between 1823 and 1832, providing a starting point for consideration of common law native title.[96] The landmark judgment came in 1978.[97] In New Zealand, the second country to recognise common law rights, native title law has been developing since the 1847 decision of *R v Symonds.*[98] The Maori Council series of cases followed between 1987 and 1990,[99] and finally, reinvigoration of the common law doctrine came in 1994.[100] In Canada, native title law has developed since 1973, where the majority of the Supreme Court explicitly recognised the legitimacy of a claim of Indigenous title to land.[101] According to Macklem, other Canadian cases were willing to interpret statutory rights that pertained to Indigenous people in a sympathetic manner.[102]

Further, in stark contrast to the Australian situation where negotiations between Indigenous people and the State have only just begun, these jurisdictions engaged in treaty-making with Indigenous people, and some enjoyed constitutional entrenchment of rights.

1 *Canada*

The Crown in Canada entered into approximately 500 treaties with Aboriginal people, both prior and subsequent to Confederation in

---

94 See McHugh, above n 6, 88; Patrick Macklem, 'Indigenous Peoples and the Canadian Constitution: Lessons for Australia?' (1994) 5 *Public Law Review* 11, 19; Gary D Meyers, 'Native Title Rights in Natural Resources: A Comparative Perspective of Common Law Jurisprudence' (2002) 19(4) *Environmental and Planning Law Journal* 245, 248-9; Strelein, above n 91, 96-7; Charlene Yates, 'Conceptualising Indigenous Land Rights in the Commonwealth' [2004] *Australian Indigenous Law Reporter* 19.Australia is however ahead of some countries in the recognition of native title rights – for example, South Africa, where the Constitutional Court for the first time in 2003 explicitly recognised Indigenous people's claims to ancestral lands – see *Alexkor Ltd v Richtersveld Community and Ors* [2003] Constitutional Court of South Africa, Case No CCT19/03, 14 October 2003.

95 *Johnson v M'Intosh* 21 US (8 Wheat) 543 (1823).

96 See *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831); *Worcester v Georgia* 31 US (6 Pet) 515 (1832).

97 *Santa Clara Pueblo v Martinez* 439 US 49 (1978).

98 *R v Symonds* [1847] NZPCC 387.

99 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641; *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142; *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513; *New Zealand Maori Council v Attorney-General* [1990] (Unreported, HC Wellington, CP 785/90, 21 September 1990).

100 in *Te Runanganui o Te Ika Whenua Inc Society v Attorney General* [1994] 2 NZLR 20.

101 *Calder v Attorney General for British Columbia* [1973] SCR 313; (1973) 34 DLR (3d) 145.

102 Macklem, above n 94, 19, providing the example of *Guerin v The Queen* [1984] 2 SCR 335.

1867,[103] covering more than half of Canada's land mass.[104] Canada has also had constitutional protection of treaty rights since 1982.[105] The Canadian constitutional package contains several provisions fundamentally transforming the constitutional position of Indigenous peoples in Canada.[106] The constitutional relationship between the government and Indigenous peoples is also a fiduciary one, whereby the government is expected to act in the interests of Aboriginal people.[107] Further, Canada also had the *Royal Proclamation* of 1763 which prohibited private purchases of Indian land throughout the Crown's North American colonies,[108] and reserved extensive lands for the use of Indians.[109]

2 *New Zealand*

Treaties also played a prominent role in settling native title claims in New Zealand,[110] where there is statutory recognition of treaty principles.[111] The starting point for Maori land and resource rights was the Treaty of Waitangi, signed in 1840 by a number of Maori Chiefs (from New Zealand's northern island) and representatives of the British

---

103 The colonies decided in 1867 to form a Confederation.

104 Macklem, above n 94, 15, citing DJ Purich, *Our Land: Native Rights in Canada* (1986) 95. These treaties include the 1975 agreement between the Federal and Quebec governments and the Cree and Inuit of Northern Quebec regarding lands in the James Bay region in Quebec – *James Bay and Northern Quebec Agreement* (1976), Canada. This agreement was extended in 1978 to include the Naskapi nation of north eastern Quebec – *Northeastern Quebec Agreement* (1978), Canada. In 1984, the Inuvialuit people reached agreement with the Federal government with respect to lands located in the Western Arctic – see Indian Affairs and Northern Development, *The Western Arctic Claim: The Inuvialuit Final Agreement* (1984). In virtually all treaties, Aboriginal signatories agreed to 'cede, release, surrender, and yield up' their rights with respect to land in return for specified benefits and reserve land, and such clauses were typically seen by the judiciary as extinguishing common law rights associated with Aboriginal title and substituting a set of treaty-based rights – Macklem, above n 94, 15; see eg, *Horse v The Queen* [1988] 1 SCR 187.

105 Langton and Palmer, above n 3, 4. For a decision on constitutional rights, see eg, *R v Sparrow* [1990] 1 SCR 1,075.

106 Macklem, above n 94, 22. Section 35 of the *Constitution Act 1982* (Canada) protects 'existing Aboriginal and treaty rights' from legislative and administrative infraction – McHugh, above n 6, 92.

107 Macklem, above n 94, 23. Note that this article does not deal with possibility of fiduciary duties owed by the State to Aboriginal people within Australia.

108 Macklem, above n 94, 16.

109 See RSC 1970, App II, No 1; quoted in Macklem, above n 94, 16. This included "all the Lands and Territories not included within the Limits of our said Three new Governments (Quebec, East Florida, and West Florida), or within the Limits of the Territory granted to the Hudson's Bay Company, as well as all the Lands and Territories lying Westward of the Sources of the Rivers which wall into the Atlantic Ocean from the West and North West."

110 See eg, McHugh, above n 6, 89, 90.

111 McHugh, above n 6, 91.

Crown. It constitutes the mechanism by which the British asserted sovereignty over New Zealand. The Treaty is not the source of Maori rights,[112] but rather reserves pre-existing rights to the Maori.[113] The key treaty principles are redress, self-determination, partnership and active protection (to different extents).[114] As a result, there has been a focus on settlements in New Zealand,[115] demonstrated in the Maori Council cases and various fisheries agreements.

