



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

Ulla Secher*

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 title² was not a recognised part of

LLB(Hons) JCU, Barrister of the Supreme Court of Queensland; Lecturer in Law, James Cook University; PhD candidate, University of New South Wales. The author would like to thank Dr H.A. Amankwah for valuable comments on earlier drafts of this paper. The basis for this paper is a suggestion from Brendan Edgeworth that a concept from the author's PhD thesis be developed further.

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'; Toohy 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 land⁴ 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 Acts⁹ adequately address

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 ... [dic] 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

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 '[c]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'ney 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

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

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 *Pareroutja 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 JJ) 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': *Pareroutja v Tickner* No. S156 of 1993, 12-13 April 1993; Casenote: *Pareroutja and Others v Tickner and Others* No S 156 of 1993 (1994) 3(68) *Aboriginal Law Bulletin* 26.

³⁰ *Pareroutja 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.³⁵

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 *Pareroutja 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 *Pareroutja 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 *Pareroutja 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,

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 Acts⁴⁶

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

⁴³ *NTA*, s 8.

⁴⁴ *NTA*, s 210.

⁴⁵ As a result of the common law position espoused in *Pareroutja 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 A⁵³ and B⁵⁴

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 statutory 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

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(c)). 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

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 *Pareroutja 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 statutory 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 compulsory 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 Plan⁶⁷ 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 Plan⁶⁹ 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

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 23C 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 Territory⁷² 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

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)(ii) to (viii), ss 23B(3) and (7).

⁷⁵ *NTA*, s 23B(2)(c)(ii).

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 Schedule⁸⁵ 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

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*, ss 247B, 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.

applied by the High Court in *Wik* to determine whether the relevant leases granted exclusive possession, differs in one important respect. The Court in *Wik* approached the task of determining whether the relevant pastoral leases conferred exclusive possession by examining the legislation under which the leases were granted, the specific terms of the lease instruments in light of the historical development of the pastoral lease interest in Australia and other factors such as the purpose and size of the leases.

In determining whether a particular interest would be included in the Schedule, the relevant legislatures had regard, principally, to the 'substantive rights and obligations of the grantee under the relevant legislation.'⁸⁹ A variety of factors in the relevant legislation were considered, including, the terms and conditions of the interest, the conferral of rights on the Crown and third parties, the obligations conferred and the restrictions imposed upon the grantee and the capacity to upgrade.⁹⁰ Reliance was also placed upon a number of other factors in relation to particular interests, including the purpose, historical origins, location and the size of the interest.⁹¹ The legislature did not, however, consider the terms contained in each particular instrument relating to the interests which were included in the Schedule. Rather, the interests contained in the Schedule are interests which, 'without needing to have recourse to the terms of the ... instruments themselves, it [could] be said with reasonable certainty conferred a right of exclusive possession on the grantee.'⁹²

It is clear from the High Court judgments in *Wik* that no one particular factor can be determinative of whether a particular interest confers a right of exclusive possession on the grantee. Accordingly, since the Schedule was prepared without examining one of the important factors that the High Court declared to be relevant in indicating whether a particular interest confers a right of exclusive possession, namely, the terms of the particular instruments themselves,⁹³ the interests listed in the Schedule potentially extinguish native

⁸⁹ The Parliament of the Commonwealth of Australia, the Senate, *Native Title Amendment Bill 1997 - Explanatory Memorandum*, op cit (n 71), p 373.

⁹⁰ *Ibid* at 373-374.

⁹¹ *Ibid* at 374-375.

⁹² *Ibid* at 375. The Explanatory Memorandum notes that if there was 'significant doubt about whether a particular lease conferred a right of exclusive possession, it was not included in the Schedule': *Id*.

⁹³ Furthermore, in determining whether a particular interest should be included in the Schedule, the relevant governments did not have regard to the activities which were in fact being undertaken on the subject land. The High Court appears to have distinguished between extinguishment by the grant, rather than the exercise, of an interest in land which is inconsistent with the continued enjoyment of native title, and the 'yeilding' of native title rights to pastoralist's rights as a result of any factual exercise of an interest in land which is consistent with the enjoyment of native title. Nevertheless, because the interests listed in the Schedule are deemed to confer a right of exclusive possession and therefore extinguish native title, the relevant test does not have to consider what activities are in fact being undertaken on the subject land.

title which, at common law, co-exist with these interests.⁹⁴

In addition to the two-pronged approach adopted in defining a 'previous exclusive possession act', under both the general and specific limbs of the definition of 'previous exclusive possession act,' the relevant act must be valid,⁹⁵ must have occurred on or before 23 December 1996,⁹⁶ and must not be expressly excluded from the definition.⁹⁷ The express exclusion of an act from the definition of previous exclusive possession act does not automatically mean that the act does not extinguish native title. Rather, such an exclusion leaves the common law as the source of authority on the effect of the act on native title. Thus, although a particular interest does not appear in the Schedule, it is open to the grantee or relevant government to argue that the particular interest does in fact confer exclusive possession and therefore extinguish native title.⁹⁸ This situation does not, of course, guarantee the

⁹⁴ Thus, although the Explanatory Memorandum for the *Native Title Amendment Bill 1997* expressly states that the general tests for extinguishment set out in *Wik* and in *Mabo* 'are accepted and adopted', the relevant governments, in deciding whether a particular interest was included in the Schedule, disregarded selective aspects of the test for determining whether a particular lease conferred exclusive possession: The Parliament of the Commonwealth of Australia, the Senate, *Native Title Amendment Bill 1997 - Explanatory Memorandum*, op cit (n 71), p 372, and see p 369. Accordingly, where there is ambiguity regarding the inclusion of a particular interest in the Schedule, the Court may have regard to the Explanatory Memorandum to deduce the purpose of the amended *NTA*. Accordingly, since this appears to be a *Wik*-consistent purpose, that is, since Scheduled interests are interests which, 'on the basis of the common law', purport to confer exclusive possession and therefore extinguish native title, if a Court finds that, at common law, the particular interest does not in fact confer such exclusive possession on the grantee, the interest's description as a Scheduled interest may be questioned. See *Acts Interpretation Act 1901* (Cth), s 15AA.

⁹⁵ Although validity can arise from validation as a past act under ss 14 or 19 of the *NTA* or validation as an intermediate period act under ss 22A or 22F of the amended *NTA*: s 23B(2)(a).

⁹⁶ *NTA*, s 23B(2)(b). Point two of the 10 Point Plan referred to confirmation in relation to tenures in existence on or before 1 January 1994. Although the confirmation provisions in Division 2B apply to acts done on or before 23 December 1996, the date of the *Wik* decision, the only acts occurring between those two dates which will be covered are those which either validly extinguished native title in accordance with the *NTA* or those which are validated by Division 2A.

⁹⁷ *NTA*, ss 23B(9), (9A), (9B), (9C), and (10). The grant or vesting of any type of interest for the benefit of Aboriginal peoples or Torres Strait Islanders (s 23B(9)) and the establishment of a national, State or Territory park (s 23B(9A)) are specifically not previous exclusive possession acts. An act will also not be a previous exclusive possession act if legislation provides that it does not extinguish native title (s 23B(9B)), or if regulations have removed the act from the category of previous exclusive possession acts (s 23B(10)). Furthermore, the grant to the Crown or a statutory authority will only constitute a previous exclusive possession act if the grant extinguished native title at common law, or where the grant did not extinguish native title at common law, when the land or waters concerned were used in such a way that, at common law, native title is extinguished: s 23B(9C). In effect, this provision excludes 'fake freehold' or Crown to Crown grants from the list of tenures which the government considers confer a right to exclusive possession on the grantee. In the latter case, the Crown's right to use the land or waters concerned is expressly declared to be valid: *NTA*, s 23DA.

⁹⁸ In such a case, the particular interest would come within the relevant subparagraph of 23B(2)(c) of the *NTA*. Where a particular interest has been included in the Schedule,

certainty which was the hallmark of the amending legislation. Furthermore, the amended *NTA* also contains a mechanism to add other interests to the Schedule. An interest may be declared to be a ‘Scheduled interest’ by regulation⁹⁹ provided that the regulation only covers a single type of interest.¹⁰⁰

Previous Non-Exclusive Possession Acts

Division 2B of Part 2 of the *NTA* also confirms the effect on native title of previous non-exclusive possession acts. For an act to be a previous non-exclusive possession act, the act must be valid,¹⁰¹ must have taken place on or before 23 December 1996¹⁰² and must consist of the grant of a non-exclusive agricultural lease or a non-exclusive pastoral lease.¹⁰³ However, an act is also a previous non-exclusive possession act if it takes place after 23 December 1996,¹⁰⁴ provided that the act would have been a previous non-exclusive possession act under the general definition¹⁰⁵ if that definition allowed acts after 23 December 1996 to be previous non-exclusive possession acts¹⁰⁶ and the act took place in exercise of a legally enforceable right created, or as a result of a bona fide offer, commitment, arrangement or undertaking made or given before 23 December 1996 where there is written evidence of such offer, commitment, arrangement or undertaking created at or near the time it was made or given.¹⁰⁷

Previous non-exclusive possession acts attributable to the Commonwealth or to a State or Territory¹⁰⁸ either extinguish any native title rights that are

however, it is conclusive proof that the interest is a previous exclusive possession act and therefore extinguishes native title.

