Indigenous Property Rights

New Developments for Planning and Valuation

John Sheehan
Ed Wensing

Number 17
March 1998

THE AUSTRALIA INSTITUTE

Indigenous Property Rights

New Developments for Planning and Valuation

John Sheehan
Chartered Town Planner and Valuer
Fellow and Native Title Spokesman
Australian Institute of Valuers and Land Economists
Member, Royal Australian Planning Institute

Ed Wensing
Town Planner
Fellow, Australian Institute of Valuers and Land Economists
Member, Royal Australian Planning Institute

Discussion Paper Number 17
March 1998

ISSN 1322-5421

CONTENTS

Preface

In April last year the Australia Institute published *Native Title: Implications for land management* (Discussion Paper Number 11) by Ed Wensing and John Sheehan. It was a runaway success with hundreds of copies circulating around Australia from Parliament House in Canberra to remote communities in Western Australia. The success of that paper was proof of the craving for clearly presented information about native title or, as the authors now prefer, 'Indigenous property rights'.

While the issues are extremely complex and very few people understand the legal ramifications of native title in any depth, at another level the question of Indigenous property rights is simple. For many Australians it is a question of the historical responsibility of white Australia to provide justice to Aboriginal people.

The debate has raged since our first Discussion Paper, with the development of the Prime Minister's 10-point plan, the parliamentary battle over the Native Title Amendment Bill and the threat of a double dissolution and a 'race election'. Throughout Australia debate has been fierce and disinformation has been effectively deployed to spread uncertainty and fear.

This paper up-dates and develops the arguments and information of our first paper. The Institute is very pleased to be putting this analysis by John Sheehan and Ed Wensing into the public domain, especially just as the debate is due to be resumed in the Senate. We hope that it will contribute to a solution that is fair and workable.

Clive Hamilton
Executive Director
25 March 1998

Acknowledgments and disclaimer

This paper is the result of continuing research being undertaken by John Sheehan (Member, Royal Australian Planning Institute and Fellow, Australian Institute of Valuers and Land Economists) and Ed Wensing (Member of the Royal Australian Planning Institute and Fellow of the Australian Institute of Valuers and Land Economists). John is the Native Title Spokesman for the Australian Institute of Valuers and Land Economists, and Ed is the former National Policy Director of the Royal Australian Planning Institute.

This document is general in nature and does not constitute legal advice and should not be relied upon for the purpose of a particular matter. Readers should seek independent professional advice.

We wish to acknowledge input and comments from a number of people on earlier drafts of this work, which informed our thinking. We are indebted to them for their insights.

The views expressed are personal.

John Sheehan, Sydney
Ed Wensing, Canberra

A word about terminology

The term 'native title' is a misnomer and has colonial overtones. It is also misleading as it ignores the all-encompassing view of land that Indigenous peoples have and focuses on property and ownership aspects.

Since *Mabo v. the State of Queensland [No. 2] (1992) 175 CLR 1*, the term 'native title' appears to have contributed to confusion in the community. Accordingly, we have adopted the term '*Indigenous property rights'* as a convenient way of referring to Indigenous peoples' rights and interests in land, including their special relationships to land. For a discussion of the special nature of Indigenous people's relationship to land, see our earlier Australia Institute Discussion Paper (No. 11) (Wensing and Sheehan 1997:4-5). In addition, Indigenous property rights are 'sui generis'. That is, they are unique to the holders of those rights and interests and these vary between different groups or clans and between locations.

In our land tenure system the term 'title' is regarded as 'a proprietary interest in land' which is supported either by a state guaranteed 'certificate of title' (Torrens Title) or by a valid chain of earlier titles (Old System). Possession of either form of title denotes 'ownership' of the parcel of land (Butt 1996:686).

The term 'title' can have two inter-related meanings. Firstly, as 'an established or recognised right to something', and secondly, 'a ground for claim against others'. Hence, 'native title' is more than a 'legal right to property' and may embrace other Indigenous law and culture.

Furthermore, it is not commonly recognised that native title is not registrable with State or Territory land administrations. Under the *Native Title Act 1993*, all determinations of native title must be kept on a Native Title Register and all applications for native title claims must be kept on a Register of Native Title Claims by the National Native Title Tribunal.

John Sheehan
Ed Wensing

1. INTRODUCTION

The common law of Australia has recognised Indigenous property rights and interests since 1992. These rights and interests are existing: they do not depend on formal recognition by a court. While the areas still subject to native title remain unresolved, land managers including planners, land economists and valuers, must exercise due diligence in their respective disciplines and ensure they take proper account of Indigenous peoples' property rights and interests and their culture.

In this paper, we endeavour to examine methodologies for:

- the valuation of Indigenous property rights; and
- land use planning and management processes encompassing Indigenous property rights.

The order in which these matters are listed reflects the manner in which Indigenous property rights tend to emerge. Public awareness of the possible existence of Indigenous property rights first surfaces when a claim for Indigenous property rights is mooted. As a result, various stakeholders in the claimed land become aware of the possible compensation implications arising from the impairment, diminution or partial or total expropriation of Indigenous property rights.

Hence, valuation advice is obtained as to the likely amount and nature of compensation.

Three main avenues for resolution of claims for Indigenous property rights arise once valuation advice is obtained: namely, legislation, litigation and negotiation.

Given that legislation or litigation may not provide optimal results, negotiation may be a more workable solution. For legislation or negotiation, stakeholders such as State and local government authorities will require appropriate planning and land management advice.

The recognition of Indigenous property rights in Australia in *Mabo (No. 2)* has produced a dyschronous (separate in time) land law, which cannot be ignored by either profession. The High Court moved the established Anglo-Australian legal system irrevocably towards a truly Australian land law which encompasses both the rights and interests of Indigenous Australians and those coexisting non-Indigenous rights and interests arising from colonisation.

The critical task for valuers and planners is to devise new methodologies which recognise the rights and interests of Indigenous peoples. This encompasses altering decades of experience rooted in Anglo-Australian land law which is largely irrelevant when dealing with a different cultural milieu.

At present, it is not possible to provide clear guidance on how to value land that is subject to Indigenous property rights or how to value Indigenous property rights for the purposes of compensation for their loss, impairment, diminution or partial or total expropriation. However, we have endeavoured to explore the relationships between Indigenous property rights and the functions of planning and valuation. In doing so, the implications of the High Court's *Wik* decision and the Government's response are examined.

However, coexistence of title is important to Indigenous peoples and is a common feature of Australian land law and practice. We are of the view that coexistence and negotiation are the only practical opportunity for ensuring sustainable land use, proper management, certainty and equity.

2. RECENT DEVELOPMENTS AND THE CONTINUING DEBATE

2.1 The *Wik* case

In mid-1993, before the enactment of the *Native Title Act 1993*, the Wik Peoples made a claim for Indigenous property rights (native title) in the Federal Court of Australia in relation to land on Cape York Peninsula in Queensland. The Thayorre People joined the action because they had claimed their Indigenous property rights over an area of land which partly overlapped the *Wik* claim. The land claimed by the two groups included land for which the Queensland Government had issued two pastoral leases – the Mitchelton Pastoral Holding Lease, granted pursuant to the *Land Act 1910 (Qld)*, and the Holroyd River Pastoral Lease, granted pursuant to the *Land Act 1962 (Qld).*

The Wik and Thayorre Peoples argued that their Indigenous property rights were not extinguished by the grant of leases, but rather coexisted with the interests of the lessees (Gal 1997:2).

In December 1996, the High Court handed down its decision in *Wik Peoples v. State of Queensland and Others.* The decision confirmed that Indigenous property rights may exist over land which is or has been subject to a pastoral lease and possibly some other forms of statutory estates. The Court decided that existing pastoral leases issued prior to 1 January 1994 and the rights granted under them are valid, and that the rights of the pastoralist prevail over Indigenous property rights to the extent of any inconsistency.

Considered strictly on its facts, the *Wik* case is confined to a decision on two specific pastoral leases granted under the *Land Act 1910 (Qld)* and the *Land Act 1962 (Qld).* The High Court decided on the merits of the lease instruments and the legislative *Acts* under which they were issued, and decided that these pastoral leases did not automatically extinguish any surviving Indigenous property rights simply by their grant because they did not grant exclusive possession (Horrigan 1997b:5).

> *Confined in this way, the outcome of Wik turns on an examination of the historical development of pastoral leasehold titles in Australia, the authorising provisions of the Queensland Land Acts, and the terms and limits of the particular instruments of lease.* (Horrigan 1997b:5).

Smith (Smith P. 1997:24) summarises the decision as follows:

> *"In essence, the majority of the High Court ruled that a lease granted pursuant to a statute is different from a lease at common law. The distinction is relatively straightforward. A lease at common law is usually in the form of a commercial transaction between two parties and has, as an essential component of the transaction, a transfer of exclusive possession to the lessee. A statutory lease, on the other hand, does not necessarily involve a grant of exclusive possession. In order to determine what is actually granted under a statutory lease, it is necessary to consider the terms of the grant, the legislation under which the grant is made, and, if necessary, the legislative intent."*

> *"In applying these principles to native title, the majority found that the pastoral leases concerned, both by their own terms and in the light of the legislation, in not specifically granting exclusive possession to the grantee, left room for the possibility that native title may exist. The Court went on to say that whether or not native title continued to exist could only be determined following a factual finding of what the actual native title rights are and whether those rights could coexist with the grantee's rights. To the extent that there is any conflict in the rights, the rights of the grantee (for example, the pastoralist) prevail. Importantly, the Court's ruling is not limited in its terms to pastoral leases. The principles enunciated apply equally to all forms of statutory lease."*

Contrary to sometimes ill-informed public debate, the *Wik* decision did not threaten or change the rights of pastoralists. Indeed, Lockhart J. indicated as long ago as September 1993 in *Pareroultja v. Tickner ((1993) 42 FCR 32)* that:

> *"[t]he 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 (e.g. a monthly tenancy or lease for 99 years) and inconsistency, if any, between Native Title and the lessor's reversionary interest"*.

The above conflicts with the views of parties such as the National Farmers Federation, who have argued that *Wik* shattered the long-held assumption that pastoralists were free to manage the land as they wished subject only to the usual controls imposed by government (Bachelard 1997:77; NFF 1997).

2.2 The Government's response to *Wik*

The Government was faced with a number of options in responding to the *Wik* decision. It could:

- allow the *Wik* decision to stand, permitting the processes of existing legislation (the *Native Title Act 1993*) and the common law to deal with the outcomes;
- enact amendments to the *Native Title Act 1993* to effect the *Wik* decision, or
- enact amendments to the *Native Title Act 1993* to extinguish Indigenous property rights on pastoral leases and other statutory estates (Bachelard 1997, NFF 1997).

The response chosen by the Federal Government was a document known as the '10-point plan' summaries of which were released on 1st and 8th May 1997. The full details of the plan were released in early June 1997 and covered:

1. Validation of acts/grants between 1/1/94 and 23/12/96;
2. Confirmation of extinguishment of native title on 'exclusive' tenures;
3. Provision of government services;
4. Extinguishment of native title on pastoral leases to the extent of any inconsistency and enabling pastoralists to expand permissible uses to the definition of 'primary production' in the *Income Tax Assessment Act 1936* without reference to Native title claimants or holders;

5. Statutory access rights;
6. Future mining activity;
7. Future government and commercial development;
8. Management of water resources and airspace;
9. Management of claims;
10. Measure to facilitate and bind agreements.

The authors' comments on the 10-point plan were published in the Australia Institute's Newsletter of June 1997. Those comments remain valid.

Draft legislation implementing the 10-point plan was released for comment in June 1997 and, following discussions with a number of interests, the *Native Title Amendment Bill 1997* was introduced into the House of Representatives in September 1997. Following inquiries by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (1997) and by the Senate Legal and Constitutional Legislation Committee (1997) and debate in the House of Representatives, the *Bill* was passed in the House where the Coalition Government has a large majority.

The Bill was introduced into the Senate on 25 November 1997. Following two weeks of debate the *Bill* was passed on 5 December 1997 with several amendments by the non-government parties in the Senate.

The *Sydney Morning Herald* of 6th December 1997 summarised the impact of the Senate's amendments on the 10-point plan as follows:

> 1. Validation of acts/grants in the period between passage of the *Native Title Act 1993* and the *Wik* decision.
> *Result:* *Senate delivers Government all it wants.*
>
> 2. States and Territories would be able to confirm that 'exclusive' tenures such as freehold, residential, commercial and public works in existence before the enactment of the *Native Title Act 1993* extinguish native title. Any current or former pastoral lease conferring exclusive possession would also be included.
> *Result:* *Delivered in full.*
>
> 3. Impediments to the provision of government services in relation to land on which native title may exist would be removed.
> *Result:* *Delivered in full.*
>
> 4. As provided in the *Wik* decision, native title rights over current or former pastoral leases and any agricultural leases not covered under point 2 above, would be permanently extinguished to the extent that those rights are inconsistent with those of the pastoralist. The native title holder's right to negotiate would be completely removed in relation to the use of pastoral leases for all activities pursuant to, or incidental to, 'primary production' as defined in the *Income Tax Assessment Act 1936*, including farmstay tourism.

Result: *Substantially delivered, except native title rights can revive when a pastoral lease expires.*

5. Where registered claimants can demonstrate that they currently have physical access to pastoral lease land, their continued access will be legislatively confirmed until the native title claim is determined.
Result: *Delivered in part.*

6. For mining on vacant crown land there would be a higher registration test for claimants seeking the right to negotiate, no negotiations on exploration, and one right to negotiate per project.
Result: *Government loss.*

7. Future government and commercial development. A higher registration test would be required for the right to negotiate on vacant crown land outside towns and cities. The right to negotiate on the compulsory acquisition of native title rights on other 'non-exclusive' tenures will continue on terms at least equivalent to other parties with an interest in the land. The right to negotiate would be removed in relation to the acquisition of land for third parties in towns and cities, although the same procedural and compensation rights as applies to other landholders will apply to native title holders. Future actions for the management of any existing national park or forest reserve would be allowed. A regime to authorise activities such as the taking of timber or gravel on pastoral leases, would be provided.
Result: *Delivered in part.*

8. The ability of governments to regulate and manage surface and sub-surface water, off-shore resources and airspace, and the rights of those interests under any such regulatory or management regime would be put beyond doubt.
Result: *Delivered.*

9. In relation to new and existing native title claims, there would be a higher registration test to access the right to negotiate, amendments to speed up handling of claims, and the measures to encourage the States to manage claims within their own systems. A sunset clause within which new claims would have to be made would be introduced.
Result: *Loss. No sunset clause; test eased, but still tougher than at present.*

10. Measures would be introduced to facilitate the negotiation of voluntary but binding agreements as an alternative to more formal native title machinery.
Result: *Delivered.*

On this assessment, the Government scored about seven out of the ten points of the plan.

The proposed amendments include proposals to place an upper limit on the amount of compensation that may be payable for the loss, diminution, impairment or partial or total expropriation of Indigenous property rights at something equivalent to freehold, and proposals to remove the 'right to negotiate' on compulsory acquisitions for third parties on

lands within designated towns and cities. These proposals were rejected by the non-Government parties in the Senate, on the grounds that such proposals are either unconstitutional or racially discriminatory.

The Government submitted the Senate's amendments to the House of Representatives at a special Saturday sitting on 6th December, only the second time the House has sat on a Saturday since Federation. Predictably, the Government rejected most of the Senate's amendments and declared that it would resubmit the Bill in its original form to the Senate in March 1998. If the Senate rejects the Bill, in its original form for a second time, it may provide a trigger for a double dissolution election.

The Government has since released two papers aimed at promoting its opposition to the amendments made by the Senate. One is entitled 'Native Title made easy' and was released by the Deputy Prime Minister, Tim Fisher MP (1998), and the other is entilted 'Fairness and Balance: the Howard Government's response to the High Court's *Wik* decision, an overview of native title and the *Government's Native Title Amendment Bill 1997'*, released by the Special Minister of State, Senator Nick Minchin (1998). In so far as these documents relate to the substance of this discussion paper, they do not cast any new light and nor do they clarify any of the issues arising from *Wik* that planners and valuers need to address.

2.3 Reactions to the 10-point plan

The impact of the Prime Minister's 10-point plan would be twofold. Firstly, it would reduce the range of claimable land and makes it more difficult for Indigenous peoples to exercise their negotiating rights, especially in relation to compulsory acquisition for third parties in areas designated as being a town or a city irrespective of whether or not the land is actually part of an existing town or city. Secondly, it would reduce the level of Indigenous property rights currently recognised under Australian law after *Mabo (No. 2*), the *Native Title Act 1993* and *Wik.*

From a land management perspective, there are also a number of constraints on both the content and implementation of the 10-point plan. These include:

- the need to resolve the uncertainty for leases issued and renewed in the period between the enactment of the *Native Title Act 1993* (1/1/94) and the date of the *Wik* decision (23/12/96). This only affects leases where States and Territories did not follow the due processes under the *Native Title Act 1993*;

- the *Native Title Act 1993* and the *Racial Discrimination Act 1975* prevent blanket extinguishment, extinguishment without compensation and other discriminatory actions concerning land use;

- the constraints in the *Australian Constitution* prevent the Commonwealth Government from extinguishing native title without compensation, at least to the extent that would amount to an acquisition of property on unjust terms by the Commonwealth;

- changes to the way new and upgraded rights may be validly granted are being deliberately clouded by unnecessary debate about existing rights;

- the possibility of international attention if legislation implementing the plan breaches rights protected by international treaty; and

- the fact that the amendments to the *Native Title Act 1993* cannot be considered in a vacuum. The present *Act* contains a delicate balance between Indigenous and non-indigenous interests, and discriminatory and non-discriminatory measures. *"That balance cannot be disturbed too much without being lost, and that affects the constitutional legitimacy of whatever post-Wik legislation finally emerges from both houses of the Commonwealth Parliament"* (Horrigan 1997b:12).

