# Land, Rights, Laws:Issues of Native Title

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*The common law recognition of native title in the High Court's* Mabo *decision in 1992 and the Commonwealth Native Title Act have transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.*

*This paper discusses the use of Federal Court consent determinations to resolve native title determination applications. These determinations arguably provide an expeditious means of settling native title issues, particularly the description of native title holders and their rights and interests. The paper also sketches the implications of consent determinations for representative bodies and peak industry groups.*

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# THE BEGINNING OF CERTAINTY: CONSENT DETERMINATIONS OF NATIVE TITLE

**Paul Sheiner**

Almost a decade after the *Mabo (No2)*[1] decision and eight years after passage of the *Native Title Act* 1993 (Cth) (NTA) there have been 30 determinations of native title by the Federal Court.[2] Of these determinations 22 were made by consent.[3] In light of the avowed commitment by relatively new State and Territory governments to settling native title matters by agreement,[4] consent determinations may continue to be the principal means by which native title determination applications are resolved. This paper examines the trend towards consent determinations and its implications for the native title process.

## Statutory framework

The Commonwealth in its response to the *Mabo (No2)* decision, which included the *Native Title Act 1993* (Cth), rejected an approach based on settling native title by consent in the form of regional treaties or agreements.[5] The Preamble to the NTA contemplates instead a special procedure;

> for the just and proper ascertainment of native title rights and interests which will ensure that, if possible this is done by conciliation and, if not in a manner that has due regard to their unique character.

The National Native Title Tribunal (NNTT) was given the primary function of mediating native title claims.[6] However the NNTT has no power in the event that the parties cannot reach agreement. The Federal Court (the Court) is the body empowered to determine native title.[7] Since 1998, the power of the NNTT to conduct mediation in respect of native title

determination applications has been conditional upon an actual, or deemed, referral of a matter to it by the Court.[8]

The NTA contemplates a complementary relationship between the Court and the NNTT; the Court can request mediation reports from the NNTT,[9] determine questions of law or fact referred by the NNTT and adopt agreement on facts reached by parties during mediation.[10] Section 86F provides the Federal Court with a specific power to adjourn court proceedings to allow negotiations between all or some of the parties aimed at settling the application, in whole or in part. In addition, the Court has the power to refer matters, or any part of them, to mediation under the *Federal Court Act 1976*.[11] Such 'court annexed mediation' is generally conducted by Federal Court Registrars, and indeed the Federal Court has used funds allocated to it as part of its substantial native title budget to employ designated 'Native Title Deputy District Registrars' in most of its Registries.[12]

The NTA contains specific provisions that allow the Court to make a determination of native title where there is agreement between the parties. Section 87 allows the Court to make orders in relation to the proceedings without the need to hold a hearing, or further hearing, where:

- the orders are agreed between the parties, and
- the Court is satisfied that, 'it appears appropriate to do so'.[13]

Section 86G provides the Court with the same discretionary power where the orders sought by the applicants are unopposed.

Where the order sought is one for a determination of native title, the order must comply with the requirements of s.225 of the NTA.[14] In general terms, s.225 provides that in making a determination of native title the Court must;

- decide whether or not native title exists in respect of the determination area,
- identify the group that holds native title,
- state the nature and extent of the native title rights and interests, and
- set out other rights and interests in the determination area and the relationship between those rights and native title.

The practice of court orders being made with the consent of the parties is well established within the Federal Court and elsewhere.[15] While the 'settlement' of matters in other jurisdictions may indicate that a 'commercial' or 'pragmatic' agreement has been reached by the parties, a consent determination of native title involves the making of a declaratory order by the Court, in a prescribed form, as to rights that otherwise exist at common law.[16] An analysis of the determinations of native title that have been made suggests that once it is accepted that native title exists, absent extinguishment issues, there is little room for compromise over the form such a declaratory order should take.

## Consent determinations thus far

Thirteen of the consent determinations of native title thus far have been over islands in the Torres Strait. All but two of the determinations[17] have been made in respect of unallocated crown land, reserved land or land already held by, or for the benefit of, Aboriginal or Torres Strait Islander people. These determinations reflect a fairly uniform approach to the requirements of s.225 of the NTA. Consent determinations made over land subject to other types of tenure have largely resulted in non-native title outcomes.

