National Native Title Tribunal

Native title in the Northern Territory: some current issues

by Graeme Neate, President, 16 November 2006

Seminar session 3

Mineral and uranium resource issues, and future ownership and management of Commonwealth National Parks and Marine Protection Areas in the Northern Territory

Presentation to the seminar on 'Federal implications of statehood for the Northern Territory' convened by the House of Representatives Standing Committee on Legal and Constitutional Affairs - Darwin

1. Introduction

On behalf of the National Native Title Tribunal, I welcome the opportunity to participate in and contribute to this seminar convened by the House of Representatives Standing Committee on Legal and Constitutional Affairs, and thank the Chairman, the Hon Peter Slipper MP, for his kind invitation to address the Committee.

I have prepared a brief paper to which I will speak in this session.

It should come as no surprise that the paper addresses some of the key issues from the perspective of native title law and practice as it has developed since the decision of the High Court of Australia in *Mabo v Queensland (No 2)*[1] and more substantially since the enactment and subsequent amendment of the *Native Title Act 1993* (Cwlth) (the Act).

In particular, the paper:

- outlines some key points about native title as they currently apply to the Northern Territory and would apply if the Northern Territory becomes a state;
- outlines some of the implications of native title law and practice for exploration and mining in the Northern Territory; and
- describes Indigenous land use agreements (ILUAs) negotiated under the Native Title Act in relation to some national parks in the Northern Territory, and suggests how that agreement-making process might have implications for other agreements, including agreement about statehood for the Northern Territory.

2. Some key points about native title

Issues about Aboriginal land loom large in the debate about possible statehood for the Northern Territory. Not surprisingly, much of the discussion concerns the future operation of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (the Land Rights Act), including whether it would be patriated to the new state and what would happen in relation to land and associated rights granted under that Act.

Aboriginal leaders have expressed their concerns and articulated their aspirations in relation to this issue in various public statements. The Kalkaringi Statement of August 1998, for example, contains statements about Aboriginal land rights to the effect that:

- the Land Rights Act must remain Commonwealth legislation administered by the Commonwealth
- the rights of Aboriginal peoples in relation to land must be respected and accorded constitutional protection
- the rights of Aboriginal peoples as owners of national park land must be recognised by the implementation of cooperative management structures that give them effective control

[1] (1992) 175 CLR 1

- common law and statutory rights (including those in the Land Rights Act), as well as those recognised or negotiated in current years, must be recognised and afforded constitutional protection.

The Final Report of the Northern Territory Statehood Working Group published in May 1996 stated that the options in relation to the Land Rights Act included:

- the patriation of the Land Rights Act to the Northern Territory with some form of constitutional entrenchment to protect key provisions; or
- the status quo be continued, i.e. the Commonwealth retains jurisdiction over the Land Rights Act.[2]

Not surprisingly, neither document referred to native title. Three years ago, however, Mr Galarrwuy Yunupingu has argued that the Northern Territory is 'the ideal place for new approaches to governance and decision-making' because the Territory has had 'the extraordinary benefit of nearly 30 years of recognition' of Aboriginal law, particularly through the Land Rights Act. Moreover 'about 30% of the population is Aboriginal, native title coexists in Alice Springs, and it can be expected that native title will also coexist in other towns, on pastoral leases and offshore.' In his assessment, in the Territory, Aboriginal people and their 'traditional land and sea rights are here to stay'.[3]

The submission made to this Committee by the Northern Territory Statehood Steering Committee, while noting the 'long history of discussion about which jurisdiction should exercise legislative power over Aboriginal land currently administered under' the Land Rights Act and listing the various options that have been suggested in the past, also states that 'things have moved on in the past 14 years, with the commencement of the *Native Title Act* which has a national application'.[4]

Native title is assuming increasing significance in the Territory. Since 2000 there have been seven determinations that native title exists over areas of land in the Northern Territory, including determinations over areas of land in Alice Springs[5] (2000), the St Vidgeon's (Roper River) area[6] (2000), Urapunga (near the Roper River)[7] (2002), in the north-west of the Territory as part of the Miriuwung-Gajerrong claim[8] (2003), in the Davenport/Murchison area in the region of Tennant Creek[9] (2004-2005), Blue Mud Bay[10] (2005) and Timber Creek[11] (2006).

