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EROSION OF THE INDIGENOUS RIGHT TO NEGOTIATE IN AUSTRALIA: PROPOSED AMENDMENTS TO THE NATIVE TITLE ACT

Gretchen Freeman Cappio

Abstract: The Australian government seeks to amend the Native Title Act, which presently gives indigenous Australians real property rights by virtue of their history living on the land. In their present form, the proposed amendments to the Native Title Act threaten indigenous representation regarding land disputes. The right to negotiate currently protected by the Act must be preserved, ensuring indigenous participation as well as consensual and procedural agreement. The government should not change its course: indigenous parties deserve the same rights today as were granted just five years ago. Government and indigenous leaders must work cooperatively to draft new amendments to guarantee an indigenous voice in land dispute resolution under the Native Title Act.

I. INTRODUCTION

Over the past two hundred years of European settlement in Australia, institutional discrimination against the indigenous peoples of Australia has taken many forms, including governmental policies that undermined indigenous customs, language, education, and social structures.¹ Aborigines' land rights were also discriminated against. As a result of the doctrine of *terra nullius*,² indigenous possession of land was denied in favor of settlers' claims to the property. Yet in the landmark 1992 case of *Mabo v. State of Queensland*,³ the doctrine of *terra nullius* was ruled void and indigenous real property rights were finally recognized. The Native Title Act of 1993 ("NTA") codified the reforms of *Mabo*.⁴

¹ See *infra* notes 7-13, 17-25 and accompanying text.

² *Terra nullius* means "unoccupied land." Ann McGrath, *Introduction to CONTESTED GROUND: AUSTRALIAN ABORIGINES UNDER THE BRITISH CROWN* 1 (Ann McGrath, ed. 1995). See *infra* text accompanying notes 35-36 for a further discussion of the doctrine.

³ *Mabo v. State of Queensland* (1992) 175 C.L.R. 1 (Austl.).

⁴ "Native title" refers to the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or water where: "(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed . . . (b) [the indigenous peoples] have a connection with the land or waters; and (c) the rights and interests are recognized by the common law of Australia." Native Title Act, 1993, § 223(1) (Austl.).

In the upcoming 1998 session of Parliament, the Australian government will consider amending the Native Title Act.⁵ If Parliament adopts the proposed 1997 amendments, special interests, such as the mining industry, will benefit to the detriment of indigenous interests. Indeed, contracts negotiated in the mining industry exemplify the tension between indigenous property rights and the interests of others who wish to claim rights to these lands.⁶

This Comment asserts that the Australian government must implement policies that benefit all Australians, including indigenous peoples, and so should refuse to pass the proposed amendments. This Comment begins by explaining the importance of land to the indigenous people of Australia and their treatment from the time of British colonization up to the present. The Comment then focuses on policies involving indigenous Australians, including those derived from *terra nullius* and the watershed case *Mabo*. Next, the Comment describes the Native Title Act, which Parliament passed to codify the judicial holding in *Mabo*. The Comment stresses the importance of negotiation while examining how the right to negotiate operates within the Native Title Act. The piece asserts that the proposed amendments fail to provide significant negotiation opportunities for indigenous claimants and are biased in favor of industry.

The Comment concludes by identifying the tension between the interest in streamlining the process of asserting native title claims and the interest in ensuring that all parties have a right to be heard. It recommends that indigenous parties and the government should draft amendments together to serve these dual purposes. The Comment also suggests improvements Parliament could make to the current Native Title Act to preserve indigenous claimants' right to negotiate.

⁵ The 1997 amendments to the Native Title Act were defeated by a thin, one-vote margin in Dec. 1997. Laura Tingle, *Historic Outing Has Headaches in Store*, THE AGE (Melbourne, Austl.), (Dec. 8, 1997) <<http://www.theage.com.au/daily/971208/news/news8.htm>>. The Parliament reached a stalemate and so conducted a rare emergency Saturday morning meeting on Dec. 6, 1997. *Id.* The reasons for the impasse were three Senate amendments to the original proposed amendments that the Prime Minister would not accept. *Id.* The three Senate amendments that the executive found unacceptable were: the threshold test for the acceptance of native title claims, the right to negotiate, and the proposal to subject the Native Title Act to the requirements of the Racial Discrimination Act. *Id.* Senator Brian Harradine cast the deciding vote (after changing his mind over lunch with persuasive senators) in favor of rejecting the amendments, suspending debates for at least four months. David Marr, *Harradine's Lunch That Ate the Wik Bill*, SYDNEY MORNING HERALD, (Dec. 6, 1997) <<http://www.smh.com.au/daily/content/971206/pageone/pageone3.html>>.

⁶ See *infra* notes 91-97 and accompanying text.

II. BACKGROUND

A. *Importance of Land to the Indigenous People of Australia*

Indigenous Australians, or Aboriginal peoples, and Torres Strait Islanders⁷ are the population groups whose ancestors were the original inhabitants of Australia, predating European settlement.⁸ Since the time of settlement, indigenous Australians have been dispossessed of their lands, largely without just compensation.⁹ From the colonial period¹⁰ until this decade, Australia's state governments have failed to reach fair agreements with Australian Aborigines regarding the dispossession of their lands.¹¹ This failure has contributed to making indigenous people the "most disadvantaged [group] in Australian society."¹² Not only have the economic repercussions of *terra nullius* been severe, but indigenous Australians' cultural identity has been undercut by these policies as well. As recognized in the recent proposed amendments to the Native Title Act, "[I]and is fundamental to . . . identity, cultural survival and economic viability."¹³

The bond between indigenous Australians and the land surpasses the attachment that most non-indigenous Australians have with their real property.¹⁴ Land is the Aborigines' source of religion, art, and other forms of culture.¹⁵ It is said that "[a]n Aborigine does not own the land but rather is of the land."¹⁶

B. *Historical Discrimination Against Indigenous People*

European colonization began in Australia in 1788.¹⁷ At that time, the indigenous population was approximately 750,000 people.¹⁸ During the time

⁷ The Torres Strait Islands lie off of the northern tip of Australia. The major islands are: Boigu, Saibai, Dauan, and Thursday. Penny Taylor, *Introduction to See AFTER 200 YEARS* xiv (Penny Taylor, ed. 1998).

⁸ Native Title Act, 1993, Preamble (Austl.).

⁹ *Id.*

¹⁰ The first colonialists came to Australia in 1788. Taylor, *supra* note 7, at ix.