### Non-native title outcomes

A consent determination can be made that native title does not exist or a claim can be withdrawn by agreement under s.86F of the NTA. For instance, native title claim groups in the ACT entered into an agreement providing for the withdrawal of all native title claims in return for joint management arrangements for the Namadgi National Park.[18]

In *Clarrie Smith & Ors v Western Australia & Ors*[19] (Nharnuwangga) the claimants accepted the possible extinguishment of their native title rights and interests, in accordance with the decision of the Full Federal Court in *Western Australia v Ward*.[20] However they also entered into a land access protocol, to apply in respect of identified pastoral leases irrespective of the existence of native title.[21] A different approach was taken in *Buck v New South Wales*[22] in which case the claimants received a determination of native title and simultaneously agreed to terms for its surrender and the payment of compensation.

The Court has eschewed playing a paternalistic role as to the '*merits or demerits*' of a proposed settlement where the parties are legally represented.[23] However given the acknowledged inequality of bargaining power between native title and non-native title parties,[24] there maybe some room for increased judicial scrutiny of non-native title or extinguishment outcomes in so far as the NTA requires the Court to be satisfied that it is appropriate to make the orders sought.

**Nature and extent of native title**

There is clear authority emanating from the *Mabo (No.2)* decision that, absent issues of extinguishment, native title will amount to possession, occupation, use and enjoyment to the exclusion of all others. The Full Federal Court in *Western Australia v Ward* can be taken to have agreed that where communal native title is established it is sufficient for the purpose of s.225 to describe the nature and extent of the native title rights and interests in such terms.[25] Indeed there has been only one contested determination in which native title in respect of land has been found to amount to a lesser right.[26]

Consistent with this authority, most of the consent determinations have been in respect of native title amounting to possession, occupation, use and enjoyment to the exclusion of all others, known as 'exclusive possession determinations'.[27] This has been variously expressed, and the determinations have chosen to identify all or some of the rights that flow from such exclusive possession.

The formula followed by many of the Queensland determinations is to describe the native title as a right to possess, use, occupy and enjoy the determination area including the right to control access.[28] The *Tjurabalan* determination[29] and most of the recent *Kaurareg* determinations[30] provide that native title is a right to possess, use occupy and enjoy the determination area to the exclusion of all others, which right includes certain identified parasitic, or pendant, rights.[31]

While extent of the parasitic rights identified varies as between the consent determinations, these identified rights do not operate as a legal limitation on the native title.[32] In contrast, the *Spinifex* determination[33] provides an exhaustive list of rights that are said to amount to exclusive possession. This form of words may leave it open to an argument that the exclusive possession conferred is only for the purpose of the listed rights, which rights do not include a right to the commercial use of resources.[34]

A 'standard' clause in these exclusive possession consent determinations provides that the native title rights and interests are subject to and/or exercisable in accordance with the traditional laws and customs of the native title holders. This is to be understood as an acknowledgment, although perhaps an unnecessary one,[35] that the enjoyment of the exclusive native title by the community that holds the title is to be in accordance with its own laws and

customs. For instance, in *Ward v Western Australia* the trial judge found that, while the native title was held by the Miriuwung and Gajerrong People, members of that community under their laws and customs enjoyed a differing array of rights both within and outside of their particular family or estate country.[36]

The issue of whether an exclusive possession determination extends to a right to minerals remains unclear. The present position in Queensland, Western Australia and the Northern Territory is that any such rights have been extinguished, although, in respect of Western Australia and the Northern Territory the issue is on appeal to the High Court.[37] An argument is also circulating that such a determination cannot apply to flowing and subterranean waters.[38] Section 225 does not, however, compel a conclusive statement on these issues. This is reflected in the consent determinations that have dealt with minerals and flowing water by acknowledging that native title only extends to these resources to the extent recognised by the common law.[39]

The *Tjurabalan* determination acknowledges the existing law as set out in *Western Australia v Ward* that there is no native title in minerals, but at the same time confirms that should that law relevantly change, the native title holders have a right to apply under s.13 of the NTA to vary the determination.[40] While sub-sections 13(4) and 13(5) of the NTA provide mechanisms to deal with changes in the common law, the use of these provisions in a consent determination is not entirely satisfactory in that it gives rise to the prospect of substantial further litigation.