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[2] Northern Territory Statehood Working Group, *Final Report*, May 1996, para 21.

[3] G Yunupingu, 'Land Rights, the Northern Territory and "development" into the 21st Century', 18 July 2003.

[4] Northern Territory Statehood Steering Committee, *Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs' Inquiry into the Federal Implications of Northern Territory Statehood*, 8 September 2006, p 21.

[5] *Hayes v Northern Territory of Australia* [2000] FCA 671

[6] *Wandarang, Alawa, Marra and Ngalakan Peoples v Northern Territory of Australia* [2004] FCAFC 187.

[7] *Ngalakan People v Northern Territory of Australia*, FCA 7 February 2002; see (2001) 112 FCR 148, 186 ALR 124.

[8] *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283.

[9] *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; 220 ALR 431

[10] *Gawirrin Gumana v Northern Territory of Australia (No 2)* [2005] FCA 1425

[11] *Griffith v Northern Territory of Australia (No 2)* [2006] FCA 1155.

Generally speaking, native title claims and determinations do not cover areas of Aboriginal land under the Land Rights Act. The Blue Mud Bay claim, however, covered land granted to the Arnhem Land Aboriginal Land Trust under that Act[12]

There has been a determination that native title exists over the sea and seabed surrounding Croker Island.[13] There has been a determination that native title does not exist over land in Darwin,[14] although that decision is currently subject to appeal to a Full Court of the Federal Court.

Determinations that native title exists cover an area of approximately 12,800 square kilometres or less than one percent of the Northern Territory.[15]

Significantly, at 10 November 2006 there were 185 unresolved native title determination applications (or claimant applications) in the Northern Territory. That is the highest number of claimant applications in any jurisdiction in Australia[16] and constitutes more than one third of the national total of 542.

Accordingly, native title is highly relevant to the debate about Aboriginal land issues in the Northern Territory.

For present purposes, it is appropriate to highlight some of the distinguishing features of native title.

Native title is different from land rights. Unlike land rights, native title is not a creature of statute. Nor is it a creature of the common law. Rather, the High Court has stated:

> 'Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law. There is, therefore, an intersection of traditional laws and customs with the common law.'[17]

Native title is recognised and protected by an overarching scheme in Commonwealth legislation. The Australian Parliament enacted the *Native Title Act 1993*, which commenced to operate on 1 January 1994.

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[12] Native title claims could be made to land which has been granted under the Land Rights Act. The effect of s 47A of the Native Title Act would be that any extinguishing effect of a prior grant would be disregarded for the purpose of recognising native title.

[13] See *Yarmirr v Northern Territory of Australia,* FCA 4 September 1998; see (1998) 82 FCR 533, 156 ALR 370; *Commonwealth v Yarmirr* (2001) 208 CLR 1.

[14] *Risk v Northern Territory of Australia* [2006] FCA 404.

[15] That area includes the Croker Island and Blue Mud Bay #2 determinations (portion seaward of the High Water Mark).

[16] By comparison, on 10 November 2006 there were 162 current claims in Queensland, 117 in Western Australia, 38 in New South Wales, 22 in South Australia, 17 in Victoria and one in the Australian Capital Territory.

[17] *Fejo v Northern Territory* (1998) 195 CLR 96 at [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

The Act includes an extensive preamble setting out 'considerations taken into account by the Parliament of Australia in enacting the law'. The preamble recites various historical and social factors, and describes matters that needed to be covered by and balanced in the legislative scheme. The 'main objects' of the Act[18] capture those policy objectives in the following terms:

- to provide for the recognition and protection of native title;[19]
- to establish ways in which future dealings affecting native title may proceed and to set standards for those dealing;
- to establish a mechanism for determining claims to native title;
- to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.