¹¹ Native Title Act, Preamble.

¹² *Id.*

¹³ Lois O'Donoghue, Foreword, *Proposed Amendments to the Native Title Act 1993: Issues for Indigenous Peoples*, available in Aboriginal and Torres Strait Islander Commission (visited Oct. 26, 1997) <<http://www.atsic.gov.au/>>. Lois O'Donoghue is the Aboriginal and Torres Strait Islander Commission Chairperson. *Id.*

¹⁴ *Id.* at 7.

¹⁵ *Id.*

¹⁶ IAN C. PALMER, *BUYING BACK THE LAND* 2 (1988).

¹⁷ *Id.* at 3.

of colonization, indigenous possession was denied in favor of European "rights."¹⁹

From the time of the first European settlers until the late 1960s, the Australian government managed Aboriginal affairs under assimilationist policies.²⁰ These policies allowed the day-to-day needs of indigenous peoples to be met, but they neglected their long-term developmental needs.²¹ During assimilation, paternalistic attitudes toward Aborigines prevailed throughout Australia.²² Assimilation policies allowed Aborigines to contribute to the material development of Australia on local and national levels.²³ Yet this process undermined indigenous traditional education, languages, customs, and social structures.²⁴ Moreover, Aborigines were pressured to join the labor force, but often at the bottom rung of the job ladder.²⁵

In the early 1960s, a push started for Aboriginal empowerment in response to assimilationist policies.²⁶ By 1966, the first organized demonstrations by Aborigines occurred in the remote north of Australia.²⁷ The next year, after centuries of mistreatment, Aborigines were formally made Australian citizens in a referendum that amended the Australian Commonwealth Constitution.²⁸ The referendum also gave oversight responsibility for the office of Aboriginal Affairs directly to the federal government, rather than the states.²⁹ At least in word, indigenous Australians' desires for autonomy and land rights were legitimized under this new policy known as "integration."³⁰ Aboriginal affairs have since been governed by a long line of specialized agencies.³¹

¹⁸ McGrath, *supra* note 2, at 10.

¹⁹ *Id.* at 1.

²⁰ ELSPETH YOUNG, *THIRD WORLD IN THE FIRST: DEVELOPMENT OF INDIGENOUS PEOPLES* 102 (1995).

²¹ For example, Aborigines were typically allowed to earn just enough cash to survive. *Id.* at 103. Their monetary earnings were carefully supervised in their workplaces. Such policies had enduring effects on indigenous attitudes towards participation in the cash economy. *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ As a result of the government's oppressive policies, the Aboriginal workforce in Wave Hill cattle station walked off and the Gurindji (an indigenous population group) subsequently settled at Wattie Creek. *Id.*

²⁸ *Id.* at 42.

²⁹ *Id.* at 103.

³⁰ *Id.*

³¹ Among the agencies that have dealt with Aboriginal Affairs are the: Council for Aboriginal Affairs, Committee for Aboriginal Affairs, Department of Aboriginal Affairs, Aboriginal Land Fund

II. THE MABO DECISION

A. *Terra Nullius in Australia*

During the time of settlement, newcomers justified their means of acquiring ownership and sovereignty of the Australian continent by claiming they were bringing the benefits of Christianity, protection, and European civilization to the Aborigines.³² Their claim to this land was further buttressed by the legal philosophies of the Spanish and Portuguese.³³ Under policies of physical threat and cultural assimilation dating back to the sixteenth century, indigenous peoples in Central and South America had very limited legal rights.³⁴ Like the Spanish and Portuguese, the settlers imagined that Australian land was ownerless under the doctrine of *terra nullius*, meaning "unoccupied land."³⁵ This doctrine denied indigenous possession of land in favor of settlers' "rights."³⁶

Terra nullius was initially supported by the judiciary, to the further detriment of Aboriginal rights. The first legal test of the doctrine was in *Milirrpum v. Nabalco Pty. Ltd.* in 1971.³⁷ In *Milirrpum*, decided by the Northern Territory Supreme Court, Justice Blackburn based the decision both on eighteenth-century legal commentaries as well as ethnographic materials.³⁸ The court reasoned that, although indigenous Australians did have a system of land tenure, it could not be recognized within the current Australian conception of legal title because indigenous Australians lived in a "primitive state of society" and as such should not be entitled to legal ownership of land.³⁹ This decision was a huge defeat for indigenous Australians who had been hopeful that the Australian justice system would recognize their interests

Commission, and the Aboriginal Development Commission. The Aboriginal and Torres Strait Islander Commission ("ATSIC"), founded in 1990, is the only agency still existing today. *Id.* at 104-05. For a table explaining Australian Commonwealth Aboriginal economic development programs, see *id.* at 107.

³² McGrath, *supra* note 2, at 130.

³³ DAVID H. GETCHES & CHARLES F. WILKINSON, FEDERAL INDIAN LAW CASES AND MATERIALS 36 (2d ed. 1986).

³⁴ *Id.*

³⁵ McGrath, *supra* note 2, at 1.

³⁶ *Id.*

³⁷ (1971) 17 F.L.R. 141 (Sup. Ct. N. Terr. Austl.), cited in Nicolas Peterson & Marcia Langton, *Introduction to ABORIGINES, LAND AND LAND RIGHTS* 3 (Nicolas Peterson & Marcia Langton, eds., 1983).

³⁸ *Id.*

³⁹ *Id.*

in the land that had been theirs since “time immemorial.”⁴⁰ *Milirrputum* set the stage for future indigenous defeats in the courts through 1992.⁴¹

B. *Mabo v. State of Queensland*

On June 3, 1992, however, the High Court of Australia⁴² drastically changed indigenous Australians’ “legacy of dispossession.”⁴³ The historic decision in *Mabo v. Queensland*⁴⁴ involved a ten-year dispute in which the indigenous Meriam people, occupants of the Murray Islands,⁴⁵ sought property rights in the land they had inhabited for centuries.⁴⁶ Although the Meriam had been on the Murray Islands long before European settlement, the British simply annexed the Murray Islands, subjecting the Meriam to British rule.⁴⁷

There were two claims made by the plaintiffs in the *Mabo* case.⁴⁸ The first was whether the annexation of Queensland in the Murray Islands vested the Crown with complete ownership of the islands in addition to sovereignty, or rather with sovereignty alone.⁴⁹ The second issue was whether native title

⁴⁰ ABORIGINES, LAND AND LAND RIGHTS *supra* note 37, at 3.