3 *United States of America*

In the United States, initial relationships with the Tribes were also established by treaty negotiations, first by Great Britain and later by the new US government.[116] As Chief Justice Marshall noted in *Johnson v McIntosh*, in establishing relations between US Indian Tribes and the British Crown, 'the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired.'[117] Therefore, on reservation lands held pursuant to Indian title, treaties or executive agreements, the Tribes own and have exclusive control of lands and resources on Indian lands that have not passed into the control of non-Indians.[118]

4 *Lessons for Australia*

Having lacked the experiences of other jurisdictions which have long histories of treaty-making and constitutional entrenchment of native title rights, agreement-making in Australia has only just begun. This historical pattern of formal engagements between the government and tribes in North America and New Zealand is absent in Australia. Further, Australia has not experienced the recognition which came with governmental acceptance of key Indigenous rights, both through non-adversarial relations (away from the courts), and the integration of those rights into the broader constitutional culture (a process inside the court system).[119] It is in this context that we must examine the way agreements can be used to overcome the problems in native title law post-*Mabo*. Australia ought to acknowledge the approaches utilized in other jurisdictions in developing

---

112 It is not a grant of rights to New Zealand's Indigenous peoples – Meyers, above n 94, 248.

113 Note however the disagreement over the status of the Treaty of Waitangi.

114 McHugh, above n 6, 92. However, McHugh argues treaty principles in New Zealand articulated standards and norms that might have arisen anyway through a more common law based notion of aboriginality – McHugh, above n 6, 95.

115 This meant that by the early 1990s settlement was a very real likelihood – McHugh, above n 6, 91.

116 Meyers, above n 94, 248.

117 *Johnson v McIntosh* 21 US (8 Wheat) 543, 574 (1823) (Marshall CJ).

118 Meyers, above n 94, 253.

119 McHugh, above n 6, 98.

non-adversarial processes as alternatives to litigation. This requires involvement in negotiation and agreement-making by the State as well as other stakeholders, such as pastoralists and resource companies.

PART II – NEW APPROACHES

A *The Way Forward*

It is clear from the above examination that alternative approaches to litigation must be considered. The common law has failed to deliver the promises of *Mabo* for Indigenous people, leaving no realistic ability to sue successfully through the courts. Parties unavoidably face this post-*Mabo* context when dealing with native title issues. The challenge is to move beyond these difficulties to identify viable solutions for the resolution of native title issues.

The promotion of negotiation and agreement between Indigenous and non-indigenous people through consent determinations and ILUAs are such viable solutions. Agreement-making (as opposed to litigation) can deliver quicker solutions to native title disputes, avoiding imposed outcomes which are unlikely to favour native title claimants given the dismal state of the law, and at the same time providing certainty and a variety of economic and other benefits to Indigenous people. Other stakeholders, including mining companies, pastoralists and governments, also benefit from the speed and certainty involved in negotiating native title agreements. In fact, these features provide a huge incentive for stakeholders to come to the negotiating table. Whilst litigation is unlikely to succeed, the potential to commence a native title action and delay commercial projects affords Indigenous people significant bargaining power in the agreement-making context. Therefore, it is submitted that negotiation and agreement-making can produce practical outcomes despite the existence of diametrically opposed interests.

B *Negotiation & Agreement-Making in Australia*

Negotiation is mutual discussion and arrangement of the terms of a transaction or agreement.[120] The term 'agreement-making' in the native title context encompasses two or more parties coming to a mutual understanding regarding the use of land. The first agreements regarding native title in Australia were signed under the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*ALRA*') on 3 November 1978. Two agreements were signed – the Ranger

120 Peter Butt and Peter Nygh (eds), *Butterworths Concise Australian Legal Dictionary* (2nd ed, Sydney: Butterworths, 1998) 303.

Uranium Project Agreement and the Kakadu National Park Lease Agreement.[121]

Since then agreement-making has become more commonplace.[122] The *NTA* encourages and facilitates resolutions of native title claims by agreement[123] through its preamble and provisions. Although the precise number of agreements being negotiated has always been difficult to quantify,[124] it is estimated that there are now 251 land use and 200 exploration agreements in the Northern Land Council's jurisdiction alone.[125] Agreements have been made over resource extraction, railways, pipelines and other major infrastructure projects, farming and grazing, publishing, arts, and for other purposes. The parties, in addition to the Land Trusts on behalf of the traditional owners, include representatives of Commonwealth and Territory governments, and members of the mineral, infrastructure, tourism, fishing, aquaculture and pastoral industries. Further, agreements may have statutory status (such as those concluded under the *ALRA*); have resulted in determinations of the Federal Court; be registered under the terms of the *NTA* (such as Indigenous Land Use Agreements), or be simple contractual agreements setting out the terms of 'licenses to operate' and future developments, memoranda of understanding, or statements of 'commitment' or intent.[126]

This paper focuses on consent determinations made by the Federal Court, and Indigenous Land Use Agreements (ILUAs) registered under the terms of the *NTA*, as practical alternatives to litigation. I will examine the way in which these types of agreements can be used to achieve greater justice for Indigenous Australians.

C *Consent Determinations*

1 *Nature of Consent Determinations*

A consent determination is a decision by an Australian court or other recognised body[127] that native title does or does not exist in a particular area, made when parties have reached an agreement following

---

121 Langton and Palmer, above n 3, 2.

122 Langton and Palmer, above n 3, 2. See also Tehan, above n 3, 564.

123 *Kelly on behalf of the Byron Bay Bundjalung People v NSW Aboriginal Land Council* [2001] FCA 1479, 23 October 2001, [23] (Branson J); Preamble to the *Native Title Act 1993* (Cth); Bartlett, above n 46, 523, 534.

124 Tehan, above n 3, 565.

125 Langton and Palmer, above n 3, 2.

126 Langton and Palmer, above n 3, 2.

127 Specifically a court, office, tribunal or body formally recognised by the Commonwealth Attorney-General as able to make determinations in relation to particular land or waters.

mediation.[128] The Court may make an order[129] consistent with the terms of a signed written agreement which has been filed by the parties, without holding or completing a hearing, where it is satisfied that the order is within its power and it is 'appropriate to do so.'[130] The application must be unopposed during the three month notification period provided for under the *NTA*.[131] The Court will then review the evidence admitted by consent in support of the application, including anthropological reports,[132] and consider whether independent and competent legal representation was obtained before making the agreement.[133] The consent order must contain all the elements of a determination of native title under section 255 of the *NTA*, including whether native title exists,[134] and if so, the nature and relationship of those rights and interests.[135]

Consent determinations have been made in Western Australia,[136] New South Wales, Queensland, and now Victoria (but not in the other states

---

128 See National Native Title Tribunal Website, Glossary of terms, at <http://www.nntt.gov.au>

129 See *Native Title Act 1993* (Cth) ss87, 94A, 225.

130 *Native Title Act 1993* (Cth) s87; see also *Ngalpil v Western Australia (Tjurabalan People)* [2001] FCA 1140 (Unreported, Carr J, 20 August 2001) [12].

131 An application is unopposed if the only party is the applicant or if every other party notifies the court that they are not opposed to the order sought – *Native Title Act 1993* (Cth) s86G. Bartlett notes that all unopposed determinations to date, as distinct from agreed determinations, have been to the effect that native title does not exist – Bartlett, above n 46, 544-5.

