NATIVE TITLE - AN EXCEPTION TO INDEFEASIBILITY AND A GROUND FOR INVOKING THE DEFERRED INDEFEASIBILITY THEORY

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ABSTRACT

Neither the *Native Title Act* 1993 (Cth) nor the various State and Territory real property Acts adequately address the effect upon native title of the administrative act of registering an instrument creating or affecting ordinary (non-native title) interests in land under the Torrens system of land registration. The possibility that native title qualifies the concept of indefeasibility of title in two situations is examined in this paper. The first possible qualification relates to whether or not registration of a statutory grant of land made pursuant to land rights legislation attracts the indefeasibility provisions of the Torrens statutes vis a vis native title. The second possible qualification stems from the Federal Court decision in *Hayes v Northern Territory*. It relates to whether or not registration of an invalid 'previous exclusive possession act,' which is relied upon to confirm the extinguishment of native title, confers an indefeasible title on the registered proprietor in relation to native title. The practical legal implications of classifying native title as an exception to indefeasibility and as a ground for invoking the deferred indefeasibility theory are considered. Two theoretical rationales underlying a native title exception to indefeasibility are also suggested.

INTRODUCTION

It is trite law that until the decision of the High Court in *Mabo and Others v State of Queensland (No.2)*[1] native title[2] was not a recognised part of

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1 (1992) 175 CLR 1- hereafter referred to as '*Mabo*.' *Mabo* has also been reported in the following services: 66 ALJR 408; 107 ALR 1.

2 'Native title' is the term most commonly used in cases arising from disputes in Africa and the Americas. In *Mabo*, Brennan J, as he then was, uses this term; Deane and Gaudron JJ use 'common law native title'; Toohey uses 'traditional title' and Dawson J uses 'aboriginal title'.

Australian land law.[3] From a property law perspective, the importance of the decision in *Mabo* is that rights in land[4] which are not derived from the doctrine of tenure were, for the first time in Australia's legal history, recognised by the common law.[5] Parliament's acceptance of the High Court's ruling and the codification of the *Mabo* definition of native title in the *Native Title Act 1993* (Cth)[6] provides a statutory basis for accommodating this new source of title within Australian land law. This new dimension to Australian landholding has thus attained legislative status in much the same way as the doctrine of tenure has under the various State and Territory real property statutes.[7]

The general policy of the *NTA* has, however, always been to ensure that, in the case of inconsistency, ordinary (non-native) title prevails over native title.[8] Nevertheless, neither the *NTA* nor the real property Acts[9] adequately address

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3 *Attorney-General v Brown* (1847) Legge 312; 2 SCR App 30; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (The Gove Land Rights Case)- a decision by Justice Blackburn, a single judge of the Northern Territory Supreme Court, in which his Honour concluded that the 'doctrine of communal native title ... [did] not form, and ha[d] never formed, part of the law of any part of Australia' (at 244-245).

4 Although at least three members of the majority of the High Court in *Mabo* held that native title is an interest in land (see Brennan J at 51), the majority of the Full Federal Court in *State of Western Australia v Ward* [2000] 170 ALR 159 considered that native title constituted merely a 'bundle of rights' (see Beaumont and von Doussa JJ at 185). However, the majority did conclude that '[t]o describe native title as a bundle of rights is not to deny the possibility that in a particular case the rights and interests may be so extensive as to be in the nature of a proprietary interest in land' (at 186-187). See also Pt III, section entitled 'The Equitable Proprietary Nature of Native Title', infra.

5 It was assumed that when Great Britain established colonies in Australia, title to all the lands within those colonies immediately vested in the Crown and that no one could acquire a valid title to those lands save by Crown grant: *R v Steel* (1834) Legge 65; *Attorney-General v Brown* (1847) Legge 312 at 316-7. This assumption is, of course, no longer part of the common law of Australia: *Mabo*. See also the *Native Title Act* 1993 (Cth) and complimentary state native title legislation, which codify the *Mabo* definition of native title, and represent statutory recognition of rights in land which arise in some way other than by Crown grant.

6 Hereafter referred to as the '*NTA*'. See definition of 'native title' in s 223 of the *NTA*. The *NTA* was designed to establish a national scheme of native title and although it contemplates, it does not require, complementary State and Territory legislation (ss 5 and 8 of the *NTA*). All States and Territories have, however, enacted legislation complementary to the *NTA*, so that there now exists a nationally consistent approach to native title. Because State and Territory native title legislation is valid only so far as it is capable of operating concurrently with the Commonwealth Act (s 8 of the *NTA*), the discussion in this paper will focus on the scheme of the *NTA*.

7 See for eg *Property Law Act* 1974 (Qld), ss 20, 21.

8 For the purpose of confirming the effect of previous non-exclusive possession acts, even where a lease involves the grant of rights that are consistent with native title rights, the rights of the lessee, although not technically extinguishing the native title rights, prevail over the native title rights: s 23G(1)(a) of the *NTA*.

9 The relevant enactments which give effect to the Torrens system of land ownership in each of the Australian states and territories are: *Land Titles Act* 1925 (ACT); *Real Property Act* 1900 (NSW); *Real Property Act* 1886 (NT); *Land Title Act* 1994 (Qld); *Real Property Act* 1886 (SA); *Land Titles Act* 1980 (Tas); *Transfer of Land Act* 1958 (Vic); *Transfer of Land Act* 1893 (WA).

the effect upon native title of the administrative act of registering an instrument creating or affecting ordinary (non-native title) interests in land under the Torrens system of land registration. This situation is, of course, not unusual. Indeed, it has been observed that:[10]

> [n]o other part of Torrens system law has created such diversity of judicial and academic opinion as that concerned with indefeasibility and the effect of registration under the Torrens Act. The principal reason is that this is the point at which the doctrines of the general law and the Torrens statutes meet most forcefully; from earliest times it has proved to be the flashpoint.

It is in this context, therefore, that native title potentially qualifies the concept of 'indefeasibility of title'[11] in two situations and, in practical terms, prevails over ordinary (non-native) title.[12]

The first possible qualification to the concept of indefeasibility relates to whether or not registration of a statutory grant of land made pursuant to land rights legislation attracts the indefeasibility provisions of the Torrens statutes vis a vis native title. The original *NTA* did not resolve the effect on native title of all past grants of interests in land; rather, it applied only to those acts which would have been invalid because of the existence at the time of native title.[13] Accordingly, if the effect of the *Racial Discrimination Act* 1975 (Cth)[14]

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10 D.J. Whalan, *The Torrens System in Australia* (Law Book Co, Sydney, 1982), p 297.