Several lawyers and legal experts (Horrigan 1997a and 1997b; see also Senate Legal and Constitutional Committee 1997) and agencies, including the Australian Law Reform Commission (ALRC 1997:7), have commented that if the *Bill* is enacted in its present form, there will be substantial grounds upon which it could be challenged before the courts.

Some aspects of the *Bill* in relation to compensation and land use planning are explored further in the following chapters.

3. THE EMERGENCE OF STATUTORY ESTATES (Leasehold) AND THEIR IMPACT ON INDIGENOUS PROPERTY RIGHTS

3.1 Statutory estates

Much of Australia's land surface remains vested in the Crown, with any privately held land largely confined to the seaboard or to closely settled rural areas. This dichotomy in the pattern of tenure was firmly established by Federation in 1901.

In the interests of encouraging settlement and consolidating their hold on the continent, the various colonial governments gave, sold or leased vast tracts of land to new arrivals, land speculators, pastoralists and churches. The colonial and later State Governments also kept a lot of land for themselves for a variety of reasons, including for defence purposes. In many instances the land was kept by the States often because the land was inaccessible or thought to have little or no economic use. Such land was and still is referred to 'vacant Crown land' (Spearritt 1993:2). Currently, over 40 percent of the continent is under one form or other of statutory estate (Brennan 1996).

Because much of the land occupied by settlers last century was leased Crown land, a vast amount of colonial legislation was enacted, and administrative arrangements established and overseen by centralised bureaucracies responsible for the statutory estates. These bureaucracies were seen as imperative given that certain land management rights were retained by the Crown influencing the way in which the statutory estates were to be used, and in certain cases enabling the extraction of royalties for timber, minerals and petroleum reserved in the name of the Crown (Spearritt 1993:3).

The resultant body of legislation created to control the issuing of statutory estates (for example, in New South Wales) was historically

> *"contained in the Crown Lands Consolidation Act; the Western Lands Act and the Closer Settlement Acts. Leases for mining purposes [were] .. governed by the Mining Act." (Hallman 1973:61).*

Importantly, Hallman (1973:61) also notes that

> *"[w]hilst leasehold interests are recognised as interests in land, they are not classed as real property; they are classed as personal property. The reason for this is historical - in the early days a freeholder could recover possession of his land in a real action, but a dispossessed leaseholder could only claim damages in a personal action."*

As a result, the management role of the Crown estate has always been regarded as one of substance and especially of value. Indeed, the administration of statutory estates was of such importance that

> *"[t]he revenue from and the management and control of Crown land in Great Britain was surrendered to the British Parliament by George III early in his reign in exchange*

> *for the grant to him of a fixed Civil List and relief from the costs from government, maintaining the army and navy, etc. The same policy has been followed by the ensuing British monarchs and was followed when the revenue, management and control of Crown land was passed on to the State Parliament by its (Imperial) Constitution* Act" (Hallman 1973:124).

Given the obvious value of the Crown estate, it is not surprising that statutory estates have contained various reservation clauses that reserve rights primarily to the Crown, such as ownership of natural resources. In addition, Stephenson (1995a:104) notes that such estates have also in certain circumstances reserved rights in favour of Indigenous peoples.

3.2 Reservation clauses of statutory estates

After the arrival of the early European settlers in the Australian colonies, debate arose (and has continued) over the unresolved issue of Indigenous property rights. Watkin Trench, who travelled with the First Fleet to New South Wales, records on 14th September 1790 that two *natives (sic)*

> *"said that they were inhabitants of Rose Hill, and expressed great dissatisfaction at the number of white men who had settled in their former territories"* (Flannery 1996:140).

From this early empirical information, it is clear that by 1790 the property rights of the Indigenous people were the cause of some friction with Governor Arthur Phillip's allocation of land to the newly arrived settlers. As late as 1841, it is recorded that intending leaseholders in East Gippsland were encountering resistance.

> *"In the 1830's and 40's the East Gippsland forests were much more open than they are now. The first Europeans in the area were seeking cattle pastures … The leaseholds were in areas of ten square miles at a very nominal rental and were the only title to occupy....*
>
> *It is interesting to note that the Commissioner of Lands stated in 1850 that Stevenson* [an early settler at Mallacoota] *had occupied the run for seven years without taking out a licence.*
>
> *In 1841 John Stevenson and James Allen attempted to settle at Cann River but were driven off by aborigines."* (Mallacoota & District Historical Society 1980:13)

During the 1830s and 40s, annual squatting licences and subsequently pastoral leases were issued to the pastoralists throughout the colonies. The expansion of pastoral interests threatened Aboriginal communities, and tension between these groups often escalated to violence. The fate of these Indigenous communities rested with the Governors and colonial officials who were left to protect their rights.

According to Reynolds (1996a:29), it was the view of Governor Gawler and Land Commissioner Charles Sturt in South Australia, that the Aborigines had *"an absolute right of selection prior to all Europeans who have settled in...[the land]"*.

In contrast, the pastoralists arriving in the colonies forced the Indigenous people from the most valuable and productive land. Secretary of State, Earl Grey, was aware of the creation of Indigenous reserves in other parts of the world, however he considered them unsuitable for the Australian colonies, given their geography. He suggested that the dryness of the continent and the need for extensive grazing required a uniquely Australian solution (Reynolds 1996a:31).

Grey's solution took into consideration both the feudal land law of Britain and the special relationship he believed that Aborigines had with the land. It was decided that the best way to protect the rights of Indigenous peoples was to insert into pastoral leases appropriate reservation clauses which allowed for traditional activities and customs. The bureaucracies managing the Crown estate were instructed accordingly by an Order in Council, issued under the Imperial *Waste Land Act, 1846.*

To prevent the squatters from converting their land rights to freehold and to prevent the Indigenous peoples from being driven from the land, Grey also instructed:

> "*that leases granted for this purpose give the grantees only an exclusive right of pastorage for their cattle..., but that leases are not intended to deprive the natives of their former right to hunt over these districts, to wander over them in search of sustenance, in the manner in which they have been hitherto accustomed*" (Reynolds 1996a:22).

After this date, the granting of leases and the reservations therein ensured that neither the pastoralists nor the traditional occupants had exclusive rights over land but shared the rights.

Despite these instructions, attempts have continued to disenfranchise Indigenous property interests. In 1850, the Western Australian Colonial Government sent plans for land occupation regulations to the Colonial Office for approval, however these plans failed to protect Aboriginal interests. Grey noticed the omission and ordered that the documents be amended in order to preserve access rights for the traditional occupants. As a result, reservation clauses were added to all pastoral leases in Western Australia issued after December 1850 and similar clauses were inserted in the leases granted by the other Colonies.

Since then, reservation clauses have lapsed in all States, except Western Australia, the Northern Territory and South Australia. Queensland, for example, ceased the insertion of such reservations early this century.

Nevertheless, it is clear that it was Grey's intention that the Colonies, when assuming self-government, should uphold the Imperial Government's view on Aborigines. In this context, Grey wrote to the Colonial governments in a didactic manner, advising that:

> *"[in] assuming their territory, the settlers in Australia have incurred a moral obligation of the most sacred kind."*

Grey also felt that the Imperial Government had made every effort

> *"to avert the destruction of the native race as a consequence of the occupation of the territory by British subjects"* (Reynolds 1996a:22).

3.3 Indigenous property rights survive the grant of a statutory estate

The majority decision of the High Court in the *Mabo (No. 2)* case found that a lease that grants exclusive occupancy rights to the lessee will extinguish Indigenous property rights, as such title was seen to be inconsistent with the act of *de facto* alienation.

In the decision, both Deane and Gaudron JJ. analysed the impacts of leases on native title and concluded that native title is extinguished at least where the Crown grants exclusive rights to the lessee. Brennan J. concluded that native title would: *"be lost to the extent that it was factually inconsistent with the interests granted"* (see discussion in Stephenson 1995a:106).

The *Wik* decision confirmed this view. However, it remains unclear whether a lease containing a reservation clause would completely extinguish native title or whether it would only extinguish Indigenous property rights to the extent of the inconsistency (Horrigan 1997:27).

In the *Mabo (No. 2)* decision, Brennan J., Mason C J. and McHugh J. also agreed that:

> *"the limited reservations in the special conditions are not sufficient to avoid the consequence that the traditional rights and interests of the Miriam People were extinguished. By granting the lease, the Crown purported to confer possessor rights on the lessee and to acquire for itself the reversion expected on the termination of the lease. The sum of those rights would have left no room for the continued existence of rights and interests derived from Miriam laws and custom"* (Stephenson 1995a:107).

As regards the issue of reservations in leases, Deane and Gaudron JJ. stated that there may be no extinguishment of Indigenous property rights:

> *"This lease recognised and protected usufructuary rights of the Murray Islanders. It would seem likely that, if it was valid, it neither extinguished nor had any continuing adverse effect upon any rights of Murray Islanders under common law native title. It is, however, appropriate to leave the question of the validity and the possible effect of that lease until another day."* (Stephenson 1995a:108).

It is clear that the earlier administrators, both in the colonies and in Britain, intended that reservations in pastoral leases were not:

> *"a case of creating new rights, but the recognition of existing ones, the shaping of an instrument to ensure the 'continuance of their rights'. They clearly interpreted a reservation in the precise legal sense of retaining or holding back some right, power or privilege. Equally, when they wrote of 'rights' they referred not to moral rights but*

> *to 'legal' rights. And the term 'right' was employed over and over again in official correspondence of the time"* (Reynolds 1996b:32).

The issue of reservations was canvassed in *Wik* (Horrigan 1997a:378) but not judicially determined. However, it is clear in the light of *Wik*, that to form a definitive view it is necessary in each case that the title instruments and the statutes under which the statutory estates were authorised, and, if necessary, the legislative intent, will need to be examined in order to determine the extent to which the statutory rights granted may have extinguished or suppressed the Indigenous property rights (Toohey J. (1996) 141 ALR. 129 at 189-190).

The slow emergence of such guidance, especially in relation to Indigenous property rights, has enabled pastoralists to enjoy tacit exclusivity over the land, to the detriment of other stakeholders. This exclusive possession has thwarted the altruistic efforts of early administrators such as Gawler, Sturt and Grey, whose intentions regarding lease reservations were largely ignored by subsequent Colonial and State governments.

3.4 Pastoral leases do not extinguish Indigenous property rights

Assertions that pastoral leases extinguished Indigenous property rights rely heavily on the statements of Brennan J. in *Mabo (No. 2)*, where his Honour said (at 68):

> *"A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title."*

In addition, it has been argued that his Honour's comments are supported in the Second Reading Speech on the *Native Title Bill 1993* by the then Prime Minister, Paul Keating (1993), where he said:

> *"I draw attention also to the recording in the preamble of the Bill of the government's view that under the common law past valid freehold and leasehold grants extinguish native title. There is therefore no obstacle or hindrance to renewal of pastoral leases in the future, whether validated or already valid" (Hansard, House of Representatives, 16 November 1993:2880).*

These assertions warrant closer examination as they significantly oversimplify the issue. Toohey J. in *Wik* (at 183), stated that the recital in the preamble to the *Act* "read too much into *Mabo (No. 2)*". The assumptions that Indigenous property rights were extinguished by the grant of pastoral leases represents a misreading of history. It was well known that *Mabo (No. 2)* had not dealt with these matters and that the statements in *Mabo (No. 2)* were not among the questions that the Court had been asked to decide. Indeed, the possibility of the continued existence of Indigenous property rights on pastoral leases was known when the Government came to office in March 1996 because:

- the *Wik* case itself had been continuing in the courts, notwithstanding the passing of the *Native Title Act 1993*, and it was known the question had not been resolved;

- in *Waanyi People's Native Title Application* (which commenced in 1995 and a decision was handed down in April 1996), the High Court refused to rule out an application for Indigenous property rights over a pastoral lease, saying the issue of the existence of Indigenous property rights on a pastoral lease was arguable;

- the Government's own discussion paper of May 1996 on its proposed amendments to the *Native Title Act 1993* acknowledged that the High Court had not yet ruled on the issue (Office of Indigenous Affairs, Department of Prime Minister and Cabinet 1996:12)

In addition, the creation of the unique Australian pastoral lease was discussed by Kirby J. in *Wik* (at 284-285), and it is clear that extinguishment of Indigenous property rights was never an option given the nature of the special property interest created by Queensland legislation or similar legislation elsewhere in Australia.

3.5 Issues

It is important to remember that the High Court:

> *"has not affected to state the precise nature or incidents of native title. For this, one must search the laws and customs of the Indigenous people who, by those laws and customs, have a connexion* (sic) *with the land. As those laws and customs seem to vary greatly and would seem to be capable of being different for every parcel of land involved, this is an impossible task until the laws and customs in question have been identified by evidence, for they are not of course recorded in writing"* (Connolly 1995:125).

The difficulty of this ethnographic task has been highlighted in the Report of the Hindmarsh Island Bridge Royal Commission (1995), which showed that..

> *"most of the 'old people' with detailed knowledge of the pre-European period had died by the mid-1920s. Although there were still men and women who had direct exposure to their traditional background... many Ngarrindjeri people found that 'much of what they had learnt had little or no practical use in their changed surroundings'."* (Hindmarsh Island Bridge Royal Commission 1995:44).

Nevertheless, Nicholls (1996:26) observes that:

> *"[w]hile the ability of many, but by no means all, contemporary Aboriginal pen pie to navigate the land has diminished because such sophisticated mapping skills are no longer necessary for survival, oral tradition has ensured that the knowledge (or sacred sites in particular) has not been lost entirely. But again processes of Colonisation have interrupted and disrupted this process, which means that today, some people do know, and others don't."*

What these observations demonstrate is that colonisation has had a dramatic effect on Indigenous property rights and that its continuing existence may in certain circumstances be difficult to establish. It is important to remember that under both the *Native Title Act 1993*

and the common law, the test for proving native title has two limbs, and both limbs must be addressed:

> 1. Has any governmental legislative action or executive action extinguished or suppressed Indigenous property rights by being completely inconsistent with ongoing enjoyment of Indigenous property rights (remembering that Indigenous property rights can exist concurrently with grants of title which are not completely inconsistent with it)? and
>
> 2. Do the traditional Aboriginal peoples or Torres Strait Islander group still survive and maintain a sufficient, ongoing connection with the relevant area of land? (Horrigan 1997a:6)

3.6 Consequences for land management

There has been a long history of recognition of Indigenous property rights within leasehold interests in Australia. At various times, Imperial, Colonial and State governments have all acted to ensure the protection of some elements of Indigenous property rights when Crown land has been leased to private parties.

It has been shown that the rights of leaseholders are quite variable, emanating from the terms and conditions of the grant of the leases and the statute under which they have been authorised, and as a result of the *Wik* decision, these matters need to be considered in each case.

The economic consequences of the recognition of co-existence of Indigenous property rights with statutory estates will be driven by the degree of uncertainty perceived, primarily by lenders. The anecdotal evidence thus far suggests that the value of pastoral leases operating within the parameters of the title deed creating the particular statutory estate, have been almost wholly unaffected by claims for Indigenous property rights (for example, Herron 1997).

Indeed, the paradox of the Commonwealth Government's 10-point plan is that the very uncertainty that the plan seeks to overcome may arise out of the resultant amending legislation. If the amended *Native Title Act 1993* does not respect the Constitution's 'just terms' provisions under s.51(xxxi) when treating the issue of compensation for the expropriation of Indigenous property rights, it will be a catalyst for protracted litigation.

We have previously expressed our concerns over the implications of poorly drafted amendments to the *Native Title Act 1993,* which will do little to allay any alleged uncertainty arising from the recognition of coexistence of Indigenous property rights with statutory estates (Attachment A). Indeed, none of the legal experts that appeared before the Senate Legal and Constitutional Legislation Committee (1997:53) was prepared to state that the *Native Title Amendment Bill 1997* is constitutionally certain. The balance of expert legal opinion presented to the Committee was that the *Bill* was likely to be found unconstitutional. Similar views were also expressed in a draft paper prepared by the Australian Law Reform Commission (ALRC 1997:7), as cited above.

4. LAND USE PLANNING AND MANAGEMENT

4.1 Coexistence is commonplace

The High Court in *Wik Peoples v. State of Queensland and Others (1996)*, found that Indigenous property rights may coexist with other rights, including rights granted under pastoral leases, and that the grant of a pastoral lease does not necessarily extinguish Indigenous property rights. Where there is any inconsistency between the rights granted under a pastoral lease and Indigenous property rights and interests, the former prevail. Thus, where there is no inconsistency, both sets of rights may co-exist.

Unfortunately, the reaction to the *Wik* decision has been based more on fear and rhetoric than on calm consideration of the facts.