⁹⁹ The regulation must be made for the purposes of s 249C(1)(b) of the *NTA*.

¹⁰⁰ *NTA*, s 249C(2). The consequences for interests contained in the Schedule are the same for interests that are declared to be ‘Scheduled interests’ by regulation.

¹⁰¹ *NTA*, s 23F(2)(a). Such validity may arise as a result of the validation of past acts under ss 14 or 19 of the *NTA* or as a result of the validation of intermediate period acts under ss 22A or 22F of the amended *NTA*.

¹⁰² *NTA*, s 23F(2)(b). The date of the High Court’s decision in *Wik*.

¹⁰³ *NTA*, s 23F(2)(c). The terms ‘non-exclusive agricultural lease’ and ‘non-exclusive pastoral lease’ are defined in ss 247B and 248B, respectively, of the *NTA*. A non-exclusive agricultural lease is an agricultural lease (s 247) which is not an exclusive agricultural lease (s 247B, namely, not an agricultural lease that confers a right of exclusive possession over the land or waters covered by the lease or which is a Scheduled interest: s 247)). A non-exclusive pastoral lease is a pastoral lease (s 248) that is not an exclusive possession pastoral lease (s 248B, namely, not a lease which confers a right of exclusive possession over the land or waters covered by the lease or which is a Scheduled interest: s 248A).

¹⁰⁴ *NTA*, s 23F(3)(a).

¹⁰⁵ *NTA*, s 23F.

¹⁰⁶ *NTA*, s 23F(3)(b).

¹⁰⁷ *NTA*, s 23F(3)(c).

¹⁰⁸ Provided the State or Territory has legislated in accordance with Division 2B of the *NTA*.

inconsistent with the grant if that is the position at common law,¹⁰⁹ or suspend any native title rights that are inconsistent with the grant.¹¹⁰ Whether inconsistent native title rights are extinguished or merely suspended by a previous non-exclusive possession act does not, however, affect the rights of the lessee. In either case, the lessee will be able to carry on activities pursuant to the lease and the future act regime without impediment from native title. Moreover, even where a non-exclusive possession act involves the grant of rights that are consistent with native title rights, the rights of the lessee, although not extinguishing native title rights, prevail over the native title rights.¹¹¹

Immediate v Deferred Indefeasibility

In the case of both previous exclusive and previous non-exclusive possession acts, the crucial point is that the relevant act which is sought to be confirmed for the purpose of extinguishing native title must be valid. What happens when the relevant act, although invalid, is nevertheless registered under the Torrens system? Does the regulation of ordinary title under the Torrens system of land registration cure the defect with the result that the confirmation provisions apply to extinguish any native title? The question of 'immediate' versus 'deferred' indefeasibility comes into issue:¹¹² does indefeasibility apply immediately on registration or not?¹¹³ Despite the clear

¹⁰⁹ NTA, ss 23G(1)(b)(ii), 23I. Any extinguishment is taken to have occurred at the time of the grant of the lease and not at the time that the relevant section of the NTA came into effect: s 23G(1)(c).

¹¹⁰ NTA, ss 23G(1)(b)(i), 23I.

¹¹¹ NTA, ss 23G(1)(a), 24GC(2) and 44H. The existence of s 24GC 'is not intended to limit the operation of s 44H and is included to add certainty for primary producers affected by native title': The Parliament of the Commonwealth of Australia, the Senate, *Native Title Amendment Bill 1997 - Explanatory Memorandum*, op cit (n 71), p 60.

¹¹² Invalidities in the process of transfer, as opposed to the process of registration, have led to these two competing theories of the concept of indefeasibility. The process of transfer involves the parties to the transaction executing registrable instruments, whereas the process of registration involves the Registrar actually registering the instrument. The doctrine of immediate indefeasibility confers a good title on the registered proprietor immediately he obtains registration of the transfer or other instrument regardless of its validity: *Breskvar v Wall* (1971) 126 CLR 376 approving the Privy Council in *Frazer v Walker* [1967] 1 AC 569. See also *Leros Pty Ltd v Terara Pty Ltd* (1992) 174 CLR 407. Under the doctrine of deferred indefeasibility, however, indefeasibility is deferred to one step away from the void instrument. Thus, although a transfer which is void at common law will, when duly entered on the register, become the root of a valid title in a bona fide purchaser, the registered proprietor's title under a null deed is not indefeasible: *Gibbs v Messer* [1891] AC 248.

¹¹³ This question has also been raised in the context of registered proprietors who have become registered as volunteers, whether as donees or devisees. Significantly, there have been two broad responses to the question of the title of the registered volunteer. First, to accord the volunteer immediate indefeasibility (*Bogdanovic v Koteff* (1988) 12 NSWLR 472; *Hamilton v Iredale* (1903) 3 SR (NSW) 535) and, secondly, to defer indefeasibility to a purchaser for value from the volunteer (*King v Smail* [1958] VR 273; *Rasmussen v Rasmussen* [1995] 1 VR 613; *Official Receiver v Klau* (1987) 74 ALR 67; *Ovenden v Palyaris* (1974) 11 SASR 41; *Crow v Campbell* (1884) 10 VLR (Eq) 86; *Biggs v McElister* (1880) 14 SALR 86; *Chomley v Firebrace* (1879) 5 VLR (Eq) 57). For a discussion on this aspect of the Torrens system, see generally R. Atherton, 'Donees, devisees and Torrens

acceptance of immediate indefeasibility¹¹⁴ by the High Court in *Breskvar v Wall*,¹¹⁵ the Federal Court of Australia, in *Hayes v Northern Territory*,¹¹⁶ rejected this conventional approach and held that different propositions of law govern the legal effect upon native title of the administrative act of registering an instrument creating or affecting non-native title interests in land, at least in the context of confirmation of extinguishment by previous exclusive possession act.¹¹⁷ Could it be that the Torrens system embraces not one but, depending on the existence of native title, both theories of indefeasibility? Are the two competing theories of indefeasibility mutually exclusive, or is their application merely dependent on the facts of the particular case?

*Hayes v Northern Territory*¹¹⁸

The applicants¹¹⁹ sought a determination of native title in respect of 166 separate parcels of land in and near Alice Springs. It was alleged that all land and waters claimed were either 'vacant Crown land, Crown land subject to various reserves, Crown land subject to various leases [or] Crown land 'set aside' for various purposes',¹²⁰ and that none of the claimed area was held under freehold title or held under a current pastoral lease.¹²¹ In concluding that native title existed in relation to either the whole or part of 113 of the 166 parcels of land, the Federal Court judgment, delivered by Olney J, rejected the Northern Territory's argument that native title had been extinguished by reason of the establishment of various legislative regimes which were said to be inconsistent either in whole or in part with the continuation of native title¹²² and that the *Crown Lands Ordinance 1912 (NT)* manifested a clear and plain intention to extinguish native title rights and

title: the problem of the volunteer under the Real Property Acts'. *ALTA Conference Proceedings*, Volume 2, 1998 (held at the University of Otago, Dunedin, July 5-8, 1998); (Butterworths and LBC Information Services, Sydney, 1998), pp 645-678.

¹¹⁴ As determined by the Privy Council in *Fraser v Walker* [1967] CA 569.

¹¹⁵ (1971) 126 CLR 376, which, it is worth noting, was decided before the High Court's judgment in *Mabo*.

¹¹⁶ [1999] FCA 1248.

¹¹⁷ The application of the principle of immediate indefeasibility is also doubtful in South Australia and Victoria because of the particular Torrens statutes in those jurisdictions: *Rogers v Resi-Statewide Corp Ltd* (1991) 32 FCR 344 and *Chasfield Pty Ltd v Taranto* [1991] 1 VR 225.

¹¹⁸ [1999] FCA 1248 - hereafter referred to as '*Hayes*'.

¹¹⁹ Who were family representatives of the Central Arrernte and other Arrernte people. For the purposes of the application, these families were collectively termed the 'Mbantuarinya Arrernte': [1999] FCA 1248, [5] per Olney J.

¹²⁰ [1999] FCA 1248, [6].

¹²¹ [1999] FCA 1248, [6]. The appendix to the reasons for judgment sets out, inter alia, particulars of each separate parcel of land and waters and identifies each parcel by reference to an area number.

¹²² [1999] FCA 1248, [120]. In this context, Olney J examined seven categories of legislative regimes, the subject matter of which were: minerals; water; flora and fauna; Aboriginal people; local government; soil conservation; and defence.

interests with the consequence that leasehold interests granted pursuant to it were intended to grant lessees a right to exclusive possession.