11 Torrens used this phrase in his own book on the *Real Property Act* 1858 (SA): R.R. Torrens, *The South Australian System of Conveyancing by Registration of Title* (Register and Observer General Printing Offices, Adelaide, 1859), p 9. The phrase was included in the heading to the paramountcy provision in the *Real Property Amendment Act* 1858 (SA), s 20, and is now included in the following Australian legislative provisions: *Real Property Act* 1886 (SA), ss 10, 69; *Land Title Act* 1994 (Qld), ss 38, 184, 185; *Land Titles Act* 1980 (Tas), s 40.

12 It is worth noting that whether native title can give rise to a registrable Torrens interest or whether native title can be protected by a caveat remain unclear. Sir Robert Richard Torrens, the founder of the Torrens system, would not, of course, have thought about these problems. Peter Butt has observed that '[d]ifferences of opinion existed between the various judges [in *Mabo*] about whether native title constituted an interest in land. Some thought it did; others thought it did not. This issue is important for property lawyers, since it will determine whether native title can be protected by caveat': P. Butt, 'The Native Title Act: A Property Law Perspective' (1994) 68 *Australian Law Journal* 285, 286. See also n 4 *supra*. It has been convincingly argued that, with the enactment of the *NTA* and complementary State and Territory legislation, Australia has placed native title within the hierarchy of equitable and Torrens interests in land. Accordingly, Australian law makes it possible for the recognition of native title as an interest in land capable of supporting a Torrens system caveat: P. Babie, 'Case Note: *James Smith Indian Band v Saskatchewan (Master of Titles)* - Is Native Title Capable of Supporting a Torrens Caveat?' (1995) 20 *Melbourne University Law Review* 588. The issue can, therefore, be reduced to whether or not, in a particular case, native title does in fact constitute an interest in land for Torrens purposes? Consequently, and in accordance with Sherstobitoff JA's judgment in *James Smith Indian Band v Saskatchewan (Master of Titles)* (1995) 123 DLR (4th) 280 at 287, determinations of the caveatability of native title should be allowed to proceed on a case-by-case basis.

13 *NTA*, s 228. Under the common law doctrine of extinguishment, as formulated by the High Court in *Mabo*, native title can be extinguished by government action, whether legislative or executive, provided it reveals a clear and plain intention to extinguish

would have been to invalidate grants or interests over land which was subject to native title, such 'past acts' were validated. Whether or not native title was thereby extinguished depended upon the kind of interest created in the past.[15] Notwithstanding the past acts regime, however, the *NTA* expressly provided that it did not affect the rights or interests of any person held under Commonwealth land rights legislation,[16] including the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth).[17] Since this express declaration continues to apply to the *NTA* as amended by the *Native Title Amendment Act* 1998 (Cth),[18] statutory title holders are also not affected by the new intermediate period act and future act regimes.[19] Although this is no doubt a legislative attempt to ensure that statutory rights prevail over, and thereby extinguish, native title rights, the issue is whether this result is in fact achieved? Put differently, the issue, which is examined in Part I, is whether the existence of native title in such cases constitutes an example of the overriding statute exception to indefeasibility in the context of statutory grants.

The second possible qualification to the concept of indefeasibility, and potentially raising wider legal implications than the first, stems from the Federal Court decision in *Hayes v Northern Territory*.[20] The decision in *Hayes* highlights two important issues: does registration, of itself, confer an

native title. Such extinguishment does not revive after the relevant government act ceases to have effect and does not give rise to a claim for compensatory damages. The conclusion of the majority of the Court on the compensation issue was, however, made expressly subject to the operation of the *Racial Discrimination Act* 1975 (Cth) (*RDA*). Because the *RDA* commenced operation on 31 October 1975, uncertainty exists as to the validity of government actions since that date, particularly grants of interests in land, over land which is subject to native title. It is arguable that the *RDA* invalidates Crown grants made since the commencement of that Act on the basis that such grants had the effect of extinguishing native title without compensation in circumstances where the grants would not have extinguished other interests without compensation and therefore had a discriminatory effect in relation to a human right to own property and not to be arbitrarily deprived of it. The reasoning in *Mabo v Queensland (No 1)* (1988) 166 CLR 186 and comments by some members of the Court in *Mabo* in relation to the operation of the *RDA* in general (see esp, *Mabo* at 15 per Mason CJ and McHugh J) support such a view. See also P. Butt, 'The Native Title Act: A Property Law Perspective' (1994) 68 *Australian Law Journal* 285, 287-288; and Attorney-General's Department, *Native Title: Legislation with Commentary by the Attorney General's Practice* (AGPS, Canberra, 1994) pp C6-C7.

14 Hereafter referred to as the '*RDA*'.

15 *NTA*, s 15.

16 *NTA*, s 210.

17 *NTA*, s 210(c).

18 Hereafter referred to as the '*NTAA*'.

19 The grant or vesting of any type of interest for the benefit of Aboriginal people or Torres Strait Islanders is also specifically not a previous exclusive possession act for the purpose of the confirmation provisions of the *NTA*: s 23B(9) of the *NTA*. See n 97 *infra*. Statutory title holders are also not affected by an act that causes land or waters to be held by or for the benefit of Aboriginal peoples and Torres Strait Islanders: *NTA*, ss 16, 22C and s 233(3)(a) definition of 'future act' and s 253 definition of 'Aboriginal/Torres Strait Islander land or waters.' See text accompanying nn 57 and 58 *infra*.