132 To determine whether the orders sought can be reasonably related to the evidence – *Smith v Western Australia (Nbarnuwangga)* [2000] FCA 1249 (Unreported, Madgwick J, 12 August 2000) [26], [28]; cited in Barnett, above n 3, 534.

133 *Munn on behalf of the Gunggari People v Queensland* [2001] FCA 1229 (Unreported, Emmett J) [29]; *Kelly on behalf of the Byron Bay Bundjalung People v NSW Aboriginal Land Council* [2001] FCA 1479 (Unreported, 23 October 2001) [23]; *Smith v Western Australia (Nbarnuwangga)* [2000] FCA 1249 (Unreported, Madgwick J, 12 August 2000) [26]. Barnett states that the legal representation is supposed to ensure that inquiries as to fairness are not necessary – Barnett, above n 3, 534.

134 In making the consent determination, the Court will consider whether or not native title has been extinguished, as it is required to consider the likely state of the law in the absence of the agreement – See eg, *Smith v Western Australia (Nbarnuwangga)* [2000] FCA 1249 (Unreported, Madgwick J, 12 August 2000). However, the court will disregard extinguishment where a determination relates to pastoral leases, reserves or vacant crown land held by or occupied by one or more members of the native title claim group – *Native Title Act 1993* (Cth) ss47, 47A or 47B; *Ngalpil v Western Australia (Tjurabalan People)* [2001] FCA 1140 (Unreported, Carr J, 20 August 2001) [12]; *Passi on behalf of Meriam People v Queensland* [2001] FCA 697 (Unreported, Black CJ, 14 June 2001) [27]; Bartlett, above n 46, 532-3.

135 *Native Title Act 1993* (Cth) s225. See also Bartlett, above n 46, 532.

136 Tehan, above n 3, 568, listing the determinations as follows: Karajarri People: *Nangkiriny v Western Australia* (2002) 117 FCR 6; Kiwirrkurra People: *Brown v Western Australia* [2001] FCA 1462 (Unreported, French J, 19 October 2001); Martu and Ngurrara Peoples:

or the Northern Territory). Agreements have declared the extinguishment of native title over such land as public works, roads, railways, grants in fee simple and homestead leases.[137] Yet they have also provided for the recognition and respect of native title interests in addition to a myriad of other interests, and set out how these interests may be exercised.[138] The recent Wimmera determination in *Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupgulk Peoples v State of Victoria* [2005] FCA 1795[139] provides a useful example of how agreements which provide numerous benefits to Indigenous people can be reached through negotiation.

2 *The Wimmera Consent Determination*

The Wimmera determination constitutes Victoria's first consent determination in which the Federal Court recognised native title for the first time in Victoria. In this case, the parties came to an agreement regarding the existence of native title after ten years of mediation by the National Native Title Tribunal.

The applicants, the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupgulk peoples, filed an application in 1995 for determination of native title in respect of 9,642 square metres of land and waters in the Wimmera region of Western Victoria. The respondents were the State of Victoria and a number of other parties, including individuals, councils and businesses. The applicants and respondents reached agreement as to the terms of a determination that native title exists in respect of one of the areas (Determination Area A), but did not exist in respect of the other (Determination Area B). Over 400 parties agreed to the determinations and an agreement package that delivers tangible benefits to the native title holders.

The determination was held 'on country' at Horshoe Bend in the Little Desert National Park, Western Victoria. Merkel J held that the requirements

---

James v Western Australia [2002] FCA 1208 (Unreported, French J, 27 September 2002); Nharnuwangga People: *Smith v Western Australia* (2000) 104 FCR 494; Spinifex People: *Anderson v Western Australia* [2000] FCA 1717 (Unreported, Black CJ, 28 November 2000); Tjurabalan People: *Ngalpil v Western Australia* [2001] FCA 1140 (Unreported, Carr J, 20 August 2001). For a list of agreed consent determinations in other states up to October 2003, see Bartlett, above n 46, 536-8.

137 Bartlett, above n 46, 541.

138 Reference to other interests will include reference to any agreements reached as to how those interests may be exercised – ILUAs, specifically contemplated under ss24BB(c), s24CB(c) and 24DB(c) of the Native Title Act 1993 (Cth); Bartlett, above n 46, 542.

139 For the background to the agreement, see National Native Title Tribunal (Information Booklet), *Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk determinations: What they Mean for the Wimmera Region* (National Native Title Tribunal, Commonwealth of Australia, December 2005).

of section 87 of the *NTA*[140] were met, and that it was appropriate to make the consent orders sought. The terms of the orders were clear, unambiguous, and freely agreed upon after the parties had access to competent and independent legal advice.[141] Further, the history of the Wotjobaluk peoples was such that native title rights enjoyed by them had not been extinguished in parts of the claim area. Rather, the applicants were regarded as possessing communal native title rights and interests under traditional laws and customs which they acknowledged and observed 'since long before the imposition of British sovereignty.'[142]

In conjunction with the consent determination, the parties entered into an Access Agreement (an ILUA[143]) regarding the co-existence of their various rights over the area, which controls the existence and exercise of the native title rights. The nature and extent of these rights in Determination Area A are the non-exclusive rights to hunt, fish, gather and camp for personal, domestic and non-commercial communal needs in Crown reserves totalling 269 square kilometres along the banks of the Wimmera River.[144] The agreement does not confer exclusive possession, occupation, use or enjoyment of the area, and rights of other parties may co-exist with these native title rights. Whilst native title does not exist in Area B, under the agreement package, the native title holders will enjoy a range of other rights and benefits in these remaining areas.

The agreements also provide for the establishment of a consultation protocol about future developments, giving native title holders an advisory role in the management of some national parks and wilderness areas. Three parcels of culturally significant land have been transferred, and native title holders will enjoy financial support to manage this land and develop a community and cultural centre.[145]

3 *Consent Determinations as a Viable Alternative to Litigation*

By choosing to resolve their issues through negotiation, the parties demonstrated that common ground and some certainty can be achieved.[146] Such agreements also have the potential to address social

---

140 *Native Title Act 1993* (Cth) s87, 'Power of the Federal Court if parties reach agreement'.

141 *Clarke* [2005] FCA 1795 (Unreported, Merkel J, 13 December 2005) [6].

142 *Clarke* [2005] FCA 1795 (Unreported, Merkel J, 13 December 2005) [12].

143 For discussion of the types and effect of ILUAs, see below: D 'Indigenous Land Use Agreements.'

144 See *Clarke* [2005] FCA 1795 (Unreported, Merkel J, 13 December 2005) Order 7.

145 National Native Title Tribunal, 'Wimmera Native Title Consent Determinations a First for Victoria' (Press Release, 13 December 2005).