Significantly, Olney J closely examined the history of the native land holdings and their consistency or inconsistency with various other types of non-native land holding.¹²³ It was in the context of examining a particular miscellaneous lease that Olney J rejected the conventional approach to indefeasibility. The lease¹²⁴, which was granted pursuant to the *Crown Lands Ordinance* 1912 (NT) for a term of 14 years,¹²⁵ failed to specify the purpose for which it was granted.¹²⁶ This failure was in direct breach of s 72 of the *Crown Lands Ordinance*.¹²⁷ Nevertheless, it was argued by counsel for the Northern Territory that the execution of the lease constituted a previous exclusive possession act and thereby extinguished any native title to the subject land.

As the lease did not express the purpose for which the land was leased, Justice Olney observed that it did not comply with the statute which authorised its grant.¹²⁸ Accordingly, the execution of the lease in the form described could not have been a previous exclusive possession act.¹²⁹ Importantly, however, it was contended that any defect in the grant had been cured by the fact of registration of the lease under the relevant Real Property Act.¹³⁰ In rejecting the argument that registration of the lease guaranteed an absolute and indefeasible title to the land,¹³¹ Justice Olney appears to have treated native title as either an exception to indefeasibility of title per se, or as a sufficient ground for applying the deferred indefeasibility theory.

Olney J observed that notwithstanding that registration confers an indefeasible title to the land, 's 23B(2) [of the NTA] applies only to acts which are valid and *whatever rights registration may have conferred on persons*

¹²³ The non-native land holdings included: Pastoral leases ([66] - [88]); Crown leases perpetual ([89]), Crown leases term ([89]), Miscellaneous leases ([90]); special purpose leases ([91]), agricultural leases ([92]-[93]), leases of Town land and Town land subdivision leases ([94]), freehold estates ([95]-[96]), public works ([97]-[98]); grazing, occupation and miscellaneous licences ([99]-[110]), pipeline licences ([111]-[115]); sand and gravel permits ([116]); and the reservation of land for a public purpose ([117]).

¹²⁴ Which was identified as 'ML 380 14 years from 1/7/ 1943 No purpose stated.'

¹²⁵ From 1 July 1948.

¹²⁶ Although the purpose 'Business (gardening)' was noted on an administrative record which was in evidence.

¹²⁷ As amended by the *Crown Lands Ordinance* (No 2) 1959. Section 72 of that Ordinance provided that '[e]very miscellaneous lease shall express the purpose for which it is granted and shall contain a covenant by the lessee that he will use the land only for the purpose expressed in the lease.'

¹²⁸ [1999] FCA 1248, [90(iv)]. His Honour did observe that had s 72 provided that the lessee covenant to use the land only for the purpose for which the lease was granted, it may have been possible to look to extrinsic evidence to establish that purpose and so give substance to the covenant: para 90(iv).

¹²⁹ [1999] FCA 1248, [90(iv)].

¹³⁰ *Real Property Act* 1886 (NT).

¹³¹ [1999] FCA 1248, [90 (iv)].

dealing with the lessees, the lease when granted was invalid, thus a nullity.¹³² His Honour continued that if the argument advanced was accepted, it would mean that 'the administrative act of registering the lease under the Real Property Act not only cured its invalidity but also had the effect of extinguishing any existing native title rights and interests in the land.'¹³³ Olney J explained that such a proposition:¹³⁴

does not sit comfortably with either the general thrust of dicta of various Judges in both *Mabo No 2* and *Wik* which emphasise the need for a clear and plain intention in order to extinguish native title, or with the requirement of s 23B(2) (a) of the Native Title Act that the initial criterion to establish a previous exclusive possession act is that the act is valid.

Another Exception to Indefeasibility or Ground for Applying the Deferred Indefeasibility Theory?

Prima facie, it appears that Olney J's judgment embraces the deferred indefeasibility theory: a registered proprietor's rights under a 'null deed'¹³⁵ are not indefeasible vis a vis native title, rather indefeasibility is 'deferred' to one step away from the void instrument. Accordingly, if an interest is void it cannot be validated by registration. On the facts of the case before him, Olney J concluded that registration of the invalid instrument was not a valid previous exclusive possession act and, consequently, native title was not extinguished. Nevertheless, the actual basis for Olney J's conclusion is equivocal. Since Olney J expressly stated that his conclusion was consistent with both the common law and the relevant statutory provisions, there are four possible interpretations of his decision; the first two based on the relevant legislative provisions, the latter two based upon the common law. Importantly, except for the second possible interpretation, which is narrower in its operation than the others, these interpretations potentially raise wider legal implications than those applying to the immediate facts of the decision in *Hayes*.

Olney J's Decision: Statutory Interpretations

First, Justice Olney's decision may constitute another example of the overriding statute exception. It is well established that where a later statute is inconsistent with the provisions of a Torrens Act conferring absolute and indefeasible title on the registered proprietor, the later law overrides the Torrens Act.¹³⁶ In this context, one of the requirements for establishing a previous exclusive possession act under s 23B(2) of the NTA is that the act

¹³² [1999] FCA 1248, [90(iv)], emphasis added.

¹³³ [1999] FCA 1248, [90(iv)].

¹³⁴ [1999] FCA 1248, [90(iv)].

¹³⁵ See *Gibbs v Messer* [1891] AC 248 per Lord Watson delivering the judgment of the Board.

¹³⁶ *Miller v Minister of Mines* [1963] AC 484; *Travinto Nominees Pty Ltd v Viattas* (1973) 129 CLR 135; *British American Cattle Co v Caribe Farm Industries Ltd* [1998] 1 WLR 1529. See also n 40 *supra* and Mr Justice P.W. Young, 'Indefeasibility of Title in Belize' (1999) 73 *Australian Law Journal* 27.

must be valid.¹³⁷ Although the Torrens legislation contains no specific exception to indefeasibility based on the invalidity of a document through which registration was obtained,¹³⁸ since the *NTA* is the later law, it overrides the Torrens Act¹³⁹ with the result that registration of an invalid interest does not attract the protection of the indefeasibility provisions of the Torrens Act vis a vis native title.¹⁴⁰

Although Olney J only referred to the validity requirement contained in s23B(2)(a) of the *NTA*, the consequences of this interpretation are important for all acts which are invalid under the *NTA*. Once native title is recognised under the *NTA*, it can not be extinguished contrary to the Act.¹⁴¹ The *NTA* provides only five general ways in which this can happen: under the schemes for the validation of past acts and intermediate period acts, native title is extinguished only in limited circumstances where it is necessary to validate past or intermediate period acts which are invalid but 'would have been valid ... if the native title did not exist';¹⁴² under the scheme for the confirmation of previous exclusive possession acts and previous non-exclusive possession acts, native title is only extinguished if the act sought to be confirmed is valid;¹⁴³ and under the future acts regime, native title may only be

¹³⁷ Section 23B(2)(a) of the *NTA*. See also [1999] FCA 1248 at [90(iv)] per Olney J.

¹³⁸ The tenor of the relevant Torrens Acts is that the registered proprietor's interest is only subject to registered interests unless some ground of statutory exception prevents the acquisition of indefeasibility of title.

¹³⁹ The later statute need not expressly override the indefeasibility provisions of the Torrens Acts; it is sufficient if that is the proper implication from its terms: *Miller v Minister for Mines* [1963] 2 WLR 92, 98.

¹⁴⁰ In this respect, the interests which are invalid for failure to comply with the provisions of the *NTA* are in a special position. This conclusion would also be applicable to any other acts which are required, by the *NTA*, to be valid before they have an extinguishing effect on native title. Cf the position of a registered proprietor who acquires an indefeasible title notwithstanding that the dealing under which he or she claimed title was void for breach of statutory prohibition: *Boyd v Mayor of Wellington* [1924] NZLR 1174 (void proclamation); *Breskvar v Wall* (1971) 126 CLR 376 (transfer void for breach of stamp duties legislation); *Rockhampton Permanent Building Society v Petersen (No 2)* [1989] 1 Qd R 670 (mortgage void for breach of lending rules) or that the instrument was executed under a power of attorney that did not authorise its execution (*Broadlands International Finance Pty Ltd v Sly* (1987) 4 BPR 9420; *Co-operative Property Developments of Australia Ltd v Commonwealth Bank of Australia* (1992) 1 Tas R 308), or in the case of a registered proprietor of a lot in a subdivision, where the subdivision breached the statutory requirements for creating legal subdivisions (*Sutherland Shire Council v Moir* (1982) 49 LGRA 112). See generally P. Butt, *Land Law*, op cit (n 39), pp 698-699.

¹⁴¹ *NTA*, s 11. At common law, native title will be extinguished as a result of action by the native title holders themselves, such as losing their connection with the land or the death of the last member of a particular Aboriginal group. The *NTA*'s failure to address this issue in the context of future extinguishment of native title may, therefore, create a legal anomaly: native title, once recognised under the *NTA*, may exist in perpetuity notwithstanding that it no longer satisfies the definition of 'native title' in the *NTA*.

¹⁴² For Past Acts: s 228(2)(b) of the *NTA*; for intermediate period acts: s 232A(2)(c) of the *NTA*.