⁴¹ See, e.g., *New South Wales v. Commonwealth* (1975) 135 C.L.R. 337 (Austl.); *Coe v. Commonwealth of Australia* (1979) 24 A.L.R. 119 (Austl.).

⁴² The High Court is the highest judicial body in Australia. The High Court of Australia, *Operation of the Court*, (visited Apr. 12, 1998) <<http://www.hcourt.gov.au/Link10.htm>>.

⁴³ Belinda Tasker, *Wik Law Could Cause Bucketloads of Legislation: NIWG [National Indigenous Working Group on Native Title]*, Austl. Assoc. Press Newsfeed, Sept. 23, 1997; see generally, *Mabo v. State of Queensland* (1992) 175 C.L.R. 1 (Austl.).

⁴⁴ 1992 175 C.L.R. 1. The *Mabo* judgment is named after the late plaintiff, Eddie Mabo, who filed the action. Narelle Hooper, *Australia: Growing Alarm on Mabo Impact*, BUS. REV. WKLY, Mar. 12, 1993, at 32.

⁴⁵ The three Murray Islands lie between Papua New Guinea and Cape York, Australia. The islands’ total area is about nine square kilometers or 3.25 square miles. *Mabo*, 175 C.L.R. at 16.

⁴⁶ The plaintiffs did not debate the Crown’s sovereignty, but rather whether the Crown actually owned the Islands. *Mabo*, 175 C.L.R. at 9.

⁴⁷ *Mabo*, 175 C.L.R. at 16. The plaintiffs in *Mabo* argued that the common law could recognize native title in four key ways: under the rubric of traditional native title, which is a burden on the Crown’s title; as a result of local legal custom which was sufficiently certain and long standing; by the presumption of lost grant; and the presumption of title founded on possession. For a full discussion of these claims, see *Argument of Counsel in Mabo*, 1992 175 C.L.R. at 8-15.

The plaintiffs supported their arguments by asserting that upon annexation of the islands in 1879, the Crown legislation then in force failed to vest in the Crown the entire ownership of the land and extinguish native title or possession. *Mabo*, 175 C.L.R. at 9. The plaintiffs also claimed that whether the test for native title is occupation beyond living memory, or from the time of European settlement in 1788, the plaintiffs could still claim title based on local native custom because they satisfy both tests. *Id.* at 10. They pointed out that Murray Island practices regarding land use has continued operating in the same manner before and since annexation. *Id.* at 12. In addition, the plaintiffs argued that the sovereign, Great Britain, never granted enough power to enable Queensland to take steps to extinguish native title. *Id.* at 13.

⁴⁸ *Id.* at 178.

⁴⁹ *Id.*

to the Islands had ever existed, and if so, whether it had been extinguished by official actions after colonial annexation.⁵⁰

Before turning to the precise issues raised in *Mabo*, Justice Brennan addressed the doctrine of *terra nullius*. Brennan overturned two hundred years of Australian property rights law in *Mabo v. State of Queensland* by writing:

Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted⁵¹

With the stroke of a pen, the Court recognized native title to land and entirely rejected the doctrine of *terra nullius*.⁵²

In addressing the specific issues before it, the High Court sided with indigenous interests.⁵³ The Court held that imperial annexation had *not* vested the Crown with absolute ownership of the islands because that theory of ownership was rooted in the now-void *terra nullius* doctrine.⁵⁴ In answering whether native title to the islands had ever existed and, if so, whether it had been extinguished by official actions after the annexation,⁵⁵ the Court held that native title may continue to exist despite the settlement of outsiders on the land.⁵⁶ For continued native title to be found, two requirements must be satisfied.⁵⁷ First, Aboriginal and Torres Strait Islander people must have maintained their connection with the land during the years of settlement by outsiders.⁵⁸ Second, Aboriginal title must not have been extinguished by valid acts of an imperial, colonial, state, or territorial government or act of the Commonwealth government.⁵⁹

⁵⁰ *Id.*

⁵¹ *Id.* at 42.

⁵² *Id.*

⁵³ *See generally id.*

⁵⁴ *Id.* at 58.

⁵⁵ *Id.* at 178.

⁵⁶ *Id.* at 100.

⁵⁷ *See AUSTRALIAN HIGH COURT, MABO: THE HIGH COURT DECISION ON NATIVE TITLE DISCUSSION PAPER 1* (1993); *Mabo*, 175 C.L.R. at 58-60.

⁵⁸ *Mabo*, 175 C.L.R. at 59-60. For example, Aborigines may not assert a native title claim if they no longer live on ancestral land. *See AUSTRALIAN HIGH COURT, supra* note 57, at 15.

⁵⁹ *Mabo*, 175 C.L.R. at 69. For example, a valid act would be appropriation of land to become a national park. *See AUSTRALIAN HIGH COURT, supra* note 57, at 16.

Importantly, the judiciary was not the only branch of government to recognize the need for establishing a concrete means for determining whether native title attached to land. Shortly after the *Mabo* decision, Parliament enacted native title legislation, building on the native title test set out in the *Mabo* opinion.⁶⁰

IV. THE NATIVE TITLE ACT 1993

A. *Parliament's Reaction to the Mabo Decision*

The Commonwealth Government recognized that the *Mabo* decision warranted a major national response and it subsequently enacted legislation addressing the issue.⁶¹ Parliament sought to clarify legislatively what the judiciary established in *Mabo*: that *terra nullius* was a closed chapter of history and that indigenous people of Australia have native title rights.⁶² Parliament's efforts to codify *Mabo* resulted in the Native Title Act. The Act was a significant legal policy initiative, responding to a wide range of issues encompassed by native title rights.⁶³

In the process of drafting the Native Title Act, indigenous leaders from all over Australia negotiated directly with high government officials.⁶⁴ The indigenous and governmental leaders agreed that the purpose of the NTA, as stated in the Preamble, should be to "rectify the consequences of past injustices[;] . . . [to secure] the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and to ensure that Aboriginal peoples and Torres Strait Islanders receive full recognition and status within the Australian nation."⁶⁵

In order to achieve these ends, the leaders crafted the NTA with a clearly-stated procedure, emphasizing the role of negotiation in resolving native title claim disputes.⁶⁶ The resulting Act is one hundred pages and addresses many of the logistics surrounding indigenous Australians' right to

⁶⁰ Michael Lavarch, *Foreward* to NATIVE TITLE ACT 1993, at iii (1994).