20 [1999] FCA 1248, Federal Court of Australia, O'Loughlin J, 9 September 1999.

indefeasible title on the registered proprietor of *any* interest in land vis a vis native title? And, if it does, does indefeasibility apply immediately on registration or not? In particular, although the original *NTA* was silent on the effect of previous *valid* government acts on native title, the amendments made by the *NTAA* sought, inter alia, to confirm that native title is extinguished by the grant of valid 'exclusive' tenures and extinguished to the extent of any inconsistency by the grant of valid 'non-exclusive' agricultural and pastoral leases.[21] However, it may be asked: what if the relevant act relied upon to confirm the extinguishment of native title is invalid, yet registered- can registration of the act cure the defect such that the registered interest will prevail over native title rights? This issue is discussed in Part II. Parts III and IV analyse the conclusions reached in Part II, with Part III offering two possible theoretical rationales for the conclusions and Part IV considering their practical implications.

PART I: NATIVE TITLE AS AN EXCEPTION TO INDEFEASIBILITY OF TITLE IN THE CONTEXT OF STATUTORY TITLE

Statutory Title and Native Title: 1975-1994

Although the *NTA* expressly provides that it does not affect the rights or interests of any person held under Commonwealth land rights legislation,[22] including the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth),[23] the definition of native title includes rights and interests which have been 'compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders.'[24] Where statutory grants made pursuant to land rights legislation between 1975 and 1994 might be invalid because of the existence of native title, the grant would attract the *NTA*'s validation of past acts provisions. However, because freehold and leasehold grants that benefit Aboriginal peoples or Torres Strait Islanders are expressly excluded from Category A and B past acts, the only categories of past acts under the *NTA* that can extinguish native title, the 'non-extinguishment' principle would apply to such grants.[25] Furthermore, the non-extinguishment principle would only apply to the extent that the statutory grant is inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests.[26]

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21 As part of the confirmation process, therefore, the *NTA* distinguishes between 'exclusive possession acts' and 'non-exclusive possession acts' to determine the consequences of the confirmation of the effect of valid government acts on native title.

22 *NTA*, s 210.

23 *NTA*, s 210(c).

24 *NTA*, s 223 definition of 'native title', esp subs (3).

25 Statutory grants would probably be classified as Category D past acts.

26 *NTA*, s 238 definition of 'non-extinguishment principle.' Under the non-extinguishment principle, although an act affects any native title in relation to the land or waters concerned, the native title is not extinguished, either wholly or partly: *NTA*, s 238(2). If

Accordingly, at most, the native title rights would be suspended, and, therefore, would be capable of reviving upon expiration of the statutory title.[27] However, the common law position in such a situation is that a grant of land, which is subject to native title, to a Land Trust pursuant to the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth)[28] does not extinguish native title because such a grant is consistent with the preservation of native title; 'indeed, the two co-exist harmoniously.'[29] Moreover, although the rights and obligations that flow from a grant of fee simple to a Land Trust are not precisely identical with the incidents of native title, precise correspondence is not necessary.[30] Consequently, the non-extinguishment

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the act is wholly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title continues to exist in its entirety but the rights and interests have no effect in relation to the act: *NTA*, s 238(3). If there is partial inconsistency, native title continues to exist in its entirety, but the rights and interests have no effect in relation to the act to the extent of the inconsistency: *NTA*, s 238(4). If the act or its effects are subsequently removed or otherwise cease to operate, whether wholly or partially, the native title rights and interests again have effect, either wholly or to the extent of the removal or cessation of the act: *NTA*, ss 238(6) and (7). An example of the operation of s 238 is provided in subs (8).

27 For example, where the freehold or leasehold is surrendered or compulsorily acquired by the government.

28 This Act was based upon recommendations in the final report of Mr Justice A E Woodward as Commissioner to inquire into and report upon, inter alia, the appropriate means to recognise and establish the traditional rights and interest of Aboriginals in, and in relation to, land: Aboriginal Land Rights Commission, *Second Report* (AGPS, Canberra, 1974). The Act and the legislative scheme for making and processing land claims have been considered by the High Court and the Federal Court in a number of cases, including the following High Court Decisions: *R v Toohey; Ex parte Attorney-General (NT)* (1980) 145 CLR 374; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; *Meneling Station; R v Toohey; Ex parte Stanton* (1982) 57 ALJR 73; *R v Kearney; Ex parte Northern Land Council* (1984) 158 CLR 365; *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395; *R v Kearney; Ex parte Jurlama* (1984) 158 CLR 426; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 and *Mabo*.

29 *Pareroultja v Tickner* (1993) 42 FLR 32; (1993) 117 ALR 206, 218 per Lockhart J, with whom Whitlam and O'Loughlin JJ agreed; see also 214-217. The Full Federal Court considered that, notwithstanding that grants of freehold may extinguish native title, various statements in *Mabo* (at 111 per Deane and Gaudron JJ; at 196 per Toohey J) compelled a different conclusion in respect of freehold grants under land rights legislation: at 215-216, 218. An application for special leave to appeal to the High Court was refused by a majority of the Court on 13 April 1993 (Deane and Gaudron JJ dissenting). However, the Chief Justice, speaking for the majority, expressly stated that in refusing special leave, the majority were 'not to be taken as necessarily agreeing with the conclusion of the Full Court that the grant of an estate in fee simple to a Land Trust under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) is consistent with the preservation of native title to the land the subject of the grant': *Pareroultja v Tickner* No. S156 of 1993, 12-13 April 1993; Casenote: Pareroultja and Others v Tickner and Others No S 156 of 1993 (1994) 3(68) *Aboriginal Law Bulletin* 26.

30 *Pareroultja and Others v Tickner* (1993) 117 ALR 206, 216, per Lockhart J, with whom Whitlam and O'Loughlin concurred. This point is illustrated by the judgment of Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70, 116: 'Although there is no precise correspondence between the rights and powers conferred on Pitjantjatjaras by the Land Rights Act and the traditional rights and obligations of Pitjantjatjaras or of particular Pitjantjatjara groups with respect to their clan territory or "country", the rights and powers conferred upon Pitjantjatjaras are sufficient to permit the use and management of

principle would have no inconsistency to apply to.[31] On this interpretation, native title rights would continue to have effect for the duration of the term of the statutory grant.[32] This conclusion would also be applicable to reserves created for the benefit of Aboriginal people and to the grant of title under Deeds of Grant in Trust.[33]

Nevertheless, the express declaration contained in the *NTA*, that the Act does not affect rights held under land rights legislation, may be a legislative attempt to ensure that statutory rights prevail over native title rights, and thereby effectively extinguish native title, albeit technically only temporarily, in such cases. It must be pointed out, however, that even if this is the intention, such a result would not be achieved since the common law position in this context supports the non-extinguishment of native title. At common law, the rights of a statutory grantee do not enjoy a superior status to those of a native title holder as 'the two co-exist harmoniously.'[34] Accordingly, the fact that native title rights continue to have effect during the statutory grant would not 'affect'[35] rights held under the statutory grant.[36]

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the lands in such a way as to allow their traditional relationship with their country to be enjoyed and their traditional obligations in respect of their country to be fulfilled.'