The High Court decision raises the question as to whether other non-pastoral uses or leases can be permitted without negotiation with the holders of Indigenous property rights, and the question of whether some compensation may be payable for the extent to which the value of Indigenous property rights is affected.

The facts are that the only kinds of uses or developments that will require the approval of the holders of Indigenous property rights in the future are those which are not already authorised by the pastoral lease. Under leasehold, the lessor always retains the right to grant further development or use rights, with or without conditions or to refuse them, for whatever reasons. The possible existence of Indigenous property rights on a pastoral lease where a lessee has been undertaking unauthorised activities inconsistent with the purposes for which the lease was issued, does not warrant calls for the blanket extinguishment of Indigenous property rights on pastoral leases.

The coexistence of pastoral interests, or indeed many other forms of regulated land uses, and Indigenous property rights and interests is not in itself remarkable or problematic, and certainly not in relation to planning and land management.

A way of understanding the concept of coexistence is to view Indigenous property rights as an overlay on existing rights and interests in land. It is more accurate to view them as an underlay because they existed prior to colonial settlement. Valid acts of government, such as private freehold titles, other forms of tenure which grant exclusive possession in land, and public works extinguish or impair Indigenous property rights and interests in favour of the rights and interests conferred by those acts.

Coexistence of rights and interests in land is commonplace both at common law and under statute throughout Australia. For example, through restrictive covenants, easements, profits a pendre, and mining tenements. They are characterised by a clear enunciation of each of the interests in order that they do not conflict. Once the parameters have been identified and the means for determining conflicts are clarified, then there is no bar to the continued, concurrent enjoyment of the rights and interests of each party (Tehan 1997:7).

Shared land uses such as strata titles provide some practical examples of how overlapping interests in land can be managed. The legal basis for such shared or co-existing interests varies, however there are some common elements:

- clear enunciation of the rights and interests of the various parties;
- articulation of the regime on which co-existence and shared land use occurs; and
- articulation of a basis for resolving conflicts (Tehan 1997:6).

As we have previously stated, there is no land use planning or management rationale necessitating extinguishment of Indigenous property rights on any form of statutory leasehold (Wensing and Sheehan 1997:27).

The extinguishment of Indigenous property rights on all pastoral leases and any other forms of non-exclusive statutory estates would indeed be an unprecedented confiscation of property rights. Coexisting land uses do not pose a problem for land use planners and managers, and the expropriation or extinguishment of Indigenous property rights on such grounds cannot be justified.

4.2 The impact of Indigenous property rights on land use planning

Indigenous property rights include traditional rights of access, use or occupation concerning land. Encompassed within these rights are uses which may include living areas, hunting, fishing, gathering, ceremonial and cultural activities including travelling across the land, holding meetings, caring for and looking after the land, holding ceremonies and looking after sites or places of significance to Indigenous peoples (Muir 1998). However, Indigenous property rights are different to most other land uses, in that Indigenous property rights are recognised and protected under laws separate to a planning scheme, and yet still have the capacity to influence the achievement of planning outcomes.

In our previous paper (Wensing and Sheehan 1997) we canvassed two questions in relation to the interaction between Indigenous property rights and land use planning.

The first question was whether land that is subject to Indigenous property rights can continue to be identified or designated for particular land uses in planning documents. In answer to this question we said that planning documents are subject to the *Act's* 'equal treatment with freehold' or 'ordinary title' test. Section 235(5)(b) of the *Native Title Act 1993* provides that a permissible 'future act' includes acts that can be done in relation to land that is or may be subject to Indigenous property rights as if 'the native title holders concerned instead hold ordinary title to it'. In applying this test to land use planning we concluded that:

- non-statutory, strategic planning policies can continue to identify land for particular purposes, provided such designations can be promulgated over freehold land; and that
- the effect of statutory planning documents (that is those having the force of law) made or amended on or after 1 July 1993, on land that is or may be subject to Indigenous property rights is more problematic. If the planning instrument causes greater restrictions than it otherwise would in relation to freehold title, then it will fail the 'ordinary title' test.

Other important considerations include whether planning instruments have application over Crown land as in some jurisdictions planning instruments have no effect over Crown land, and whether the planning or regulatory instrument adversely affects the rights and interests of holders of Indigenous property rights to a greater extent than other statutory title holders. If it does then it may in fact be discriminatory and therefore invalid.

The second question was whether or not the holders of Indigenous property rights and their exercise can be subject to conventional planning, development and environmental management controls which all other title holders are subject to. In answer to this question we said that the situation is not clear because planning is a way of regulating land use and development in traditional Anglo-Australian land title systems, and the extent to which Indigenous property rights can be made subject to the same kinds of controls embedded in Anglo-Australian planning and environmental protection legislation is unknown. The application of such controls may depend on the extent to which the exercise of Indigenous property rights give rise to the kinds of activities (developments) normally regulated by the land use planning system, such as building a residence.

There are also considerable legal and constitutional impediments that need to be overcome, such as the application of the *Racial Discrimination Act 1975 (Cth)*, Australia's international obligations, the Constitutional rights to compensation under *s.51(xxxi)*, and the likelihood of post-*Wik* legislation passing the Senate unscathed. As land management and grants of titles are predominantly State matters, Commonwealth legislation facilitating the codification of rights or other matters must be constitutionally based on the "race" power, the "external affairs" power, the "incidental" power, or other powers under s.51 of the Constitution.

While Kirby, as President of the NSW Court of Appeal, in *Mason v. Tritton (1994)*, has expressed the view that holders of Indigenous property rights are not able to remove themselves from the ordinary regulatory mechanisms of Australian society, we are of the view that this can only be clarified in the fullness of time through further discovery, and that negotiation almost certainly must occur to resolve these issues (Hughes 1995).

Nevertheless, it is now becoming very clear that planners cannot ignore the existence of Indigenous property rights in preparing planning schemes or documents in areas where it cannot be established that Indigenous property rights have been extinguished.

For example, in Queensland under the terms of the *Integrated Planning Act 1997 (IPA)*, which comes into effect in June 1998, a local Council is required to establish through their planning processes *"a framework to integrate planning and development assessment so that development and its effects are managed in a way that is ecologically sustainable"*.

To ignore the potential impact or influence of Indigenous property rights could result in:

- a planning scheme that is fundamentally flawed, in that it may propose land uses or developments that are incompatible with the traditional owners' rights and interests. Such a plan would create community expectations that then cannot be met because Indigenous property rights were not taken onto consideration in formulating the plan or scheme.

- locking up land in the non-claimant processes under the *Native Title Act 1993 (Cth)* unless the support of the Indigenous peoples has been obtained. Under the *Native Title Act 1993 (Cth)*, land uses that are impermissible future acts (e.g. settlement or industrial uses) on land with Indigenous property rights, irrespective of whether a determination or claim exists) are invalid, unless the agreement of the holders of the Indigenous property rights has been first obtained, or a determination under the non-claimant process that there are no known native title interests has been obtained.

- a planning scheme which does not comply with the requirements of the ecological sustainability provisions in the *Integrated Planning Act 1997 (IPA) (Qld).* Ecological sustainability by definition, encompasses *"maintenance of the economic, social and physical well-being of people and communities",* which includes Indigenous peoples (CQLC 1997, Davis 1998).

Planning methodologies and processes therefore need to change to ensure Indigenous interests are properly recognised and protected in the same way as other property rights and interests are recognised and protected, and that Indigenous peoples are able to be involved in planning processes in the same way as other people are able to be involved.

4.3 A critique of existing approaches to planning and land management

The practice of land use planning in Australia does not have a particularly good record in relation to the recognition and protection of Indigenous cultural heritage and land interests and to the involvement of Indigenous peoples in formal planning processes, especially not in towns and cities.

In a recent study of land use planning in northern Australia, Susan Jackson (1996, 1997a, 1997b), a researcher from the North Australia Research Unit of the Australian National University, analyses how conventional town planning fails to take account of Indigenous peoples' rights, interests, needs and aspirations. Jackson's research highlights the imbroglio the planning profession finds itself in when it comes to the interaction between Indigenous and non-indigenous peoples and their respective cultures:

> *"The town, or city, is one of the environments which is most hostile towards Aboriginal culture, and their rights to country and resources. Historically, the views of the urban Aboriginal community have rarely been sought by planners, governments and developers. Although contemporary land use practice now accepts a stronger role for a more expansive 'public', decision makers reveal only a token understanding of cultural difference and an unwillingness to redress the power imbalances between Aboriginal and non-Aboriginal people*" (Jackson 1997a:221).

Jackson's research is a scathing attack on the failure of rational land use planning to take proper account of cultural differences, especially those relating to the interests of Indigenous Australians. Jackson's findings can be summarised as follows:

- the fact that planners often regard land occupied by Aboriginal peoples and Torres Strait islanders as a blank space from which to plan, bears much resemblance to the fiction of 'terra nullius';

- the language adopted in planning documents frequently ignores or precludes the aspirations of the Aboriginal community. Indeed, some land use plans have been effectively hostile towards Aboriginal communities;

- those making land use decisions rarely seek a thorough understanding of the places that land and resources play in the maintenance of Aboriginal culture;

- some development planning and land use decisions have done little to improve the marginalised position of Indigenous peoples;

- where attention was given to an Aboriginal community's aspirations in planning strategies and schemes, the treatment was, at best, superficial.

There have been many situations where, instead of giving expression to Indigenous interests in land, there has been a continual process of ignoring the need to properly take Indigenous interests into account and an erosion of their responsibilities and obligations to country. Jackson (1997b) concludes that the normative values which are so influential in determining the objectives of planning and the economic framework in which land use plans serve as decision making instruments, are deeply ingrained. Current values and processes remain largely unquestioned by our present planning systems in most, if not all, jurisdictions, and nor do they require that their contribution to social justice be clearly demonstrated in an accountable way.

The *Mabo* decision requires a fundamental change in the way we view and understand interests in land (Jackson 1997a:226). Many jurisdictions are still coming to terms with this reality, as confirmed by the High Court in *Bilijabu v. The State of Western Australia (the challenge case)* (1995) 128 ALR 1 (at 59), where the Mason CJ states that the practical difficulties that arise in land use and administration can be attributed to *"the realisation that land subject to native title is not the unburdened property of the State to use or dispose of as though it were the beneficial owner"*.

The extent to which these concepts remain to be worked out is illustrated in the contrast between the majority and minority views in the *Wik* case (1996: 141 ALR 129).

Brennan CJ, in the minority, expressed concern that *"it is now too late to develop a new theory of land law that would throw the whole structure of land titles based on Crown grants into confusion*" (at 158). On the other hand, the judgements in the majority of both Toohey and Grummow JJ accept that the unique circumstances of settlement of the Australian colonies are relevant to construing the rights granted by the Crown to settlers, and Grummow J warns *of "the need to adjust ingrained habits of thought and understanding to what, since 1992, must be accepted as the common law of Australia"* (at 227).

Clearly, what Toohey and Grummow JJ are saying is that as a result of *Mabo* and the recognition by the common law of Australia of Indigenous rights and interests in land, two systems of law and culture are meeting, and there is a real need for the two systems to learn to coexist. Contrary to the views of Brennan CJ, we are of the view that it is not too late to devise a new system of land law - one that recognises the prior occupation of Australia (and in certain circumstances protects the continuing rights and interests of the Indigenous peoples in land) and the other that recognises the rights granted by the Crown since colonisation.

Some Indigenous groups assert that their Indigenous property rights existed at the time of colonisation and they continue to exist except where they have been extinguished by valid acts of government. It is important to recognise there may be an Indigenous group with continuing cultural, social and economic interests in any part of Australia (Mirimbiak 1998).

The *Native Title Act 1993* is an attempt come to grips with the divergent perceptions and attitudes of two cultures to a basic resource - land. Current attempts to amend the legislation beyond the implementation of the High Court's *Wik* decision appear premature and unnecessary. The current debate centres mainly on the need to have one unambiguous tenure of land and to subsume native title or Indigenous property rights and interests into our current planning and land management regimes. This is neither possible nor necessary.

There is an urgent need to identify new methodologies for planning and land management that openly acknowledge coexistence and that concentrate on methods of reaching agreement rather than setting in stone a set of laws that will not always be successful in resolving differences. As we have previously stated, in the longer term, the issues are not about land ownership, but rather about respect and recognition of Indigenous rights and interests in land and waters and sustainable land use and management, and these issues need to be separated (Wensing and Sheehan 1997:15).

4.4 Removal of the 'right to negotiate' in towns and cities akin to reinstating 'terra nullius'

Among the amendments in the *Native Title Amendment Bill 1997*, is the proposal to exclude the operation of the 'right to negotiate' on compulsory acquisition for third parties on land within a designated town or city boundary. (Sections 26(2)(f) and 251(C) of the *Bill*.) The *Bill's* Explanatory Memorandum does not provide an explanation or give any reasons why these provisions have been included. They have no origins in the *Wik* decision and appear to have been included at the behest of the States and Territories. It appears these provisions may have been sought on the misapprehension that the 'right to negotiate' is a right of veto over future acts.

These particular provisions were defeated in the Senate last December. However, as the Government remains resolute in wanting the Senate to pass the *Native Title Amendment Bill 1997* without amendments by the non-Government parties, there is an urgent need to draw attention to the fact that these provisions may be discriminatory and that they raise serious issues for professional planners and land managers.

Since that time, the Government claims that Indigenous property rights could only have survived on remnant areas of vacant Crown land and believes that it is inappropriate for native title holders and registered claimants to have greater procedural rights than those of other interest holders within towns and cities (Minchin 1998:18).

It is our understanding that some States and the Northern Territory asked the Federal Government to apply the same kind of restrictions on Indigenous peoples in claiming their rights and interests in relation to land located within towns and cities, as apply in the Northern Territory under the provisions in the *Aboriginal Land Rights (Northern Territory) Act 1976* where Aboriginal peoples are precluded from claiming land in declared towns and cities.

What this shows is the poor understanding of the distinction between statutory grants of land made under various State and Federal *Aboriginal Land Rights Acts*, and existing common law rights. While it is possible to place arbitrary limits on statutory land grants because it is the Government's prerogative to do so, it is not possible to apply the same rules in relation to common law rights. Indigenous peoples can now assert their legal rights on their country as a matter of right and not as a matter of grace or favour handed out by governments (French 1997:31). They are existing rights that are recognised under common law.

While the Federal Government maintains that it is inappropriate for native title holders and registered claimants to have the 'right to negotiate' over compulsory acquisitions of land for third parties in designated towns and cities on the grounds that it gives them greater procedural rights than those of other interest holders within towns and cities (Minchin 1998:18), its removal may be seen as akin to reinstating the notion of 'terra nullius' and could be construed as being racially discriminatory.

The 'right to negotiate' is an essential structural component of the *Native Title Act 1993* in balancing Indigenous and non-indigenous interests. But, it is *not* a right of veto for native title parties. It applies to all parties. It is a right to agree or to disagree to conditions about the doing of a future act and to seek compensation for the loss. impairment, diminution and total or partial expropriation of Indigenous property rights. While it is a substantial legal entitlement for the holders and registered claimants of Indigenous property rights, it is not an unfettered one. There are clear limits to its application. Negotiations are conducted within a framework in which participating parties have specific legal responsibilities, strict timeframes apply and an imposed arbitration mechanism is invoked if agreement is not reached. In other words, it is negotiation 'in the shadow of the law' (Smith D, 1997:100).

The 'right to negotiate' is a core element of the recognition of Indigenous rights and interests in relation to land, especially their special relationship to country, and the Indigenous people's rights to substantive equality of treatment (Dodson 1996:15). The special nature of Indigenous peoples' relationship to land has long been recognised in Australia. In his 1971 decision on the Gove land rights case, Blackburn J (*Milirrpum*) recognised that Aboriginal people have an underlying relationship with their land.

Subsequent inquiries into proposals for land rights legislation (in the years before Indigenous property rights were recognised) and other major inquiries such as the Mr Justice Fox's

Inquiry into the Ranger Uranium Mine in the 1970's (Fox 1970), and the Resource Assessment Commission's Inquiry into Coronation Hill (RAC 1991), all reached the same conclusion - that the relationship of Indigenous Australians to their land was special and that they should have considerable power to control developments affecting their land (ATSIC 1996:4). Aboriginal Land Commissioners in the Northern Territory have long recognised the dynamic nature of Aboriginal traditions and the special relationship they have with land (Kearney J 1985; Maurice J 1988).

It is in this context that the removal of the 'right to negotiate' can be seen as contrary to Indigenous peoples' spiritual relationship to land, and it is from this perspective that its removal could be construed as being racially discriminatory, as other interest holders in towns and cities are not able to claim the same kind of spiritual relationship.

The proposals, if passed into law, could potentially put professional planners and land managers in a very difficult position.

For example, the Royal Australian Planning Institute (RAPI) has a 'Code of Professional Conduct' to ensure that members *"practice their profession with the highest ethical and professional standards and earn the confidence and respect of the community which they serve"* (RAPI 1997). Members are bound by the code, which includes disciplinary procedures such as termination of membership for any breaches. The code requires members to *"uphold and promote the elimination of discrimination on the grounds of race, creed, gender, age, location, social status or disability"* (Clause 3.1.2). In other words, members can not partake in actions that could be discriminatory on the basis of race.