¹⁴³ Section 23B(2)(a) and 23F(2)(a) of the *NTA* respectively.

extinguished by acts which fall within one of the twelve prescribed categories of future acts¹⁴⁴ and comply with the conditions for validity specified for that type of future act.¹⁴⁵

Thus, the *NTA* requires, expressly or by implication, that before native title can be extinguished by any act, the extinguishing act must, in the absence of native title, be valid; any invalidity of the extinguishing act must be due to the existence of native title. Accordingly, on the basis of the overriding statute exception, registration of any act which is invalid other than as a result of the existence of native title, would not attract the benefits of the indefeasibility of title provisions of the Torrens statutes vis a vis native title.¹⁴⁶ Thus the Torrens legislation must be read in light of principles contained in the *NTA*, which relate to the validity of acts.¹⁴⁷

Secondly, and more narrowly, it can be argued that the decision stands for the proposition that a person registering a void instrument, specifically because it fails to satisfy the requirements of s 23B(2)(a) of the *NTA*, does not obtain an indefeasible title. This interpretation means that if a document is void for the purpose of the statutory confirmation of extinguishment of native title by previous exclusive possession act, it cannot be validated by registration: in such cases either the deferred indefeasibility theory applies or native title constitutes an exception to indefeasibility in this limited context. This ratio responds to the serious consequences for native title of the *NTA*'s confirmation provisions.¹⁴⁸

¹⁴⁴ See n 303 *infra*.

¹⁴⁵ *NTA*, s 24AA.

¹⁴⁶ There is, however, an exception in relation to the registration of invalid future acts: see Part IV, section entitled 'Registration of Invalid Future Acts', *infra*.

¹⁴⁷ Prior to the repeal of the Queensland *Real Property Acts 1861 and 1877* by the *Land Title Act 1994 (Qld)*, all the Torrens statutes were later Acts to the *NTA*. The enactment of the *Land Title Act 1994*, however, complicates this position. Since this Act commenced operation on 4 April 1994, the earlier statute has now become the later statute in point of time for the purposes of inconsistency with the *NTA*. There is considerable authority for the view that the relevant date for applying the rule of construction is the date of the re-enactment rather than the date of the legislation's first enactment: *Bennett v Minister for public Works (NSW)* (1908) 7 CLR 372; *Maybury v Plowman* (1913) 16 CLR 468; *Miller v Minister for Mines* [1963] AC 484; see O'Connor, 'Public Rights and Overriding Statutes as Exceptions to Indefeasibility of Title' (1994) 19 *Melbourne University Law Review* 649 at p 658. Nevertheless, MacDonald et al, convincingly argues that, with respect to Queensland, the 're-enactment' of the indefeasibility provisions in the *Land Title Act 1994* should not necessarily be interpreted as impliedly amending or repealing an inconsistent statute which, prior to the 1994 Act, prevailed because it was a later statute to the *Real Property Act 1861*: C. MacDonald et al, *Real Property Law in Queensland* (LBC Information Services, Sydney, 1998), p 369.

¹⁴⁸ This interpretation also accords with the *NTA*'s provisions dealing with the confirmation of Crown rights to natural resources. Governments may confirm any existing ownership of natural resources (*NTA*, s 212(1)(a)); any right to use, control and regulate the flow of water (*NTA*, s 212(1)(b)); any access to beaches and public places (*NTA*, s 212(2)) and that any existing fishing access rights prevail over any other public or private fishing rights (*NTA*, s 212(1)(c)). Such confirmation does not, however, extinguish or impair any native title rights and interests and does not affect any conferral of land or waters, or an interest in land or waters, under a law that confers benefits only on Aboriginal people or

Olney J's Decision: Common Law Interpretations

Thirdly, the decision may have been based on the holding that a person registering any instrument which is void for any reason on ordinary principles of law, does not obtain an indefeasible title (*vis a vis* native title). This interpretation means that any invalid instrument cannot be validated by registration - whether this means that the deferred indefeasibility doctrine applies to the registration of all invalid instruments or whether native title constitutes a general exception to indefeasibility in the context of registered invalid interests, the result is the same: the registered proprietor's title is subject to any native title in respect of the land.

Olney J expressly rejected the general proposition that the administrative act of registering an invalid instrument not only 'cured its invalidity but also had the effect of extinguishing any existing native title rights and interests in the land.'¹⁴⁹ Furthermore, his Honour based this conclusion on the common law need for 'a clear and plain intention in order to extinguish native title.'¹⁵⁰ Accordingly, this interpretation also means that the act of registering any void instrument does not evince a clear and plain intention for the purpose of extinguishing native title.¹⁵¹

Finally, the broadest possible interpretation of the decision in *Hayes* indicates that native title *per se* constitutes a new general exception to indefeasibility.¹⁵² It is clear that on the particular facts in *Hayes*, registration of the invalid lease did not attract the indefeasibility of title provisions under the Torrens statute and therefore, since the lease could not be validated by registration, it was not a previous exclusive possession act for the purpose of confirming extinguishment of native title. Accordingly, the registered proprietor under the null lease did not obtain the benefits of indefeasibility *vis a vis* the unextinguished native title. Nevertheless, Justice Olney expressly left open the question of what rights 'registration may have conferred on persons dealing with the lessees'.¹⁵³ Thus, it may be that, in such circumstances, rather than the deferred indefeasibility theory applying or native title constituting a general exception to indefeasibility in the context of the registration of invalid interests, the existence of native title amounts to a new exception to indefeasibility of title: an implied exception to

Torres Strait Islanders: *NTA*, s 212(3). Cf the amended *NTA* pursuant to which the reference to 'impair' in s 212(3) has been removed because the confirmation of ownership or access may technically impair the enjoyment of native title in some respects.

¹⁴⁹ [1999] FCA 1248, [90(iv)].

¹⁵⁰ 1999] FCA 1248, [90(iv)].

¹⁵¹ This is important, because by bringing the registration of a void instrument within the scope of the common law doctrine of extinguishment, Olney J's decision is not limited to the registration of an invalid instrument merely for the purposes of the *NTA*'s confirmation provisions.

¹⁵² In such a case, the exception in the context of statutory grants, would simply be one aspect of the general exception.

¹⁵³ 1999] FCA 1248, [90(iv)].

indefeasibility based upon the common law recognition of native title rights.¹⁵⁴

Indeed, although the original Torrens Acts contained certain specific exceptions to indefeasibility, the exceptions have been refined and extended not only by statutory amendment¹⁵⁵ and judicial interpretation of the statutory provisions themselves, but also by the development of common law principles governing the rights of a registered proprietor.¹⁵⁶ It is suggested, therefore, that there are three possible bases for accommodating this new exception within the existing Torrens scheme.

First, native title may be a (retrospective) common law exception to the principle of indefeasibility as a result of balanced judicial response to the retrospective recognition of this new source of title. Although the *in personam* exception is specifically set out in the Torrens statutes in Queensland, South Australia and the Northern Territory,¹⁵⁷ there is no statutory provision to this effect in the other Australian jurisdictions. Nevertheless, it is clear that a common law *in personam* exception also exists in the context of the Torrens regimes in these other jurisdictions.¹⁵⁸

Because common law recognition of native title, in 1992, has brought into Australian courts a species of landholding which has been excluded from the common law since 1788, this form of landholding would not have been considered at the time of the introduction of the Torrens system.

¹⁵⁴ In relation to the established exception of 'Inherent Rights Recognised Under the General Law', see generally C. MacDonald et al, *Real Property Law in Queensland*, op cit (n 147), pp 369-370.

¹⁵⁵ See for example the discussion in A. J. Bradbrook et al, *Australian Real Property Law*, op cit (n 39), [4.36] ff.

¹⁵⁶ Apart from the express exceptions to indefeasibility specifically set out in the Torrens statutes, there are a number of exceptions to indefeasibility of title which arise outside the Torrens statutes. See generally P. Butt, *Land Law*, op cit (n 39), pp 751 - 759; A. J. Bradbrook et al, *Australian Real Property Law*, op cit (n 39), [4.63] - [4.77]. Although in Queensland, South Australia and the Northern Territory the *in personam* exception is specifically set out in the Torrens statutes (*Land Title Act 1994* (Qld), s 185(1)(a); *Real Property Act 1886* (SA), ss 71IV, 71V; *Real Property Act 1886* (NT), ss 71IV, 71V), there is no statutory provision in the other Australian jurisdictions. However, despite the absence of a specific statutory provision in the other jurisdictions, it is clear that the exception also exists under the relevant Torrens Acts: *Frazer v Walker* [1967] 1 AC 569 at p 585. See also *Bahr v Nicolay (No 2)* (1988) 164 CLR 604; *Logue v Shoalhaven SC* [1979] 1 NSWLR 537, 543ff per Mahoney J; *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466 (where the High Court's reasoning in *Bahr v Nicolay*, although not applied, was approved).