31 Cf G. Nettheim, 'Native Title and Statutory Title' in M.A. Stephenson (ed), *Mabo: The Native Title Legislation - A Legislative Response to the High Court's Decision*, (University of Queensland Press, Queensland, 1995), p 195.

32 See also *Pareroultja and Others v Tickner* (1993) 117 ALR 206, 215, per Lockhart J, with whom Whitlam and O'Loughlin concurred. Note that the long title of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) describes it as: 'An act providing for the granting of Traditional Aboriginal Land in the northern Territory for the benefit of Aboriginals, and not for other purposes.' Thus, the Act vests ownership of lands in Aboriginal peoples upon the assumption that the 'indigenous relationship to land was a reality, deriving from the laws of the particular peoples concerned, so that the primary function of the legislation was to provide recognition of, and protection for such rights and interests under Australian law.': G. Nettheim, 'Native Title and Statutory Title' in *Mabo: The Native Title Legislation*, op cit (n 31), p 184; see also *Pareroultja and Others v Tickner* (1993) 117 ALR 206, 210 et seq, per Lockhart J (with whom Whitlam and O'Loughlin JJ agreed). Other land rights Acts are not, however, of this nature. Importantly, land rights legislation that confers title other than on the basis of traditional rights in relation to land will not necessarily be consistent with native title.

33 For example, pursuant to the *Land Act* 1962 (Qld). In *Mabo*, the plaintiffs asked for a declaration that it would be unlawful for the Queensland Government to grant title pursuant to a Deed of Grant in Trust as such title would extinguish native title and, consequently, be invalid because of the *RDA*. The High Court refused to grant the declaration on the ground that there was no evidence that the Governor General intended to grant such title: *Mabo* at 74 per Brennan J; 119-120 per Deane and Gaudron JJ. Accordingly, the question whether the grant of title under Deeds of Grant in Trust is sufficiently inconsistent with native title to extinguish it, remains open. For an account of the treatment, by the majority judges, of the potential application of the *RDA* to title granted pursuant to a deed of grant in trust, see G. Nettheim, 'Native title and Statutory Title, in *Mabo: The Native Title Legislation, op cit (n 31)*, pp 187-189.

34 *Pareroultja and Others v Tickner* (1993) 117 ALR 206, 218, per Lockhart J, with whom Whitlam and O'Loughlin JJ concurred.

35 An act *affects* native title if it extinguishes the native title rights or interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise: *NTA*, s 227.

A New Exception to Indefeasibility of Title?

The above analysis is important, because it illustrates that the existence of native title constitutes a possible new exception to indefeasibility of title. Although a statutory grant of land under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) is in practice registered under the *Real Property Act* 1886 (NT), and therefore has the benefit of the indefeasibility of title provisions, because native title is not extinguished by such grant, and because the *NTA* expressly provides that native title is not able to be extinguished contrary to the Act,[37] native title will be preserved despite registration of the statutory title.

Whether the existence of native title in such cases constitutes a new exception to indefeasibility per se,[38] or whether the *NTA* is an example of the overriding statute exception to indefeasibility in the context of statutory grants is unclear.[39] It is suggested that the *NTA* overrules or effectively repeals the Northern Territory Torrens statute in the limited context of statutory title and thereby subjects the registered statutory title holder to the native title interest although not noted on the register.[40] The basis for this view is the decision in *Attorney-General (NT) v Minister for Aboriginal Affairs*,[41] where it was held that in the case of a conflict between relevant provisions of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) and the operation of the indefeasibility provisions of the *Real Property Act* 1886 (NT), the *Real Property Act*, being an earlier law of the Northern Territory, could not confer an indefeasible title which would operate inconsistently with the later land rights Act, a law of the Commonwealth, unless the Commonwealth legislation was stated to be subject to the provisions of the Northern Territory Act.[42]

The *NTA* provides that native title is subject to the general laws of Australia,

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36 *Pareroultja and Others v Tickner* (1993) 42 FLR 32.

37 *NTA*, s 11.

38 Since the Federal Court decision in *Hayes v Northern Territory* [1999] FCA 1248, however, it appears that native title per se could be a new exception to indefeasibility. See Part II *infra*.

39 In all jurisdictions, provisions of the Torrens statutes are capable of being overruled or repealed by a later statute when on ordinary principles of statutory interpretation the later statute affects the Torrens legislation by subjecting the registered proprietor to interests not noted on the register: *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603; *Miller v Minister of Mines* [1963] AC 484 (PC); *Pratten v Warringah Shire Council* (1969) 90 WN (Pt 1) (NSW) 134 and *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 135. See also A. J. Bradbrook et al, *Australian Real Property Law* (LBC Information Services, Sydney, 1997), [4.65] - [4.67]; P. Butt, *Land Law* (LBC Information Services, Sydney, 1996), p 532.

40 *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603; *Miller v Minister of Mines* [1963] AC 484 (PC); *Pratten v Warringah Shire Council* (1969) 90 WN (NSW) (Pt 1) 134; [1969] 2 NSWLR 161; *Attorney-General (NT) v Minister for Aboriginal Affairs* (1990) 90 ALR 59.

41 (1990) 90 ALR 59.