Members of such professional associations practice in areas beyond the boundaries of towns and cities and well into rural and regional Australia. It will be very difficult for planners to, on the one hand, sit down and negotiate with Indigenous peoples on future land use and development intentions for areas outside towns and cities, but on the other hand, have to deny the same Indigenous peoples the same rights in relation to land contained within towns and cities. This makes towns and cities the province of non-indigenous people, and yet again, planners could find themselves caught up in the dispossession of Aboriginal people from their rights and interests in land.

There are also definitional problems. As evidenced by the definitions in Section 251C of the *Bill*, the provisions rely on a variety of statutes and methods for delineating towns and cities. None of the proposed delineations are consistent between and within the States and Territories, except in Western Australia where there is only one statutory definition. Each of the different methods has its own problems of consistent definition. In some instances the provisions for delineating towns and cities have not been used for some time and the reasons for their existence have lapsed. In others, town boundaries will have exceeded the defined areas, or even the reverse may be the case where towns have been declared but never developed. There are also potential inconsistencies where some areas have been declared in accordance with an appropriate statute, while in other areas in the same State/Territory, towns and cities have been built but never declared. These discrepancies will result in uneven and discriminatory outcomes and contribute to or exacerbate different outcomes in different locations, including within and between States and Territories.

The prospect of successful claims over large areas within cities and towns is extremely remote. In most cases Indigenous property rights have already been extinguished in towns and cities by Government acts, such as grants of freehold title and by public works. Where it has not, then developers, including State/Territory Governments, should negotiate with the traditional owners and, where appropriate, pay compensation for such development to proceed.

There are no logical or ethical reasons why negotiation of agreements and attempts to reconcile the interests of Indigenous and non-indigenous interests in towns and cities should be any different from elsewhere. There are many examples of where these issues are being addressed constructively through agreements and it has not been found necessary to preclude native title claims from towns and cities (ie. Broome, see Wensing and Sheehan 1997:16).

There is no justification from a land use planning perspective to remove the 'right to negotiate' over lands within towns and cities where native title has not been extinguished by valid acts of government prior to 1 January 1994. If the proposals in Sections 26(2)(f) and 251C of the *Native Title Amendment Bill 1997* are passed into law, it could be untenable for many land use planners and land managers to continue practicing in accordance with their code of ethical and professional conduct in areas where there may be existing Indigenous property rights within declared towns and cities.

4.5 Towards new methodologies for land use planning

Land use planning is ultimately about people and their relationship with land and other natural resources, and the skills that planners and land managers bring to this process are those of recognising and accommodating competing or multi-layered and coexisting interests.

Planning and land management processes are often the basis for the development of meaningful and workable relationships amongst joint land users, and as a result of the emergence of Indigenous property rights, these processes must be changed to take account of:

- the concept of multiple land use involving genuine Aboriginal participation in decision making (Head and Hughes 1996:286); and
- the special attachment to land enjoyed by Indigenous peoples (Dodson 1996:15, Wensing and Sheehan 1997:21).

A formidable task lies ahead. The challenge for professional land use planning and land management is to recognise that vacant Crown land (or any other forms of tenure where Indigenous property rights have not been extinguished) can no longer be regarded as being *'terra nullius'* - a land belonging to no-one - and available for zoning and development.. Planning and land management must treat such land as potentially having traditional owners and that such owners have the same procedural rights to consultation and just terms compensation as any other title holders are entitled to. In knowing that the property rights and interests of Indigenous Australians may be prevalent in an area, practitioners in planning

and land management are challenged in that they must accommodate those rights and interests without discrimination, and they must not fail to recognise the Indigenous peoples' rights to negotiate.

In any event, just as the rights and interests of others are intimately involved in the planning process, it is also important and relevant that Indigenous peoples participate in all stages of the planning process, and receive particular attention in respect of land where Indigenous property rights may continue to exist. The principal aim should be to ensure that the rights, interests, needs and aspirations of the holders of Indigenous property rights, similarly to those of others, are addressed in both the planning process and in determining broader local or regional management arrangements.

This is not to say that practitioners in the planning and land management fields are not aware of these issues and the need for changes in planning methodologies where Indigenous peoples' rights and interests in land may still exist. Quite the contrary. Many planners and land managers are acutely aware of the issues and are actively involved in trying to find new approaches. They are attempting to make planning and land management practices more inclusive and adaptive, and in shifting the paradigm from consultation to negotiated outcomes.

Two examples are worth mentioning. On 14 August 1997, Redland Shire Council and the Quandamooka Land Council Aboriginal Corporation signed an historic agreement titled, a "*Native Title Process Agreement*". The essential elements of the agreement include:

- a joint study which combines native title (or Indigenous property rights) with other land use planning and management issues to achieve a balanced outcome that is in the community's best interests;
- a commitment by both parties to accepting ownership of the outcomes of the planning and management study; and
- both parties agreeing to make all reasonable endeavours to implement the agreement on native title, notwithstanding any determination, by agreement or otherwise, of the Quandamooka people's native title rights and interests.

This agreement is indeed a significant and historic agreement from at least two perspectives. First, it is the first such agreement between a local Council and an Aboriginal Land Council that goes so far as to agree on a joint planning and management study with both parties accepting ownership of the outcomes and implementing them, notwithstanding any determination of the Indigenous people's native title rights and interests.

Secondly, given that planning laws, processes and procedures have in many instances been the instrument of colonial land occupation and dispossession of the Indigenous inhabitants, the agreement seeks to use the planning process as the basis for reconciliation between each other's rights, interests and responsibilities. This puts the discipline of planning and the planning profession at the cutting-edge of reconciling past differences and wrongs with better outcomes for present and future generations, for both Indigenous and non-indigenous peoples alike.

Such agreements provide an important framework for the mutual recognition of rights and interests, and for ensuring that the parties utilise planning processes for advancing the interests of the whole community while also promoting harmonious community relations.

The second example is a 'Local Government Planning Kit' prepared by the Central Queensland Land Council Aboriginal Corporation (CQLC). The CQLC is a designated Representative Body (NTRB) under the *Native Title Act 1993 (Cth)* and an incorporated Aboriginal Association under the *Aboriginal Council and Association Act 1976 (Qld).* The CQLC is responsible for the protection and preservation of the Indigenous property rights of those Aboriginal peoples who are the traditional owners of lands and waters within central Queensland. The Kit is a detailed guide to local Councils on how to take proper account of Indigenous cultural heritage and land interests in their land use planning and development approval processes. There are several elements to the Kit, but the most notable features include:

- A draft 'Recognition Statement' which includes a strong commitment on the part of local Councils to recognise and protect Indigenous cultural heritage and land interests through their land use planning processes.

- A draft 'Strategic Planning Outcomes' statement which articulates a strategic planning objective and suggests a number of strategies for achieving the objective. It also includes an example of a values statement and advises that this needs to be prepared in close consultation with the local Indigenous peoples.

- The model 'Local Planning Policy on Aboriginal Cultural Heritage and Land Interests' which provides a basis for identifying, recognising, protecting and managing Aboriginal cultural heritage and land interests, and recognising and respecting Aboriginal peoples' role, status and fundamental rights.

The CQLC has had some success with its Kit. Bowen, Burdekin and Whitsunday Councils have included appropriate provisions in their planning schemes based on CQLC recommendations, while Cardwell has previously agreed in-principle and Mackay City has agreed in-principle to adopt the recommendations on Indigenous cultural heritage and land interests provided by the CQLC.

In addition to adopting statements and making policy adjustments, Councils are urged to establish referral processes and a register of Aboriginal cultural heritage and land interests to avoid doing anything that may offend or inadvertently damage or destroy such interests without the prior consent of the local Indigenous peoples. Councils are also urged to make provisions for dealing with situations where a known place of Aboriginal cultural heritage or land interests is damaged or destroyed prior to any approval being granted.

These processes and documents combined, are intended to ensure that land use planning processes at the local level take full account of Indigenous cultural heritage and land interests in formulating planning schemes and in assessing development applications. Local Councils are also urged by the CQLC to consult with Aboriginal Referral Agencies before:

- amending the Policy;
- repealing the Policy;
- making any new Policy or amendments to an existing policy that impacts on this Policy; and
- the commencement of a new planning scheme.

What is unique about this Kit, is the quite detailed provisions for recognising and protecting Aboriginal cultural heritage and interests in land in local planning processes and for ensuring that Indigenous peoples have a legitimate and genuine role in matters affecting their interests, rights and responsibilities. The Kit provides considerable practical advice on establishing processes for consultation and negotiation with local Aboriginal community organisations and for accessing authoritative sources of information about local Aboriginal cultural heritage and land interests.

What these examples show is that it is possible to introduce policies and practices in relation to planning and land management that recognise and protect Indigenous interests, including in relation to land.

However, these changes to existing policies and processes do not reflect the kind of fundamental changes to planning philosophy and methodology that are required if cultural differences are to be taken fully into consideration.

4.6 Planning philosophy and practice: a time for change

As a first step, land use planners and managers must be aware of the perceptual limitations of their own discipline and the particular discourse of their own craft. In particular, the rational technocratic focus of much land use planning which often precludes appropriate and meaningful consultation with Indigenous peoples. Land use planners and managers must also be aware of the norms of Anglo-Australian culture with its emphasis on liberalist ideas of individual property ownership, the rights of the individual (remembering the past connection between property ownership and voting rights, especially in Local Government), materialism, free enterprise, competition, nuclear families, and written sources of history and law. These need to be contrasted to the non-competitive, communal and extended families, and a dependency on oral traditions and customary laws of Aboriginal and Torres Strait Islander society. Aboriginal and Torres Strait Islander communities are always viewed against this benchmark (Davis 1998).

For their culture to survive, Indigenous peoples need to be able to access, protect and revitalise their country, places, sites and objects through rituals and customary practices. This is integral to Indigenous property rights and interests.

Rational approaches to land use planning, especially in relation to `vacant' Crown land, rest on an assumption that most Crown land for new development is 'waste land' and belongs to no-one. These assumptions are no longer valid (Jackson (1997a). New approaches or methodologies are urgently required for planning which begin from a different premise - a premise that genuinely recognises cultural differences and Indigenous interests, rights, obligations and responsibilities, especially for country.

In light of the *Mabo* and *Wik* decisions and the enactment of the *Native Title Act 1993*, some adjustments need to be made to planning philosophy and practice, and these can only be brought about with the backing of relevant professional associations such as the Royal Australian Planning Institute (RAPI). There are several actions that professional associations could take, including for example:

- improving planning education for Indigenous interests by amending the range of subject matter and skills regarded as being basic to planning education;
- amending the codes of ethical and professional conduct to improve protection for members taking Indigenous interests into account in planning processes; and
- at an appropriate time, institute a public re-examination of past and present professional practices which unwittingly reinforce the dispossession of Indigenous peoples from their land.

4.6.1 Improving planning education for Indigenous interests

As the professional association for urban and regional planners, one of the Royal Australian Planning Institute's (RAPI) main functions is the formal accreditation of tertiary education courses for the discipline of urban and regional planning, including land use planning and management. Such accreditation is the primary means of establishing a basis for individual corporate membership of the Institute. RAPI's 'Education Accreditation Policy' states that:

> *"It is a key objective of RAPI to maintain and advance the study of planning with the purpose of securing high standards of professional competence. To achieve this objective the Institute believes that the most acceptable path to corporate membership should be through recognised Planning Schools"* (RAPI 1995).

In order to obtain formal recognition as a Planning School, tertiary education institutions are required to develop educational programs that satisfy a number of criteria, including as a minimum, a schedule of subject matter and skills which RAPI regards as being basic to planning education. These are set out in Appendix A to its 'Education Accreditation Policy', and are grouped under four headings, as follows: Planning Methodology; the Physical Environment and Human Activities; the Administrative Context; and Communication Skills.

Presently, there are no references to Indigenous peoples or their interests in Appendix A (RAPI 1995). This is not a criticism, but rather an observation of the impact of approaches to planning that were devised at a time when *'terra nullius'* was an accepted fact in history and Indigenous people were denied any of their rights to land. It is also worth observing that very few if any Indigenous peoples have graduated as planners in Australia. RAPI could play a role in encouraging Indigenous people into the profession.

In the light of *Mabo* and other decisions by the High Court and the enactment of the *Native Title Act 1993*, it is no longer appropriate in most circumstances to disregard Indigenous interests, irrespective of whether a determination on the existence of Indigenous property interests has been made, either judicially or by agreement. As a common law right, native title must be presumed to exist prior to its determination, and considered appropriately in all planning processes. This requires new skills and methodologies.

'Vacant' Crown lands are no longer blank or empty landscapes devoid of cultural relationships to places and country. Nor are they lands upon which the planner can lay down lands use ideals in the absence of consultation, negotiation and a willingness to compromise in order to accommodate cultural differences. To do so will damage the social and cultural fabric of Indigenous communities. If "good planning is persuasive storytelling about the future" as Throgmorton suggests (1992:17), let it be a new story, not the kind of fiction which legitimised terra nullius and rationalised unjust and racist land use decisions (Jackson 1997a:226).

As a first step toward the development of new methodologies, the following changes to RAPI's 'Education Accreditation Policy' are suggested:

Planning Methodology
New theories of planning need to be devised that are much more sensitive to cultural differences. The notions of rational planning that were applied to what was previously regarded as 'vacant Crown land' or 'waste land' need to be replaced with methods of planning that begin from a different premise. A premise that respects Indigenous culture and heritage and Indigenous needs, aspirations, rights and responsibilities, especially for country.

The Physical Environment and Human Activities
Current normative values and processes are, in certain situations, no longer relevant, and new values and processes of planning need to be devised. New methods of determining land usage and capacity need to be devised that records, interprets and absorbs Indigenous peoples' intrinsic knowledge of country and the environment. New methods also need to be devised that take proper account of the full range of Indigenous needs and aspirations in relation to the built environment.

The Administrative Context
Administrative processes need to change to enable Indigenous peoples to be involved in planning processes at least to the same extent as other interested parties. Indeed, Indigenous peoples should be involved in determining the processes by which consultation, participation and negotiation will take place. In addition, all planners must have a sound understanding of the concepts of Indigenous property rights and the procedures and institutions established under the *Native Title Act 1993 (Cth)* and any parallel or companion legislation in their State or Territory, just as they are required to have a sound understanding of the concepts of land tenure and land law introduced since colonisation and of relevant State/Territory planning, heritage, and environmental protection legislation.

Planners also need to understand concepts of cultural heritage and what this means to Indigenous peoples, and they need to respect Indigenous intellectual property rights and interests when dealing with cultural heritage. Moreover, planners need to recognise the necessity to involve Indigenous peoples in making decisions about cultural heritage and intellectual property rights.

Communication Skills
Communication which is rigidly constructed, alien, unfamiliar and monitored via committee procedures constraints and inhibits genuine participation and involvement of Indigenous peoples (Cosgrove and Kliger 1997:215). Indigenous peoples have different ways of making decisions and different community and hierarchical structures, and it is important that planning processes take account of these cultural differences. Indigenous peoples feel more comfortable with decision making processes that are more inclusive and communicative than those generally utilised by government bureaucratic processes. Communicating with Indigenous peoples therefore, requires different skills, including cross cultural communication skills.

These kinds of changes to RAPI's `Education Accreditation Policy' will ensure that land use planning practices will in the longer term have a better chance of taking proper account of Indigenous interests.

4.6.2 Enhancing planning practice

Many professional associations have a code of professional conduct to ensure that members practice their profession in an ethical and professional manner. Members are bound by the Code which also include disciplinary procedures for any breaches. The RAPI's Code, for example, requires members to *"uphold and promote the elimination of discrimination on the grounds of race, creed, gender, age, location, social status or disability"* (Clause 3.1.2). The Code also requires members to *"use their best endeavours to ensure development:*

- *is sustainable;*
- *provides for the protection of natural and man-made resources;*
- *is aimed at securing a pleasant, efficient and safe working, living and recreation environment; and*
- *is efficient and economic."* (Clause 3.1.5)

While this is commendable, the code does not contain any particular provisions requiring members to recognise and respect Indigenous interests, or provide any protection for members seeking to comply with the Code.

Again, this is not a criticism, but rather an observation of the context within which the code was drawn up. Accordingly, the code should be amended in several ways to provide greater recognition and mutual respect and understanding for Indigenous interests. For example, Clause 3.1.5 could be amended by the insertion of an additional requirement as follows:

> *'is cognisant of Indigenous peoples' interests, which include their special relationship to land, ownership of the land through traditional laws and customs, and the management and preservation of their country and their cultural heritage.'*

The RAPI's code could also be amended to require members, prior to undertaking a planning study or making a planning and development decision, to establish whether there are any Indigenous property rights in relation to land where it is known that Indigenous property rights have not been extinguished by an executive action of government, the grant of a

freehold title or any other form of title granting exclusive possession, or the construction of public works. These provisions are required to ensure members are able to invoke the code in situations where they may be coerced to make hasty and ill-informed decisions which may affect Indigenous property rights and interests without their consent. Such codes should provide members with the secure knowledge that the Institute will support them in such situations.

Professional land use planners and land managers have a duty of care to take Indigenous property interests into account at all times in their practice, and their professional associations have a general duty to support their members in situations where Indigenous property rights and interests are being disregarded. Members of professional associations should also be disciplined where they are responsible for negligent disregard of Indigenous land interests (Davis 1998).