Native title exists over some areas not covered by the Land Rights Act. The areas of land over which native title might exist are not circumscribed in the same way as land that may be claimed is circumscribed by reference to certain categories of land under the Land Rights Act.[20] Rather, native title rights and interests survive and can be recognised by the general law over areas of land and waters where:

- as a matter of fact, Aboriginal people have retained the requisite level of traditional connection to those areas and satisfy other statutory criteria;[21] and
- as a matter of law, those rights and interests have not been extinguished by acts which, according to the general law, prevent legal recognition being accorded to those rights and interests.

The High Court has noted that:

> 'The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title.'[22]

Part 7 of Schedule 1 to the Native Title Act lists categories of leases in the Northern Territory[23] which, according to the Act,[24] have extinguished native title. Native title could exist in relation to other areas of the Northern Territory.

Consequently, native title can exist (and has been found to exist) over areas to which the Land Rights Act does not apply, including land in towns[25] and pastoral lease land.[26] In that

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[18] *Native Title Act 1993* s 3.

[19] See also *Native Title Act 1993* ss 4(1), 10.

[20] Traditional land claims can be made to 'unalienated Crown land' or 'alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals': see *Aboriginal Land Rights (Northern Territory Act 1976* s 50 and s 3 (Interpretation).

[21] See *Native Title Act 1993* s 223.

[22] *Fejo v Northern Territory* (1998) 195 CLR 96 at [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

[23] The categories of leases include town leases, agricultural leases, leases for special purposes, miscellaneous leases and various other identified leases.

[24] See *Native Title Act 1993* ss 23B, 23C, 23E and *Validation (Native Title) Act 1994* (NT) s 3A.

geographic sense, the Land Rights Act and the Native Title Act operate along side each other. To the extent that they do overlap, the Native Title Act provides that nothing in that Act 'affects the rights or interests of any person under' the Land Rights Act.[27]

The Native Title Act has federal features. Although it was enacted by the Australian Parliament, the Native Title Act is, among other things, expressed to be part of the Federal scheme.

First, it is binding on the Crown in right of the Commonwealth, of each of the states, of the Australian Capital Territory, of the Northern Territory and of Norfolk Island.[28]

Despite the political controversy surrounding the passage of the Act, and a state challenge to it, the High Court of Australia held that the legislation was constitutionally valid. In rejecting the challenge, the High Court clearly decided that the 'race' power in the Constitution[29] can be relied on by the Federal Parliament to support native title legislation.[30] It held that the Native Title Act is 'special' in that 'it confers uniquely on the Aboriginal and Torres Strait Islander holders of native title (the 'people of any race') a benefit protective of their native title'. Whether it was 'necessary' to enact that law was a matter for the Parliament.[31] The power supports a law which protects native title from extinguishment or impairment and which requires compensation to be paid where native title is extinguished.[32]

Second, the Native Title Act 'is not intended to affect the operation of any law of a State or Territory that is capable of operating concurrently with this Act'.[33] As a corollary, Northern Territory legislation operates over land where native title exists. Various Northern Territory Acts refer to the Native Title Act,[34] including to adopt definitions of terms in the Native Title Act or to express that the Northern Territory legislation is subject to that Act. Those Acts and other Northern Territory legislation[35] use expressions such as 'native title' and 'native

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[25] See *Hayes v Northern Territory* [2000] FCA 671 (Alice Springs), *Griffith v Northern Territory (No 2)* [2006] FCA 1155 (Timber Creek).

[26] See e.g. *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; 220 ALR 431.

[27] *Native Title Act 1993* s 210(c).

[28] *Native Title Act 1993* s 6.

[29] Section 51(xxvi) of the Constitution states that the Federal Parliament has power to make laws with respect to 'The people of any race, for whom it is deemed necessary to make special laws'.

[30] *Western Australia v Commonwealth* (1994-1995) 183 CLR 373.

[31] *Western Australia v Commonwealth* (1994-1995) 183 CLR 373 at 462 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

[32] *Western Australia v Commonwealth* (1994-1995) 183 CLR 373 at 468-9, 475-6, 478, 481-2 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

[33] *Native Title Act 1993* s 8. The same terminology is used in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 73 (Reciprocal legislation of the Northern Territory) and s 74 (Application of laws of Northern Territory to Aboriginal land).