¹⁵⁷ *Land Title Act 1994* (Qld), s 185(1)(a); *Real Property Act 1886* (SA), ss 71IV, 71V; *Real Property Act 1886* (NT), ss 71IV, 71V.

¹⁵⁸ See *Barry v Heider* (1914) 19 CLR 197; *Frazer v Walker* [1967] 1 AC 569, 585. See also the authorities cited in n 156 *supra*. It is also worth noting that despite the specific enactment of the exception in some jurisdictions, the interpretation and operation of the exception appear to be the same: Wallace and MacDonald, 'A New Era in Torrens Title in Queensland - The Land Title Act 1994' (1994) 68 *Australian Law Journal* 675, 678.

Nevertheless, the objects of the Torrens system are:¹⁵⁹

to give security and simplicity to all dealings with land by providing that the title shall depend upon registration, that all interests shall be capable of appearing or being protected upon the face of the registry, and that a registered title or interest shall never be affected by any claim or charge which is not registered.

Despite the retrospective recognition of native title, however, it is still questionable whether native title gives rise to a registrable Torrens interest or whether native title can be protected by caveat.¹⁶⁰ These are some indications of its vulnerability and it would be inequitable to allow the act of registration, of itself, to extinguish any existing native title interests. To deny native title holders any protection under the Torrens system, a system which contemplated that all interests were capable of being recorded or registered, would only continue to exclude this form of landholding from Australian courts. By classifying native title as a retrospective common law exception to indefeasibility, however, Australian Courts can effectively balance the retrospective existence of native title with conventional land law concepts.

Secondly, the existence of native title may come within the ambit of the in personam exception. It has been observed that the extent and limits of the in personam exception to indefeasibility have not been clearly defined.¹⁶¹ However, the courts have consistently held that the Torrens legislation does not 'abrogate the principles of equity; it alters the application of particular rules of equity but only so far as is necessary to achieve its own special objects'.¹⁶² Since the Torrens system 'is a system of conveyancing',¹⁶³ and the indefeasibility provisions are designed to 'protect a transferee from defects in the title of the transferor, not to free him from interests with which he has burdened his own title',¹⁶⁴ the Torrens legislation does not affect the personal

¹⁵⁹ This was one of the opening statements in the Report of the Real Property Law Commission in November 1861, a Commission of five, which included Torrens, appointed to review the working of the *Real Property Act 1858*: cited by R. Atherton, 'Donees, devisees and Torrens title: the problem of the volunteer under the Real Property Acts', *ALTA Conference Proceedings*, Volume 2, 1998 (held at the University of Otago, Dunedin, July 5-8, 1998) (Butterworths and LBC Information Services, Sydney, 1998), p 645.

¹⁶⁰ see n 12 *supra*.

¹⁶¹ Stevens, 'The In personam Exceptions to the Principle of Indefeasibility' (1969) 1 *Auckland University Law Review* 29, 42. See also P. Butt, 'Personal Equities Revisited' (1994) 68 *Australian Law Journal* 448; Skapinker, 'Equitable Interests, Mere Equities, 'Personal' Equities and 'Personal Equities' - Distinction With A Difference' (1994) 68 *Australian Law Journal* 593.

¹⁶² *Oh Hiam v Tham Kong* (1980) 2 BPR 9451 (PC), 9454 per Lord Russell delivering the judgment of the Board; *Barry v Heider* (1914) 19 CLR 197, 213 per Isaacs J; *Butler v Fairclough* (1917) 23 CLR 78, 91; *Frazer v Walker* [1967] 1 AC 569, 585; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, 613; *Friedman v Barrett* [1962] Qd R 498, 511.

¹⁶³ *Oh Hiam v Tham Kong* (1980) 2 BPR 9451 (PC), 9454 per Lord Russell delivering the judgment of the Board.

¹⁶⁴ *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, 653 per Brennan J.

obligations of the registered proprietor; such in personam rights are enforceable against the registered proprietor notwithstanding that they are not noted on the Register.

According to conventional principles, however, the conduct complained of for the purposes of the in personam exception, must be that of the registered proprietor,¹⁶⁵ occurring either before or after registration,¹⁶⁶ which resulted in the creation of legal¹⁶⁷ or equitable rights enforceable against the registered proprietor. The interest created may be an equitable interest in the land or a personal equity enforceable against the registered proprietor.¹⁶⁸ However, because an essential feature of native title is that it is created independently of the registered proprietor's conduct, it is arguable that the existence of native title alters the application of the in personam exception vis a vis native title. Accordingly, in the context of native title, the focus of the registered proprietor's conduct is not on what he has done, but on what he has *not* done.

By imposing a personal obligation on the registered proprietor-to-be to take steps to ensure that there is no native title affecting the property in respect of which he seeks to become registered, the common law extends the in personam exception to acts of the registered proprietor occurring before registration which would have given notice¹⁶⁹ of the existence of native title interests in the land. Significantly, because of the non-proprietary nature of the in personam exception, the exact nature of a particular native title interest is irrelevant. Indeed, the uncertain status of native title strengthens the argument that the registered proprietor has an obligation to take steps to ensure that there is no native title affecting the land.¹⁷⁰ What this compulsory personal obligation involves is elucidated in the context of the third basis for incorporating a general native title exception to indefeasibility within the

¹⁶⁵ Or an agent acting on behalf of the registered proprietor.

¹⁶⁶ *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, 613 per Mason CJ and Dawson J; and at 638 per Wilson and Toohey JJ.

¹⁶⁷ Although the in personam exception has been called the 'personal equities' exception (*Breskvar v Wall* (1971) 126 CLR 376, 385 per Barwick CJ), this description obscures the fact that it encompasses rights arising at law as well as rights arising in equity: for example, an action at law for deceit (*Garofano v Reliance Finance Corporation Ltd* (1992) NSW Conv R 55-540, 59,662 per Meagher JA).

¹⁶⁸ *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, 638 per Wilson and Toohey JJ. See also *Leros Pty Ltd v Terara Pty Ltd* (1992) 174 CLR 407, 421.

¹⁶⁹ Which may amount to more than mere notice - see discussion in text accompanying n 172-n 190 *infra*.

¹⁷⁰ Native title may be protected by such legal and equitable remedies as are appropriate to the particular rights and interests established by the evidence (*Mabo*, at 61 per Brennan J), including an injunction: *Fejo v Northern Territory* (1998) 72 ALJR 1442. This is so whether the rights and interests are proprietary or personal and usufructuary in nature and whether possessed by a community, a group or an individual. For a general overview of the protection offered to native title in the United States, Canada and New Zealand and Australia, see R. Bartlett, 'Native Title: From Pragmatism to Equality Before the Law' (1995) 20 *Melbourne University Law Review* 282, 294-310.

existing Torrens system.¹⁷¹

Thirdly, and as an alternative basis for subjecting registered title to any pre-existing native title, notice of native title may amount to more than 'mere notice' for the purpose of the indefeasibility provisions. Although notice may be effected outside the caveat process, such notice¹⁷² of an antecedent unregistered interest does not affect the registered proprietor's title.¹⁷³ However, a registered proprietor who has notice, including constructive notice, of native title affecting the land may gain no protection in respect of the native title under the notice provision.¹⁷⁴ As will be explicated below, it is because of the unique attributes of native title that notice of native title at common law may be in a different position from notice of other interests in land.

Importantly, the *NTA* makes specific provision for establishment of three registers: the Register of Native Title Claims, for recording details about claims,¹⁷⁵ the National Native Title Register, for recording determinations of native title,¹⁷⁶ and the Register of Indigenous Land Use Agreements, for recording details of indigenous land use agreements.¹⁷⁷ Furthermore, a person whose name appears in an entry on the Register of Native Title Claims, a 'registered native title claimant,'¹⁷⁸ is given a right to negotiate before the

¹⁷¹ It has also been held that the *in personam* exception may be invoked against the registered proprietor if the registered proprietor has constructive notice of wrongdoing or unconscionable conduct towards the claimant which results in the claimant being deprived of an interest in the land: *Sixty-Fourth Throne Pty Ltd v Macquarie Bank* (1996) V Conv R 54-546, per Hedigan J. See also *Burke v State Bank of New South Wales* [1994] 37 NSWLR 53; *H G & R Nominees Pty Ltd v Fava* (1995) V Conv R 54-522; *Pyramid Building Society v Scorpion Hotels Pty Ltd* (1996) 136 ALR 166.

¹⁷² The categories of notice that were recognised by the common law are now set out in statutory form in all Australian jurisdictions except Western Australia: *Conveyancing Act* 1919 (NSW), s 164; *Property Law Act* 1958 (Vic), s 199; *Property Law Act* 1974 (Qld), s 342; *Law of Property Act* 1936 (SA), s 117; *Conveyancing and Law of Property Act* 1884 (Tas), s 5.