146 Doug Williamson QC, quoted in National Native Title Tribunal, 'Wimmera Native Title Consent Determinations a First for Victoria' (Press Release, 13 December 2005).

problems and improve economic standing, provided parties take a forward-looking approach to what is required for the future. The process involves building relationships between the parties involved. As Tribunal member, Professor Doug Williamson QC, who mediated between the parties states:

> By taking this approach, [the parties] have formed long-term relationships that will help all parties to coordinate the enjoyment of their rights on the ground in the future.[147]

It is hoped that the Wimmera determination will pave the way for increased resolution of native title claims in Australia through negotiation and agreement. The determination is proof that whilst the law has the potential to dispossess, it also has potential to provide a way forward through negotiated outcomes which provide tangible social, economic and cultural advantages to Indigenous people, including possibly the recognition of some native title rights.

4 *Possible Improvements*

There are, however, a number of ways in which consent determinations may be reviewed to better serve Indigenous communities. It is hoped that these concerns will be addressed in the near future to increase the effectiveness of consent determinations for Indigenous communities. The main criticism of consent determinations as they operate presently is the limited scope for compromise stemming from the merely supervisory role of the Federal Court. According to Bartlett, this constitutes a 'considerable impediment' to comprehensive settlements of the kind usually agreed in North America.[148] Further, Bartlett points out that the agreements generally make no express provision for social and economic development, and in that respect differ markedly from North American precedents. Instead, compensation is contemplated under the *NTA* for loss of native title on account of future acts.[149]

In this way, there is a need for the legislature to consider extending the scope of the Court's powers to include evaluation of the fairness of any settlement.[150] Such an extension would safeguard Indigenous rights by providing an added incentive for commercial stakeholders to aim for fair agreements from the outset. Secondly, negotiating parties need to begin to expressly provide for economic benefits in their agreements.

---

147 Doug Williamson QC, quoted in National Native Title Tribunal, 'Wimmera Native Title Consent Determinations a First for Victoria' (Press Release, 13 December 2005).

148 Bartlett, above n 46, 532.

149 Bartlett, above n 46, 544.

150 See eg, *Smith v Western Australia (Nharnuwangga)* [2000] FCA 1249 (Unreported, Madgwick J, 12 August 2000); Bartlett, above n 46, 534.

Indigenous people need to identify their needs both currently and in terms of future generations, and pressure other stakeholders to meet these needs financially. Perhaps in the future we will also see companies embrace their corporate responsibility – in terms of a 'real company commitment to resource the process and outcomes of agreements,'[151] or even through recognition that 'native title is not just popular but the right thing to do.'[152] Nevertheless, Indigenous people would benefit from specific legislative reference to the need to provide for social and economic benefits in the negotiation of agreements.

D *Indigenous Land Use Agreements (ILUAs)*

1 *Nature of ILUAs*

An ILUA[153] is a voluntary agreement entered into between a native title group and other stakeholders allowing flexible resolutions about the use and management of land and waters. Conducted entirely by negotiation between parties, they can be made separately from the formal native title process, or can be stepping stones towards, or part of, native title determinations.[154] ILUAs are the tenth point of the Howard Governments' *Ten Point Plan*, devised as an 'alternative to more formal native title machinery.'[155] The amended *NTA* provides for three types of ILUAs – Body Corporate Agreements,[156] Area Agreements,[157] and Alternative Procedure Agreements.[158] There are presently more than 230 registered ILUAs across Australia.[159]

ILUAs may cover almost any matter concerning native title, including agreed recognition, authorization of future acts,[160] relationships between native title and other interests, and extinguishment by surrender to the

---

151 Jan MacPherson, 'Indigenous Land Use Agreements: Timing Issues for the Resource Industry' (1999) 4(4) *Native Title News* 64, 65; Phil Ramsay, *Agreement Making under the Native Title Act 1993 (Cth): A Western Australian Perspective* (Honours Thesis, University of Notre Dame Australia, 2005) 38-9.

152 Marcus Priest, 'Brand New Day?' (2006) *The Australian Financial Review Magazine* (August 2006) 40, 45, quoting Paul Dowd, former Newmont Mining Managing Director.

153 *Native Title Act 1993* (Cth) ss24BA-24EC.

154 National Native Title Tribunal, Fact Sheet No 2b: *What is an Indigenous Land Use Agreement (ILUA)?* (ISSN: 1444-0962), August 2000 <www.nntt.gov.au/publications> at 15 April 2006.

155 See Bartlett, above n 46, 63, 524; citing *Wik: The 10 Point Plan Explained*, 1997, 9.

156 *Native Title Act 1993* (Cth) ss24BD-24BI.

157 *Native Title Act 1993* (Cth) ss24CA-24CL.

158 *Native Title Act 1993* (Cth) ss24DA-24DM. For detailed information on the different types of ILUAs, see Bartlett, above n 46, 524-6.

159 National Native Title Tribunal website: <www.nntt.gov.au> at 14 April 2006.

160 This includes the ability to provide for future acts that have already been done, such as validating the grant of a mining lease that failed to go through the right to negotiate

government.[161] Some ILUAs are in fact negotiated as part of consent determination negotiations, as seen in the Wimmera Determination discussed above. Registration of an ILUA confers contractual effect, thus providing the legal certainty sought by parties to the agreement.[162] Essentially, ILUAs are a good option for Indigenous people because they enable the establishment of an agreed cooperative relationship with resource developers or other stakeholders, without costly litigation or an imposed outcome[163] unlikely to benefit them given the current state of the law. At the same time, ILUAs can provide numerous benefits to Indigenous people. Potential benefits include recognition of native title interests, education and employment, protection of sites of cultural significance and heritage value, provision for access rights, compensation, business opportunities, and substantial royalties that provide infrastructure and capital to communities. Aborigines are able to take on an active role in the preservation and protection of areas of native title significance over which they may be unable to successfully make out a native title claim. Examples of the successful negotiation of ILUAs which provide real benefits to Indigenous people are the *Western Cape Communities Co-Existence Agreement*, and the *Hamersley Iron Pty Ltd – Eastern Guruma Agreement*.

2 *Western Cape Communities Co-Existence Agreement (Comalco ILUA)*

The *Western Cape Communities Co-Existence Agreement*, finalised in 2001, is a significant ILUA covering areas of land in and around Weipa on the Cape York Peninsula, the site of a Comalco alumina mine.[164] Registered as the *Comalco ILUA*, the parties to the Area Agreement are Comalco, the Queensland Government, the Cape York Land Council, traditional landowners and community representatives. The agreement covers land that is or will be the subject of native title as well as land over which native title does not exist. It provides for some of the land currently leased by Comalco to be returned to Indigenous people once it is no longer required for mining. It also acknowledges the traditional owners of land covered by the Weipa township, which will continue to be used for development.