### Description of the native title holders

Native title holders have generally been described in the consent determinations by identifying the group/s or community/ies that are said to hold the native title,[41] following the approach set out by Lee J. in *Ward v Western Australia*[42] and approved by the Full Court on appeal.[43] While the NNTT has applied the registration test under the NTA so as to compel claimants to define themselves as the descendants of named apical ancestors,[44] this may well become a peccadillo of that particular administrative process.[45]

### Other rights and interests

The approach adopted in most of the consent determinations is to apply the non-extinguishment principle to the other rights and interests – such as crown leases, reserves and interests created by regulatory legislation – that may exist in respect of the determination area. That principle provides that the other interest will prevail over native title to the extent of any inconsistency. This is consistent with the NTA[46] and most existing authority.[47] It remains uncertain, however, whether this principle applies to certain types of other interests such as common law rights (for example any public right to fish[48]), or rights and interests that may be created by reserves for the benefit of Aboriginal and Torres Strait Islander people.[49]

It may be in the interests of non-native title parties to a consent determination to ensure that the relationship between their rights and interests and the native title is described in a greater level of detail. The NTA contemplates that such arrangements will be the subject of separate agreements between the native titleholders and the non-native title party.[50] Non-native title parties may perceive that their consent to the determination is a form of consideration that can be used to extract concessions from native title holders in respect of such agreements.[51]

## Manufacturing consent determinations

The fresh policies of new State governments have no doubt contributed to some of the more recent consent determinations.[52] The identification of common law holders of native title in a

just and efficient manner is now properly perceived to be in the interests of the broader community,[53] and arguably there is a tacit acceptance that in relation to native title claims the honour of the Crown is at stake.[54]

The proportionately higher numbers of native title matters being settled by consent over the last few years is also attributable to the fact that the law of native title has become more settled. Claims under the NTA have now made their way through the Federal Court to the High Court.[55] While it is acknowledged that there are still areas of uncertainty, not the least of which is the issue of partial extinguishment, as outlined above, the law as to the nature and extent of native title over land is now fairly clear.

Further, *Ward v Western Australia*[56] and on appeal *Western Australia v Ward*[57] (the *Miriuwung Gajerrong* case) dealt with and largely disposed of a plethora of 'legal' arguments put forward by respondent parties as to the requirements of proof of native title. The law applied by the trial judge and confirmed by the Full Court on appeal included the following principles:

- there is not a strict requirement of biological descent between the members of the community asserting native title and the members of the community in occupation of the claim area at the time of sovereignty;[58]
- native title can be held by a broader community or language group albeit that there are sub-groups within that broader community;[59]
- substantial maintenance of connection does not require continuing physical occupation or use of all parts of the claim area;[60]
- native title will not disappear simply because the claimants have modified their way of life;[61] and
- boundaries of land to which a traditional connection could not and need not be accurately declared and a degree of indeterminacy was to be expected;[62]

Only the third of these principles is on appeal to the High Court in this matter.

The *Miriuwung Gajerrong* case provides a particularly strong precedent in respect of parts of Australia, such as the *Tjurabalan* determination area, which experienced sustained contact with Europeans through the expansion of the pastoral industry in the late nineteenth and early twentieth centuries. Similarly, the *Mabo (No.2)* decision provided a strong precedent in respect of proof of native title for other communities in the Torres Strait.

The *Native Title Act 1993* and the subsequent *Native Title Amendment Act 1998* have also contributed to the 'settling' of native title law. These Acts and complementary State and Territory legislation have rendered the 'native title' a far less potent means for Aboriginal and Torres Strait Islander peoples to advance their rights and aspirations than may have been envisaged following the *Mabo (No.2)* decision. Conversely, the consequences of the making of a native title determination in favour of Aboriginal and Torres Strait Islander peoples have become less threatening for State governments and groups traditionally opposed to 'Aboriginal land rights' such as pastoralists and mining companies.