4.6.3 A re-examination of past and present professional land use planning practices

Recent research by Jackson and others (Cosgrove and Kliger 1997, Small 1997, Hillier 1993, Throgmorton 1992) is highlighting some of the regrettable outcomes of past approaches to planning practice. It is an undeniable fact that Indigenous interests were ignored, and indeed alienated, by rational approaches to planning that assumed all 'vacant' Crown land was unoccupied and freely available for planning and development. It is acknowledged that this is not the fault of the profession *per se*, but that it was a consequence of the notion of '*terra nullius*' and was reinforced by the statutory planning processes put in place by State and Territory Governments.

Just as the wider Australian community has to acknowledge the wrongs of past generations in relation to the forced removal of Aboriginal peoples and Torres Strait Islanders (HREOC 1997b), so too must the planning profession acknowledge that it does not have a rosy past when it comes to the treatment of Indigenous interests, especially in relation to land.

The High Court has judged the history of *terra nullius* to be wrong, and while not pursuing a position of guilt, neither must this generation compound a wrong. It is our collective responsibility to correct the wrongs perpetrated by the myth of *terra nullius* and move forward as an informed, positive and united nation of peoples. Indigenous Australians now have enforceable rights, and these need to be recognised in all planning processes where it cannot be established beyond any doubt that there are no Indigenous property rights.

In the interests of reconciling the past with the present and making a better future, it is appropriate to institute a public re-examination of past and present professional land use planning practices which unwittingly reinforce the dispossession of Indigenous peoples from their land, and to undertake to do things differently in future. Such actions are not about looking backwards. They are about looking forwards, and in doing so professional land use planners and land managers need to acknowledge what happened and make a break with the past. It is about righting a wrong. It is about making the fundamental changes that are necessary to prevent any recurrence of past mistakes. As we mentioned in Part 4.4, as a consequence of the *Mabo* decision, a fundamental change is required in the way Australians view and understand interests in land. Moreover, for too long Aboriginal peoples and Torres

Strait Islanders have not been involved in planning decisions which affect their lives and their rights and responsibilities to country, as evidenced by the work of Jackson and others. A re-examination of past dubious practices would be a significant step toward imbuing the land use planning discipline with that changed view of land.

Such actions also need to be made in an appropriate way and to the right Aboriginal and Torres Strait Islander representatives. It would also remind planners of the guiding premise of the discipline, to serve and protect the wider 'public interest'.

These delicate matters could be progressed through high level dialogue with Aboriginal and Torres Strait Islander community leaders to develop a ten year plan for decolonising and re-sensitising land use planning practices to become more aware of Indigenous rights, interests, obligations and responsibilities for country.

Such important steps can only be taken after professional land management associations can show they are willing and able to make some of the fundamental changes as suggested above. As Davis concludes, whether planners can properly address the issue of Indigenous interests in land, something which is clearly within our professional domain, will be a test of how relevant planning continues to be in 'planning for the good of the community' (Davis 1998).

5. VALUATION AND COMPENSATION

All property rights, other than Indigenous property rights, are granted by governments under Australian land law and Australian governments have powers to change many aspects of property rights. However, Section 51 (xxxi) of the *Australian Constitution* requires the Commonwealth Government to compensate owners for the acquisition of their property according to 'just terms' (Law Reform Commission 1980:33). Similar constraints apply to Territory Governments, but not all State Governments, although they normally compensate owners whose property rights are resumed.

The High Court's *Mabo* and *Wik* decisions state that in certain specific circumstances, Indigenous property rights can be extinguished or impaired. The *Native Title Act 1993* makes provision for claims to, and assessment of, compensation for the loss, extinguishment, diminution or impairment of Indigenous property rights. The provisions of the *Act* have been amply discussed by Neate (1997) and others (Lavarch 1997) are not explored further here.

Since the *Wik* decision, the two issues that have received particular attention are valuation and compensation. Namely:

- the valuation of land subject to Indigenous property rights; and
- the valuation of Indigenous property rights per se, especially where those rights may be extinguished, diminished or impaired and compensation is payable.

5.1 Existing case law in the areas of valuation and compensation

The incidence of Indigenous property rights can be divided into two distinct categories of valuation. Firstly, there is the phenomena which results when native title coexists on land, and the resultant value affect. Secondly, there is the issue of the assessment of compensation payable for the partial or total extinguishment of native title (Hyam 1997:1.).

5.1.1 Case law relevant for the coexistence of Indigenous property rights on land with other statutory rights

Hyam (1997:1) has suggested that this first area of valuation may be analogous to the impact of an easement. In support of this, Brown (1991:143) describes an easement as:

> *"a right attached to one particular piece of land which allows an owner of that land to use the land of another in a particular manner or to restrict its user by that other person to a particular extent. An obvious example is a right of way, a positive easement which permits a person to do something on the land of another. Another example is a right to light, a negative easement which signifies that an adjoining owner may not build so as to obstruct the flow of light. Another example is a profit a prendre, a right to take something off or from another's land, say, sand and gravel."*

The term *profit a prendre* was described by Wilson J. in *Re: Toohey; Ex Parte Meneling Station Pty Ltd (1982) 57 ALJR 59* at 68 as*:*

> *"A right to enter another's land to take some portion of the soil or of its natural produce. The grant may confer an exclusive right, or it may be a right enjoyed in common with others. It may be granted either in perpetuity or for a fixed term and presumably it may by agreement be terminable on specified notice... The right to pasture may be the subject of a profit a prendre; the taking and carrying away is effected by means of the mouths and stomachs of the cattle in question.... Profits are classed as corporeal hereditaments and may be assigned. They may properly be described as interests in land."*

When estimating the impact of the forced acquisition of an easement, Brown (1991:144-145) provides the following guidance as regards principles:

> "*Where an easement is compulsorily acquired the principles to be applied in assessing compensation are no different from those applying when the full fee simple is acquired. For practical purposes it becomes a matter of assessing the extent to which the claimant has been disadvantaged as a natural and reasonable consequence of the taking of the easement. The test is the attitude of the hypothetical prudent purchaser and the extent to which in the opinion of such person the claimant has suffered diminution in the value of his property resulting. ..Each case must be considered according to the terms and conditions of the easement created and the frequency and magnitude of the disturbance likely to result in consequence of the claimant's proprietary rights. No fixed or constant figure may be laid down. Negligent or other tortuous acts done by the employees or agents of a constructing authority are not compensable nor is the probability of such acts occurring. Lawful use only and its consequential effects, if any, can be considered in assessing compensation."*

In addition, the following three cases provide an indication of the courts' approach to injurious affectation, the loss of access and special advantage, and the loss of riparian rights. All of the above have particular importance for the development of an appropriate methodology to determine the resultant value effect when indigenous property rights co-exist on land.

In *Eagle v. The Charing Cross Railway Company* (1867) LR 2 CP 638 it was held that construction by the railway company pursuant to its enabling legislation, had resulted in a diminution of light to the plaintiff's property, and was injurious to his interest in the premises. As a result he was entitled to compensation under the relevant statute, and it was no defence that by reason of accidental circumstances, the market value was not diminished.

In *Smale v. Takapuna Council* (1932) NZLR 35, it was held that a right to sea access, and use and sale of sand and shells, had been lost. As a result it was held that these rights and special advantages were proper subjects for compensation.

In *Hone te Anga v. Kawa Drainage Board* (1914) 33 NZLR 1139, an area of low land and swamp was compulsorily acquired, and it was held that compensation was due for the resultant destruction of an eel *pa*, and the inability to hunt for eels which had been previously held as a riparian interest.

Whilst these court decisions provide an overview of the existing case law, it should be recognised that there is depauperate case law in this newly developing area of coexisting property rights. Future judicial direction will clarify whether the current methods utilised by the valuation profession, (and accepted by the courts) in determining the impact of the forced acquisition of easements and *profits a prendre*, are appropriate when considering the impact of native title on coexisting property rights such as pastoral leases and other statutory estates.

5.1.2 Case law for the assessment of compensation for the extinguishment of Indigenous property rights

The foregoing discussion in 5.1.1, provides an overview of the existing case law which should be applicable when determining the impact when native title coexists on land.

However, guidance for the development of an appropriate methodology for the assessment of compensation for the partial or total extinguishment of Indigenous property rights, will almost certainly emerge from the above mentioned case law, and existing case law and methodologies dealing with compensation for compulsory acquisition of property rights, and loss of other rights such as personalty, and the law of nuisance (Lavarch 1997).

In addition there are specific requirements pertaining to compensation for indigenous property rights which are embodied in the *Native Title Act 1993*, the *Racial Discrimination Act 1975* and importantly, the *Australian Constitution.*

Hyam (1995:154) notes that the word "compensation" was defined by the High Court in *Nelungaloo Pty Ltd v Commonwealth (1948) 75 CLR 495 at 571* to mean:

> "*recompense for loss, and when an owner is to receive compensation for being deprived of real or personal property his pecuniary loss must be ascertained by determining the value to him of the property taken from him. As the object is to find the money equivalent for the loss or, in other words, the pecuniary value to the owner contained in the asset, it cannot be less than the money value into which he might have converted his property had the law not deprived him of it."*

The acquisition of property rights pursuant to any Commonwealth-sourced fiat is subject to the statutory provisions setting out the basis for the assessment of compensation in respect of such property rights compulsorily acquired. Such provisions are contained within *ss55-58* of the *Lands Acquisition Act 1989* (Cth.).

The assessment of compensation of

> "[*a*]*ny acquisition of property by the Commonwealth will … attract[s] the operation of s51(xxxi)* [of the Australian Constitution] *because it will be in pursuit of a purpose in respect of which the Parliament has power to make laws…"*

(Toohey, J. *Newcrest Mining (WA) Ltd & or. v. The Commonwealth of Australia & or*. High Court (unreported) FC 97/036 at 41).

S51(xxxi) of the Australian Constitution states

> *"the Parliament shall subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:*
>
> *…(xxxi) The acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws"*

Kirby J in *Newcrest* (at 146) provides valuers with guidance stating that:

> [t]*he terms of s51(xxxi) were 'intended to recognise the principle of the immunity of private and provincial property from interference by the federal authority, except on fair and equitable terms.'*

Except for the above, Clarke (1997:5) notes that there is little guidance as to the nature of *just terms*, notwithstanding that all existing compensation assessments involving Commonwealth legislation must be undertaken with a view to ensuring that the resultant compensation package respects *s51(xxxi).*

Further, Clarke states that:

> *"*[w]*hat 'just terms' constitutes in the native title context is not clear, but is likely to be substantial, given the religious and cultural significance of land to many indigenous people."*

Lofgren and Kilduff (1997:67) note that whether terms of compensation are 'just' is subject to a test of reasonableness or degree of being unreasonable. Further, that 'just terms' should not be narrowly construed.

It is proposed that forced acquisition of Indigenous property rights may ultimately be undertaken by the States acting through their own lands acquisition legislation pursuant to powers conferred upon them in the current *Native Title Act Amendment Bill 1997.* It is clear that while the *Bill* proposes at *s51A* that compensation will be limited to that currently available to a holder of freehold property rights, such compensation must be subject to *s51(xxxi)* of the *Constitution*.

Valuers and land economists would be aware that a different regime can apply where property rights are acquired pursuant to State-based legislation, which may not afford the holder of expropriated property rights similar constitutional safeguards. Indeed, some land acquisition legislation specifically limits compensation payable to the dispossessed holder of property rights.

For example, the *City and Suburban Electric Railways Act 1915-67* (NSW) provides that:

> "[t]*he interest in land to be valued shall be their value as at 27/2/1967 which is the day prior to the date when the Government announced its intention to proceed with the construction of the Eastern Suburbs Railway"* (Sheehan, 1984:111)

Importantly, commentators (The Canberra Times, 19.8.97) have noted that the existing approach to compensation for the acquisition of property rights by the Commonwealth is embodied in one of the relatively few guarantees of rights expressly stated in the *Constitution*.

In reinforcement of this, Kirby J in *Newcrest* (at 161) stated that fundamental rights such as *s51(xxxi)* are such that:

> "[t]*his court should ensure that the promise is kept"*.

5.2 Pre-empting the courts on valuation and compensation

The Federal Government's *Native Title Amendment Bill 1997* proposes to amend the provisions in the *Act* relating to compensation. Of particular concern is sub-Section 51A(1) of the *Bill* which states:

> *"The total compensation payable...for an act that extinguishes all native title in relation to particular land or waters must not exceed the amount that would be payable if the act were instead a compulsory acquisition of freehold estate in the land or waters"*

This provision seeks to equate Indigenous property rights with freehold title for the purposes of compensation (Explanatory Memorandum p226). In the immediately following sub-Section the *Bill* also seeks to ensure that this new provision would not displace the 'just terms' requirements of Section 51(xxxi) of the Constitution. Section 51A(1) was deleted by the non-Government parties in the Senate.

These provisions are extraordinary, if not contradictory. On the one hand, the Government is seeking to limit the amount of compensation that may be payable to a level equivalent to that payable as if the rights being acquired were freehold. On the other hand, the Government is seeking to ensure that the 'just terms' provisions of the Constitution for compulsory acquisitions continues to apply. While such provisions are commendable, there are several difficulties with seeking to place limits on the levels of compensation that may be payable.

As discussed above, the basis for the assessment of compensation for the extinguishment of Indigenous property rights is not clear, and any attempt to limit it to freehold would be pre-empting the courts.

Any limitations may also not permit the full range of heads of consideration that ought to be afforded to the holders of Indigenous property rights as they are to the holders of other forms of title. In addition, given that compensation for the expropriation of Indigenous property rights could, in certain circumstances, exceed that which would be paid for freehold land, any reference to freehold title is inappropriate.

The Government's own information paper that accompanied the *Native Title Amendment Bill 1996*, observed that failure to provide just terms compensation for the acquisition of Indigenous property rights could lead to the legislation being held to be invalid (Office of Indigenous Affairs 1996:12).

Section 13(1A) of the *Native Title Amendment Bill 1997* also seeks to include a sunset clause on the making of applications for a determination of Indigenous property rights under the *Native Title Act 1993*. This particular clause was also deleted by the non-Government parties in the Senate.

There are two concerns with this provision. Firstly, the Government is seeking, yet again, to apply a provision which exists in the *Aboriginal Land Rights (Northern Territory) Act 1976*. This *Act* contains a sunset clause which precludes Aboriginal people from lodging applications for land rights grants after a certain date. As Indigenous property rights are recognised under common law, it is not possible to impose an arbitrary sunset clause on the lodgement of applications for their recognition and protection.. Secondly, it is clear that claims for the loss, diminution, impairment or extinguishment of Indigenous property rights may occur well into the future (well after six years) when activities are initiated.

The prospect of common law claims being lodged external to the *Native Title Act 1993* is considered to be highly undesirable, and fragmentary. The protracted litigation that almost certainly would arise, suggests that the proposed sunset clause may create confusion and division with consequent extraordinary costs for all stakeholders involved.

However, it is recognised that there should be time limits on the lodgement of any compensation claims arising from the expropriation of property rights, and that the time limit should commence at the time the cause of action arises. The *Bill* does not deal with this matter.

If the 'just terms' provisions of the Constitution are not respected when treating the issue of compensation for the expropriation of Indigenous property rights, then protracted litigation will inevitably occur.

5.3 Towards a methodology for valuation and compensation

It will be seen that there does not exist any substantial case law on the valuation of Indigenous property rights.

Valuers would be familiar with traditional compensation items such as special value to the owner and solatium (a judicial discretion) in addition to the usual valuation of land and buildings (Hyam 1995). However, it is clear that the valuation of Indigenous property rights will necessitate adaptation of principles derived from existing case law relating to, for example, special value and solatium. Lavarch (1997:23) notes that:

> *"Native Title is more than simply a title in land. As Justice Kirby described it, Native Title rights are property, usufructuary and personal. Accordingly the loss or*

restriction in these rights can amount to more than a restriction on property rights. It can also amount to a personal loss."

Accordingly, the recognition of *'intangible factors of this nature'* (Addicott 1997:541) will almost certainly involve the adaptation of established valuation methodologies to account for such matters as cultural or spiritual attachment which have in the past been largely ignored or disregarded in case law.