42 *Attorney-General (NT) v Minister for Aboriginal Affairs* (1990) 90 ALR 59.

including State and Territory laws which are consistent with the *NTA*.[43] Since the effect of the *NTA* is to either extinguish native title or suspend native title for the term of an inconsistent interest, the *NTA* ensures that ordinary title is given primacy over native title. By implication, therefore, the *NTA* is subject to the various Australian state and territory Real Property Acts and the general principle that the registered proprietor has an indefeasible title to land pursuant to the Real Property Acts is maintained. However, since the *NTA* expressly provides that nothing in the Act affects the rights or interests of any person under land rights legislation,[44] statutory title is excluded from the *NTA*'s implied subjection to the Real Property Acts and, consequently, the Real Property Acts cannot confer an indefeasible title on statutory titleholders as this would operate inconsistently with the *NTA*.[45]

Statutory Title and Native Title: 1994- 1996 - Validation of Intermediate Period Acts[46]

Prior to the High Court decision in *Wik Peoples and Thayorre People v Queensland*,[47] it was assumed that the grant of a lease, including a pastoral lease, extinguished native title.[48] The pre-*Wik* presumption that leases extinguished native title had the consequence that during the period between the commencement of the original *NTA* (1 January 1994) and the date of the High Court's decision in *Wik* (23 December 1996), governments did acts and made grants in relation to leasehold land without observing the future act regime and procedures set out in the original *NTA*. The post-*Wik* possibility of the co-existence of native title rights and interests with those under a pastoral lease meant, however, that titles granted or acts done by governments over existing or former pastoral lease land since 1 January 1994 on the assumption that native title had been extinguished by those leases, were potentially invalid if native title was proven to exist. Because the Commonwealth Government did not believe that 'invalidity [was] the appropriate consequence for acts done and grants made on the basis of a legitimate assumption subsequently proved wrong',[49] the *Wik* decision necessitated a major reassessment of the effect of the original *NTA*'s future act

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43 *NTA*, s 8.

44 *NTA*, s 210.

45 As a result of the common law position espoused in *Pareroultja and Others v Tickner* (1993) 117 ALR 206.

46 This scheme achieves Point 1 of the 10 Point Plan: 'Legislative action will be taken to ensure that the validity of any acts or grants made in relation to non-vacant crown land in the period between the passage of the Native Title Act and the Wik decision is put beyond doubt.'

47 (1996) 187 CLR 1 - hereafter referred to as '*Wik*'. *Wik* has also been reported in the following services: 71 ALJR 173; 141 ALR 1.

48 An assumption reflected in the Preamble to the *NTA* and *NTA* provisions such as s 47. See however the views of Amankwah and Reynolds to the contrary cited in P Butt, *Land Law*, op cit (n 39), p 889.

49 The Parliament of the Commonwealth of Australia, the Senate, *Native Title Amendment Bill 1997 - Explanatory Memorandum* (Commonwealth Government Printer, Canberra, 1997), pp 23-24.

regime. The amended *NTA*[50] responds to the invalidity of titles granted or acts done over co-existing native title on certain land in contravention of the original *NTA* 'future acts' regime by validating those grants and acts if they come within the definition of 'intermediate period acts'.[51]

Conformably with the approach adopted in the original *NTA* for the validation of past acts, the effect of a validated intermediate period act on native title rights and interests depends upon the kind of interest created by the particular intermediate period act.[52] For this purpose, the validation regime for intermediate period acts mirrors the classification of validated past acts. Because freehold and leasehold grants that benefit Aboriginal peoples or Torres Strait Islanders are expressly excluded from Category A[53] and B[54]

50 New Division 2A of Part 2 of the *NTA* was introduced by the *NTAA* to provide for the validation of 'intermediate period acts.' A new s 21 was inserted to provide an overview of Division 2A. Section 3 of the *NTA*, the objects section, was also amended to make it clear that an object of the Act is to provide for, or permit, the validation of intermediate period acts invalid because of the existence of native title: s 3(d).

51 *NTA*, s 232A. Note that s 226 of the *NTA* defines the word 'act' and that s 227 of the *NTA* defines the term 'act affecting native title.' To qualify as an 'intermediate period act', the act must have taken place between 1 January 1994 and 23 December 1996 when native title existed in relation to particular land or waters (s 232A(2)(a)); must not be a past act (s 232A(2)(d)); must be invalid because of native title (s 232A(2)(c)); and must be over land covered by a freehold estate, a lease (other than a mining lease) or a public work (ss 232A(2)(e)and (f)). Only limited forms of legislation qualify as 'intermediate period acts' (s 232A(2)(b)). As a general rule, acts done over vacant Crown land or land covered by mining leases during the relevant period are expressly excluded from the definition of 'intermediate period act' and, therefore, such acts are not validated as a result of the new Division 2A of Part 2 of the *NTA*. Acts done partly over vacant Crown land or mining leases during the intermediate period will, however, be validated if at least part of the land affected is, or has been, freehold or leasehold or occupied by public works: The Parliament of the Commonwealth of Australia, *The Senate-Native Title Amendment Bill 1997: Explanatory Memorandum* (Commonwealth Government Printer, Canberra, 1997), p 27. Note, however, that Regulations can specifically declare an act not to be an intermediate period act notwithstanding it is otherwise defined to be one: s 232A(3) of the *NTA*.

52 Section 22B of the *NTA*. Section 22B will not, however, apply to acts covered by the provisions dealing with confirmation of extinguishment of native title. Accordingly, where an act is both an intermediate period act and covered by Division 2B (confirmation of past extinguishment of native title by certain valid or validated acts), the effect of the act on native title is to be determined by reference to the relevant provisions in Division 2B, not Division 2A. Other than the grant of non-exclusive pastoral or agricultural leases, which are included in Category B intermediate period acts, the effect of validated intermediate period acts reflects the approach taken with respect to the validation of past acts: see s 15. Consequently, s 11 of the *NTA* providing that native title cannot be extinguished by legislation on or after 1 July 1993 except in accordance with certain provisions of the *NTA*, was amended to include those validating intermediate period acts which extinguish native title (namely, Category A and B intermediate period acts): s 11(2).