The inroads and statutory additions made to the common law concept of native title by the NTA and complementary State and Territory legislation include the following:

- the removal of the uncertainty regarding the validity of acts and legislation of the several Australian governments and legislatures by reason of the operation the *Racial Discrimination Act 1975* (RDA),
- the future act regime of the NTA including the right to negotiate, which confirms that native title can be extinguished without the consent of the common law holders,[63]

- the requirement that native title holders must form a body corporate to either hold the native title on trust or to act as their agent,[64]
- the exclusion from native title determination applications of certain types of current and historic tenures,[65]
- the removal of substantive procedural protection for native title holders in respect of various categories of future acts, including the grant of interests to third parties in relation to water,[66] and
- the removal of the right to negotiate in respect of mining infrastructure, and compulsory acquisitions where the native title is within towns and cities.[67]

These statutory inroads into native title, a common law concept which itself has inherent limitations,[68] set the parameters for consent determinations. Given these parameters, the expenditure of considerable resources by government and interest groups contesting the existence of native title may hardly seem worthwhile.

## Implications for the native title process

There are obvious advantages to all parties in consenting to an exclusive possession determination in terms of saving time and resources and relationship building.[69] For native title parties, it is acknowledged that a lengthy hearing places considerable stress on claimants and communities, particularly those people who are custodians of confidential and restricted information.[70] Further, while the cross-examination in such cases is generally ineffective,[71] it still has the potential to offend and insult Aboriginal witnesses.[72]

In contrast to a litigated approach, the process leading towards a consent determination is less intrusive but more expert driven. Government guidelines in Queensland and Western Australia require the provision of 'connection reports' that satisfy the respective governments that the native title claimants are the native title holders in respect of the claim area.[73] The 'satisfaction' of the government may in some cases be dependent on a meeting of minds between the expert engaged by the native title party and an expert engaged by the government.[74] In the absence of an agreed, or court imposed, process or timetable, the government's satisfaction has the potential to become a moveable feast in which the native title claimants are continually responding to requests for more information.

A realisation that there is a degree of overlap and similarity between the respective roles of the State and Territory governments, on the one hand, and native title representative bodies, on the other, would assist this connection report process. Land Councils are no longer autonomous non-government organisations. The NTA effectively requires native title representative bodies to support inclusive claims, widely consult with persons who may hold native title in respect of a claim area and ensure that all claims are properly authorised.[75] These 'due diligence' statutory duties may well correspond to the matters of principal concern to governments in deciding whether or not to consent to a determination of native title.[76]

As set out above, in terms of content, the consent determinations are fairly unremarkable, representing legal conclusions as to existence and extent of native title on the basis of accepted facts. This raises questions as to the need for a permanent specialist mediation body, in addition to the Court annexed mediation service, and the direct negotiations contemplated by the Government guidelines. It does not appear that the NNTT has played a significant mediation role in any of the consent determinations.[77]

As State and Territory governments adopt a more responsible position in relation to the expenditure of public funds on native title litigation, the principal objectors to the consent determination process may prove to be peak industry groups and their members.[78] Such groups

receive Commonwealth government funding for their legal representation[79] and many have, in the past, taken strong political stances against native title.[80] While in most situations the relevant legal interests held by a pastoralist, mining company or commercial fisherman will prevail over any native title that is determined to exist, the legal funding appears to allow them to take an adversarial position in relation to issues of proof of native title.[81] The absence of merits testing in the allocation of legal aid funds to these groups and their members remains a serious impediment to future consent determinations.

## The beginning of certainty?

Native title is, on one view, a legal strategy designed to achieve a greater level of self-determination for Aboriginal and Torres Strait Islander people.[82] As the common law develops and governments and the legal system begin to manage native title, the capacity of native title to be an effective vehicle for such self-determination may be diminishing. For example in Western Australia under the former State government negotiations pursuant to the Balangarra Framework Agreement, which was to provide for a special form of freehold title and mining access regime, were stopped because the State decided to focus on the more limited outcome of a consent determination.