[34] *Validation (Native Title) Act* ss 3, 13; *Mining Act* s 4; *Petroleum Act* s 5; *Lands Acquisition Act* ss 4, 39, *Petroleum (Submerged Lands) Act* s 4; *Lands, Planning and Mining Tribunal Act* s 3; *Pastoral Land Act* s 72A; *Energy Pipelines Act* s 3; *Soil Conservation and Land Utilization Act* s 3; *Electricity Reform Act* s 57; *Territory Parks and Wildlife Conservation Act* ss 12, 122; *Merlin Project Agreement Ratification Act* Schedule; *Water Supply and Sewerage Services Act* s 4; *Parks and Reserves (Framework for the Future) Act* s 4; *Tanami Exploration Agreement Ratification Act 2004* Schedule.

[35] E.g. *Australasia Railway (Special Provisions) Act, Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Parks Act.*

title rights and interests', 'approved determination of native title' and 'alternative provision area' used in the Native Title Act.

Third, the Native Title Act contemplates complementary legislation by state and territories. For example, a state or territory:

- can make laws validating 'past acts' or 'intermediate period acts' attributable to it, and native title holders may recover compensation from it for such acts;[36]
- can make laws in respect of all or any 'previous exclusive possession acts' and 'non-exclusive possession acts' attributable to it, and is liable to pay compensation in relation to such acts;[37]
- can by law confer functions on a representative body.[38]

Among the subjects for possible legislation, the Act expressly permits a law of a state or territory to confirm:

- any existing ownership of natural resources by the Crown;
- any existing right of the Crown in that capacity to use, control and regulate he flow of water;
- that any existing fishing access rights prevail over any other public or private fishing rights; or
- any existing public access to and enjoyment of waterways, beds and banks or foreshores of waterways, coastal waters, beaches, stock routes, or areas that were public places at the end of 31 December 1993.[39]

The Northern Territory has enacted legislation consistently with some provisions of the Native Title Act.[40]

Numerous other provisions of the Native Title Act apply equally to states and territories. For example, a state or a territory:

- can be a party to an ILUA negotiated under the Native Title Act, and must be a party to certain types of ILUA;[41]
- is entitled to notice of certain matters under the Act;[42]
- is entitled, through the relevant state or territory minister, to be a party to proceedings before the Federal Court in relation to native title applications over areas within the jurisdictional limits of the state or territory;[43]

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[36] *Native Title Act 1993* ss 19, 20, 21, 22F, 22G, 22H.
[37] *Native Title Act 1993* ss 23E, 23I, 23J(3), 23JA, see also s 61A(2) and (3).
[38] *Native Title Act 1993* ss 201A, 203B(2), 203FF(1).
[39] *Native Title Act 1993* s 212.
[40] See *Validation (Native Title) Act 1994.*
[41] *Native Title Act 1993* ss 24BD(2), 24CD(5), 24DE(3), 24EBA.
[42] *Native Title Act 1993* ss 24BH(1)(a)(ii), 24CH(1)(a)(ii), 24DI(1)(a)(ii), 66(2), 199, 199B(3).
[43] *Native Title Act 1993* s 84(4).

- may enter a written agreement with the Commonwealth for financial assistance in relation to a range of native title matters, including the satisfaction of any liability to pay compensation for acts affecting native title, the cost of establishing and administering a 'recognised State/Territory body' or 'equivalent body', or the costs of administering alternative state or territory provisions.[44]

A state or territory minister may nominate a court, office, tribunal or body established by or under a law of the state or territory for the Commonwealth minister to determine that it is a 'recognised State/territory body' under the Native Title Act. To ensure that there is a nationally consistent approach to the recognition and protection of native title, the Commonwealth minister must not make the determination unless he or she is satisfied that various criteria under the Native Title Act are met in relation to the procedures, resources, and functions of the body.[45]

Where a state or territory establishes a recognised State/Territory body, that body can register claimant applications by reference to conditions equivalent to relevant sections of the Native Title Act,[46] notify claimant applications,[47] make approved determinations of native title,[48] be an arbitral body in relation to certain acts,[49] and exercise delegated powers of the Native Title Registrar.[50]

Similarly, a state or territory may nominate one of more offices, tribunals or bodies established under a law or the state or territory to be an 'equivalent body' to perform specified functions or exercising specified powers to the National Native Title Tribunal or the Native Title Registrar.[51]

To date, the Northern Territory has not sought recognition of a 'recognised state/territory body' or an 'equivalent body' for the purpose of exercising that broad range of functions and powers. Nor has any state other than South Australia.