5.3.1 The valuation of an interest in land where there may be coexisting Indigenous property rights

Hyam (1997:2) believes that the existing case law directs that regard must be had to the following when attempting to value an interest in land where there may be coexisting native title:

> "(a) *The nature of the rights conferred by the native title. It must be established whether they entitle the native people to access only or other rights are conferred, such as, the right to camp or dwell on the land, the right to fish and hunt game.*
>
> *(b) The frequency at which the rights will, or are likely to, be exercised; the number of people who may enjoy the rights.*
>
> *(c) The number of occasions upon which the rights have been exercised in the past.*
>
> *(d) The impact which the exercise of the rights will have on the interest of the co-existing owner in the land.*
>
> *(e) The attitude of the hypothetical prudent purchaser to the co-existing rights.*
>
> *(f) The possibility of the native people killing stock and causing wrongful damage to the property of the co-existing owner, though strictly not claimable as a head of compensation upon compulsory acquisition, may be factors which the hypothetical prudent purchaser would take into account."*

It should also be remembered as Young points out (1997:13) that:

> *"[i]f native title exists, the statutory lessee may face a claim for damages for the impairment of native title rights as a result of non-authorised activities and may also be liable to account for the profits where the non-authorised improvements have been used for the purpose of generating income. It is not clear whether any limitation period applies. Native title holders may also be able to compel statutory lessees to remove non-authorised improvements, for example, swimming pools or sheds erected for non-authorised purposes and reinstate the land to its former state, or to the approved statutory purpose."*

From the valuer's perspective, the issue of deprivation of aboriginal access rights have also to be considered. In this regard, Young (1997:p.13) observes that:

> *"[w]here native title coexists on statutory lease land, the denial of access to land to native title holders (either before or after any determination of native title rights) may give rise to an entitlement to recover damages similar to an 'occupation rent'. Such a claim would be analogous to a rental claim where a tenant-in-common has occupied the common property and excluded another co-tenant."*

Commentators such as Boyd (1997:22) consider that there is little evidence that the market regards coexisting indigenous property rights as an increased risk and that *"it was not possible to demonstrate that a change in sale price was caused"*.

Whilst Boyd's research was undertaken to investigate the value effect surrounding Maori Reserved Land, the results do suggest that the analogous situation in Australia of coexisting native title rights may also reflect this lack of documented effect.

Since the *Wik* decision, evidence has emerged that suggested the prospect of recognition of native title on leasehold land has not affected the use or value of such land for genuine grazing use provided the lease conditions and legislative constraints have been complied with.

Herron (1997) notes that examination of recent pastoral sales evidence in Queensland failed to identify any "*which can be said to have been devalued by the Wik decision"*.

Since the *Wik* decision, there have obviously been attempts by purchasers to use the decision as an argument in their negotiations. However, it is generally accepted that the *Wik* decision together with the combination of drought and low commodity prices have probably moved vendors to a lower price range.

Herron (1997) also reports that significant valuations were recently carried out for the Prudential Group, as the buyer for the Heytesbury properties, Bankers Trust (Queensland Northern Territory Pastoral Company) and National Mutual. Whilst the authors are not privy to the details of these valuations, we are informed that parties in the first two valuations expressed little concern over the impact of coexistence.

It appears that pastoral leases are regarded by the holders as merely 'renting the grass' (Herron 1997), and many pastoral holdings already have Aboriginal settlements thereon (or adjacent thereto) where some exercise of *profit a prendre* occurs. It is reported that some lessees lose the occasional beast due apparently to indigenous hunting, however given the large size of herds on many pastoral holdings the impact is negligible. There is in reality little concern over the '*odd bit of hunting and fishing [that] takes place'* (Herron 1997).

The apparent minimal effect on the value of pastoral leases appears to have been encouraged by the reference in the *Wik* decision to pastoral rights prevailing over native title rights to the extent of any inconsistency. It also appears that issues such as the exchange rate, commodity

prices, drought, screw worm and foot and mouth disease are causing greater concern than native title.

Nevertheless it is not denied that the market place recognises that some problems may have been caused by the *Wik* decision, compounding current market uncertainties for rural properties.

The National Native Title Tribunal (McRae 1997) has reported speculation that some sales in the Lightning Ridge, Walgett and Collarenebri areas may have been adversely affected by perceived threats of native title coexistence. The sales may however also evidence the effect of the growing drought and associated rural de-population which is occurring through much of rural Australia.

It is reported that whilst banks do not appear to have made any changes to existing rural loans, it is nevertheless anticipated that they may exercise greater caution in granting new loans.

In this regard, the National Native Title Tribunal has advised of the inclusion of 'land rights' as an 'Event of Default' in some security documents. (Haines 1997). While we do not wish to comment on the legal validity or enforceability of the inclusion of these clauses in security documents, we are of the view that their inclusion is probably not unreasonable, given the developing nature of due diligence in the commercial world.

The inclusion of an ever widening range of events which may adversely affect the collateral which is offered as security to financial institutions, is a manifestation of risk assessment. The need to recognise, assess and manage such risks is now contained in an Australian Standard entitled *Risk Management* (AS/NZS 4360:195).

From a legal compliance standpoint, Directors of corporations must not only "positively consider the risk" of such incidents as Indigenous property rights, but also:

> *"be able to demonstrate that they have positively considered this risk and consequence. If they do not, they in turn run the risk of extremely heavy penalties."* (CCH 1997:6)

Notwithstanding, it is important to note that the identification of Indigenous property rights ("land rights") appears to be viewed adversely in security documents only if:

> *"... such circumstances materially reduce the value of the Mortgaged Property or materially adversely affect the financial position of the Mortgagor and/or the Debtor.*" (s)(ii) (extract from typical security document)

Clearly, financial institutions will be seeking professional advice from the valuer members of this Institute as to whether the value of the security has been reduced, such that the identification of native title (or possibility thereof) is grounds for an "Event of Default".

Nevertheless, it is clear that there has been much ill informed comment in the press since the *Wik* decision, and the AIVLE has been concerned that the consequences of such media speculation could be most profound for the stability of the national property market.

Current research suggests that the effect of coexisting indigenous property rights upon such interests as statutory estates (pastoral leases), may be analogous to the nominal value effect, which commonly occurs when a high tension transmission line easement is placed over freehold land. This effect often amounts to little more than a blemish upon the freehold title, and its market value.

Importantly, the *Wik* decision reflects this view, in that indigenous activities on land additional to those currently exercised by native title holders cannot occur unless *"the rights of the lessees are guaranteed to prevail"* (Brennan 1997:12). As previously noted, commentators such as Herron (1997) have observed that there is little evidence of devaluation of pastoral leases since the *Wik* decision and that the exercise of *profit a prendre* by the holders (or aspirants) of Indigenous property rights is of little concern.

Such views are also supported by the Australian Law Reform Commission (1997:15) which stated that the value of any inconsistent Indigenous property rights activity *"would probably equate with a small percentage of the freehold value".*

5.3.2 Assessment of compensation for the expropriation of Indigenous property rights

When assessing compensation for the partial or total extinguishment of indigenous property rights, the task to be embarked upon by the valuer is much more complex.

The essential nature of Indigenous property rights had been considered by Small (1997:617) who states that:

> *"[a] survey of the relationships between various indigenous peoples and their land reveals that the relationship has typically two dimensions. The first dimensions is spiritual, or metaphysical, and the second is material, relating to the political economy of land."*

Small further states that insofar as Indigenous land holding is concerned:

> *"*[t]*he value of the land for producing the material needs of the tribe is freely available for any member who wishes to apply the labour necessary for the production required. For that person the land is free, there is no rent to pay for its use"*

And further:

> "[i]*n the long term, a strong ethic of conservation insists that the land be preserved for future members of the tribe. These are regarded as having the same rights of access to the land as those tribe members currently alive. Children cannot be charged for access to the land of their parents for the same reasons. The land is free for the use of*

> *current tribe members, on condition that it be passed on without degradation to future members."*

Finally, Small (1997:618) comments that:

> "[t]*o put tribal collective ownership of land into Western terms, one could consider the land as the joint property of all the members of the tribe, past, present and future, with present members having only a leasehold interest, with their rental obligation equal to their income as joint owners and a commitment not to diminish the reversionary value during their tenancy. This interpretation requires only a relaxation of the Western understanding of owner as a person who is currently alive, but otherwise reduces customary title to a form that is otherwise totally integrated into the western system."*

Given the above guidance by Small on the nature of Indigenous property rights, it is relevant to note that Whipple (1997:30) suggests that an appropriate methodology to assess the various component parts of a valuation of a specific native title claim requires the division of such property rights into material, and non-material rights.

Whipple considers that the material rights can be given a monetary value, however:

> "*predicting the price the non-material or spiritual rights are likely to fetch falls outside the scope of the formal object of the discipline of valuation and is properly the province of the Federal Court which, by receiving and testing evidence, is best placed to ascertain the facts of a particular case."*

However, it is our view that such a view is too restrictive, and the assessment of compensation for the expropriation of such property rights, must address cultural and environmental, as well economic values.

In forming this view, we have had regard to Hyam (1995:206), who cites the decision in *Commissioner of Highways v. Tynan ((1982) 53 LGRA 1 at 14)* suggesting that categories of special value, like the categories of negligence are never closed:

> *"The special value referred to may be derived from an immense variety of circumstances exemplifying many forms of relationship and interdependence between the expropriated and retained land."*

Admittedly, Hyam further suggests that due to the precedent established in *Turner v. Minister ((1956) 95 CLR 245),* the court will ordinarily disregard a special price payable because, for example, a certain buyer's ancestors lived there. However, through evidence supplied by ethnoecological and ethnographic consultants, it may be held that the relationship of Indigenous peoples to the land surpasses that of mere ancestral roots.

This new approach to the assessment of special value arising is supported by *Western Australia and Roberta Thomas & Ors and Austwhim Resources NL* (NNTT Application WF96/3, at 96). In this decision, the National Native Title Tribunal stated that all loss and damage suffered or likely to be suffered by the dispossessed holder of Indigenous property

rights included those aspects of Indigenous property rights which are not comparable to the rights held under freehold. The Tribunal said that "*any special or unique aspects* [of] *native title holders to an area of land*" is relevant and to be taken into account in an assessment of compensation.

Given the above, and the limited literature presently available, it is considered that special value to the owner and solatium can be constructed to cover compensation, for example, for loss of access to ceremonial lands, spiritual deprivation and loss, and loss or perceived loss of social environment.

Valuers dealing with non-land components of compensation, often work in teams with other disciplines such as mining engineers or heritage consultants. In the case of indigenous property rights, it is my view that the valuation process would be conducted in concert with ethnoecological and ethnographic consultants.

The Central Land Council based in Alice Springs has undertaken work within its Land Assessment and Land Use Planning Program, which involves ecological and cultural mapping which enables effective interpretation of special value to the indigenous title claimants. It is anticipated that valuation of indigenous property rights could utilise such ethnoecological materials to underpin any valuation methodology.

A critical issue to be resolved by valuers is whether such rights existed at European contact, and whether they have continued until the present time, notwithstanding that they may have been altered as a result of European contact or activities.

Such issues can only be confirmed on the basis of ethnoecological and ethnographic opinion as to whether the varied elements of Indigenous property rights do indeed equate to the current rights exercised over the land affected by the compulsory acquisition.

In preparing an assessment for compensation, the valuer would have to be convinced by the specialist opinion. To that extent, the compensation assessment would need to identify in brief, as much as can be known of the various elements of the rights which may be affected by the compulsory acquisition.

In addition, any methodology would have to consider the issue of connection, drawing again from the relevant specialist opinion and from existing material already available from the claimants (particularly from evidence in any proceedings).

In summary, it is our view that there are three main subheadings under assessment of compensation of Indigenous property rights which should be addressed, namely:

- entitlement to compensation;
- selection of assessment methodology, having regard to the various elements of Indigenous property rights evident in the particular exercise; and
- assessment of various components of the compensation package, having regard to the weight and quantum of each component that current knowledge will permit.

As regards the non-material component of the compensation assessment, some commentators such as Whipple (1997:33) have suggested that it may be necessary to draw upon the law of nuisance.

However, concerns have been raised over this view. The AIVLE (media release 20th April 1997) has stated that:

> *"it is unnecessary and undesirable to resort to the areas of personal injury compensation, as some commentators have suggested, to deal with the non-land components of compensation claims. The AIVLE is concerned that such an approach could lead to unrealistic expectations and concerns for all stakeholders as regards monetary compensation entitlements"*

Nevertheless, it would be misleading to deny that many aspects of the usual non-land components of a compensation package are analogous to personal injury compensation. Commentators such as Budrikis (1997) suggest that such losses, (for example as the loss of the right or ability to hunt, or to be initiated on one's country) can be compared to personal injury losses as being directly related to native title rights. The previously mentioned decision by the Tribunal refers to certain personal injury cases and suggests that analogies can be drawn.

Budrikis has suggested that rather than inflating expectations, it should be remembered that this is merely the traditional way that the common law has developed by relating hitherto unaddressed legal issues to existing case law.

Orr (1997:19) notes that:

> *"*[t]*he law does not judge the actions of others, but their effects on the litigant concerned. It merely accepts such background as real and integral to a particular plaintiff's life and circumstances. To do otherwise would be to fail to abide by the fundamental principle of awarding damages: to attempt, as far as lump sum compensation can, to restore plaintiffs to the positions they would have been in had the negligent injuries not occurred."*

In various cases dealing with loss of cultural fulfilment, there is an attempt by the courts to gain sensitivity to cultural differences. Within the evidentiary framework of the law, the special nature of indigenous life is, to the degree achievable, made understandable, and hence compensatable.

The HREOC (1997:303) notes that the Courts have awarded substantial damages for such "non-material rights"(after Whipple 1997, p.30) as loss of cultural fulfilment. In cases such as *Napaluna v. Baker* (1982) 29 SASR 192, and *Dixon v. Davies* (1982) 17 NTR 31, the loss of cultural fulfilment by Indigenous persons was assessed and monetary compensation for denial of access to initiation was given.

In addition, the HREOC reports that the Cape York Land Council in submissions to the Commission's Inquiry (HREOC 1997:303-304) indicated that with respect to compensation for loss of indigenous rights two heads of damage arise:

> *"specific damages for the loss of actual legal rights, which in this case would be the right to enjoy native title as part of a group, and general damages for the pain and suffering arising from the loss of these particular legal rights."*

Clearly, as compensation questions are resolved by the courts, the specific losses claimed by holders of expropriated indigenous property rights will be tested and determined. However, the ripple effects of expropriation of indigenous property rights may be far reaching and it is clear that the assessment of the losses associated with social, spiritual and broader cultural deprivation will involve valuers working closely with ethnoecological and ethnographic consultants.

The delineation of the edge of the ripple was considered many years ago in Victoria when consideration was given to devising methodologies for the assessment of compensation arising from the effect of town planning blight *(Report of Committee of Inquiry Presented to the Premier of Victoria, 1978*). The proposals were however largely shelved, but do provide an epistemological basis for dealing with some of the issues surrounding compensation for the expropriation of indigenous property rights.

The Committee observed that throughout Australia compensation is not provided for those holders of property rights whose land is not physically acquired by compulsory process. It was observed that this was:

> *"...because* [of] *the difficulty of drawing the line for entitlement or finding the edge of the ripple. Nevertheless this difficult issue was tackled in England and resulted in the Land Compensation Act 1973 that provided compensation outside the actual acquisition area."* (1978:32)

However, the Committee agreed with existing English experience that there should not be compensation for non-physical factors, such as personal inconvenience and detraction of view. Importantly, the Committee stated that:

> *"these are notoriously difficult to evaluate and measure. If there is to be an innovation in this field of compensation it should be into an area where in the interests of both the claimant and the authority, some objective measurement and even calculation are possible."* (1978:33)

There is currently an impasse in existing case law, in that valuers are unable to give substantive consideration to sentimental, cultural and spiritual values when assessing the compensation due to a dispossessed holder of Indigenous property rights. It is our view that the courts will develop a new arm of land law specifically dealing with native title, in order that s51(xxxi) of the Constitution can be respected.

5.4 Future directions for the valuation profession

There has been a general view by commentators that most claims for Indigenous property rights if ultimately successful would probably be achieved in a form of tenure that would be demonstrably less than freehold. It is considered by such commentators that the bundle of property rights that may comprise a particular native title may amount to little more than an easement or a *profit a prendre*. Indeed, the Australian Institute of Valuers and Land Economists' submission on the *Native Title Amendment Bill 1996* followed this line of reasoning.

However, subsequent research now suggests that while there has been no recognition of intangible factors such as sentimental (or spiritual) attachment in existing case law (viz. *Raja* case (1939) AC 302 at 312; *Wilson Bros Pty Ltd v. Commonwealth* (1948) SASR 61; *Russell v. Minister for Lands* (1898) 16 NZLR 241), it appears that forthcoming court decisions will almost certainly direct how compensation for the loss of cultural, social or spiritual values should be assessed.

Addicott (1997:541) agrees with this view noting that:

> "[w]*ithout further legal precedents and the establishment of a greater degree of certainty,…. no one can speak with any great confidence in respect of any of the unresolved issues which still surround native title."*

Addicott continues, noting that:

> "[a]*s yet there appears to be no Australian court decision which indicates how compensation for elements of cultural, or spiritual value should be measured.*
>
> *Other indigenous peoples experience a similar attachment or association with the land. The Maori people of New Zealand, and the native people of North America use similar terms and expressions to describe their relationship to the land. It would be fair to say that this element of compensation for special attachment has not been satisfactorily addressed in any of the Common Law countries."*

While Addicott considers that little confidence surrounds such unresolved issues, Clark (1997:5) concludes that Indigenous property rights as an interest in land is problematic, and is currently incapable of *"being registered on any parcel"*. Clark also notes (p.4) that there is a long history of reluctance by the courts to assume that such rights can be described in forms "*analogous to estates"* in Anglo-Australian land law (viz. *Amodu Tijani* (1921) 2AC at 403). Clark's conclusions are supported by the recent Canadian case *R v Van der Peet ((1996) 2 RCS 507).* In this interpretation of what constitutes Indigenous property rights, the Supreme Court of Canada has been quite restrictive in its view of such rights.