The approach adopted by the Aboriginal Legal Rights Movement and native title claim groups in South Australia who are looking at negotiating a State-wide Indigenous Land Use Agreement, recognises the limitations inherent in a determination of native title and the importance of process.[83] Similarly, while the focus of the present Western Australian government is on negotiating consent determinations, the policy of the Western Australian Aboriginal Native Title Working Group is for framework agreements on both State and regional levels.[84] Such agreements could involve a process for the making of consent determinations,[85] but would not be limited to the settlement of narrowly defined 'land rights'.

Nevertheless the role consent determinations can play in ensuring that the claims still before the Federal Court, most of which were lodged over five years ago, are resolved within a single generation should be acknowledged. *Mabo (No.2)* and the NTA have raised expectations amongst Aboriginal people that the process they have embarked upon by lodging their native title claim will deliver a satisfactory outcome. Native title representative bodies bear the weight of that expectation. In the absence of a State-wide approach by representative bodies, many claim groups, given the choice, may continue to take an incremental approach to self-determination.[86] They may accept an exclusive possession determination as a form of guarantee that, in the future, their right to speak for their country will not be questioned.

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[1] *Mabo v Queensland* (1992) 175 CLR 1.

[2] NNTT Native Title Register (current as at 22/10/01).

[3] Of the eight determinations that were contested [ Croker Island (*Mary Yarmirr & Ors v NT* ), Miriuwung Gajerrong No. 1 (*Ben Ward & Ors v Western Australia*; *Western Australia v Ward*); Yorta Yorta (*The members of the Yorta Yorta Aboriginal Community v Victoria & ors* (1998); *The members of the Yorta Yorta Aboriginal Community v Victoria & ors* (2000)), St. Vidgeons (*Wandarang, Alawa, Mara & Ngalakan Peoples v NT*), *Bodney v Westralia Airports Corporation*; Mbantuarinya/Arrernte People (*Hayes v NT*), Leregon/Yawuru People & Rubibi Community (*Rubibi Community & Anor v Western Australia*), Ngalakan People (*Ngalakan People v NT* )], all but two, *Rubibi* and *Ngalakan*, are still subject to appeals (at the time this article was written the NNTT was awaiting notification from the Federal Court before formally registering these two determinations).

[4] Paul Wand and Chris Athanasiou, *Review of Western Australian General Guidelines – Native Title Determinations and Agreements* (2001); Queensland Native Title Services, *Guide to Compiling a Connection Report*, 3; The new Northern Territory Labor government has not yet released an official policy on native title but has been critical of the previous government's hostile approach: http://www. nt. alp. org. au/media/cmmsnt310800. html; Parry Agius, Jocelyn Davies, Richie Howitt and Lesley Johns, 'Negotiating

Comprehensive Settlement of Native Title Issues: building a new scale of justice in South Australia', Paper presented at the AIATSIS Native Title Representative Bodies Legal Conference,Townsville, August 2001. Negotiation Protocol between Mirimbiak Aboriginal Corporation, Victorian Government and ATSIC, 4 November 2000.

[5] Richard Bartlett *Native Title in Australia* (2000), [3. 16], [3. 21].

[6] Section 108 NTA.

[7] Bartlett (2000) [3. 21].

[8] For example: ss. 86B and 108(1B).

[9] Section 86E NTA.

[10] Section 86D.

[11] O 72 Federal Court Rules.

[12] The Federal Court is to receive over 5 million dollars in 'additional' native title funding in 2001-2002.

[13] For an examination of the case law on s.87 see Stephen Beesley ' The role of the Federal Court when parties reach Agreement' (2001) 5(1) NTN 5.

[14] Section 94A of the NTA.

[15] See O 35 r 10A *Federal Court Rules*; *Kovalev v MIEA* [1997] FCA 557.

[16] *Ward v Western Australia*; *s.*223 (1)(c) NTA.

[17] *Clarrie Smith & Ors v Western Australia & Ors* (*Nharnuwangga*) [2000] FCA 1249 and *Western Yalanji or 'Sunset' peoples v Alan & Karen Pedersen & Ors* [1998] FCA 1269.