Few provisions of the Native Title Act apply specifically or exclusively to the Northern Territory. Those that do are special provisions in relation to the effect on native title of certain mining and exploration tenements at the McArthur River project,[52] the implications of the Act for the rights or interests of people under the Land Rights Act,[53] the definition of a what constitutes a particular area in a 'town or city' in the Northern Territory,[54] the jurisdictional limits of the Northern Territory,[55] what land or waters in the Northern

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[44] *Native Title Act 1993* s 200.
[45] *Native Title Act 1993* s 207A.
[46] *Native Title Act 1993* ss 24CL(2)(b), 24FE(b), 207A(2)(ab) and (b).
[47] *Native Title Act 1993* ss 24FB(c), 24FC(d), 207A(2)(b).
[48] *Native Title Act 1993* ss 13(3) and (4), 24FB(a), 24FC(a), 193(2)(iv), 207A(2)(a)(i).
[49] *Native Title Act 1993* ss 27(1), 43(2)(h), see also ss 27A(2), 36A, 42.
[50] *Native Title Act 1993* ss 191, 198, see also s 199F.
[51] *Native Title Act 1993* s 207B, see also s 200.
[52] *Native Title Act 1993* s 46.
[53] *Native Title Act 1993* s 210(c).
[54] *Native Title Act 1993* s 251C(3).
[55] *Native Title Act 1993* s 253 'jurisdictional limits'.

Territory comprise 'Aboriginal/Torres Strait Islander land or waters',[56] and what are the scheduled interests that have extinguished native title in the Northern Territory.[57]

3. Native title and mining

The Native Title Act directly affects the grant of exploration and mining tenements in parts of the Northern Territory in relation to those areas where native title exists or might exist. It should be noted, however, that, even if native title is recognised over areas of Aboriginal land under the Land Rights Act, the future act regime of the Native Title Act would not apply to that land because the definition of 'future act' excludes acts affecting Aboriginal/Torres Strait Islander land or waters.[58]

In summary, the future act scheme sets out[59] the steps to be taken to:

- notify native title holders about the proposed grant of an exploration or mining tenement;
- notify people whether the expedited procedure is said to apply to the proposed grant of exploration tenements;
- object to the expedited procedure and activate the arbitral proceeding to determine whether the expedited procedure applies;
- negotiate an agreement about the grant of the exploration or mining tenement;
- ask the National Native Title Tribunal to mediate between the parties to assist in obtaining their agreements to the doing of the future act and any conditions to be complied with by any of the parties;
- ask the Tribunal to arbitrate and determine whether the future act must not be done or that the act may be done (possibly subject to conditions to be complied with by any of the parties).

Furthermore, any such future act that is done contrary to the scheme of the Act is invalid to the extent that it affects native title.[60]

In that respect, the Northern Territory is not treated differently from a state.

Of some historical (if not potential future) significance to the Northern Territory, the Act allows a law of a state or territory to provide for alternative provisions to those contained in Subdivision P of Part 2 Division 3 of the Act,[61] i.e. the provisions of the Native Title Act dealing with the right to negotiate in relation to certain future acts done by the Northern Territory including the conferral of mining rights. To have effect, the relevant Commonwealth Minister (currently the Attorney-General) would have to be satisfied that the alternative provisions meet the minimum requirements of the Native Title Act. If the

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[56] *Native Title Act 1993* s 253 'Aboriginal/Torres Strait Islander land or waters'.

[57] *Native Title Act 1993* Schedule 1 Part 7.

[58] *Native Title Act 1993* s 233(3)(b).

[59] *Native Title Act 1993* ss 25-42.

[60] *Native Title Act 1993* s 24AA(2), 24OA, 25(4), 28(1).