⁶¹ *Id.*

⁶² According to Michael Lavarch, the Australian Attorney-General in 1993, the Native Title Act confirms the *Mabo* decision, particularly the fundamental propositions on which the decision rested, namely: "the rejection of the myth that Australia was *terra nullius* . . . ; and the recognition of native title rights based on the traditions of the indigenous people of Australia." Lavarch, *supra* note 60, at iii-iv.

⁶³ *Id.*

⁶⁴ O'Donoghue, *supra* note 13, at 5.

⁶⁵ Native Title Act, Preamble.

⁶⁶ *Id.* §§ 24-44.

native title, including native title application procedures, duties of the registrar, and the representation of the Aboriginal/Torres Strait Islander Bodies.⁶⁷

B. *Negotiation in the Native Title Act*

Although negotiation was not mentioned in the *Mabo* decision *per se*, the importance of negotiation to native title has been recognized since that decision.⁶⁸ In an official government explanation of *Mabo* published immediately after the decision, the government noted the central role that negotiation would play in determining native title.⁶⁹ Accordingly, the government itself agreed in 1993 that negotiation should be aimed at fair compromises for all parties involved and it should be conducted between native title holders and land developers.⁷⁰

The right to negotiate is presented in the NTA as a right guaranteeing native title claimants in specified land disputes an opportunity to negotiate about the performance of specified future actions by other parties. The actions invoking the right to negotiate are:

- a) the creation of a right to mine, whether by the grant of a mining lease or otherwise;

⁶⁷ Part 3 of the Native Title Act deals with applications, Part 5 outlines the duties of the Registrar (i.e., appointment of the registrar, powers of the registrar, and procedures for termination of employment), and Part 11 discusses the Representative Aboriginal/Torres Strait Islander Bodies (i.e., financial assistance to representative Aboriginal/Torres Strait Islander Bodies). *Id.* §§ 61-79, 95-106, 202-03.

Along with fulfilling the purpose of the *Mabo* decision, the Native Title Act may have assisted in the rejuvenation of indigenous pride. Interestingly, the five years since the Native Title Act was passed have coincided with a feeling of increased efficacy and population pride among indigenous Australians. See AUSTRALIAN BUREAU OF STATISTICS, 1996 CENSUS OF POPULATION AND HOUSING IN AUSTRALIA, SUMMARY OF FINDINGS 2 (1996). Statistics show a correlation between the protections afforded native title under *Mabo* and the Native Title Act and the number of Australians who identified themselves in the last census as being of indigenous origin. Australian Bureau of Statistics. The number of self-identified indigenous Australians increased by 33% between 1991 and 1996, from 265,458 to 352,970. The Australian Bureau of Statistics attributes this increase to an "increased willingness [of Aborigines] to declare their [i]ndigenous origin." *Id.* Considering that the *Mabo* decision came down in 1992, the 1991 figures could be used as a baseline measurement of indigenous self-identification before the decision's repercussions were experienced. Of course, it is also possible that other factors, such as improved census methods, could explain the change in self-identification.

⁶⁸ In fact, the Native Title Act was drafted through a process of negotiations between indigenous Australians and the Commonwealth Government. O'Donoghue, *supra* note 13, at 18.

⁶⁹ AUSTRALIAN HIGH COURT, *supra* note 57, at 60-61.

⁷⁰ O'Donoghue, *supra* note 13, at 5.

- b) the variation of such a right to mine, to extend the area to which it relates;
- c) the extension of the period for which such a right has effect, other than under an option or right of extension or renewal created by the lease, contract or other thing whose grant or making created the right to mine;
- d) the compulsory acquisition of native rights and interests . . . ;
- e) any other act approved by the Commonwealth Minister, in writing, for the purposes of this paragraph.⁷¹

The procedural steps by which these rights must be negotiated are prescribed in the NTA.⁷² First, the government must issue a notice.⁷³ Any party that wishes to assert a claim in native title must respond to this notice within four to six months.⁷⁴ The matter is then negotiated in a good faith manner among the stakeholders.⁷⁵ A good faith effort includes, but is not limited to, a process that suggests a “view to obtaining the agreement of the native title parties.”⁷⁶ One of the negotiating parties may apply to an “arbitral body” for mediation.⁷⁷ The arbitral body must operate according to certain constraints outlined in section 39(1)(a) of the NTA.⁷⁸ The decision of that

⁷¹ Native Title Act, § 26(2)(a)-(c).

⁷² See *id.* §§ 26-44.

⁷³ *Id.* § 29.

⁷⁴ *Id.* § 36(1).

⁷⁵ *Id.* § 31(1)(b).

⁷⁶ *Id.*

⁷⁷ *Id.* § 31(2).

⁷⁸ In making its determination about whether a proposed action (for example, development of a mine) should be approved, the arbitral body must take into account the effects of the proposed action on the following, under the Native Title Act, § 39(1) (a)-(f): any native title rights or interests, the culture of any of “native title parties,” the development of those parties, the freedom of access by any of those parties to the land or waters, freedom to carry out rites, ceremonies or other activities of cultural or traditional significance on the land or waters, the environment of the land or waters concerned, the economic or other significance to Australia and the State or Territory concerned, any public interest in the doing of the act, and any other matter that the arbitral body considers relevant. *Id.* § 39(1)(a)-(f).

It should be noted that consideration of the criteria:

place the arbitral decision-making process on a different footing from that upon which the Minister would proceed. The requirements upon the arbitral body to consider the various listed criteria determine to a degree the nature of the process which has to be undertaken by the arbitral body and the minimum times within which that process can fairly be carried out.

body is reviewable, and may be overturned under the "right of [a] state or territory to overrule," which means that a state or territory can substitute its opinion for that of the arbitral body.⁷⁹

Currently, the right to negotiate plays an integral role in indigenous empowerment because it provides many indigenous Australians the ability to actively protect their way of life.⁸⁰ As the Reconciliation and Social Justice Library points out, the right to negotiate has, for the first time, given Aborigines a real right to directly control the protection of their culture.⁸¹ They have a secure right to be involved in economic activity through agreements that provide employment and wealth-generation opportunities.⁸² Aborigines can also control negative social impacts related to developments in historic homelands.⁸³ The indigenous voice in negotiations, which is so tightly bound to essential rights such as the ability to earn a living and own land, is an essential component of future amendments to the NTA.⁸⁴

V. PROPOSED PROTECTIONS OF THE RIGHT TO NEGOTIATE ARE WEAK

A. *The Bias of the Amendments*

While the protection of native rights under the current NTA has not been perfect, the changes proposed by the current Prime Minister are biased against indigenous interests. The Prime Minister of Australia, John Howard, has proposed changes to the NTA featured in the Native Title Amendment Bill 1997.⁸⁵ These changes are biased in favor of the economic interests of

Justice R. S. French, *Response to the Native Title Amendment Bill 1997*, National Native Title Tribunal, Sept. 1997, at § 39.