[18] NTRU, *Native Title Newsletter*, No. 3, 2001.

[19] [2000] FCA 1249.

[20] (2000) 170 ALR 59.

[21] There is also an Indigenous Land Use Agreement dealing with State based future acts in respect of that part of the determination area where native title was determined to exist.

[22] *Buck v New South Wales*, Lockhart J. , 7 April 1997.

[23] *Nharnuwangga* [26] (Madgwick J. ).

[24] K. Dolman 'Native Title Mediation: Is it Fair?' (1999) 4(21) ILB 8. See generally: Larissa Behrendt *Aboriginal Dispute Resolution* (1995). See also sub-section 199C(3) of the NTA in relations to the de-registration of ILUAs.

[25] (2000) 170 ALR 59, [206]-[207] (Beaumont and von Doussa JJ. ).

[26] *Hayes v Northern Territory* [1999] FCA 1248, [48] (Olney J. ) presently on appeal to the Full Federal Court. Olney J. in *Wandarang, Alawa, Marra & Ngalakan Peoples v Northern Territory of Australia* [2000] FCA 923 seems to have dealt with the absence of exclusive rights on the basis of extinguishment: see at [75]-[76] and [112]. That case is also on appeal. It is unclear whether what was being asserted by the Applicants in these cases was communal native title or particular native title rights and interests based on traditional laws and customs. Compare *The Ngalakan People v Northern Territory of Australia* [2001] FCA, [55]-[60] and [63] (O'Loughlin J.).

[27] *Nharnuwangga* [2000] FCA 1249 is not an exclusive possession determination in so far as it relates to reserve land. *Mark Anderson on behalf of the Spinifex People v Western Australia* [2000] FCA 1717 (Spinifex) is not an exclusive possession determination in so far as it relates to reserve land. Similarly one of the determinations in *Kaurareg People v Queensland* [2001] FCA 657 (No QG 6023 of 1998) is not for exclusive possession nor is *Congoo v Queensland* [2001] FCA 868. *Western Yalanji or 'Sunset' peoples v Alan & Karen Pedersen & Ors* [1998] FCA 1269 is not for exclusive possession as the determination area was over an existing occupation licence that was to be upgraded to a perpetual lease: see Bartlett, *Native Title in Australia* (2000), [20. 32].

[28] For example: *Wik Peoples v Queensland* [2000] FCA 1443

[29] *Ngalpil v Western Australia* [2001] FCA 1140

[30][2001] FCA 657

[31] The term parasitic derives from the judgment of Lamer CJ in *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193, cited in *Ward v Western Australia*(1998) 159 ALR 483, 505, 507.

[32] They may however operate so as to shape perceptions of what native title is.

[33] *Mark Anderson on behalf of the Spinifex People v Western Australia* [2000] FCA 1717.

[34] See *Rubibi Community & Anor v Western Australia & Ors* ([2001] FCA 607 (29 May 2001) where the judge held on a contested determination that the order should provide that native title confers the right of occupation, use, possession and enjoyment of the area, as against the whole world `for ceremonial purposes' (emphasis added).

[35] For example s.223(1)(a) NTA.

[36] (1998) 159 ALR 483, 541-542. On appeal *Western Australia v Ward* (2000) 170 ALR 59, [239]. See also N. Pearson 'Native Title as a Recognition Concept' in G. Yunupingu (ed. ) *Our Land is Our Life* (1997).

[37] *Ward & Ors v Crosswalk Pty Ltd & Anor* (P67/2000); *Ningarmara & Ors v Northern Territory & Ors* (P63/2000).