53 *NTA*, s 232B(8). Category A intermediate period acts are defined to consist of the grant or vesting of a freehold estate (s 232B(2)); a Scheduled interest (s 232B(3)(a)); a commercial lease (s 232B(3)(b)); an agricultural lease which confers a right of exclusive possession (s 232B(3)(c)); a pastoral lease which confers a right of exclusive possession (s 232B(3)(c)); a residential lease (s 232B(3)(d)); a community purpose lease (s 232B(3)(e)); residential rights in a mining lease (s 232B(3)(f)); any other lease, other than a mining lease, which confers a right of exclusive possession over particular land or waters (s 232B(3)(g); the

intermediate period acts, the only categories of intermediate period acts that can extinguish native title, the non-extinguishment principle would apply to such grants, as it does in the case of the past act regime.[55] The analysis referred to in the context of native title and pre-1994 statutory title is, therefore, apposite. Consequently, the existence of native title as an exception to indefeasibility of title in the context of the statutory title is maintained.[56]

Furthermore, both the past act regime and the intermediate period act regime are not intended to affect reservations and conditions for the benefit of Aboriginal peoples or Torres Strait Islanders or the non-native title rights and interests of Aboriginal peoples and Torres Strait Islanders.[57] Accordingly, the extinguishing effect of the validation of past and intermediate period acts does not extend to such rights or interests. Consequently, the legislature is again purporting to give statutory title primacy over native title. In this context, however, the attempt is effective: native title being categorically extinguished by the particular past act or intermediate period act (not being a grant of stautory title) as opposed to its purported extinguishment as a result of inconsistency with statutory title. In such circumstances, therefore, the statutory title is merely given a privileged status; its priority has nothing to do with registration of the statutory title attracting the indefeasibility principle vis a vis native title as there is no native title for the indefeasibility principle to

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vesting of a not less than leasehold interest by or under legislation, where the land is required, by or under legislation, to be used at some time for residential, community, religious, educational, charitable or sporting purposes (s 232B(6)); and the construction or establishment of a public work (s 232B(7)). Regulations may, however, provide that an act is not a category A intermediate period act: s 232B(9).

54 *NTA*, s232C . A category B intermediate period act is the grant of a lease that is not a category A intermediate period act or a mining lease or a lease granted by or under legislation that grants such estates or leases only to or for the benefit of Aboriginal peoples or Torres Strait Islanders (s 232C). Category B intermediate period acts extinguish native title to the extent of any inconsistency between the act and the continued existence, enjoyment or exercise of the relevant native title rights and interests. Thus, like category B past acts, category B intermediate period acts that are wholly inconsistent with the continuance of native title will completely extinguish native title. Such extinguishment is deemed to have occurred at the time the act was done (s 22B(c)).

55 An intermediate period act constitutes a category C intermediate period act if it is the grant of a mining lease (*NTA*, s 232D). The term 'mining lease' is defined in s 245 of the *NTA*. Because the non-extinguishment principle applies to category C intermediate period acts (s 22B(d)), although the validation of a mining lease conferring exclusive possession in respect of land will nullify the effect of any native title existing on former pastoral lease land, the native title will revive when the term of the mining lease expires. If an intermediate period act does not fall into any of the other categories of intermediate period acts, it will be a category D intermediate period act (s 232E) to which the non-extinguishment principle applies (s 22B(d)). Accordingly, a grant of statutory title could only be a category D intermediate period act to which the non-extinguishment principle applies. Consequently, the analysis referred to in the context of native title and pre-1994 statutory title is relevant.

56 This position is also maintained in respect of post-1994 statutory title. See text accompanying n 58-n 65 *infra*.

57 *NTA*, ss 16, 22C. Section 22C is in the same terms as s 16 of the *NTA*, which applies to the past acts regime.

apply to.

Native Title and Post-1994 Statutory Title

Because the definition of 'future act' in the *NTA* does not apply to 'an act that causes land or waters to be held by or for the benefit of Aboriginal peoples or Torres Strait Islanders' under land rights legislation,[58] a grant of statutory title made after 1 January 1994 does not come within the definition.[59]

The future act regime provides that future acts which fall into one of twelve prescribed categories can be done notwithstanding the existence of native title in relation to the land or waters affected, provided that the act complies with the conditions for validity specified for that type of future act in Division 3 of Part 2 of the *NTA*.[60] However, a future act that affects native title but which is not permitted by the future act regime is invalid to the extent that it affects native title, unless a provision of the *NTA* provides otherwise.[61] Thus, although a grant of statutory title made after 1 January 1994 appears, prima facie, to be invalid, this result is avoided both at common law and under the *NTA* itself. It has already been observed that at common law, the rights of a statutory grantee do not enjoy a superior status to those of a native title holder as 'the two co-exist harmoniously.'[62] Accordingly, rights under a statutory grant would not 'affect' rights held under native title. Furthermore, the express declaration contained in the *NTA* that nothing in the Act affects rights held under land rights legislation,[63] would, independently of the common law position, apply to prevent the statutory title from being invalid.

Although post-1994 grants of statutory title are, therefore, valid, they are nonetheless not 'future acts' within the *NTA*.[64] Consequently, the 'future acts

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58 *NTA*, s 233(3)(a) definition of 'future act' and s 253 definition of 'Aboriginal/Torres Strait Islander land or waters.'

59 The note accompanying the s 223(3) definition of 'native title' therefore appears to be otiose. An act consisting of either an administrative act that takes place on or after 1 January 1994 or the making, amendment or repeal of legislation that takes place on or after 1 July 1993 is a future act if it affects native title: ss 226 and 233(1)(a). An act affects native title if it extinguishes native title rights and interests or is otherwise wholly or partially inconsistent with their continued existence, enjoyment or exercise: s 227. Technically, past acts are not future acts, but intermediate period acts are: s 233(1)(b).

60 *NTA*, s 24AA. Where a future act meets the requirements of more than one validating provision of Division 3, the act is dealt with by the subdivision which occurs first: s 24AB of the *NTA*. Such a rule was necessary because different consequences may flow from the application of different provisions. The non-extinguishment principle applies to most acts that are rendered valid under Division 3 (the non-extinguishment principle is defined in s 238 of the *NTA*), and the Division provides a right of compensation to native title holders for valid future acts (Part 2 of Division 3 of the *NTA*).

61 *NTA*, s 24OA. In appropriate circumstances, injunctive relief may be granted to prevent a future act which might be invalid: *Fejo v Northern Territory* (1998) 72 ALJR 1442.

62 *Pareroultja and Others v Tickner* (1993) 117 ALR 206, 218, per Lockhart J, with whom Whitlam and O'Loughlin JJ concurred. See text accompanying n 29 *supra*.

63 *NTA*, s 210.