⁷⁹ Native Title Act, § 42.

⁸⁰ See The Reconciliation and Social Justice Library, *Chapter 4: The Right to Negotiate* (visited on Nov. 25, 1997) <<http://www.austlii.edu.au/rsjlibrary/niwg/nt-4.html>>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *A Native Title Claim Makes History*, Australian Associated Press (Dec. 12, 1997). Native Title claims have been successfully asserted under the NTA in two instances. A native title claim was successfully negotiated by the Dunghutti people in New South Wales in 1997. The Dunghutti people immediately handed the land over to the government for compensation. The land was subsequently converted to a national park. In that same year, the Hopevale community in northern Queensland was granted 110,000 hectares or 275,000 acres. Thirteen indigenous "clans" and other parties, including the Queensland government, the Far North Queensland Electricity Corporation, and the Australian Maritime Safety Authority, came to agreement. *Id.*

⁸⁵ Note that there have been several Native Title Amendment Bills in 1995 and 1996, e.g. Native Title Amendment Bill 1996 (Austl.).

industry⁸⁶ and dramatically limit native title holders' right to negotiate.⁸⁷ The purported purpose of the amendments is to "streamline the right to negotiate processes so that unnecessary delays are eliminated while protecting the legitimate interests of native title holders."⁸⁸ Yet while the government purports to have the interests of native title claimants at heart, the Prime Minister tells another story.⁸⁹ He has openly admitted that proposed changes to the right to negotiate in the Native Title Act are specifically designed to simplify approval of mining deals when huge profits for the Australian government, such as those derived from mining taxes, are on the line.⁹⁰

The stormy Century Zinc Mine saga aptly demonstrates the tension in the Native Title Act between indigenous property negotiation rights and the competing concern for the expedient resolution of mining rights that is supported by the Amendments. Century is the world's largest undeveloped zinc deposit; it is located in Queensland, Australia.⁹¹ Pasminco, a mining conglomerate, agreed to acquire the Century Project from another mining company for a large sum, subject to the issuance of a valid mining lease.⁹² Under the Native Title Act 1993, Pasminco had to negotiate mining rights with local indigenous groups in Queensland before obtaining the lease.⁹³ The parties failed to reach a negotiated settlement by the deadline imposed under the NTA.⁹⁴ The impasse required parties to proceed to the arbitration phase, where the parties finally reached agreement in May 1997, after a five-month negotiation process.⁹⁵

Critics of native title legislation argue that the native title process has resulted in the postponement of investment decisions for major mining projects throughout Australia. For example, Senator Warwick Parer, the Federal Resources Minister, asserted that the green light for the Century Zinc mine purchase was unnecessarily delayed.⁹⁶ He explains that for too long the

⁸⁶ Elizabeth Keith, *Neither Rights nor Workability: The Proposed Amendments to the Right to Negotiate*, NATIVE TITLES RESEARCH UNIT (Apr. 1997), available in Australian Institute of Aboriginal and Torres Strait Islander Studies <<http://www.aiatsis.gov.au/ntpapers/ntip15.htm>>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Nikki Tait, *Australia Plans Native Title Veto*, FIN. TIMES (London), Oct. 10, 1996, at 35.

⁹⁰ *Id.*

⁹¹ *Australia Queensland's Century Zinc Mine Agreement Ends Stormy Native Title Claims Saga*, FT Asia Intelligence Wire, May 9, 1997, available in LEXIS, World Library, Allnews File.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

Australian economy has been deprived of significant jobs, training, and financial benefits from the Century mine—all because the native title negotiation system caused needless delay.⁹⁷

Prime Minister Howard stands squarely in the camp of staunch critics of the current legislation. He has stated, “[t]o prevent a repeat of the Century situation, the [federal] minister for Aboriginal and Torres Strait Islander affairs will be able to ensure that a project of major economic benefit to Australia can proceed if it appears that . . . benefit will be lost if a decision is not made urgently.”⁹⁸ In other words, if it is important to the rest of Australia’s economy, “details” like negotiating with native title claimants should be suspended. Howard favors this new process which he calls “streamlin[ing]” because “it is only necessary for a mining project to go through the [negotiation] process once”⁹⁹

Many Australians are concerned about the impact the amendments may have on native rights, however. For example, the National Indigenous Working Group on Native Title warns that the government’s biased amendments to the NTA pending in Parliament threaten the reconciliation process between native Australians and those of immigrant descent.¹⁰⁰ Spokesperson for the group, Aden Ridgeway, predicts that if the amendments go through unchanged, they will leave an “open racial sore” on Australia.¹⁰¹ If such concerns are not heeded, the amendments will compromise native title rights.

B. *The Proposed Amendments and Their Effects*

There are two main problems with the current NTA amendments. First, they provide loopholes which permit negotiating procedures to be

⁹⁷ *Id.* On the other hand, proponents of the native title system of negotiations, such as Justice Robert French, President of the Native Title Tribunal, have a different view of the Century mine story. They emphasize the end result, claiming that negotiation talks led the way to the agreement and that, although difficult, the talks underscored the worth of the NTA and the procedures it requires. *Id.*

⁹⁸ Tait, *supra* note 89.

⁹⁹ *Id.* Howard refers to the 1996 proposed amendments here. See Native Title Act Amendment Bill 1996. The goals of the 1996 amendments apply to the 1997 amendments, as well. The primary difference between the two sets of amendments is that the 1997 amendments place additional limitations on indigenous rights, by including increased restrictions on the right to negotiate. See Jennifer Clarke, *The Native Title Act Amendment Bill 1997*, 4 INDIGENOUS L. BUL. 4, 6 (1997); SENATE’S SUPPLEMENTARY EXPLANATORY MEMORANDUM TO THE NATIVE TITLE AMENDMENT BILL 1996, at 2 (1996). The 1996 amendments foreshadowed the restrictions that would be placed on native title claimants in the 1997 amendments. *Id.*

¹⁰⁰ Tasker, *supra* note 43.