[38] Graham Hiley QC, 'Recognition of Native Title Rights in Water' (1999-2000) 4 NTN 160.
[39] *Saibai v Queensland* [1999] FCA 158; *Mualgal People v Queensland* [1990] FCA 157.
[40] See also *Brown v Western Australia* [2001] FCA 1462.
[41] See for example *'Sunset' peoples* [1998] FCA 1269.
[42] (1998) 159 ALR 483.
[43] [195]-[201] (Beaumont and Von Doussa JJ. ). This is issue is not before the High Court on appeal.
[44] See: *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732; for a critique of the Registrar's approach see McIntyre et al. , 'Administrative Avalanche: The Application of the Registration Test under the NTA' (1999) 4(20) ILB 8.
[45] Ibid at [26]. Note however *Rubibi Community & Anor v The Western Australia & Ors* [2001] FCA 607 in which the trial judge proposes to determine that native title is held by the 'claimant group'.
[46] The NTA effectively prevents claims in respect of areas covered by 'previous exclusive possession acts' with the result that determinations of native title will not usually be made in respect of areas where native title has been extinguished.
[47] Cf. Lee J. in *Ward v Western Australia* who described them as concurrent rights; *Kaurareg People v Queensland* [2001] FCA 657.
[48] This issue has been resolved by the High Court in *Commonwealth v* Yarmirr [2001] FCA 56.
[49] Compare the orders of Full Court in *Western Australia v Ward* which do not refer to Aboriginal reserves as 'other interests' and the *Tjurabalan* determination in which Aboriginal reserves are said to be subject to the non-extinguishment principle.
[50] ILUA's may provide for the relationship between native title and other rights and interests: ss. 24BB(c); 24CB(c); 24DB(c).
[51] G. Gishubl, 'Land Access Issues as part of resolving claimant applications' (2000-2001) 5(4) *NTN* 65 at 68. For a critique of such an approach see: K. Dolman (1999) op cit and M. Dodson 'Power and Cultural Difference in Native Title Mediation' (1996) *Aboriginal Law Bulletin* 3(84)9. See also the submission of the Cape York Land Council to the Joint Parliamentary Committee on Native Title Inquiry in to Indigenous Land Use Agreements 2001, to the effect that the non-native title parties to the *Kauraeg* determination viewed native title rights 'as a negotiable commodity capable of being compromised to reach agreement'.
[52] A possible example is *Wik Peoples v Queensland* [2000] FCA 1443 which case went to the High Court on demurrer under the previous State government.
[53] For example a recommendation of the Wand Review (2001) op cit. at 1 is that the Western Australian government be guided by certain policies including that ' It is in the interests of all people of Western Australia to ensure that Aboriginal peoples in this State receive the full recognition and status to which they are fully entitled to aspire to by virtue of their rights and interests and their rich and diverse culture'. The Review also recommends that the government should not pursue native title outcomes that are 'less than is possible at law'.
[54] *Brownley v Western Australia* [1999] FCA 1139, [22].
[55] The High Court has recently handed down judgement in *Yarmirr v Northern Territory. Ward v. Western Australia* is awaiting judgment in the High Court. *Yorta Yorta* is the subject of a special leave application to the High Court.
[56] (1998) 159 ALR 483.
[57] (2000) 170 ALR 59.
[58] (1998) 159 ALR 453, 503; on appeal (2000), [229]-[238]. See also *St. Vidgeons* [2000] FCA 923, [48] where Olney J. appears to accept a test of 'substantial degree of ancestral connection'.
[59] Ibid at 539-544; on appeal (2000), [239].
[60] On appeal [2000], [240]-[263]. An appeal against part of this finding by the Full Court is before the High Court in *Western Australia v Ward* (P59/2000).
[61] (1998) 159 ALR 483, 502. On appeal *Western Australia v Ward* (2000) 170 ALR 159, [241].
[62] *Ward v Western Australia* (1998) ALR 483, 504,545. Bartlett (2000) [8. 20].
[63] There are arguments that the contrary position exists at common law or in equity. See for example G. McIntyre QC, 'Fiduciary Obligations of Governments Towards Indigenous Minorities' in B. Keon-Cohen (ed), *Native Title in the New Millenium* (2001).
[64] See Mantziaris and Martin *Native Title Corporations* (2000), 130-133 who point out that this is contrary to s.10(3) of the RDA as it effectively authorises the management by a person other than the native title holders of native title regardless of whether the native title holders consent to their native title being so managed.
[65] Sections 61A(2), 190B(8) of the NTA. See also s.23B as to previous exclusive possession acts.
[66] For example s.24HA of the NTA.
[67] Sub-sections 26(1)(c)(i) and 26(2)(f).
[68] See for example M. Mansell, 'The Court Gives and Inch But Takes Another Mile' (1992) 2(57) ALB 4.
[69] *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 671 cited by Black Cj in *Spinifex* at [8].