¹⁷³ The notice provisions of each jurisdiction are: *Land Titles Act* 1925 (ACT), ss 48(6), 59; *Real Property Act* 1900 (NSW), s 43; *Real Property Act* 1885 (NT), ss 56, 72, 186-187; *Land Title Act* 1994 (Qld), ss 178(3), 184(2)(a); *Real Property Act* 1886 (SA), ss 56, 72, 186-187; *Land Titles Act* 1980 (Tas), s 41; *Transfer of Land Act* 1958 (Vic), s 43; *Transfer of Land Act* 1893 (WA), s 134.

¹⁷⁴ It may be that notice of native title, of itself, amounts to fraud for the purposes of the Torrens Acts. Cf: the position with respect to notice of non-native title equitable interests: *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 where the High Court held, *per curiam*, that notice of an equitable interest of itself does not amount to fraud within the statutory exception to indefeasibility. Whether notice of native title falls within the *in personam* exception to indefeasibility is discussed in the text accompanying n 161-n 171 *supra*.

¹⁷⁵ See definition of Register of Native Title Claims in s 253 of the *NTA*. Details are contained in Part 7 of the *NTA*.

¹⁷⁶ See definition of National Native Title Register in s 253 of the *NTA*. Details are contained in Part 8 of the *NTA*.

¹⁷⁷ See definition of Register of Indigenous Land Use Agreements in s 253 of the *NTA*. Details are contained in Part 8A of the *NTA*.

¹⁷⁸ See definition in s 253 of the *NTA*.

government does certain future acts over land subject to native title.¹⁷⁹ Thus, the common law rights of native title holders are supplemented by the *NTA* in such circumstances, indicating that knowledge of the potential existence of native title attracts greater protection for such title. It is suggested, therefore, that in the future, 'it will be prudent for purchasers to search [the first two] registers. Both registers are open to the public, except where the Registrar feels that it would not be in the public interest ...'¹⁸⁰ Failure to search these registers may have the result that the title of the registered proprietor is defeasible for any native title interest registered under the *NTA*.¹⁸¹ Thus, a registered proprietor may be prevented from purchasing with notice of a native title interest which, although 'unregistered' in terms of the Torrens system, is registered under the *NTA*, and then, upon becoming registered as proprietor, relying on the indefeasibility of title provisions to defeat that 'unregistered' interest.¹⁸²

It may be that the protection given by the notice provision to a registered proprietor against the consequences of actual or constructive notice of unregistered interests affecting the land has point only when the unregistered interest, is not 'capable of appearing or being protected upon the face of the [Torrens] registry'¹⁸³ and, although capable of being recorded or registered under an alternative regime specifically established for this purpose, is not so recorded or registered. To confer on the registered proprietor immunity from the consequences of notice of an interest which is not capable of being recorded or registered under the Torrens system, yet is recorded or registered

¹⁷⁹ *NTA*, s 29(2)(b).

¹⁸⁰ P. Butt, 'The Native Title Act: A Property Law Perspective' (1994) *Australian Law Journal* 285, 287. See also *NTA*, ss 188 and 195. In determining whether it would or would not be in the public interest for information to be available to the public, the Registrar must have due regard to the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders: s 195(2) of the *NTA*.

¹⁸¹ An examination of whether or not postponement of the subsequent legal interest could be justified pursuant to the doctrine of estoppel, or the principle of negligence, is beyond the scope of this paper.

¹⁸² It has been noted that notice of an equitable interest, of itself, does not amount to fraud within the statutory exceptions to indefeasibility (see n 174 *supra*). Under old system title, however, a purchaser who took with notice of an earlier equitable interest affecting the land held the land subject to that interest. This result was achieved because the equitable doctrine of notice, actual or constructive, was founded on the view that the taking of an interest with notice of a prior interest is a species of fraud: *Stuart v Kingston* (1923) 32 CLR 309 at p 359. Since the *in personam* exception to indefeasibility encompasses at least some actions traditionally regarded as constituting equitable fraud, this allows rights to be enforceable against a registered proprietor as a result of conduct falling short of 'fraud' as that term is understood under the Torrens Acts: *Bahr v Nicolay (No 2)* (1988) 62 ALJR 268. As Peter Butt observes 'a fine line must be drawn between purchasing with "mere" notice of another's unregistered interest (which is not sufficient to impeach a registered title) and purchasing with notice coupled with other factors which, together, constitute equitable fraud and render the proprietor liable to a claim *in personam*': *Land Law*, *op cit* (n 39), pp 754-755.

¹⁸³ See text accompanying n 159 *supra*.

under its own system, would be illusory.¹⁸⁴

The paramountcy¹⁸⁵ and notice provisions themselves draw no distinction between unregistered interests that are capable of appearing or being protected upon the face of the registry and interests although not capable of being recorded or registered directly under the Torrens system, are recordable or registrable under an alternate system designed specifically to cover the field for that type of interest. Nevertheless, since the Torrens system contemplated that all interests in land could be protected, what is relevant is whether an interest which is not capable of being recorded or registered under the Torrens system, as where it is of a non-proprietary nature,¹⁸⁶ is capable of appearing on the face of an alternate registry system and does in fact so appear. Where an interest which is unregistered in terms of the Torrens system, has not only the potential to be publicly notified, but is so notified, the interest indirectly obtains protection against the consequences of the indefeasibility of title provisions. This conclusion is also consistent with the approach adopted by the Privy Council in *Gibbs v Messer*¹⁸⁷ which, in embracing the deferred indefeasibility theory, emphasised the notice provision over the paramountcy provision in the Torrens legislation.¹⁸⁸

Whether registration under the *NTA* simply ensures that notice of native title is 'more than mere notice' or whether it is in fact tantamount to being notified for the purpose of the Torrens register, the consequences are the same: the title of the registered proprietor is subject to the native title interest.¹⁸⁹ Furthermore, although the various interpretations of *Hayes* which classify native title as an exception to indefeasibility or as a ground for applying the

¹⁸⁴ See the similar argument advanced by Adams J when examining the position of volunteers as registered proprietors under the Torrens system in *King v Smail* [1958] VR 273 esp at 275-276, and 277-278. It is worth noting that *King v Smail* was decided at a time when deferred indefeasibility was the accepted theory.

¹⁸⁵ The paramountcy provisions are those which state the principle of indefeasibility of title most positively. Although the various Torrens statutes employ different wording, the paramountcy provisions provide that notwithstanding the existence in any other person of any estate or interest which but for the Torrens Act may be held to have priority, the registered proprietor of any estate or interest in land shall except in the case of fraud and various other exceptions hold the land, estate or interest subject only to the encumbrances, estates or interests recorded in the folio of the Register: *Land Titles Act* 1925 (ACT), s 58; *Real Property Act* 1900 (NSW), s 42; *Real Property Act* 1886 (NT), ss 69, 70; *Land Title Act* 1994 (Qld), s 184; *Real Property Act* 1886 (SA), ss 96-70; *Land Titles Act* 1980 (Tas), s 40; *Transfer of Land Act* 1958 (Vic), s 42; *Transfer of Land Act* 1893 (WA), s 68.

¹⁸⁶ In the context of overriding statutes, see *Linden v Wigg* (1968) 88 WN (Pt 1) (NSW) 109, 112-115.

¹⁸⁷ [1891] AC 248.

¹⁸⁸ Cf the principle of immediate indefeasibility which emphasised the paramountcy provision rather than the notice provision: for eg, 'As registered proprietor, and while he remains as such, no adverse claim (except as specifically admitted) may be brought against him': *Frazer v Walker* [1967] AC 569, 581 per Lord Wilberforce (approved by the High Court in *Breskvar v Wall* (1971) 126 CLR 376).

¹⁸⁹ If, however, registration under the *NTA* is considered to be equivalent to being registered for the purposes of the Torrens system, different considerations would apply.

deferred indefeasibility theory differ in the extent of their operation, this is essentially the result of all the interpretations. Prima facie, therefore, the essence of the suggested interpretations of *Hayes* is that, in certain circumstances, registration does not attract the benefits of the indefeasibility provisions vis a vis native title; the registered proprietor holds subject to the native title interest. Simply stating that indefeasibility does not attach to the registered title vis a vis native title does not, however, address the extent to which the registered title is defeated by the native title. Inherent in this analysis is an examination of the question of whether or not native title has, apart from registration, been extinguished. However, before turning to an examination of the legal implications of classifying native title as an exception to indefeasibility and a ground for invoking the deferred indefeasibility doctrine, it will be instructive to consider the theoretical rationales underlying the broadest possible interpretation of the decision in *Hayes*: that native title constitutes a new general exception to indefeasibility.¹⁹⁰

PART III: THEORETICAL RATIONALES UNDERLYING NATIVE TITLE'S POSSIBLE CLASSIFICATION AS A GENERAL EXCEPTION TO INDEFEASIBILITY

Underlying all three suggested bases for the possible incorporation, within the existing Torrens system, of a new general exception to indefeasibility based on the existence of native title,¹⁹¹ are two important theoretical rationales. First, the classification of native title interests as equitable proprietary interests rather than mere personal rights and, secondly, the common law doctrine of shared exclusivity. While both rationales relate to the uncertainty surrounding the precise nature and content of rights held under native title, the former is specific to native title, while the latter is not so confined.