Before considering this Canadian case, it is important to remember that in *Mason v. Tritton* (1994), 34 NSWLR 572, a test was put forward as to the evidentiary burden to be satisfied such that Indigenous property rights could be established. This test is as follows:

> *"(1) Traditional laws and customs which included fishing rights were in existence in the Indigenous community immediately before Crown sovereignty;*
>
> *(2) The Indigenous person concerned (ie the accused) is a biological descendant of the original Indigenous community;*
>
> *(3) There is a continued and uninterrupted adherence to the traditional customs and laws and ;*
>
> *(4) The accused's conduct was an exercise of those traditional laws and customs "* (cited in Gray 1997:21).

Further guidance is however provided in *Derschaw v. Sutton* (1996) where it was held by the Western Australian Supreme Court that a:

> *"widespread customary practice of Aboriginal people … did not amount to a native title right recognised by the common law"* (cited in Gray 1997:22).

In Gray's view (1997:34), the *Van der Peet* decisions have supported the above, albeit from a restrictive standpoint. The *Van der Peet* decisions established the requirement that:

> *"the activity seeking to be characterised as an Aboriginal right must be 'integral to the distinctive culture of the aboriginal group claiming the right'. According to Chief Justice Lamer, to be "integral" the activity had to be of 'central significance to the culture in question and had to be one of the things that truly made that society what it was."*
>
> *"….*[W]*hether without this practice, tradition or custom, the culture in question would be fundamentally altered or [be] other than what it is". An activity, custom or practice which was merely incidental to the culture, was an aspect of, or took place in that society would be sufficient to satisfy the "integral" component of the test."* (cited in Gray 1997:25)

In the *Van der Peet* case, the restrictive interpretation of aboriginal rights by the Supreme Court of Canada strongly suggests that native title may indeed be, in Clark's words, a *"mere qualification of or burden on the radical or final title on the Sovereign where that exists"* (1997:5).

Subsequent to the above, an unreported decision of the Canadian Supreme Court on 11 December 1997 (the *Delgamuukw case* - <http://www.droitumontreal.ca/doc/csc-scc/en/rec/html/delgamuu.en.html>) has suggested that the restrictive views of Indigenous property rights in the *van der Peet* decisions are not correct. The court has apparently decided that Indigenes in Canada have not only a constitutional right to own their land but also to use them in a largely unrestricted manner.

Both Australian and Canadian judgements have clear implications for legal interpretation of Indigenous property rights in Australia, given the growing interplay of Australian and

Canadian law, especially in relation to native title jurisprudence. Both jurisdictions have indicated that Indigenous rights are not frozen in time and can evolve. This evolution is however, subject to the caveat that the broad nature of connection is still evident through the maintenance, for example, of established traditional practices.

There is a tension evident in the *Van der Peet* decision which interprets Indigenous rights in a restrictive manner and yet, identifies the dynamic aspects of such rights. It is this aspect of the decision that appears to have been advanced in the subsequent Delgamuukw case, overshadowing the conservative features of the earlier decision.

Nevertheless, in Australia, it appears that the conservative and incremental manner in which existing land law in Australia has developed will provide an irresistible framework for the development by the courts of a methodology for the valuation of native title.

All of the above have to be taken into account by valuers who are in a unique position and carry considerable influence with the judicial system. As a result, they can assist in the development of a methodology for the assessment of compensation for the expropriation of Indigenous property rights, irrespective of what their definitive interpretation may be.

Such intellectual effort is worthy of the valuation and land economy professions and will eventually be supported by the development of appropriate case law. In a compensation package, the quantification of factors which are non-material or intangible, is common practice within the professions of valuation and land economy. The development of a methodology appropriate for native title will necessitate a recasting of current valuation methods and judicial interpretations.

6. CONCLUSIONS

This paper has focussed on exploring new methodologies for planning and valuation and on issues that the prospective professional associations for planning and valuation need to address if Indigenous rights and interests in land are to be given proper recognition and protection. Several conclusions can be drawn from the paper and they are summarised under several headings.

6.1 Implications for land management

- Assertions that all pastoral leases necessarily extinguished Indigenous property rights warrant closer examination as they significantly oversimplify the issue. *Mabo (No. 2)* did not deal with these matters; the *Wik* case was underway when the *Native Title Act 1993* was being debated in the Parliament in 1993; the *Waanyi* case in 1996 ruled invalid a decision by the National Native Title Tribunal to refuse an application for Indigenous property rights over a pastoral lease; and the Government's own 1996 Discussion Paper acknowledged that the High Court had not ruled on this matter.

- Under leasehold, the lessor always retains the right to grant further development or use rights, with or without conditions or to refuse them, for whatever reasons. The possible existence of Indigenous property rights on a pastoral lease where a lessee has been undertaking unauthorised activities inconsistent with the purposes for which the lease was issued would appear to counter calls for the blanket extinguishment of Indigenous property rights on pastoral leases.

- The extinguishment of Indigenous property rights on all pastoral leases and any other forms of non-exclusive statutory estates would be an unprecedented confiscation of property rights.

- Current attempts to amend the legislation beyond the implementation of the High Court's *Wik* decision appear premature and unnecessary. The current debate centres mainly on the need to have one unambiguous tenure of land and to subsume Indigenous property rights and interests into our current planning and land management regimes. This is neither possible nor necessary.

If the *Native Title Amendment Bill 1997* (as prepared by the Government) is enacted, there are strong indications that there may be well-founded constitutional or discriminatory grounds upon which the legislation could be challenged before the courts. For example, the proposals to place an upper limit on the amount of compensation that may be payable for the diminution, impairment or partial or total expropriation of Indigenous property rights at something equivalent to freehold; and the proposals to remove the 'right to negotiate' on compulsory acquisitions for third parties on lands within designated towns and cities.

6.2 Coexistence

- Coexistence of title is important to Indigenous peoples and is a common feature of Australian land law and practice. We are of the view that coexistence and negotiation are the only practical opportunity for ensuring sustainable land use, proper management, certainty and equity.

- Coexisting land uses do not pose a problem for land use planning and management and the extinguishment of Indigenous property rights on such grounds would appear to be ill-founded.

- Coexistence of rights and interests in land is commonplace both at common law and under statute throughout Australia, for example, through restrictive covenants, easements, profits a prendre, and mining tenements. They are characterised by a clear enunciation of each of the interests in order that they do not conflict. Once the parameters have been identified and the means for determining conflicts are clarified, then there is no bar to the continued, concurrent enjoyment of the rights and interests of each party

6.3 Implications for land use planning

- Professional land use planners and managers cannot ignore the existence of Indigenous property rights in the preparation of planning schemes or documents. If this is not done the following could result:

  (a) A planning scheme that is fundamentally flawed, in that it may propose land uses or developments that are incompatible with the traditional owners' rights and interests, creating community expectations that then cannot be met because Indigenous property rights were not taken onto consideration in formulating the plan or scheme.

  (b) Locking up land in the non-claimant processes under the *Native Title Act 1993 (Cth)* unless the support of the Indigenous peoples has been obtained.

  (c) A planning scheme which does not comply with the requirements of Federal or State legislation in relation to the recognition and protection of Indigenous cultural heritage and land interests.

- The prospect of successful claims over large areas within towns and cities is somewhat remote. In most cases Indigenous property rights have already been extinguished in towns and cities by Government acts such as grants of freehold and by public works.

- There are no logical or ethical reasons why negotiation of agreements and attempts to reconcile the interests of Indigenous and non-indigenous interests in towns and cities should be any different from elsewhere. There are many examples where these issues are being addressed constructively through agreements and it has not been found necessary to preclude native title claims from towns and cities.

- Where Indigenous property rights in towns and cities has not been extinguished by prior acts of government, then developers, including State/Territory Governments, should negotiate with the traditional owners and, where appropriate, pay compensation for such development to proceed.

- If the proposals in Sections 26(2)(f) and 251C of the *Native Title Amendment Bill 1997* (the removal of the 'right to negotiate' in relation to the compulsory acquisition of land for third parties in towns and cities) are passed into law, it would be untenable for many professional land managers to continue practicing in accordance with their codes of ethical and professional conduct in areas where there may be existing Indigenous property rights within declared towns and cities. These proposals can potentially place members of professional associations in breach of such codes which generally requires members to avoid racially discriminatory actions.

- Removal of the 'right to negotiate' in relation to the compulsory acquisition of land for third parties in towns and cities may be seen as akin to reinstating the notion of 'terra nullius'. The 'right to negotiate' is a core element in the recognition of Indigenous rights and interests in land, especially their special relationship to country. Their removal could be construed as contrary to Indigenous peoples' spiritual relationship to land and as racially discriminatory.

6.4 Land use planning's poor record

- The practice of land use planning has a poor record in relation to the recognition of Indigenous interests and the involvement of Indigenous peoples in planning processes. For example:

  (a) Professional land use management often regards Aboriginal land as a 'blank space', which bears much resemblance to the fiction of 'terra nullius';

  (b) The language adopted in planning documents frequently ignores or precludes the aspirations of the Aboriginal community. Indeed, some land use plans have been effectively hostile towards Aboriginal communities;

  (c) Those making land use decisions rarely seek a thorough understanding of the places that land and resources play in the maintenance of Aboriginal culture;

  (d) Many land use planning and development decisions have done little to improve the marginalised position of Indigenous peoples;

  (e) Where attention was given to an Aboriginal community's aspirations in planning strategies and schemes, the treatment was, at best, superficial;

6.5 New approaches to the practice of land use planning

- This paper highlights several reasons why the practices involved in land use planning and management need to change. These include:

  (a) An acknowledgment of the special rights and interests of Indigenous peoples arising from the common law recognition of their property rights as a result of the High Court's *Mabo* decision and the enactment of the *Native Title Act 1993*;

  (b) Respect for and accommodation of the cultural differences between Indigenous and non-indigenous Australians; and

  (c) The recognition of past wrongs against Indigenous Australians and changes to the practice of the discipline of land use planning to ensure that such wrongs will never be repeated.

- New approaches or methodologies are urgently required for land use planning and management which begin from a different premise – a premise that genuinely recognises cultural differences and Indigenous interests, rights, obligations and responsibilities, especially for country.

- Professional land management associations could take a number of actions to improve planning philosophy and practice in a post-*Mabo* context, and these include:

  (a) Improving planning education for Indigenous interests by amending the range of subject matter and skills regarded as being basic to planning education;

  (b) Amending the codes of ethical and professional conduct to improve protection for members taking Indigenous interests into account in planning processes; and

  (c) At an appropriate time, institute a public re-examination of past and present professional practices which unwittingly reinforce the dispossession of Indigenous peoples from their land.

6.6 Valuation and compensation

- There has been no recognition of intangible factors such as sentimental (or spiritual) attachment in existing case law, and forthcoming court decisions will almost certainly direct how compensation for the loss of cultural, social or spiritual values should be assessed. Little confidence surrounds such unresolved issues.

- In Australia, Indigenous property rights as an interest in land are currently incapable of '*being registered on any parcel'*. There is a long history of reluctance by the courts to assume that such rights can be described in forms '*analogous to estates'* in Anglo-Australian land law.

- A recent Canadian case *R v Van der Peet ((1996) 2 RCS 507),* in the Supreme Court of Canada interpreted the nature of Indigenous property rights restrictively. Some commentators have interpreted this decision as indicating that such rights may be little more than a qualification on the title of the Sovereign.

  However, there is a tension evident in the *Van der Peet* decision which interprets Indigenous rights in a restrictive manner and yet identifies the dynamic aspects of such rights. This appears to have been addressed in a subsequent and unreported decision of the Canadian Supreme Court (the *Delgamuukw* case) which suggested that the restrictive views of Indigenous property rights in the *van der Peet* decision was not correct. The court has apparently decided that Indigenes in Canada have not only a constitutional right to own their land but also to use them in a largely unrestricted manner.

- Both Australian and Canadian judgements have clear implications for legal interpretation of Indigenous property rights in Australia. Both jurisdictions have indicated that Indigenous rights are not frozen in time and can evolve.

- In Australia, in *Mason v. Tritton* (1994) a four point test was put forward as to the evidentiary burden to be satisfied such that Indigenous property rights could be established which includes continued and uninterrupted adherence to traditional laws and customs.

- If the amended *Native Title Act* does not respect the Constitution's 'just terms' provisions under s.51(xxxi) when treating the issue of compensation for the expropriation of Indigenous property rights, it will be a catalyst for protracted litigation.

- There is currently an impasse in existing case law, in that valuers are unable to give substantive consideration to sentimental, cultural and spiritual values when assessing the compensation due to a dispossessed holder of Indigenous property rights. It is our view that the courts will develop a new arm of land law specifically dealing with Indigenous property rights in order that s51(xxxi) of the Constitution can be respected.

- Nevertheless, in Australia, it appears that the conservative and incremental manner in which existing land law in Australia has developed will provide an irresistible framework for the development by the courts of a methodology for the valuation of native title.

CASES CITED

Amodu Tijani (1921) 2AC

Bilijabu v. The State of Western Australia (the challenge case) (1995) 128 ALR 1

Commissioner of Highways v. Tynan (1982) 53 LGRA 1

Delgamuukw case - <http://www.droitumontreal.ca/doc/csc-scc/en/rec/html/delgamuu.en.html>

Derschaw v. Sutton (1996) Western Australian Supreme Court, unreported

Dixon v. Davies (1982) 17 NTR 31

Eagle v. The Charing Cross Railway Company (1867) LR 2 CP 638

Hone te Anga v. Kawa Drainage Board (1914) 33 NZLR 1139

Jawoyn (Katherine Area) Land Claim (1985) Kearney J, Aboriginal Land Commissioner, AGPS, Canberra, at para. 132

Mabo v. the State of Queensland [No. 2] (1992) 175 CLR 1.

Mason v. Tritton (1994) 34 NSWLR 572

Milirrpum v. Nabalco Pty Ltd (1971) FLR 141

Napaluna v. Baker (1982) 29 SASR 192

Nelungaloo Pty Ltd v. Commonwealth (1948) 75 CLR 495

Newcrest Mining (WA) Ltd & or. v. The Commonwealth of Australia & or. High Court (unreported) FC 97/036 at 41)

Pareroultja v. Tickner (1993) 42 FCR 32

Pastoral Finance Association Ltd v. The Minister ("The Valuer" July 1933, Vol. 2, 269.)

R v Van der Peet (Unreported 1996 SCJ No. 77)

Raja Vyricherla Narayana Gajapatiraju v. The Revenue Divisional Officer, Vizagapatam (1939) AC 302 at 312. See also "The Valuer", April 1941 Vol. 6 331-335,338.

Russell v. Minister for Lands (1898) 16 NZLR 241),

Smale v. Takapuna Council (1932) NZLR 35

Toohey: Ex Parte Meneling Station Pty Ltd (1982) 57 ALJR 59

Waanyi People's Native Title Application (1995) 129 ALR 118

Waramungu Land Claim (1988) Maurice J, Aboriginal Land Commissioner, AGPS Canberra. at para 43.1.12

Western Australia v. the Commonwealth (1995) 183 CLR 373.

Western Australia and Roberta Vera Thomas & Ors and Austwhim Resources NL (NNTT Application WF96/3, at 96)

Wik Peoples v. State of Queensland and Others (1996) High Court unreported FC 96/044.

Wilson Bros Pty Ltd v. Commonwealth (1948) SASR 61

REFERENCES

Aboriginal and Torres Strait Islander Commission (ATSIC) (1996) *Proposed amendments to the Native Title Act 1993: Issues for Indigenous Peoples*, ATSIC, Canberra.

Addicott, G (1997) "Native Title - Where does *Wik* leave us?" *The Valuer and Land Economist*, (May) 34:6, pp. 538-541.

Arnold, J., Spearritt, P., and Walker, D (eds.) (1993) *Out of Empire: The British Dominion of Australia*, Mandarin, Port Melbourne.

Attorney-General's Department (1994*) Native Title: Legislation with Commentary by the Attorney-General's Legal Practice*, AGPS, Canberra.

Attwood, B (ed.) (1996) *In the Age of Mabo: History, Aborigines and Australia*, Allen & Unwin, Sydney.

Australian Law Reform Commission (ALRC) (1997) *Comments on the working draft of the Native Title Amendment Bill 1997,* (unpublished).

Australian Standard/New Zealand Standard (AS/NZS) Risk Management 4360, Australian Standards Association.

Bachelard, M (1997) *The Great Land Grab: What every Australian should know about Wik, Mabo and the Ten Point Plan*. Hyland House, Melbourne.

Boyd, T (1995) "The Valuation of Land of Indigenous People - New Zealand Experience", *Australian Land Economics Review* 1:2 pp. 9-15

Boyd, T (1997) *"The Conflict Between Market Behaviour and Valuation Theory of Partial Interests of Real Estate"* Paper presented to the 13th Annual A.R.E.A. Meeting, Sarasota, Florida, USA, 17th April.

Brennan, F (1996) Trust: the key to Mabo negotiation, *The Sydney Morning Herald*, 4 July, p. 13.

Brennan, F (1997) "*Wik and Beyond – The Coming Debate*" (Occasional Paper No. 102), Sydney: UNIYA Jesuit Social Justice Centre, September.

Brown, D (1991) *Land Acquisition*, 3rd ed. North Ryde: Butterworths.