[70] For example *Sampi v Western Australia* [2001] FCA 619.
[71] *Milirrpum v Nabalco* (1971) 17 FLR 141, 179 cited in *Ward v Western Australia* (1998) 159 ALR 483, 497.
[72] The transcript in the *Miriuwung Gajerrong* case and the *Ngarluma Injibandi* case (*Daniels & Ors v Western Australia*) contain numerous examples. The trend has continued in the *Wanjina* case (*Wanjina Wunggurr-Wilinggin v Western Australia* ) recently heard in the Kimberley: pers. comment Julie Melbourne. See L. Strelein 'The Courts of the Conqueror' (2000) 5(3) AILR 1 for other examples. The Federal Court does not have a specialist native title division and many of the judges assigned to hear cases have no prior experience with native title or indeed Aboriginal people: see Justice North 'From Internet to Outback - A World Class Court' in B. Keon-Cohen (ed), *Native Title in the New Millenium* (2001).
[73] Such a 'connection report' is not necessarily coextensive with an expert anthropological report that is filed in the context of the Court proceedings, however a native title representative bodies' resources are no doubt best spent producing a single document.
[74] This type of process is described in the judgment in *Ngalpil v Western Australia* [2001] FCA 1140.
[75] See Division 3 of Part 11. A related point is the duplication in the functions assigned to the NNTT and representative bodies under the NTA: Parliamentary Joint Committee on Native Title, *Second Interim Report for the s.206(d) Inq*uiry, September 2001 at 84.
[76] In Western Australia the Yamatji Land and Sea Council has entered into a cooperative agreements with the State government regarding the mediation of native title claims: D. Ritter 'Co-operative Agreement Between Western Australia and the Yamatji Land and Sea Council' (2000) 4(12) NTN 227.
[77] See Parliamentary Joint Committee on Native Title, *Second Interim Report for the s.206(d) Inquiry*, September 2001 at 33-34 acknowledging the administrative assistance provided by the NNTT in ILUA negotiations but referring to criticism that the NNTT does not provide any meaningful mediation. See also submission of Cape York Land Council to the Inquiry.
[78] For example Pastoral and Graziers Association (PGA) and Western Australian Fishing Industry Council in Western Australia. See: Katrina White ' Involvement of Industry Bodies in Native Title Determination Applications' (2001-2002) 5 NTN 12.
[79] Attorney-General's Department, *Provision of Financial Assistance by the Attorney General in Native Title Cases – Guidelines*, 8.
[80] See Dr. Eshenshade, 'The Pastoralists' Perspective on Mediating Native Title Claims' (2000-2001) 5(4) NTN 62.
[81] Section 85A of the NTA establishes the prima facie rule that native title litigation is a no costs jurisdiction, although parties may receive a costs order against them in the event their conduct is unreasonable: White (2001-2002) NTN 12, 14.
[82] See L. Strelein (2000) op. cit.
[83] Parry Agius, Jocelyn Davies, Richie Howitt and Lesley Johns ' Negotiating Comprehensive Settlement of Native Title Issues: building a new scale of justice in South Australia' paper delivered to the AIATSIS Native Title Representative Bodies Legal Conference, Townsville, 2001.
[84] WAANTWG, *Reaching Agreements*, 1999.
[85] See for example: Sean McLaughlin, 'Towards a Coherent Claim Strategy: Delivering a Framework Agreement in the Northern Rivers Region of NSW', (1999) 4(21) ILB 18.
[86] Contrast the approach taken by the Gitskan and Wet'suwet'en peoples in *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 as described by Neil Sterrit, 'The Gitskan Struggle: The Origin of the Delgamuukw Case' in Bartlett and Milroy (eds. ), *Native Title Claims in Canada and Australia: Delgamuukw and Miriuwung Gajerrong* (1999) at 74.

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