---

process although required to do so – Bartlett, above n 46, 527; citing *Native Title Amendment Bill 1997 (No 2)*, Supplementary Explanatory Memorandum to Government Amendments moved in July 1998, 11-12.

161 *Native Title Act 1993* (Cth) ss24BB(e), 24CB(e), 24DB.

162 Bartlett, above n 46, 528. ILUAs are placed on the Register of Indigenous Land Use Agreements when there are no obstacles to registration, or when any obstacles have been resolved. ILUAs then remain registered unless they expire, parties advise the Registrar that they wish to terminate the agreement, or other specific circumstances occur.

163 See Bartlett, above n 46, 46.

The traditional landowners will enjoy a number of social and economic benefits from this ILUA.

It provides for the transfer of other lands, including pastoral leases, to traditional owners. There is provision for payments starting at $4 million annually – including a contribution of $2.3 million from Comalco to Indigenous communities and a further commitment of $500,000 annually from Comalco – to be expended on training and education. The government will contribute $1.5 million for community projects, and there is also provision for heritage protection. The term of the agreement is around 50 years, and includes obligations to allow further mining and development to proceed under the specified protocols and decision-making process.

3 *Hamersley Iron Pty Ltd – Eastern Guruma ILUA*

In March 2004, the Western Australian State Government signed a $38 million ILUA between the Eastern Guruma people and mining companies Hamersley Iron Pty Ltd and Rio Tinto Pty Ltd.[165] The ILUA was formally registered as an Area Agreement by the National Native Title Tribunal on 5 March 2004, and is one of the first of its kind to be registered with a major mining company in Western Australia.[166] The fifty year agreement (27 November 2002 – 1 January 2050) covers a 6,774 square kilometre area 150 kilometres south-east of Karratha in the Pilbara.[167] It brings to a close over six years of extensive consultation and negotiation between the

---

164 The Comalco ILUA was registered on 24 August 2001. See Tehan, above n 3, 567; Cape York Land Council, 'Cape York Land Council and Comalco: A Way Forward' (Press Release, 14 March 2001). For a brief overview of Comalco's activities at Weipa, see Richard Howitt, 'Developmentalism, Impact Assessment and Aborigines: Rethinking Regional Narratives at Weipa' (Discussion Paper No 24, North Australia Research Unit, 1995). See also National Native Title Tribunal, *Register of Indigenous Land Use Agreements* <http://www.nntt.gov.au/ilua/bynumber_index.html>; <www.nntt.gov.au/ilua/30.html> at 14 April 2006.

165 The signatories to the agreement are: the State of Western Australia, Rio Tinto Exploration Pty Ltd, Hamersley Iron Pty Ltd, Guruma Mali Wartu Aboriginal Corporation, and Peter Stevens, Nelson Hughes & Eva Connors. There are a number of related agreements, such as the Guruma Memorandum of Understanding (2000) and Eastern Guruma Agreement (2001) – Agreements, Treaties and Negotiated Settlements (ATNS) website, 'Hamersley Iron Pty Ltd – Eastern Guruma Indigenous Land Use Agreement (ILUA) (27 November 2002 - 1 January 2050)' <www.atns.net.au/biogs/A000092b> at 19 December 2005.

166 Hamersley Iron Website, Announcements: 'Historic Pilbara Native Title Agreement Registered – 15/03/2004,' <http://www.hamersleyiron.com/pubs_desc.asp?libraryID=225> at 19 December 2005.

167 Specifically, the Agreement Area is located 40km north of Paraburdoo and 150km south-south east of Karratha, near Tom Price in the Pilbara region of WA. It is within the local government Shire of Ashburton and the Yamatji ATSIC region. See Agreements, Treaties and Negotiated Settlements (ATNS) website, 'Hamersley Iron Pty Ltd – Eastern Guruma Indigenous Land Use Agreement (ILUA) (27 November 2002 -

mining companies and Aboriginal communities in the Pilbara and follows the signing of a commercial agreement between the parties in late 2001.[168]

The Area Agreement allows Rio Tinto and Hamersley Iron to proceed with plans for exploration, mining, and infrastructure development in the area while delivering a range of benefits to the Eastern Guruma People who have a native title claim over the agreement area. The ILUA does not extinguish native title rights and interests of the Eastern Guruma people, whose native title claim was actually in mediation at the time of the agreement.[169] Parties to the ILUA agree that new activities ('new future acts') can be done without compliance with the right to negotiate procedures under the *NTA*. However, the activities are subject to agreed conditions, including respecting an Aboriginal heritage protocol. A total of $38 million dollars will be paid in trust over twenty years for use in education, training, employment, business and community development for the Eastern Guruma people.[170]

The ILUA is considered an important way to help secure economic advancement and independence for the Eastern Guruma people in the future. Eva Connors, of the Eastern Guruma Aboriginal Community stated

> The Eastern Guruma negotiations have been strongly supported by the Elders and community members every step of the way and this is reflected in the positive community outcomes that have resulted and are already being felt in areas such as education, training, employment, community development and business opportunities...Clearly, this will help the Eastern Guruma community sustain and develop in the future."[171]

Dan O'Dea, Tribunal Member for Pilbara native title claims, commented at the signing ceremony that the parties had not only reached a 'mutually

---

1 January 2050)' <www.atns.net.au/biogs/A000092b> at 19 December 2005; Tehan 3, 567, citing 'Native Title in the News' [2002] 6 *Native Title Newsletter* 7, 8; National Native Title Tribunal, 'Eastern Guruma People and Mining Companies Reach Native Title Agreement in Pilbara, WA', (Media Release, 15 March 2004) <http://www.nntt.gov.au/media/1079307253_2096.html> at 19 December 2005; Cape York Land Council, 'Cape York Land Council and Comalco: A Way Forward' (Press Release, 14 March 2001).

168 Hamersley Iron Website, Announcements: 'Historic Pilbara Native Title Agreement Registered – 15/03/2004,' <http://www.hamersleyiron.com/pubs_desc.asp?libraryID=225> at 19 December 2005.

169 National Native Title Tribunal, 'Eastern Guruma People and Mining Companies Reach Native Title Agreement in Pilbara, WA', (Media Release, 15 March 2004) <http://www.nntt.gov.au/media/1079307253_2096.html> at 19 December 2005.

170 Agreements, Treaties and Negotiated Settlements (ATNS) website, 'Hamersley Iron Pty Ltd – Eastern Guruma Indigenous Land Use Agreement (ILUA) (27 November 2002 - 1 January 2050)' <www.atns.net.au/biogs/A000092b> at 19 December 2005.