The Equitable Proprietary Nature of Native Title¹⁹²

Native Title as a Proprietary or Personal Right

Although the *NTA* does not expressly classify native title rights and interests

¹⁹⁰ See text accompanying n 152 *supra*.

¹⁹¹ That is, whether native title is a retrospective common law exception to indefeasibility based upon its vulnerable status, or whether the existence of native title comes within the ambit of the in personam exception, or whether notice of native title amounts to more than mere notice for the purposes of the indefeasibility provisions, see text accompanying n 152-n 188 *supra*.

¹⁹² See n 4 *supra*. See also R H Bartlett, 'The Proprietary Nature of Native Title' (1998) 6 *Australian Property Law Journal* 77, which considers whether native title is a proprietary interest. The author concludes that, by regarding native title as property for the purposes of protection and enforcement against a) Crown extinguishment; b) under s 51(xxxi) of the Constitution; c) under the RDA; d) as a burden on the radical title of the Crown; and e) as against interference by third parties, the High Court has recognised the proprietary nature of native title.

according to common law concepts of proprietary or personal rights, the Act appears to adopt an approach similar to that adopted by Deane and Gaudron JJ in *Mabo*.¹⁹³ Without elevating native title to the status of a property right, it attributes to native title the characteristics of a proprietary right for a number of purposes.¹⁹⁴ However, it is arguable that the NTA in fact adopts the approach taken by Brennan J, as he then was, in *Mabo*. According to Brennan J's analysis, native title is necessarily proprietary in character,¹⁹⁵ although individual rights deriving from the communal title can be either personal or proprietary.¹⁹⁶ The formal order made by the High Court in *Mabo* was that the Meriam people of the Murray Islands, are 'entitled as against the whole world to possession, occupation, use and enjoyment of the lands.' Importantly, that entitlement to exclusive use and occupation was not limited to activities that were integral to the distinctive culture of the Meriam people

¹⁹³ *Mabo* at 88-89. This position is not affected by the NTAA.

¹⁹⁴ The effect of the original NTA was that native title was treated as equivalent to 'ordinary title' (freehold in most places: s 253(a) definition of 'ordinary title') for four purposes. First, under the 'future acts' regime, an act affecting native title in an onshore place is only valid if either it applies to native title holders in the same way as it would if they held 'ordinary title,' or if the effect of the act on native title is not such as to cause the native title holders to be in a more disadvantageous position than they would be if they held ordinary title (NTA, ss 22, 23, 235). Secondly, also under the 'future acts' regime, native title holders are entitled to the same procedural rights in relation to permissible future acts, as holders of 'ordinary title' (NTA, ss 23(6) and 235). Thirdly, where native title is impaired but not extinguished in relation to an onshore place under the 'future acts' regime, native title holders will be entitled to compensation if the act could have been done over ordinary title and but ordinary title holders would have received compensation. Furthermore, such compensation is assessed under the same regimes as are applicable to 'ordinary title' holders (NTA, ss 23(4) and 51(3)). Fourthly, where native title is impaired but not extinguished in relation to an onshore place under the 'past acts' regime, native title holders are similarly entitled to compensation if the act could have been done over ordinary title land and the ordinary title holders would have received compensation. Again, any such entitlement to compensation will be assessed under the same regime as for 'ordinary title' holders (NTA, ss 17, 20 and 51(3) and the s 240 definition of 'similar compensable interest test.'). The amended NTA continues in part to preserve the original Act's 'freehold standard' for the treatment of native title (Subdivision M of Division 3 of Part 2 of the NTA (which is based upon original ss 23 and 235 of the NTA, which were repealed by the NTAA), but this standard has been relaxed in a number of respects. Although there has been an expansion in the types of government acts which are exempt from the freehold test (for example, facilities for services to the public (Subdivision K); reserved land (Subdivision J); future water and airspace management (Subdivision H); primary production (Subdivision G) and opal and gem mining (Subdivision M)), acts which affect native title but which do not pass any of the specific tests in Subdivisions B, C, D, E, H, I, J, K, or L, must pass the general freehold test in Subdivision M of Division 3 of Part 2 of the amended NTA to be valid under the NTA's future acts regime.

¹⁹⁵ *Mabo* at 51-52. See also the same conclusion reached by R H Bartlett, 'The Proprietary Nature of Native Title' (1998) 6 *Australian Property Law Journal* 77 (where the author argues that the Australian High Court has recognised the proprietary nature of native title by regarding it as property for the purposes of protection and enforcement against a) Crown extinguishment; b) under s 51(xxxi) of the Constitution; c) under the RDA; d) as a burden on the radical title of the Crown; and e) as against interference by third parties.)

¹⁹⁶ See P. O'Connor, 'Aboriginal Land Rights at Common Law: *Mabo v Queensland* (1992) 18 *Monash University Law Review* 251 at pp 258, 260.

prior to contact with Europeans. Brennan J did, however, say that:¹⁹⁷

[n]ative title has its origin in and is given its content by the traditional laws and customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.

Although this may be taken to limit native title to uses governed by traditional laws and customs, the actual order of the Court contains no such limitations.

The apparent contradiction is resolved by Brennan J's explanation that, where the indigenous inhabitants were in exclusive possession of their lands (or, it is argued below, where exclusive possession of the land was shared by the indigenous inhabitants), the fact that the rights held within their community by virtue of their laws and customs are non-proprietary usufructuary rights is no impediment to the existence of an over-arching proprietary title held by the whole community as a result of that exclusive (or shared exclusive) possession.¹⁹⁸ In that situation, it appears that the communal proprietary title is not limited by the internal laws and customs.

In this context, the Canadian Supreme Court decision in *Delgamuukw v British Columbia*¹⁹⁹ may have persuasive value. In *Delgamuukw*, Lamer CJ summarised the content of aboriginal title in the following terms:²⁰⁰

Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and ... those protected uses must not be irreconcilable with the nature of the group's attachment to that land.

The Chief Justice emphasised that Aboriginal title is only distinguishable from other proprietary interests because it is *sui generis* and therefore characterised by its several dimensions: its inalienability, its source and the fact that it is held communally.²⁰¹

Importantly, however, Lamer CJ had previously stated, in *R v Van der Peet*,²⁰² that 'Aboriginal title is the aspect of Aboriginal rights related specifically to Aboriginal claims to land'.²⁰³ In *R v Van der Peet*, the Supreme Court of Canada explained the relationship between Aboriginal rights and Aboriginal title in the following terms:²⁰⁴

¹⁹⁷ *Mabo*, at 58.

¹⁹⁸ *Ibid* at 51. Indeed, Brennan J observed that 'it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title': *Id*.

¹⁹⁹ [1997] 3 SCR 1010 (SCC).

²⁰⁰ *Ibid* at [117].

²⁰¹ *Ibid* at [115].

²⁰² [1996] 2 SCR 507 (SCC).

²⁰³ *Ibid* at 562, emphasis added.

²⁰⁴ *R v Van der Peet* [1996] 2 SCR 507, 562; 137 DLR (4th) 289, 320.

[A]boriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land. The relationship between aboriginal title and aboriginal rights must not, however, confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.

The concept of native title developed in *Mabo* is, however, a single concept; the precise content of the title depending on the customs and traditions of the group claiming native title. Thus, the differentiation set out in *Deigamuukw* between 'rights' and 'title' is part of the single native title concept. While it may be that native title in a particular case will amount to exclusive possession (as was the case in *Mabo*), in other cases the title will amount to less than exclusive possession and perhaps consist of use rights only. In the Australian native title jurisprudence, all those rights are covered by the concept of native title and as a result amount to some interest in land.²⁰⁵ This is, no doubt, one of the factors that has contributed to the uncertainty surrounding the classification of native title as proprietary or personal in character.²⁰⁶

Nevertheless, in accordance with both Brennan J's analysis and the formal order made by the High Court in *Mabo*, provided that the indigenous inhabitants have exclusive (or shared exclusive possession) of the land, the more liberal view of the Canadian Supreme Court in relation to the content of aboriginal title would appear to be apposite. Accordingly, the rights attaching to native title would not only be proprietary, but would also not be limited to rights deriving from custom and tradition but would be expanded to reflect the nature of the title - exclusive (or shared exclusive) possession.

By not only codifying the *Mabo* definition of native title but also by ensuring equality of treatment between native title and ordinary title for a number of purposes,²⁰⁷ it can be argued that the *NTA* also implies that native title is a proprietary right. On this interpretation, both the policy of the Act and the position at common law that native title is nevertheless inferior to ordinary title in that an inconsistent ordinary title interest either extinguishes native

²⁰⁵ See M. Tehan, 'Deigamuukw v British Columbia - Casenote' (1998) 22 *Melbourne University Law Review* 763, 779. See also n 4 *supra*.

²⁰⁶ Brennan J did, however, observe that 'it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title': *Mabo*, at 51.