[61] *Native Title Act 1993* ss 43, 43A.

Commonwealth Minister determines in writing that the alternative provisions comply with those requirements then, while the determination is in force, the alternative provisions have effect instead of Subdivision P.[62] Such a determination is a disallowable instrument for the purposes of s 46A of the *Acts Interpretation Act 1901* (Cwlth).[63] The same scheme applies to a state.

In 1998 the Northern Territory Government legislated for an alternative provisions scheme. The Federal Attorney-General subsequently determined that the legislation complied with the requirements of the Act. On 31 August 1999 the Senate voted to disallow each of the three determinations made by the Attorney-General. Consequently, those alternative provisions could not operate. On 22 March 2000 the Northern Territory Minister for Resource Development issued a statement announcing that more than 1,000 exploration and mining tenure applications would be processed under the Native Title Act. All the applications were over areas of pastoral lease land. The Minister said that the Territory Government believed that its proposed alternative provisions were fair and equitable to all parties and would have provided a far better administrative process. The Government, however, was 'prepared to work closely and in good faith with the Land Councils to facilitate the grant of these titles under the Commonwealth scheme', the Minister said.[64]

The first notices were published under s 29 of the Native Title Act on 6 September 2000. In the period to 30 June 2001, notices were published fortnightly in relation to a total of 339 applications. Those tenure applications were made in relation to land where there were generally no native title applications. Thus, in most cases, Aboriginal people who wished to object to the expedited procedure being applied, or to obtain the right to negotiate under the Act, had to lodge claimant applications over those areas. The applications were assessed in accordance with the registration test conditions, then the public and persons whose interests might be affected by each application had to be notified.

As at 30 June 2001, 45 claimant applications had been lodged with the Federal Court in response to the notices that were published since 6 September 2000. Different approaches were adopted in the areas of the Northern Land Council and the Central Land Council. Of the 45 claimant applications, 44 were made in relation to land in the Northern Land Council region. By 30 June 2001, there were 129 claimant applications in the Northern territory, or 11.2 per cent of the national total. This includes an increase of 60 applications from the previous financial year.[65]

By 2002-2003, after a period of intense activity (including numerous future act determinations by the National Native Title Tribunal), the backlog of Northern Territory exploration and other mining applications that existed at 1 July 2000 had effectively been cleared, and the rate of notices published by the Northern Territory Government had dropped.[66]

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[62] *Native Title Act 1993* ss 43(1), 43A(1).

[63] *Native Title Act 1993* s 214.

[64] National Native Title Tribunal, *Annual Report 1999-2000*, pp 11-12.

[65] National Native Title Tribunal, *Annual Report 2000-2001*, p 13.

[66] National Native Title Tribunal, *Annual Report 2002-2003*, p81; see also *Annual Report 2003-2004*, p 74; *Annual Report 2004-2005*, pp72, 73, 75, 76, 80.

As noted earlier, there are currently about 185 unresolved native title claims in the Northern Territory. About half of those claims were lodged in response to s 29 notices in relation to mining and were made, initially at least, to secure the right to negotiate under the Native Title Act. Many of the applications over pastoral estate land have been made based on mining tenement boundaries, but cover large areas and in some cases almost an entire pastoral lease. The claimants' representatives have consistently indicated that they intend to prosecute these applications through to determination by clustering claims within certain geographical areas.

4. Native title and national parks

Much of the debate about national parks and statehood for the Northern Territory concerns options for the future of the two national parks that are currently administered by the Commonwealth, Kakadu and Uluru-Kata Tjuta National Parks.[67] Leasing arrangements are currently in place between the traditional Aboriginal owners and the Commonwealth to allow the land to be operated as national parks.

This paper does not deal with those national parks, but highlights some recent successful negotiations in relation to certain Northern Territory parks which have resolved native title issues and which may provide some guidance about negotiating other agreements, including in relation to possible statehood for the Northern Territory.

The judgment of the High Court in *Western Australia v Ward,*[68] delivered on 8 August 2002, provided the Northern Territory Government with an unexpected problem relating to its parks and reserves. The High Court ruled, in effect, that 49 Territory parks were invalidly created.