64 Although the requirement that 'future acts' must treat native title in the same manner as ordinary title does not, therefore, apply to such statutory grants, this requirement would

provisions' have no application when determining the effect upon native title of such grants. The question whether or not a post-1994 statutory title extinguishes native title must, therefore, be answered by reference to the common law doctrine of extinguishment. Thus, the relationship between native title and post-1994 statutory title is analogous to the relationship between native title and pre-1994 stautory title. According to this analysis, the existence of native title as an exception to indefeasibility of title in the context of statutory title is extended to encompass post-1994 grants of statutory title.

Summary

In the context of statutory title, it is argued that native title constitutes a new exception to the indefeasibility of the registered proprietor's title.[65] This result is achieved, however, because statutory title is excluded from the *NTA*'s implied subjection to the Real Property Acts. Consequently, in cases other than statutory title, the general principle that the registered proprietor has an indefeasible title to land subject to native title pursuant to the Real Property Acts is, prima facie, maintained. Nevertheless, the concept of indefeasibility has never been absolute - a qualification highlighted in the context of the statutory confirmation of extinguishment of native title.

appear to remain applicable on another basis; 'on the basis of the RDA itself': G. Nettheim, 'Native Title and Statutory Title' in *Mabo: The Native Title Legislation*, op cit (n 31), p 196. Accordingly, a proposed grant of statutory title over land subject to native title could be objected to by the native title holders, with the result that the government could not make the statutory grant without the prior compulsorily acquisition of the relevant land. In such a case, not only would the native title holders be entitled to compensation as a result of the acquisition, the acquisition itself would be subject to the native title holders' 'right to negotiate.' New South Wales and Queensland have amended their land rights acts in order to clarify the relationship between native title and post-1994 grants of statutory title. The effect of these amendments is that a grant of statutory title is subject to any native title existing immediately before the grant: *Aboriginal Land Act* 1991 (Qld), ss 3.06, 5.08 (as amended by the *Native Title (Queensland) Act* 1993 (Qld), ss 161 and 162); *Torres Strait Islander Act* 1991 (Qld), ss 3.06, 5.08 (as amended by the *Native Title (Queensland) Act* 1993 (Qld), ss 169, 170); *Aboriginal Land Rights Act* 1983 (NSW), s 36(9) and (9A) (as amended by the *Native Title (New South Wales) Act* 1994 (NSW), s 107 and Schedule 1.

65 The *NTA* provides for three situations in which native title claims can be made in relation to areas where native title has been extinguished and where that extinguishment has been validated or confirmed by or under the *NTA*. Significantly, one of these situations provides that a native title claim can be made over land granted under land rights legislation or held on trust for Aboriginal peoples or Torres Strait Islanders, provided that at least one member of the native title claim group occupies the area (ss 47A, 61 and 253). In light of the discussion in this paper, however, it would appear that this provision is otiose. See text accompanying n 297-n 301 *infra*.

PART II: NATIVE TITLE AND CONFIRMATION OF EXTINGUISHMENT : A NEW EXCEPTION TO INDEFEASIBILITY OR GROUND FOR INVOKING THE DEFERRED INDEFEASIBILITY THEORY?

Although it was apparent from both the decisions in *Mabo* and *Wik* that a grant of land or waters by the Crown conferring a right of exclusive possession on the grantee over the area of land or waters is wholly inconsistent with the continued existence of native title to that area, and, therefore, extinguishes all native title that may have existed at the time of the conferral,[66] this position was not reflected in the *NTA*. Apart from the validation of past acts regime, the original *NTA* did not address the issue of whether or where native title had been extinguished in Australia. In order to restore certainty to Australia's land tenure system, aspects of the 10 Point Plan[67] sought, inter alia, to confirm the Government's understanding of the post-*Wik* common law effect of certain Commonwealth acts on native title and to enable States and Territories to similarly confirm the effect of acts done by them on native title.[68]

The effect of the amendments implementing the aspects of the 10 Point Plan[69] dealing with confirmation of extinguishment of native title is to confirm that native title is extinguished by the grant of valid 'exclusive' tenures and extinguished to the extent of any inconsistency by the grant of valid 'non-exclusive' agricultural and pastoral leases.[70] As part of the confirmation

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66 See for example, *Mabo*, at 69 per Brennan J; 110 per Deane and Gaudron JJ; *Wik*, at 135, 155 per Gaudron J. Cf: *Fejo v Northern Territory* (1998) 72 ALJR 1442.

67 The Commonwealth Government's response to the *Wik* decision became known as the '10 Point Plan'. However, prior to the *Wik* decision, the Government had both introduced a Bill to amend the *NTA* (the *Native Title Amendment Bill* 1996 (Cth)- June 1996) and had published an exposure draft of further amendments (in October 1996). Since these proposed amendments had not been debated when the High Court handed down its decision in *Wik*, the Government decided to integrate these proposed amendments and the *Wik* specific amendments heralded in the 10 Point Plan. Consequently, draft legislation to this effect, the *Native Title Amendment Bill* 1997 (Cth), was released in June 1997. Accordingly, the amendments contained in the *Native Title Amendment Act* 1998 (Cth), which received Royal assent on 27 July 1998, included those implementing the 10 Point Plan. Confirmation of past extinguishment of native title on 'exclusive' tenures is dealt with in new Division 2B of Part 2 of the *NTA*. Confirmation of partial extinguishment by previous non-exclusive pastoral or non-exclusive agricultural leases is achieved by ss 23G to 23J of the *NTA*.

68 New Division 2B of Part 2 of the *NTA*. A new s 23A provides an overview of Division 2B. Like the validation regimes, the confirmation regime does not require States and Territories to legislate to confirm extinguishment.