¹⁰¹ *Id.*

circumvented.¹⁰² Second, they rush negotiations, thereby emphasizing the quantity of time reaching agreement, rather than the quality of the agreement.¹⁰³ While efficiency is an important goal, meaningful negotiation should follow mutually-agreed upon, consistent procedures.¹⁰⁴ Furthermore, quick resolution of claims should not come at the expense of quality discussion.¹⁰⁵ It is also apparent from the proposed amendments that mining opportunities for would-be developers are enhanced.¹⁰⁶

At the heart of the dispute over revisions of the Native Title Act is the tension between negotiation and streamlining, as exemplified in the Century Mine situation.¹⁰⁷ The current amendments jeopardize negotiation for the sake of expediency. If passed, amendment sections 26A, 26D, and 43A will change current law to limit native title claimants' right to negotiate.¹⁰⁸ Importantly, in the current NTA, section 26A concerns the conditions that must be satisfied before a minister can grant approval for mineral mining projects.¹⁰⁹ These conditions include assessing the degree of impact on indigenous peoples by the activity, notification of representative bodies and the public, and invitations to make submissions of proposed actions and consideration of those submissions.¹¹⁰ Under proposed section 26A(3), however, the agency ministers would be able to approve the exploration by a mining company simply because they consider the mining activity "unlikely to have a significant impact on the particular land or waters concerned."¹¹¹ If adopted, section 26A(3) would weaken the participation requirement of successful negotiation because it empowers ministers to exclude native title claimants from having an influential voice in these expedited decisions.¹¹²

¹⁰² See, e.g., Native Title Amendment Bill 1997, §§ 26A, 26D, 43A.

¹⁰³ See, e.g., *id.* § 34A, § 36A.

¹⁰⁴ Daniel McCool, *Indian Water Settlements: The Prerequisites of Successful Negotiation*, 21 POL'Y STUD. J. 227 (1993).

¹⁰⁵ David Straus, *Facilitated Collaborative Problem Solving and Process Management*, in NEGOTIATION: STRATEGIES FOR MUTUAL GAIN 28, 37 (Lavinia Hall ed., 1993).

¹⁰⁶ See, e.g., Native Title Amendment Bill 1997, §§ 26A, 26D, 43A.

¹⁰⁷ *Australia Queensland's Century Zinc Mine Agreement Ends Stormy Native Title Claims Saga*, *supra* note 91.

¹⁰⁸ Tamara Karmien, *Implications of the Proposed Amendments to the Native Title Act*, NATIVE TITLE RESEARCH UNIT (Nov. 20, 1997), available in Australian Institute of Aboriginal and Torres Strait Islander Studies <<http://www.aiatsis.gov.au/ntpapers/ntp19.htm>>.

¹⁰⁹ Native Title Amendment Bill 1997, § 26A.

¹¹⁰ *Id.*

¹¹¹ *Id.* § 26A(3). The amendment does not require ministers to consult experts in order to determine the environmental impact of proposed actions, such as mineral mining projects, nor does it explain how ministers are to acquire expertise in environmental assessment.

¹¹² For a discussion of the importance of participation in negotiation, see McCool, *supra* note 104, at 227, 233.

Another means by which the amendments weaken the right to negotiate is by limiting negotiation to a single opportunity for each project proposed by mining interests, even if the mining plan changes after the negotiation.¹¹³ Section 26D is known as the “once only” right because one negotiation suffices for the length of a project.¹¹⁴ The “once only” right provides a windfall for mining interests because mining companies can change their plans after negotiations with indigenous Australians are over.¹¹⁵ If a valid earlier right to mine that was commenced on or before December 23, 1996 is renewed, re-granted, or the term extended, the right to negotiate provisions would be inapplicable.¹¹⁶

In addition, where a right to mine is created after a right to explore is granted, the right to negotiate does not apply to the former, even if the mining project changes drastically between the negotiations and the actual implementation of the project.¹¹⁷ The “once only” right under section 26D will thwart negotiation rights because projects evolve between their initial phases and more developed stages.¹¹⁸ “The current dual right to negotiate [is preferable because it] recognizes both the fundamental practical differences between rights to prospect and rights to mine.”¹¹⁹ It would often be impractical to negotiate at the exploration phase, considering that *potential* mining projects are not yet officially planned. The subsequent stages of a project could be entirely different from the negotiated project. Consequently, it should not be assumed that a project once approved would remain unobjectionable.

Further weakening the indigenous right to negotiate, section 43A proposes that if a Commonwealth minister finds that state and territory provisions governing real property transactions were adequate, then the right to negotiate within the context of the NTA would be satisfied.¹²⁰ Allowing states and territories to circumvent national procedures under section 43A decreases the protection of native title by leaving the Commonwealth ministers with discretion over the alternative procedures and restricting the

¹¹³ Native Title Amendment Bill 1997, § 26D.

¹¹⁴ Kamien, *supra* note 108, at 10.

¹¹⁵ *Id.*

¹¹⁶ Native Title Amendment Bill 1997, § 26D.

¹¹⁷ *Id.*

¹¹⁸ Kamien, *supra* note 108.

¹¹⁹ *Id.*

¹²⁰ The Commonwealth minister must make the determination in writing that state or territorial provisions adequately protect the right to negotiate. Native Title Amendment Bill 1997, § 43A.

geographic area over which the right to negotiate applies.¹²¹ Thus, states and territories would be permitted to use procedures contrary to those outlined in the right to negotiate.¹²² This permission violates the tenet of negotiation that requires set, mutually-agreed upon procedures.¹²³ Although the circumstances under which amendment 43A applies are limited,¹²⁴ the very existence of an alternative to following negotiation procedures drastically undermines the value of having a set system of negotiation in the first place because it can then be avoided.¹²⁵

In addition to the new exclusions discussed above, the amendments include several procedural changes to the right to negotiate in sections 34A and 36A. Proposed 34A calls for an official to intervene and make a binding decision if negotiations become stalled.¹²⁶ The official may cut short negotiations as long as at least three months have passed since all parties were notified of the proposed land action and the official has complied with the requirements of section 36B dealing with application for arbitral body determination.¹²⁷ While in theory the goal of facilitating the resolution of negotiations may seem just, in practice the negotiation would hardly be under way before the official could intervene and make a decision independently of negotiating parties.¹²⁸

¹²¹ Kamien, *supra* note 108.