In response, the Territory re-declared 38 of those parks and reserves on 7 November 2002. The Government had legal advice however, that 11 could not be re-declared. In addition, the legal advice was that the successful re-declarations did not and could not resolve existing land claims under the Land Rights Act, existing or potential native title claims, and any issues of compensation.

The Territory Government adopted a policy position of attempting to resolve these issues through negotiations with the Land Councils, traditional owners and native title holders, and to try and avoid the costs of litigation by reaching agreements that would result in joint management arrangements over the parks and reserves.

Following consultation and negotiation with the Land Councils, the basis upon which the government was prepared to engage in such negotiations and the parameters for future park management and tenure arrangements were set out in the *Parks and Reserves (Framework for the Future) Act 2003* (NT).

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[67] See Northern Territory, *National Parks upon statehood,* Options paper, September 1987; Northern Territory Statehood Steering Committee, *Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs' Inquiry into the Federal Implications of Northern Territory Statehood,* 8 September 2006, p 19.

[68] (2002) 213 CLR 1.

In summary, that Act set out:

- a timeframe within which negotiations had to be completed:
- the types of tenure arrangements and joint management arrangements the Territory was prepared to consider;
- three schedules listing the parks or proposed parks that would be subject to particular tenure and management arrangements; and
- that none of the proposed parks or reserves listed in the schedules could be declared without an ILUA or other legally enforceable agreement that dealt with all native title issues arising from the creation of the park, including any compensation issues.

Schedule 1 parks and reserves were those that the government was prepared to use its best endeavours to get the Commonwealth Minister to add to Schedule 1 of the Land Rights Act, therefore becoming Aboriginal freehold under that Act.

Schedule 2 parks and reserves were those that could be granted as Northern Territory parks freehold to the traditional owners, in conjunction with lease back and joint management arrangements.

Schedule 3 areas were those that were proposed to be subject to joint management deeds and plans of management.

Each joint management agreement executed for each of the parks and reserves specified in Schedules 1, 2 and 3 of the *Parks and Reserves (Framework for the Future) Act 2003* must specify that Territorians and visitors to the Territory are permitted to enter the park or reserve to which the agreement relates without payment of an entry fee.[69] If the land subject of a lease under that Act is Aboriginal land,[70] the lease must require the lessor to permit Territorians and visitors to the Territory to enter the park or reserve without an entry permit.[71]

In 2005 native title issues had been settled over 27 national parks and reserves in the Northern Territory in the biggest simultaneous negotiation of ILUAs in Australia's history.

A total of 31 agreements, which paved the way for cooperative planning and co-management between the government and local Indigenous people, were made by Northern Territory Chief Minister Clare Martin and representatives of the Northern Land Council (NLC) and Central Land Council (CLC).

The resolution of native title issues over 27 national parks was a big undertaking and it was to the credit of the Northern Territory Government, the NLC, CLC and the Aboriginal groups that 31 agreements involving various native title claimant groups had been finalised.

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[69] *Parkes and Reserves (Framework for the Future) Act 2003* ss 8(d), 10(1)(d), (2).

[70] 'Aboriginal land' has the same meaning as in the *Land Rights Act*.

[71] *Parkes and Reserves (Framework for the Future) Act 2003* ss 8(c), 10(1)(c), Schedule 4.

The negotiation and registration of those agreements occurred in particular legal circumstances and within a framework and timeframe set by Northern Territory legislation, the *Parks and Reserves (Framework for the Future) Act* (NT).

The legal effect of those ILUAs is that, while they remain on the Register of Indigenous Land Use Agreements maintained under the Native Title Act by the Native Title Registrar:

- they are treated as if they were a contract among the parties to the agreements; and
- all persons holding native title in relation to any of the land or waters covered by the agreement, who are not already parties to the agreements, were bound by the agreements in the same way as the registered native title body corporate, or the native title group, as the case may be.[72]

It is worth noting that, in addition to the ILUAs involving national parks and reserves, many other ILUAs have been negotiated in the Northern Territory. At 10 November 2006 there were 78 registered ILUAs in relation to land in the Northern Territory, dealing with such matters as exploration and mining (20), petroleum, gas and pipeline projects, community living areas, government projects and infrastructure, and various forms of development (including the agreements about national parks and reserves). They make up 30 per cent of the national total of 260 registered ILUAs.