69 Points two and four of the 10 Point Plan.

70 Where the total or partial extinguishment of native title by a previous exclusive possession act or a previous non-exclusive possession act has been confirmed, the provisions that deal with the effect of past acts and intermediate period acts do not apply: ss 23C(3) and 23G(3) of the *NTA*. These provisions are the original s 15 and the new s 22B of the *NTA*. This ensures that there is no overlap between the provisions that extinguish native title.

process, therefore, the amended *NTA* distinguishes between 'exclusive possession' and 'non-exclusive possession' acts to determine the consequences of the confirmation of the effect of government acts on native title. The categories are determined according to whether the rights conferred by an act or the nature of the use of the land as a result of an act is such that the exclusion of others, including native title holders, must have been presumed when the tenure was granted.[71]

Previous Exclusive Possession Acts

Under Division 2B of Part 2 of the *NTA*, a 'previous exclusive possession act' attributable to the Commonwealth or a State or Territory[72] is confirmed as extinguishing native title totally.[73] In determining what grants constitute a previous exclusive possession act, the legislature adopted a twofold approach. First, the amended *NTA* provides that certain general types of grants have extinguished native title.[74] Thus, the *NTA* lists as previous exclusive possession acts, the grant or vesting of a freehold estate,[75] a commercial lease,[76] an agricultural lease or pastoral lease which confers a right of exclusive possession,[77] a residential lease,[78] a community purpose lease,[79] residential rights in a mining lease,[80] any other lease that confers a right of exclusive possession,[81] the vesting of a right of exclusive possession

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71 Native title holders are entitled to compensation for the effect of the confirmation of extinguishment on their rights only in limited circumstances: *NTA*, s 23J. Because the confirmation regime was intended to reflect the common law, where native title has been extinguished otherwise than under the *NTA*, compensation is not payable under the *NTA*. However, where native title is extinguished pursuant to Division 2B to a greater extent than it would have been at common law, compensation is payable to that extent: s 23J(1). Where an act which extinguishes native title in accordance with Division 2B is attributable to the Commonwealth, the compensation is payable by the Commonwealth: s 23J(2). Where an act which extinguishes native title in accordance with Division 2B is attributable to a State or Territory, the State or Territory is liable for the compensation: s 23J(3). Although the compensation provisions were included as a safeguard in the event that a court finds that extinguishment under the confirmation provisions goes further than the common law (The Parliament of the Commonwealth of Australia, the Senate, *Native Title Amendment Bill 1997 - Explanatory Memorandum* (Commonwealth Government Printer, Canberra, 1997), p 51), their inclusion is evidence that the government is aware that the confirmation provisions have the potential to not merely 'confirm' prior extinguishment but to extinguish native title which co-exists at common law with other rights and interests in land.

72 Or a State or Territory that has legislated in accordance with Division 2B of the *NTA*.

73 *NTA*, *ss* 23C and 23E.

74 *NTA*, *ss* 23B(2)(c)(i) to (viii), ss 23B(3) and (7).

75 *NTA*, *s* 23B(2)(c)(i).

76 *NTA*, *ss* 23B(2)(c)(iii) and s 246. The lease must not be an agricultural or pastoral lease.

77 *NTA*, *ss* 23B(2)(c)(iv), 247, 247A, 248, 248A.

78 *NTA*, *ss* 23B(2)(c)(v) and 249.

79 *NTA*, *ss* 23B(2)(c)(vi) and 249A.

80 *NTA*, *ss* 23B(2)(c)(vii) and 245.

81 *NTA*, *s* 23B(2)(c)(viii).

by or under legislation,[82] and the construction or establishment of a public work.[83]

Secondly, a Schedule to the amended *NTA* contains certain specific types of grants which the relevant governments considered, on the basis of the common law, had conferred exclusive possession and had therefore extinguished native title.[84] The purpose of the Schedule is to remove any doubt that the leases and other interests contained in the Schedule[85] have the same consequences under the *NTA* as other exclusive tenures.[86] These 'Scheduled interests'[87] are, therefore, deemed to confer exclusive possession, whether or not they actually do. Consequently, where a particular interest appears in the Schedule, it is not open to argue that the interest does not extinguish native title.[88]

The process adopted in compiling the Schedule, although similar to that

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82 *NTA*, s 23B(3).

83 *NTA*, ss 23B(7), 251D and 253. It is evident that the descriptions of these general grants overlaps considerably with those grants which constitute category A intermediate period acts. See ss 232B(2), 232B(3) (b) to (g), 232B(4), (5), and (7).

84 *NTA*, ss 23B(2)(c)(i), 249C and Schedule 1.

85 The Schedule primarily contains reference to residential, commercial, community purpose and agricultural leases. It includes leases granted under State or Territory law since as early as 1829. The Schedule does not include pastoral leases or lesser interests, such as licences or permits. Freehold estates are not generally listed on the basis that the reference to a grant of a freehold estate in s 23B(2)(c)(ii) of the *NTA* was adequate. The definition of 'Scheduled interests' expressly excludes mining leases and anything else which is excluded from the definition of previous exclusive possession act in s 23B: *NTA*, s 249C.

86 Although it must be clear that a lease confers exclusive possession as a matter of fact and law before it comes within s 23B(2)(c)(viii) of the *NTA* and, in the event of any dispute in this regard, the issue will need to be resolved by the courts; a lease comes within s 23B(2)(c)(i) of the *NTA* merely if it is one of the types of interests described in the Schedule. Thus, where a particular type of interest appears in the Schedule, it is not open to argue that the interest does not extinguish native title. However, any loss of native title rights that may have resulted from the inclusion of the particular interest in the Schedule is subject to just terms compensation: see *NTA*, ss 23J and 51(1).

87 Defined in s 249C of the *NTA*. The term 'Scheduled interest' also appears in the definition of 'exclusive agricultural lease' and 'exclusive pastoral lease'. Accordingly, an exclusive agricultural or pastoral lease includes an agricultural or pastoral lease that is a Scheduled interest: *NTA*, ss 247A, 248A. An agricultural or pastoral lease that is a Scheduled interest will not, therefore, fall within the definition of a non-exclusive agricultural or pastoral lease: *NTA*, ss247B, 248B. Consequently, the provisions of the *NTA* that apply to exclusive agricultural and pastoral leases apply to agricultural and pastoral leases that are Scheduled interests.

88 Where an interest appears in the Schedule, a native title claimant application may not be made in respect of any area of land or water that is or was the subject of that interest: *NTA*, s 61A(2). A claimant application made over land or waters covered by such an interest may be the subject of a strike out application to the Federal Court: *NTA*, s 84C(1). Where a claimant application is made over land or waters covered by such an interest, the Registrar of the National Native Title Tribunal must refuse its registration if the application and accompanying documents disclose, or the Registrar is otherwise aware, of that fact: *NTA*, s 190B(8). A claimant application which is refused registration will not attract the right to negotiate.