¹²² Native Title Act, §§ 26-44.

¹²³ McCool, *supra* note 104, at 227, 236. The Amendments may also violate the Racial Discrimination Act ("RDA"), which has two operative sections. Section 9 of the RDA makes it unlawful for a person to commit any act involving a distinction based on race resulting in the impaired enjoyment of any human right or fundamental freedom. Section 10 provides that where by reason of any law persons of a particular race do not enjoy a right to the same extent as persons of another race, then by force of section 10 of the RDA, the first-mentioned persons enjoy that right to the same extent. Racial Discrimination Act, 1975, §§ 9-10 (Austl.).

¹²⁴ Negotiation can be circumscribed when the provisions relate to State or Territory acts dealing with land subject to a non-exclusive lease, or reserved for public purposes. Native Title Amendment Bill 1997, § 43A. Formation of a national park, for example, would not require negotiation because it is land reserved for public purposes. French, *supra* note 78, §43A. The alternative procedures to qualify for authorization must give native title holders equivalent procedural rights to those of the non-exclusive lessee and, where there is not a lease over the area, make provisions for notification, negotiation, objection and compensation in relation to the act they propose. *Id.*

¹²⁵ Problems arise in the "gray" area when the minister determines whether or not a state or territorial provision meets the criteria because the minister has very wide discretion.

¹²⁶ Native Title Amendment Bill 1997, § 34A.

¹²⁷ *Id.*

¹²⁸ *Id.* For example, under proposed section 34A, a mining company and an indigenous group could be negotiating the plans for a new mine. Just three months after the parties were notified of the impending negotiation, a governmental official would be able to step in and make a decision; negotiations need not have even begun.

Amendment 34A also threatens to prevent meaningful negotiation because it imposes arbitrary time limits. Ample time is a prerequisite "to mak[ing] collaborative processes work."¹²⁹ Under section 34A, a native title party that becomes registered only at the end of the negotiation period would be limited to a very brief period of negotiation because the amendments reduce the negotiation period from six months in some instances¹³⁰ to a mandatory four months in every case.¹³¹ Instead of rigid deadlines, time limits should be discretionary, depending on the time constraints for the particular negotiation. Time limits should be the first order of business determined by the negotiating parties. Discretionary time limits would alleviate pressure on negotiating parties to rush, thereby emphasizing the quality of their efforts to reach agreement, rather than the quantity of time in which the agreement is achieved. And finally, the amendments never define what constitutes an "urgent" or "significant" case in which ministerial determination would be appropriate.

Proposed amendment 36A¹³² also allows for early ministerial intervention when it is in the "national interest" to reach an accelerated agreement,¹³³ again curtailing the negotiation process. Amendment 36A would result in rushed negotiations under the threat of possible early ministerial interference, thereby allowing officials to bypass so-called "delayed" negotiations. A minister may intervene and make a decision independent of on-going negotiations provided the negotiating parties have not reached agreement and it would be in the national interest to intervene.¹³⁴ The original NTA had no such provision allowing the minister to act arbitrarily, as long as he or she considers it in the "national interest."

In addition to requiring parties to expedite their negotiations, thereby jeopardizing the quality of negotiations, section 36A would codify a double standard because ministers would not have to follow the same procedures aimed at protecting indigenous parties as an arbitral body¹³⁵ when making native title determinations.¹³⁶

¹²⁹ Straus, *supra* note 105, at 37.

¹³⁰ Native Title Act, § 36(1)(b).

¹³¹ Native Title Act, § 36(3); Kamien, *supra* note 108.

¹³² Proposed amendment 36B regards "[c]onsultation prior to Section 34A or 36A determination." Section 36C deals with "Section 34A and 36A determinations." All of these amendments are interrelated, but they need not be detailed here because they are sufficiently similar to Section 36A.

¹³³ See Native Title Amendment Bill 1997, § 36A(2)(c)(i).

¹³⁴ *Id.*

¹³⁵ The usual procedure is for negotiating parties to go to the arbitral body when they reach a stalemate or need extra assistance in reaching agreement. Native Title Act, § 35. Under section 35 of the

In summary, the pending amendments to the Native Title Act threaten a right that all Australians possess: to have and preserve a seat at the negotiating table.¹³⁷ Despite the fact that streamlining is a worthy goal,¹³⁸ the proposed amendments will do more harm than good by muting indigenous voices in an arena where their views are crucial. The proposed legislation shows that the struggle for indigenous Australians to protect their land rights in Australia has not ended with *Mabo* or subsequent decisions affecting the rights and interests of Aborigines in land.¹³⁹

VI. RECOMMENDATIONS

The primary dispute over revisions of the Native Title Act is the tension between negotiation and efficiency. On the one hand, the Australian government has officially noted the importance of negotiation in carrying out the changes implemented by *Mabo*.¹⁴⁰ On the other hand, negotiation requires time, patience, and predictability.¹⁴¹ The government's current amendments do not express a realistic acknowledgement of that fact. It is not surprising that when the government drafts amendments without the input of interested parties, the amendments tend to favor governmental interests. Indigenous concerns

current NTA, "[a]ny negotiation party may apply to the arbitral body for a determination in relation to the act if there is no such agreement" within four to six months, depending on the circumstances. *Id.*

¹³⁶ Section 39 of the NTA currently requires the Tribunal to take into account a variety of factors, such as the effect of the act on the enjoyment by the native title parties of their determined or claimed native title rights and interests. Native Title Act, § 39.

¹³⁷ See generally Keith, *supra* note 86.

¹³⁸ That only two conflicts resolved under the Native Title Act have led to a successful agreement demonstrates that streamlining and other reforms are needed to improve the workability of the Act. See *A Native Title Claim Makes History*, *supra* note 84.

¹³⁹ See, e.g., *Wik Peoples v. Queensland*, (1996) 141 A.L.R. 129 (Austl.). In *Wik Peoples*, the issue was whether a pastoral lease confers rights to exclusive possession on the grantee (i.e., the pastoralist). The High Court established that native title could only be extinguished by a written law or an act of the government showing a plain intention to extinguish native title. *Id.*

The Court reasoned that the pastoral leases in Queensland were not intended to extinguish native title. *Id.* Pastoral leases come from Australian statutory law rather than from English common law. *Id.* Australians developed pastoral leases to meet the special needs of the emerging Australian pastoral industry. *Id.* The leases did not give exclusive possession to the pastoralists (exclusive possession is defined as not requiring that owners share land with others). *Id.* A pastoral lease would not necessarily extinguish all native title rights. Native title rights could continue at the same time that the land was subject to a pastoral lease. *Id.* Where there is conflict in the exercise of those rights, native title rights were subordinate to those of the pastoral lessee. *Id.* See also, *Western Australia v. Commonwealth*, (1995) 183 C.L.R. 373 (Austl.); *Coe v. Commonwealth*, (1993) 118 A.L.R. 193 (Austl.).