171 Eva Connors, quoted in Hamersley Iron Website, Announcements: 'Historic Pilbara Native Title Agreement Registered – 15/03/2004,' <http://www.hamersleyiron.com/pubs_desc.asp?libraryID=225> at 19 December 2005.

acceptable arrangement but have developed a positive working relationship based on trust,'[172] and provided the parties with certainty over their future for fifty years.[173]

4 *ILUAs as a Viable Alternative to Litigation*

As seen above, ILUAs are flexible regarding subject matter and scope, delivering potentially vast and wide ranging benefits to Indigenous communities.[174] ILUAs also offer the advantage of contractual certainty through the processes for registration which binds parties to the agreement.[175] Incidentally, from a miner's perspective, ILUAs can be of great significance in authorizing the grant of mining and petroleum tenements, speeding up the approval process, and providing the legal certainty and security of tenure a resource developer seeks. These factors provide great incentive for commercial parties to negotiate an ILUA with Indigenous claimants.

On the other hand, resource developers complain about the lack of any prescribed process for negotiating an ILUA or any deadlock breaking mechanism (like tribunal determination), which means that native title claimants must be motivated to enter into the ILUA or negotiation and registration will be a time consuming process.[176] Criticism also surrounds the requirement to gain certification of the ILUA by all representative bodies for the area, which is in practice difficult to do unless all people who hold or may hold native title in the area have been identified.[177]

However, it is submitted that agreements should not be struck where Indigenous parties are not motivated to do so, or where the native title parties have not been adequately identified. To gain the benefits associated with agreement-making as opposed to litigation, Indigenous people must identify their interests and concerns, and determine to what degree they are prepared to compromise.[178] They obviously must be party to the negotiation process to do this. In the end, if Indigenous claimants view litigation as more viable in the circumstances, then this option remains open to them.

---

172 National Native Title Tribunal, 'Eastern Guruma People and Mining Companies Reach Native Title Agreement in Pilbara, WA', (Media Release, 15 March 2004) <http://www.nntt.gov.au/media/1079307253_2096.html> at 19 December 2005.

173 Dan O'Dea, quoted in National Native Title Tribunal, 'Eastern Guruma People and Mining Companies Reach Native Title Agreement in Pilbara, WA', (Media Release, 15 March 2004) <http://www.nntt.gov.au/media/1079307253_2096.html> at 19 December 2005.

174 See eg, Ramsay, above n 151, 23.

175 See eg, Explanatory Memorandum, *Native Title Amendment Bill 1997* (Cth), 77.

176 Michael Hunt, *Mining Law in Western Australia* (3rd ed, Sydney: The Federation Press, 2001) 276.

177 See eg, Hunt, above n 176, 276.

178 Bartlett, above n 46, 522.

5 *Considerations and Possible Improvements*

ILUAs will not be suitable for the resolution of every native title issue. Further, there are a number of ways in which the agreement-making process may be reviewed to provide greater justice for Indigenous people. Firstly, an ILUA will bind all holders of native title in the area even though they may not be parties to it.[179] On the other hand, there is no certainty for Indigenous groups if the proponent changes, as there is currently no provision in the legislation dealing with this situation.[180] Ramsay notes that Indigenous parties must address this issue in drafting the terms of any agreement, suggesting the inclusion of assignment clauses that are binding on proponents, or making the ILUA an agreement that runs with the land as a form of encumbrance.[181] There certainly appears to be a need for the legislature to revisit this issue and consider placing requirements on non-native title parties as well.

Secondly, the authorisation of ILUAs has the potential to cause serious intra-Indigenous disputes within communities and regions.[182] Different Indigenous groups will inevitably have different interests, and there may be opposing views within the same group. Therefore, as Jan MacPherson notes, an 'ILUA will not always be the answer. Much will depend on the will of the parties, the area concerned and the community cohesion.'[183] Proponents need to recognise that ILUAs are a viable alternative to litigation, but that there may be other agreements better suited in the circumstances.[184]

E *How Agreement-Making can Provide a Way Forward*

There is no denying that there is a clear need for the common law to change so that the deficiencies outlined in Part I of this paper can be overcome, and the *Mabo* promise upheld. Indeed, adequate common law protection of native title rights and interests is long overdue in

---

179 See *Native Title Act 1993* (Cth) s24E(1)(b).

180 Lee Godden and Shaunnagh Dorsett, 'The Contractual Status of Indigenous Land Use Agreements' in *Land, Rights, Laws: Issues of Native Title* (Issues Paper No 1, Vol 2, <http://www.aiatsis.gov.au/rsrch/ntru/publications/issue_papers.html> at 14 October 2005) 4.

181 Ramsay, above n 151, 33, 36.

182 Daniel O'Dea, 'The Indigenous Land Use Agreement as a Risk Management Tool: An Aboriginal Perspective' (1999) *Australian Mining and Petroleum Law Association Yearbook* 238, 245-7.

183 MacPherson, above n 151, 216. See also Ramsay, above n 151, 37-8.

184 Such as a Section 31 Right to Negotiate Agreements, or entering an agreement outside the formal processes of the NTA such as an Agreement not to object or to withdraw objections – Doug Young, 'A Project Proponents' Perspective' (Speech delivered at the Negotiating Country Conference, Brisbane, Queensland, 2 August 2001) <http://www.nntt.gov.au/metacard/files/Negot_young/Pres_young.pdf> at 14 October 2005.

Australia. Yet native title issues continue to arise and must be dealt with, for the time being, in this post-*Mabo* context.

In this sense, agreement-making is providing a viable alternative to litigation for Indigenous people. Apart from the very real advantages of avoiding the dismal state of the current law, and the time, cost and uncertainty involved in litigation, a number of other positive effects flow from coming to agreement rather than resorting to litigation. Native title parties are involved in negotiating agreements that provide a variety of practical benefits to their communities. This is particularly the case with consent determinations and ILUAs,[185] such as those outlined above. Great bargaining power is derived from the potential to drag the other party, especially commercial stakeholders, into costly and time-consuming litigation which will delay or prevent operations. On the other hand, these factors provide strong incentive for commercial parties to attempt to solve native title disputes through negotiation and to avoid the courts. We have seen above that agreement-making can produce practical outcomes despite the existence of opposing interests.

1 *Support for Negotiation and Agreement-Making*

The need for negotiated agree ments was recently acknowledged by the Native Title Ministers Conference in Canberra, which highlighted:

> the significance of agreement-making, whether in the form of consent determinations, Indigenous Land Use Agreements (ILUAs) or other native title related outcomes, as a key development in resolution of native title issues...[186]

Support for agreement-making stems from recognition that native title agreements are a practical alternative to litigation, in that they are

> less time consuming, less costly, and more likely to permit 'win-win' situations that allow benefits to be channelled to Indigenous people without creating a backlash from competing interests that have incurred a commensurate loss.[187]

---

185 See eg, Bradbrook, MacCallum and Moore, above n 19, 284; Langton and Palmer, above n 3.

186 Attorney-Generals Department, *Native Title Ministers Meeting: Agreement Making in Native Title*, Canberra, 16 September 2005, <http://www.ag.gov.au/agd/www/agdhome.nsf/Page/RWP8A2BFC655753A4A0CA2570800080D39D> at 14 October 2005.