The ILUAs show what can be achieved by parties who are willing to negotiate with each other in good faith, and who are committed to an outcome.

In the case of the national park ILUAs, as noted above, the negotiations took place within a legislative framework and timeframes.

Such a process may have broader implications. In a speech delivered on his behalf in July 2003, Galarrwuy Yunupingu argued that 'success in this initiative will show the way forward for other partnerships between Aboriginal and non-Aboriginal Territorians'. He seemed to suggest that the process for negotiating the parks ILUAs illustrated an inclusive and collaborative approach that could be taken to the development of a constitution for the Northern Territory, which in turn could pave the way for Aboriginal Territorians to vote to support statehood.

5. Conclusion

In conclusion, it is apparent that, whether or not the Northern Territory becomes a state, native title will loom large in future dealings with land and waters here. Assuming that the Native Title Act remains in essentially the same as it is now,[73] it will continue to operate here

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[72] *Native Title Act 1993* s 24EA(1).

[73] The Australian Government has announced a range of proposed amendments to the Native Title Act and associated administrative arrangements dealing with such matters as the native title claims resolution process, reforms to native title representative bodies and prescribed bodies corporate, changes to the scheme for funding respondent parties, and various technical amendments. Important as those changes are likely to be, they will not affect the points made in this paper.

as it has done for the past 12 years and particularly in relation to exploration and mining since 2000.

Although native title is an 'emerging issue' for the Northern Territory, and is important to the Northern Territory, there would seem to be few if any implications for or of the native title scheme if a state were to be created in the Northern Territory. Although the current scheme is principally the product of Commonwealth legislation, in almost every respect the scheme applies without distinction to states and territories.

The Native Title Act highlights agreement-making as the preferred method of resolving native title issues, including the determination of claimant applications and the grant of exploration and mining tenements. Experience in the Northern Territory to date demonstrates that agreements can be made between governments, business enterprises, infrastructure providers and Aboriginal communities about a wide range of land uses. There is a good prospect that at least some native title claims will be resolved by consent of the parties.

The National Native Title Tribunal has a range of skills and expertise in relation to native title matters. We stand ready, willing and able to assist parties to negotiate just and enduring outcomes.

NATIONAL NATIVE TITLE TRIBUNAL

Jurisdiction	Jurisdiction Area (1000's sq km)[1]	Total Area of Determinations (1000's sq km)	% of Jurisdiction Covered by Determinations	Total area where Native Title exists in all or part of the determination area (1000's sq km)[6]	Total area where Native Title found not to exist in the determination area (1000's sq km)
NSW	800.6	0.9	0.11%	0.0	0.9
NT (Note 3)	1349.1	13.1	0.97%	12.8	0.3
QLD (Note 4)	1730.6	30.6	1.77%	30.4	0.2
SA	983.5	20.5	2.09%	20.5	0.0
VIC	227.4	10.9	4.80%	0.4	10.5
WA (Note 5)	2529.9	612.4	24.21%	582.9	29.5
TAS	68.4	0.0	0.00%	0.0	0.0
ACT	2.4	0.0	0.00%	0.0	0.0
Jervis Bay	0.0	0.0	0.00%	0.0	0.0
Total	**7691.9**	**688.4**	**8.95%**	**647.0**	**41.5**

Note 1 Areas sourced from Geoscience Australia (www.ga.gov.au/education/facts/dimensions/areadime.htm)

Note 2 Source data as at 30 September 2006. Due to the difficulties in mapping some determination areas these figures should be seen as indicative only

Note 3 Includes Croker Island and Blue Mud Bay #2 determinations (portion seaward of the High Water Mark)

Note 4 Includes Wellesley Islands determination (portion seaward of the high Water Mark)

Note 5 Includes Karajarri (portion seaward of the High Water Mark)

Note 6 Where it has been possible to map outcomes within a determination these areas have been calculated.

Produced by Geospatial Services,
National Native Title Tribunal
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