¹⁴⁰ See generally AUSTRALIAN HIGH COURT, *supra* note 57.

¹⁴¹ See Straus, *supra* note 105.

are lacking in the present proposals. Importantly, the goals of a streamlined procedure and negotiations that fairly represent all views need not be incompatible goals. However, the solution has eluded the government's current proposals. Given the recent gains in indigenous rights under *Mabo* and the NTA, the post-*Mabo* era presents the potential for indigenous Australians to own a voice in the future of their rights. It would be wrong for the government to miss this opportunity to give all Australians an opportunity to be heard.

Thus, in order for the amendments to the NTA to effect the desired goals of streamlined procedures that fairly represent all interests, the parties concerned should draft the changes together.¹⁴² The Native Title Act was originally drafted cooperatively between indigenous peoples and the Commonwealth Government,¹⁴³ and the Act should be revised through similar cooperation.¹⁴⁴ It is only through the efforts of all concerned parties that a system can evolve to carry forth the principles established in *Mabo*.¹⁴⁵

Whether or not the government does consult with indigenous leaders, there is still a primary way that the right to negotiate in the NTA could be improved. Under section 26 of the current version of the NTA, the Commonwealth minister can choose to exclude many proposed actions

¹⁴² The head of the Aboriginal and Torres Strait Islander Commission, Lois O'Donoghue, who is an indigenous Australian, points out:

Ultimately, direct negotiation by the [g]overnment with indigenous interests is essential A number of the current amendment proposals . . . are either not acceptable or are unworkable. It is important for the future management of land and resources in Australia that decisions about the provisions of the NTA are reached on a cooperative and constructive basis. Otherwise the process will leave a legacy of resentment and distrust.

O'Donoghue, *supra* note 13 at 28.

For a discussion of the importance of indigenous involvement in drafting negotiation procedures, see McCool, *supra* note 104, at 227, 236; Lara Elizabeth Burgel, *Native American Reserved Water Rights: The Legal and Historical Development of a Modern Dilemma* 119 (1996) (unpublished B.A. senior fellowship thesis, Dartmouth College) (on file with the Dartmouth College Libraries).

¹⁴³ The consultations were directed by the Committee of Ministers, convened in October 1992, chaired by the Prime Minister, and consisting of the Attorney-General, the Minister for Aboriginal and Torres Strait Islander Affairs, and other ministers. AUSTRALIAN HIGH COURT, *supra* note 57, at 10-11. Among the consultation participants were: commissioners and chairpeople of the Aboriginal and Torres Strait Islander Commission, the Northern Land Council, the Central Land Council, the Cape York Land Council, the Kimberley Land Council, the New South Wales Aboriginal Land Council, the Aboriginal Legal Service of Western Australia, the Australian Mining Industry Council, the Australian Petroleum Exploration Association, the National Farmers Federation, state and territory governments, and the Council for Aboriginal Reconciliation. *Id.* In April and May 1993, meetings were held with representatives of Aboriginal and Torres Strait Islander people and industry representatives. *Id.*

¹⁴⁴ See O'Donoghue, *supra* note 13.

¹⁴⁵ Lavarch, *supra* note 60, at iii-iv.

from negotiation eligibility.¹⁴⁶ The list of exclusions in section 26 applies to actions that the minister thinks will have “minimal effect on any native title concerned.”¹⁴⁷ Native rights are severely curtailed when the native parties’ ability to “come to the table” has been entirely destroyed by the opinion of the Commonwealth minister. This sweeping discretionary power to exclude certain actions vitiates severely the right to negotiate within the NTA. The power to exclude should not exist; there should be no acts excisable by ministerial discretion.

VII. CONCLUSION

Just six years after the historic *Mabo* decision that eliminated *terra nullius*,¹⁴⁸ the Australian government is on the verge of impairing indigenous rights to land in favor of policies that privilege special interests such as the mining industry. This change in course now, away from the structure currently set up in the NTA to protect indigenous rights, would set in motion the deterioration of those rights. Indigenous parties deserve the same rights today as they were granted both under *Mabo* and the Native Title Act. Indigenous peoples and government officials should work together to revise and improve the Act.¹⁴⁹

The overarching purpose of the government’s amendments is to “streamline the right to negotiate processes so that unnecessary delays are eliminated while protecting the legitimate interests of native title holders.”¹⁵⁰ Unfortunately, the amendments are biased in favor of industry interests, particularly those of mining companies. These biases lie at the root of the two main problems with the NTA amendments: they provide loopholes so that negotiation procedures can be avoided¹⁵¹ and they needlessly rush negotiation.¹⁵²

At its core, the dispute concerning revisions of the Native Title Act involves a tension between negotiation and streamlining. Streamlining requires speed, but negotiation takes time.¹⁵³ The government’s current amendments do not resolve or even address that conflict. This outcome is

¹⁴⁶ Native Title Act, § 26.

¹⁴⁷ *Id.* § 26(4).

¹⁴⁸ *Mabo v. State of Queensland* (1992) 175 C.L.R. 1 (Austl.).

¹⁴⁹ See O’Donoghue, *supra* note 13, at 18.

¹⁵⁰ Keith, *supra* note 86, at 3.

¹⁵¹ See, e.g., Native Title Amendment Bill 1997, §§ 26A, 26D, 43A.

¹⁵² Native Title Amendment Bill 1997, §§ 34A, 36A.

¹⁵³ See Straus, *supra* note 105, at 37.

most unfortunate because the goals of streamlined procedures and negotiations that fairly represent all views need not be incompatible.

The post-*Mabo* era presents an unprecedented opportunity for indigenous Australians to own a voice in the future of their rights. Just as they jointly wrote the original Native Title Act, governmental and indigenous leaders need to work cooperatively, in a spirit of mutual trust, to draft amendments together. Only then will they strike a balance between procedural efficiency and a secure right to negotiate.