187 Cirian O'Faircheallaigh, 'Evaluating Agreements between Indigenous Peoples and Resource Developers' in Marcia Langton, Lisa Palmer, Kathryn Shain and Maureen Tehan (eds), *Honour Among Nations?* (Victoria: Melbourne University Press, 2004) 304. See also, Attorney-Generals Department, *Native Title Ministers Meeting: Agreement Making in Native Title*, Canberra: 16 September 2005, <http://www.ag.gov.au/agd/www/agdhome.nsf/Page/RWP8A2BFC655753A4A0CA2570800080D39D> at 14 October 2005, where it was stated that "agreement making provides an effective mechanism for resolving native title issues, which can be quicker and less resource intensive than pursuing outcomes through protracted litigation."

Additionally, agreement-making can accommodate uncertainties in the legal strength of parties' positions, and enables the development of ad hoc settlements tailored to the particular circumstances[188] which have the potential to be very beneficial to Indigenous communities. Possible side effects of settling native title issues through negotiated agreements include the establishment of ongoing relationships between Indigenous and non-indigenous parties,[189] and an increased understanding of Indigenous traditions,[190] which hopefully will lead to greater acknowledgment of historical injustices.[191]

There is wide support for this non-adversarial approach. Meyers notes that litigation may not be the best way to answer all the questions associated with determining the exact contours of native title and natural resources rights in Australia.[192] Lane states that although litigation will be an inevitable consequence of setting the framework for recognition, it is an instrument which should be used efficiently, and with the possibility of negotiated agreements in mind.[193] In Tehan's view, there has been a change towards negotiation and agreement-making in Australia which 'cannot easily be set aside.'[194] Litchfield believes that:

> ...resolution through the courts is not an option. Another non-option, is legislating native title away. [Rather]... native title must be addressed in good faith and in a practical manner. The question that follows is 'how?'... Agreements that are made between parties are likely to provide the most stable long-term basis for clarifying relationships.[195]

Therefore, it is submitted that all stakeholders, including State Governments and especially Indigenous people, need to take an active role in negotiating practical solutions to native title issues.

2 *The Need to Provide for Future Generations*

Agreements, however, need to provide tangible benefits for future generations. Any agreements providing for the extinguishment of native title may have a lasting impact on future generations of potential native

---

188 Bartlett, above n 46, 522.

189 See eg, Bartlett, above n 46, 522, citing Parliamentary Joint Committee on Native Title, Commonwealth Parliament, 3rd Minority Report: *Native Title Amendment Bill 1997* (1997) [7.2]; Langton and Palmer, above n 3, 24.

190 See eg, James Cockayne, 'Members of the Yorta Yorta Aboriginal Community v Victoria; Indigenous and Colonial Traditions in Native Title' [2001] *Melbourne University Law Review* 786; John Litchfield, Mabo and Yorta Yorta – Two Approaches to History and Some Implications for the Mediation of Native Title Issues' (NNTT Occasional Paper Series No 3/2001), 22; Langton and Palmer, above n 3, 24.

191 See eg, *Mabo* (1992) 175 CLR 1 (Deane and Gaudron JJ) [55].

192 Meyers, above n 94, 257.

193 Patricia Lane, 'Native Title Litigation' (1999) 18 *Australian Bar Review* 1, 19.

194 Tehan, above n 3, 571.

195 Litchfield, above n 190, 22.

title holders. As Ramsay highlights, communities change over time, and an agreement entered into now may not reflect the views of the community in ten years time.[196] Whilst it is not wise to litigate rights away given the current state of the law, agreements constitute an effective vehicle to provide for the recognition of native title rights and interests, as well as social, economic and cultural benefits to assist future generations.

This ability for Indigenous parties to give away rights which also belong to future generations raises the very real need for some mechanism which protects future generations when negotiating. It is submitted that there is a valid role for the Federal Court to play in ensuring the rights and needs of future generations are considered before making consent determinations. The legislature should also ensure that agreements (including ILUAs) provide for the recognition of rights or provision of benefits which span generations. In the meantime, native title parties must push for long-term benefits in their agreements, whilst non-indigenous stakeholders need to recognise the need to negotiate agreements which adequately take account of future generations.

3 *Difficulties*

Of course, there are inherent difficulties in agreement-making which must be acknowledged. As Tehan aptly outlines,

> [a]greements may fail to deliver promised benefits because of a lack of resources or a failure to address implementation issues, or because the terms have been poorly negotiated.[197]

Further concerns exist over the disparate bargaining power of parties, the unwillingness of some parties and governments to enter into good faith negotiations, and the significant failure of some agreements to deliver benefits.[198] Indeed it has been noted that the mere fact that an increasing number of agreements are being negotiated does not of itself guarantee

---

196 Ramsay, above n 151, 35.

197 Tehan, above n 3, 564-5.

198 See eg, Pearson, above n 88; Jonas, Aboriginal and Torres Strait Islander Commission, *Annual Report 2001–2002* (2002) 179–80; David Ritter, 'The Long Spoon: Reflections on Two Agreements with the State of Western Australia under the Court Government' (Paper presented at The Past and Future of Native Title and Land Rights Conference, Townsville, 29 August 2001); Ciaran O'Faircheallaigh, 'Implementing Agreements between Indigenous Peoples and Resource Developers in Australia and Canada' (Research Paper No 13, School of Politics and Public Policy, Griffith University, 2003); Ciaran O'Faircheallaigh, 'Negotiating a Better Deal for Indigenous Land Owners: Combining "Research" and "Community Service"' (Research Paper No 11, School of Politics and Public Policy, Griffith University, 2003).

equitable outcomes for Indigenous parties.[199] This is very true. All of these difficulties must be considered in the agreement-making context.

However, there are numerous examples of successful agreements which demonstrate how such problems can be overcome. These include the Wimmera Consent Determination, and *Comalco* and *Hamersley Iron – Eastern Guruma* ILUAs discussed above. Essentially, when parties come to the negotiating table with a willingness to arrive at a workable solution, agreements have the potential to accommodate Indigenous interests and provide a positive path for the future. Australia needs to focus on the positive aspects resulting from negotiated agreements, and do all it can to encourage parties to negotiate in good faith towards achieving a fair result.