Budrikis, K., (1997) Letter dated 14 May from Native Title Unit, Central Land Council, Alice Springs, to the authors.

Butt, P (1996) *Land Law*, 3rd Edition, The Law Book Company, Sydney.

Central Queensland Land Council Aboriginal Corporation (CQLC) (1997) *Planning Scheme Submissions Kit.* Central Queensland Land Council Aboriginal Corporation in conjunction with Hancock Rayne, Mackay. December.

CCH, (1997) "Managing environmental risk", *Directors Briefings* (Newsletter 8A, 12 September p.5-7).

Clark, G (1997) *"Valuation of Native Title Rights*". Paper presented to the 1997 AIVLE *Northern Exposure* North Queensland Conference, Ramada Great Barrier Reef Resort, Palm Cove, North Queensland, 26th July 1997.

Clarke, J (1997) "The Native Title Act Amendment Bill 1997." *Australian Indigenous Law Reporter* 4:6 (October) p.4-6.

Connolly, P (1995) *The Commonwealth Native Title Act 1993: A Critique,* in Stephenson (1995)

Cosgrove, L and Kliger B (1997) *Planning with a difference: A reflection on planning and decision making with Indigenous people in Broome, Western Australia*. Urban Policy and Research Vol. 15 No. 3, 211-217.

Davis, R (1998) Letters dated 15 January and 3 February 1998, from the Planner at the Central Queensland Land Council Aboriginal Corporation, Mackay.

Dodson, M (1996) *Native Title Report July 1995 - June 1996*, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission (HREOC), Sydney.

Dodson, M (1997) *Native Title Report July 1996 - June 1997*, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission (HREOC), Sydney.

Fischer, T (1998) *Native Title Made Easy*, Native Title Information paper by the Deputy Prime Minister, Minister for Trade and Leader of the National Party, Canberra.

Flannery, T (ed.) (1996) *1788 Comprising a Narrative of the Expedition to Botany Bay and a Complete Account of the Settlement at Port Jackson: Watkin Tench*, Text Publishing, Melbourne.

French, Justice R S (1997) *The National Native Title Tribunal's Experience: Promise, Pain and Progress*, in Horrigan and Young (1997)

Fox, R W, Kelleher G G and Kerr C B (1977) *Ranger Uranium Environmental Inquiry*, Second report, AGPS, Canberra.

Gal, D (1997) 'An overview of the *Wik* decision', *University of New South Wales Law Journal*, Vol. 3, No. 2, June. Forum - *Wik*: The Aftermath and Implications, pp. 8-10.

Gray, J (1997) "O Canada! - Van der Peet as Guidance on the Construction of Native Title Rights" *Australian Indigenous Law Reporter* 2:1, p.18-34.

Haines, K (1997) Letter dated 21 August 1997 from Senior Communications Officer, National Native Title Tribunal, Sydney to the authors.

Hallman, F M (1973) *Legal Aspects of Boundary Surveying as Apply in New South Wales*, Institution of Surveyors Australia, NSW Division, Sydney.

Head, L and Hughes, C (1996) *One land, which law? Fire in the Northern Territory*, in Howitt (eds.) (1996), pp. 278-288.

Herron, K (1997) *"Native Title – A Valuer's Perspective"* Roneo, Brisbane, Herron Todd White - Valuers, 15 July.

Hiley, G (ed.) (1997) *The Wik Case: Issues and Implications*, Butterworths, Sydney.

Hillier, J (1993) To boldly go where no planners have ever. *Environment and Planning D: Society and Space,* Vol. 11 pp. 80-113, cited in Jackson (1997a).

Hindmarsh Island Bridge Royal Commission (1995) *Report of the Hindmarsh Island Bridge Royal Commission*, State Print, Adelaide.

Horrigan, B (1997a) *Native Title Overview: Commercial Dimensions and Ongoing Developments*, and *The Legal, Political and Commercial Implications of the High Court's Wik Decision - The Way Ahead*, in Horrigan and Young (1997).

Horrigan, B (1997b) "*Native Title Issues: Legislative Reform and Current Issues"* Paper presented to 14th Annual Banking Law and Practice Conference, The Banking Law Association, Wentworth Hotel, Sydney, 23 May 1997.

Horrigan, B and Young, S (eds.) (1997) *Commercial Implications of Native Title*, The Federation Press, Sydney, in conjunction with The Centre for Commercial Property Law, Queensland University of Technology, Brisbane.

Howitt, R with Connell, J and Hirsch, P (eds.) (1996) *Resources, Nations and Indigenous Peoples: Case studies from Australasia, Melanesia and Southeast Asia*. Oxford University Press, Melbourne.

Hughes, C (1995) *Fire Management in the Northern Territory post-Mabo: the legal basis for Aboriginal burning*, in Rose (ed.) (1995).

Human Rights and Equal Opportunity Commission (HREOC) (1997a) *The RDA and Native Title, The Implications of Statutory Extinguishment, Some Questions and Answers*, HREOC, Sydney.

Human Rights and Equal Opportunity Commission (HREOC) (1997b) *BRINGING THEM HOME: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* HREOC, Sydney.

Hyam, A (1995) *The Law Affecting Valuation of Land in Australia*, The Law Book Co. Ltd., 2nd ed. Sydney.

Hyam, A (1997) *"Valuation of Native Title Lands"* Paper presented to Native Title Workshop AIVLE, Sydney, 22nd May.

Jackson, S (1996) *When History meets the new native title era at the negotiating table: A case study in reconciling land use in Broome, Western Australia*. A Discussion Paper. The North Australia Research Unit, ANU, Darwin.

Jackson, S (1997a) *A Disturbing Story: The fiction of rationality in land use planning in Aboriginal Australia*, Australian Planner Vol. 34 No. 4. Royal Australian Planning Institute, Melbourne.

Jackson, S (1997b) *Land Use Planning and Cultural Difference*, in Rose D and Clark A, *Teaching Knowledge in North Australian Landscapes, North Australia Research Unit,* (Forthcoming).

Johnson, T (1996) 'Judicial System Outdated', *Land Rights Queensland*, Issue 1, February - March, p.5.

Keating, the Hon P(1993) *Second Reading Speech, Native Title Bill 1993*, House of Representatives, *Parliamentary Hansard*, 16 November 1993 pp. 2877-83. reproduced in Attorney-General's Department (1994).

Lane, P and McRae, T (1997) *Native Title and Regional Development: Reinventing Old Relationships,* Paper presented to 'Native Title Mediation Awareness Workshop', 3-4 December, Brisbane, Hosted by the National Native Title Tribunal, the Law Council of Australia, and the Queensland Law Society Inc.

Lavarch, the Hon M (1997) "*Compensation for Ancient Rights"* Paper presented to the 'Working with the Native Title Act 1993: The Political and Commercial Realities' AIC Conference, Brisbane, 17 June.

Law Reform Commission, The (1980) *Lands Acquisition and Compensation*, Report No. 14, AGPS, Canberra.

Lofgren, N and Kilduff, P (1997) "Some just terms implications for native title" *Native Title News* (Butterworths) 3:5, October, pp. 66-67.

Mallacoota & District Historical Society (1980) *Mallacoota Memories*, The Society, Mallacoota.

McRae, T (1997) Letter dated 22 August from Director, Research and Information, National Native Title Tribunal, Perth, to the authors.

Meyers, G D (1996a) *Implementing the Native Title Act: First steps; small steps - Selected Discussion Papers of the NNTT 1994-1995*, NNTT, Perth.

Meyers, G D (1996b) *The Way Forward: Collaboration and Cooperation 'in country'*, Second Edition, Proceedings of the Indigenous Land Use Agreements Conference 26-29 September 1995, Darwin.

Meyers, G D (1996c) *Implementing the Native Title Act - The Next Step: Facilitating negotiated agreements*, Selected discussion papers of the NNTT 1996, NNTT, Perth.

Minchin, Senator The Hon (1997*) The Federal Government's Response to the Wik Decision: The Ten Point Plan*, Canberra, 4 June.

Minchin, Senator the Hon (1998) *Fairness and Balance: The Howard Government's response to the High Court's Wik decision. An overview of Native Title and the Commonwealth's Native Title Amendment Bill 1997*, Prepared and authorised by Senator the Hon Nick Minchin, Special Minister of State, Canberra.

Minister for Aboriginal and Torres Strait Islander Affairs (1995) *Aboriginal and Torres Strait Islander Fund: An act of good faith*, AGPS, Canberra.

Mirimbiak Nations Aboriginal Corporation (1998) personal communications with the authors.

Muir, K (1998) *This Earth has an Aboriginal Culture Inside*, Paper delivered to a workshop entitled 'Compensation for Native Title: Anthropological Issues and Challenges, convened by CAEPR, NTRU of AIATSIS, the Archaeology and Anthropology Department of the ANU on behalf of the Australian Anthropology Society, Canberra, 19-20 February.

National Farmers Federation (NFF) (1997) *Native Title Post-Wik - NFF Proposal*, and other Media Releases, NFF Canberra.

Neate, G (1997) *"Compensation for Native Title: Some Legal Issues"* Paper presented at "Compensation for Native Title: Issues and Challenges" workshops, National Native Title Tribunal and AIVLE, Perth 15 August and Brisbane 18 August.

Nicholls, C (1996) 'Misrepresenting Hindmarsh', *Arena Magazine*, December 1995 - January p. 26.

Office of Indigenous Affairs, The (1996) *Towards a more workable Native Title Act: An outline of proposed amendments*, Department of Prime Minister and Cabinet, Canberra. May.

Orr, G (1997) "Damages for loss of cultural fulfilment in indigenous community life", *Indigenous Law Bulletin* 4:6 October, p.17-19.

Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (1997) *The Native Title Amendment Bill 1997, Tenth Report*, Parliament of the Commonwealth of Australia, Parliament House, Canberra. October.

Report of Committee of Inquiry Presented to the Premier of Victoria (1978) *Town Planning Compensation,* Government Printer, Melbourne, March.

Resource Assessment Commission (1991*) Kakadu Conservation Zone Inquiry: Final Report*, Vols. 1-2, AGPS, Canberra.

Reynolds, H (1996a*) 'Pastoral leases in their historical context'* Aboriginal Law Bulletin 9, Vol. 3, 81, June.

Reynolds, H (1996b) *'Native Title and Historical Tradition: Past and Present'*, in Attwood (ed.) (1996)

Reynolds, H (1996c) 'Why Native Title should stand', *The Weekend Australian*, 18 May, p22.

Rose, D B (1995) *Country in Flames: Proceedings of the 1994 symposium on biodiversity and fire in North Australia.* Biodiversity Series, Paper No. 3 Biodiversity Unit, Department of Environment, Sport and Territories, Canberra, and the North Australia Research Unit ANU, Darwin.

Rose D and Clark A (1997) *Tracking Knowledge in North Australian Landscapes*, The North Australia Research Unit, ANU, Darwin. *Forthcoming.*

Ross, A and Coghill, S (n.d.*) Stewardship: Aboriginal spirituality and bible compared*. Unpublished manuscript.

Ross, D (1996) 'ILC offers chance to reclaim heritage', *Land Rights Queensland*, Issue 1, February-March, p9.

Royal Australian Planning Institute (RAPI) (1995) *Education Accreditation Policy*, RAPI, Melbourne.

Royal Australian Planning Institute (RAPI) (1997) *Code of Professional Conduct*, Provisional: operating in conjunction with existing Code from 24 October 1997 to June 1998, RAPI, Melbourne.

Royal Australian Planning Institute (RAPI) and Australian Institute of Valuers and Land Economists (AIVLE) (1997) *Native Title: Background Paper*, RAPI Melbourne, AIVLE, Canberra.

Senate Legal and Constitutional Legislation Committee (1997) *Constitutional Aspects of the Native Title Amendment Bill 1997*, Consideration of Legislation Referred to the Committee. The Senate, Parliament House, Canberra. November.

Sheehan, J (1984) "Towards a New Theory of Planning Compensation" *The Valuer*, Vol. 28, April, p111.

Sheehan, J (1996a) 'Custom and Native Title: An unclear relationship with existing land use controls', *The Valuer and land Economist*, Vol. 34. No. 1, February, p.11-13.

Sheehan, J (1996b) Mabo: A Historical Perspective', *The Valuer and Land Economist*, Vol. 34, No. 1, February, p.14-17.

Sheehan, J (1996c) *Leasehold Interests and Native Title*, An address to Sydney Seniors Discussion Group of the AIVLE, NSW Division, 5 June.

Sheehan, J (1997a) *Native Title and Statutory Estates: The economic consequences of the Wik decision.* (This paper draws on Sheehan 1996c and partly on a joint paper with graduate researcher, Torn Playford, and was presented to the *Wik* Summit in Cairns 22-23 January 1997. It has since been re-worked with Ed Wensing and appears as Chapter 3 in this paper.)

Sheehan, J (1997b) "Native Title in Australia" *Australian Land Economics Review* 3:1 pp. 3-7.

Small, G R (1997) "A Cross Cultural Economic Analysis of Customary and Western Land Tenure", *The Valuer and Land Economist* 34:7, August, pp. 617-625.

Smith, D (1997*) From humbug to good faith? The politics of negotiating the right to negotiate*, in Smith and Finlayson (1997)

Smith, D and Finlayson J (eds.) (1997) *Fighting Over Country: Anthropological Perspectives*, Centre for Aboriginal Economic Policy and Research, Australian National University, Canberra, Research Monograph No. 12.

Smith P A (1997) *Pastoral Leases and Native Title*, in Hiley (1997)

Spearritt, P (1993) *'The British Dominion of Australia'* in Arnold, J (et al) (eds.) (1993).

Stephenson, M (1995a) *Pastoral Leases and Reservation Clauses*, in Stephenson (ed.) (1995b).

Stephenson, M (ed.) (1995b) *Mabo: The Native Title Legislation*, University of Queensland Press, St Lucia, Brisbane.

Sydney Morning Herald, The (1997) 'Losing on Points'. p. 41.

Tehan, M (1997) *Co-existence of Interests in Land: A Dominant feature in Common Law*. Land, Rights, Laws: Issues of Native Title, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Issues Paper No. 12, January, Canberra.

Throgmorton, J A (1992) 'Planning as persuasive storytelling about the future: negotiating an electric power rate settlement in Illinois', *Journal of Planning Education and Research* Vol. 12, pp. 17-31.

Wensing, E and Sheehan, J (1997) *Native Title: Implications for Land Management*. Discussion Paper No. 11, The Australia Institute, Canberra, April.

Whipple, R T M (1997) 'Assessing Compensation under the provisions of the Native Title Act 1993' *Native Title News (*Butterworths) 3:3, pp. 30-34.

Young, D (1997a) 'Wik: Implications for Statutory Lessees' *University of New South Wales Law Journal* Vol. 3 No. 2, June. Forum - *Wik*: The Aftermath and Implications, pp. 12-14.

Young, D (1997b) '*Compensation for Native Title: Issues and Challenges'*, Paper presented at 'Compensation for Native Title: Issues and Challenges' workshop, National Native Title Tribunal and AIVLE, Brisbane 18 August.

Discussion papers available from the Australia Institute

Number

1. Michael Kirby, *Trash Fights Back*, with Max Neutze, Chair's address. Speeches at the public launch of The Australia Institute, 4 May 1994.
2. John Quiggin, *Does Privatisation Pay?* September 1994.
3. George Wilkenfeld, Clive Hamilton and Hugh Saddler, *Australia's Greenhouse Strategy: Can the future be rescued?* February 1995.
4. Clive Hamilton and John Quiggin, *The Privatisation of CSL,* June 1995.
5. John Dargavel, Pat O'Shaughnessy and Clive Hamilton, *Logging and Water: A study of the effects of logging regimes on water catchment hydrology and soil stability on the eastern seaboard of Australia*, November 1995.
6. The Australia Institute, *Citizens in the Marketplace: The implications of competition policy for citizenship*, Papers from a conference held at the Australian National University, 4 December 1995, March 1996.
7. Jamieson House Employment Group, *Redistributing Work: Solutions to the paradox of overwork and unemployment in Australia*, June 1996.
8. The Australia Institute, *What Should Government Do? Auditing the Audit Report*, Papers from a conference held at the Australian National University, July 1996
9. Clive Hamilton, *Mining in Kakadu: Lessons from Coronation Hill* July 1996
10. Clive Hamilton, Tor Hundloe, and John Quiggin, *Ecological Tax Reform in Australia: Using taxes and public spending to protect the environment without hurting the economy* April 1997
11. Ed Wensing and John Sheehan, *Native Title: Implications for land management* April 1997
12. Clive Hamilton and Hugh Saddler, *The Genuine Progress Indicator for Australia* (summary version) July 1997
13. Tor Hundloe and Clive Hamilton, *Koalas and Tourism: An economic evaluation* July 1997
14. Clive Hamilton and Hugh Saddler, *The Genuine Progress Indicator: A new index of changes in well-being for Australia* October 1997
15. Clive Hamilton and John Quiggin, *Economic Analysis of Greenhouse Policy: A layperson's guide to the perils of economic modelling* December 1997
16. Julie Smith, *Gambling Taxation in Australia* March 1998
17. John Sheehan and Ed Wensing, *Indigenous Property Rights: New developments for planning and valuation* March 1998