4 *Effective Agreement-Making*

Effective agreement-making requires cultural awareness, goodwill among the parties and knowledge of the types of agreements and methods of negotiating them.[200] This involves:

> a willingness on both sides to approach land use discussions and negotiations on a co-operative basis that recognises mutual and different priorities, needs, concerns and capabilities and is motivated by a desire to achieve results.[201]

It is encouraging that attitudes towards solving native title grievances in Australia are changing for the better.[202] It must be acknowledged that agreements will only be struck where both parties can see tangible benefits, so that agreements will not solely be in the best interests of Indigenous people. Instead, they necessarily involve a balancing of competing interests. However, an approach which takes account of the interests of all parties may well be preferred to one involving 'winners' and 'losers', particularly at a time when Indigenous people are more likely to constitute the losing party. The identification of native title interests and preparedness to compromise to a certain degree allows for solutions away from the courts, therefore avoiding the time, cost, and uncertainty involved in litigation.

Whilst non-indigenous stakeholders may place a great deal of pressure on Indigenous parties to sign agreements, Indigenous people must take an active role in the agreement-making process and strongly push for their

---

199 Ciaran O'Fairchaellaigh, 'Mining Agreements in Australia: Outcomes for Indigenous Parties' (Seminar delivered at The Other Frontier Seminar Series 2002, *Negotiating Settlements: Indigenous Peoples, Settler States and the Significance of Treaties and Agreements*, Institute of Post Colonial Studies, North Melbourne, 22 August 2002).

200 Ramsay, above n 151, 43.

201 Council for Aboriginal Reconciliation, *Exploring for Common Ground* (1994) 40.

202 See especially, Tehan, above n 3, 565, 569-70, 571.

rights. Certainly, legislative change is needed to enable the courts to take a more active role in assessing the deal struck during consent determinations. Further guidance is also needed in the legislation requiring ILUAs to provide for tangible benefits which take into account the needs of future Indigenous communities. Native title would therefore become an effective vehicle in which to address the plethora of social, economic and health problems facing Aboriginal communities today.[203]

It may be some time before industry groups and governments accept the legitimacy of native title at common law and the need to secure a fair settlement.[204] It is possible that provided negotiation and agreement-making delivers tangible benefits, Indigenous groups may even come to support resource development on their lands when it takes place under agreed terms.[205] Yet even if we do not follow North America in this regard, given our vastly different histories, Australia is beginning to recognise the strong need to promote a process which should have begun centuries ago, and has long been used in other common law jurisdictions with great benefit to native title parties. This is dialogue with Indigenous people.

CONCLUSION

Some advocate changed principles of property law,[206] constitutional amendments,[207] or the recognition of fiduciary duties owed by the

---

203 As noted by the first National Population Enquiry, Aborigines and Torres Strait Islanders "probably have the highest growth rate, the highest birth rate, the highest death rate, the worst health and housing and the lowest educational, occupational, economic, social and legal status of any identifiable section of the Australian population" – Quoted in Graham Maddox, *Australian Democracy in Theory and Practice* (3rd ed, Melbourne: Longman, 1996) 419.

204 See Bartlett, above n 46, 732. See also Warren Atkinson, 'Land Rights for Miners' (March 1993) *Australian Business Monthly* 65. Bartlett notes that the pattern of hostility and opposition by state and territory governments and the mining and pastoral industries – Bartlett, above n 46, 732.

205 As seen in Northern America – Bartlett, above n 46, 734.

206 Hepburn, above n 87, 9. For detailed analysis of property law post-*Mabo*, see Patricia Lane, 'Native Title – The End of Property as we Know it? (1999) 8 *Australian Property Law Journal* 1; see also Richard Bartlett, 'The Proprietary Nature of Native Title' (1993) 6 *Australian Property Law Journal* 1.

207 See eg, Ogden, above n 36, 17, Macklem, above n 94, 32, Langton and Palmer, above n 3, 4-5, 25; Sean Brennan, 'Ward, Wilson and Yorta Yorta: The High Court, Native Title and the Constitution a Decade after Mabo' (Paper Presented at the Gilbert & Tobin Centre of Public Law '2003 Constitutional Law Conference', NSW Parliament House, Sydney, 21 February 2003); H McGlade, 'Treaty-making and reform of race discrimination law in Australia' (Seminar presented in *Negotiating Settlements: Indigenous Peoples, Settler States and the Significance of Treaties and Agreements*, The Other Frontier Seminar Series 2002, Institute of Post Colonial Studies, North Melbourne, 18 April 2002); Michael Dodson, 'An Australian Indigenous Treaty—Issues of Concern' (Paper

Crown to Aboriginal communities[208] as solutions to the native title crisis. However, where native title is currently working, it is through negotiation and agreement-making.[209] This method constitutes a legitimate and viable way forward. Thus negotiation and agreement-making appear to be Justice Kirby's 'clear sources of light' in the post-*Mabo* context. This article has attempted to highlight the opportunities afforded through negotiation and agreement-making as a means to overcome the dismal remnants of the landmark *Mabo* decision. It is essential that native title claimants, government policy makers, the legal profession and the judiciary understand the common law context that fundamentally underlies the contemporary interpretation of native title in Australia.[210] This context is one of developments which have made native title rights vulnerable and extremely difficult to prove.

However, despite the dismal state of native title law, negotiated agreement-making is proving to be an alternative and more effective way to solve native title disputes than litigation. Indeed we must acknowledge the inherent difficulties in coming to agreements over the use of land, including the possibility that agreements may fail to deliver benefits for Indigenous people. There are a number of ways in which the negotiation process can be improved. This includes legislative reform to allow the Court to evaluate the fairness of settlements by consent, review of the requirements on non-native title parties, and specifically providing for social, cultural and economic benefits which meet the needs of current as well as future generations. At the same time we must recognise that the time, cost and uncertainty associated with litigating native title issues provides a strong incentive for non-indigenous parties to attempt to come to negotiated agreements and avoid the courts. Indigenous people derive bargaining power from the potential to drag commercial parties into costly and time-consuming litigation which will delay or prevent operations. They also avoid the threat of having their native title rights further diminished by the courts and legislature. By focusing on possible ways to improve the agreement-making process to afford Indigenous people greater justice, we are able to produce practical outcomes with greater benefits for Indigenous communities. In this way, native title agreements such as consent determinations and ILUAs have the potential to deliver justice to Indigenous people, despite the existence of diametrically opposed interests.

---

presented at the AIATSIS Seminar Series, *Limits and Possibilities of a Treaty Process in Australia*, 20 March 2001) <http://www.aiatsis.gov.au/rsrch/smnrs/papers/dodson.htm>.

208 See eg, Macklem, above n 94, 33.

209 See eg, Father Frank Brennan, 'Native Title and Property Law' (Lecture delivered at the University of Notre Dame Australia, Fremantle, 15 August 2005).

210 Meyers, above n 94, 257.