²⁰⁷ See n 194 and accompanying text *supra*, and nn 305 and 307 and accompanying text *infra*.

title or suspends it to the extent of and for the duration of the inconsistent interest, merely indicates whether native title is a legal or equitable interest.²⁰⁸

Native Title: Legal or Equitable Interest?

On the assumption, consistent with Brennan J's approach in *Mabo*, that native title is a proprietary interest in land, it is arguable that the fact that ordinary title takes precedence over native title, both at common law and under the *NTA*, suggests the class of proprietary interest to which native title belongs. The principles governing the enforceability of each recognised class of interest - legal interests, equitable interests and mere equities - vary significantly at common law. Depending on their place in the hierarchy, different classes of proprietary interests have different spheres of enforceability. The statutory concept of indefeasibility of title results in a person registered as the holder of an estate taking an interest which is, subject to any exceptions, unaffected by any prior claims²⁰⁹ and is thus different from the resolution of such disputes under the general law. However, because the common law continues to be relevant to native title under the *NTA*, not only for defining native title but for determining the consequences for native title of particular grants of interests in land,²¹⁰ it is suggested that by drawing an analogy between native title and the principles governing the resolution of priority disputes arising under the general law,²¹¹ it is arguable that native title interests fall within the equitable interest class.

Native Title: Legal Interest?

A priorities dispute arises where two or more persons have inconsistent proprietary interests in the one piece of land. Although the superior claim is generally that of the prior claimant, the interaction of legal and equitable principles can produce a different result. The general principle is that legal interests are good against all the world, and consequently, that a legal interest prevails over any subsequently created legal or equitable interest to the extent to which there is any inconsistency. Thus, a dispute between the holders of two legal interests and a dispute between the holders of a prior legal interest and a subsequent equitable interest²¹² is resolved by determining when the interests were created and according priority to the interest which was created first in time. The fact that native title is, both at common law and pursuant to the *NTA*, necessarily subordinated, whether permanently or

²⁰⁸ Butt has observed, however, assuming that native title is properly characterised as 'proprietary', it would nevertheless not be an ordinary legal or equitable 'estate' of the kind recognised by the common law or equity: *Land Law*, op cit (n 39), p 885.

²⁰⁹ The Torrens statutes do, however, specifically set out a number of exceptions to the paramountcy concept: *Real Property Act 1900* (NSW), s 42; *Transfer of Land Act 1958* (Vic), s 42; *Land Title Act 1994* (Qld), s 44; *Real Property Act 1886* (SA), s 69; *Transfer of Land Act 1893* (WA), s 68; *Land Titles Act 1980* (Tas), s 40.

²¹⁰ See n 284 *infra*.

²¹¹ In particular disputes between the holders of two legal estates and disputes between the holders of a prior equitable estate and a subsequent legal estate.

²¹² Providing that the dispute is not complicated by any factor of fraud or negligence on the part of the legal interest holder.

temporarily, to all interests to the extent of any inconsistency thus excludes the possibility of native title interests falling within the legal interest class of proprietary rights.

Native Title: Equitable Interest?

The Court of Chancery developed the priority principles governing a dispute between a prior equitable interest and a subsequent legal interest, and, in general, a legal interest will not be interfered with unless the conscience of the legal interest holder is not clear. This principle manifested itself in the rule that 'a bona fide purchaser of the legal estate for value without notice of prior equitable interests takes free of prior equitable interests.'²¹³ In the context of native title, the crucial element in this proposition is that the holder of a legal interest must take without notice of the prior equitable interest in order to take priority over it.²¹⁴ This element is complicated by the fact that there are three categories of notice: actual, constructive and imputed.²¹⁵ Although the doctrine of constructive notice requires that a purchaser of a legal interest make such inquiries as are reasonable for the particular transaction,²¹⁶ including inquiries about a particular fact if a reasonable person with due regard to his or her interests would have done so, the exact parameters of the doctrine have resulted in considerable dispute. Nevertheless, since the presence of a prior, existing native title interest cannot be indicated by any inquiry other than a determination of native title,²¹⁷ until

²¹³ *Pitchee v Rawlins* (1872) LR 7 Ch 259. A purchaser of the legal interest for value without notice of the prior equitable interest can, however, give a good title to a purchaser of the legal title from him or her notwithstanding that the latter has notice of the equitable interest: *Kettlewell v Watson* (1882) 21 Ch D 685, 707; *Wilkes v Spooner* [1911] 2 KB 473.

²¹⁴ The onus of proof in this context is uncertain. The preponderance of authority supports the view that the holder of the legal interest must prove that he or she purchased for value and without notice: *Re Nisbet and Potts' Contract* [1905] 1 Ch 391; *Wilkes v Spooner* [1911] 2 KB 473; *Mills v Renwick* (1901) 1 SR (NSW) (Eq) 173. However, there are also decisions that support the view that the holder of the prior equitable interest must prove that the legal interest holder had notice: *Corser v Cartwright* (1875) LR 7 HL 731.

²¹⁵ These categories, initially recognised by the common law, are now codified in all States except Western Australia: *Conveyancing Act 1919* (NSW), s 164; *Property Law Act 1958* (Vic), s 199; *Property Law Act 1974* (Qld), s 342; *Law of Property Act 1936* (SA), s 117; *Conveyancing and Law of Property Act 1884* (Tas), s 5.

²¹⁶ *Bailey v Barnes* [1894] 1 Ch 25.

²¹⁷ The *NTA* provides a procedure for determining whether native title exists and, if it does, what rights comprise it: Parts 3 and 4. The terms 'determination of native title' and 'approved determination of native title' are defined for the purposes of the *NTA* in ss 225 and 13(3)(a) respectively. The NNTT, established pursuant to Part 6 of the *NTA*, deals with uncontested claims for a determination of native title (and uncontested claims for compensation). Where the NNTT does not make a determination on the basis that the application is unopposed or on the basis of an agreement, a mediation conference must be held between the parties or their representatives in an attempt to resolve the matter: s 72(1). If, at such conference, the parties reach agreement, the NNTT must, if satisfied that a determination consistent with the terms of the agreement are within the powers of the NNTT, make such a determination: s 73. Where an application has been accepted, but the NNTT has not made a determination on the basis that the application is unopposed,

such a determination is made, notice of a native title interest could not be attributed to anyone. Thus, in the absence of such determination, any subsequent legal interest would prevail over a prior native title interest. This approach is, therefore, consistent with both the common law and statutory positions.

However, both at common law and pursuant to the *NTA*, the fact that a determination of native title exists in relation to land does not alter the vulnerable status of native title and therefore any subsequent legal interests still prevail over native title to the extent of any inconsistency, whether permanently or temporarily. Importantly, however, it has already been observed that the *NTA* makes specific provision for the establishment of three native title registers: the Register of Native Title Claims,²¹⁶ the National Native Title Register²¹⁹ and the Register of Indigenous Land Use Agreements.²²⁰ Moreover, since a person whose name appears in an entry on the Register of Native Title Claims²²¹ is given a right to negotiate before the government does certain future acts over land subject to native title,²²² knowledge of the potential existence of native title attracts greater protection for such title. Accordingly, failure to search these registers may have the result that the holder of a subsequent ordinary title legal interest is regarded as having constructive notice of any native title interests actually registered under the *NTA*. In such circumstances, a subsequent ordinary legal title holder may be estopped from asserting the priority of his or her interest over any prior native title interest.²²³ On this analysis, native title would fall within the equitable class of proprietary interest.

Further support for the equitable nature of native title is found in the resolution of disputes between equitable interest holders. In such cases, the

or on the basis of an agreement, or through a mediation conference, the Registrar must lodge the application to the Federal Court for decision: s 74. Determinations of the NNTT are to be registered with the Federal Court: s 166(2) and have the effect of an order of the Court: s 167. However, a registered NNTT determination is not binding and conclusive (s 164) and parties to the NNTT proceedings, or any person whose interests are affected by the determination, may apply to the Court for a review of the registered determination within 28 days: ss 167(4) and 168. The jurisdiction given to the Federal Court to hear and determine applications for a determination of native title is exclusive of the jurisdiction of all other courts except the High Court: ss 80-81. Determinations by the Federal Court are dealt with in Part 4 of the *NTA*.

²¹⁶ See definition of Register of Native Title Claims in s 253. Details are contained in Part 7 of the *NTA*.

²¹⁹ See definition of National Native Title Register in s 253. Details are contained in Part 8 of the *NTA*.

²²⁰ See definition of Register of Indigenous Land Use Agreements in s 253 of the *NTA*. Details are contained in Part 8A of the *NTA*.

²²¹ A registered native title claimant: see definition in s 253 of the *NTA*.

²²² *NTA*, s 29(2)(b).

²²³ An examination of whether or not postponement of the subsequent legal interest could be justified pursuant to the doctrine of estoppel, or the principle of negligence, is beyond the scope of this paper.

rule, formulated in *Rice v Rice*,²²⁴ is that 'if their equities are in all other respects equal, priority of time gives the better equity; or *qui prior est tempore potior est jure*.'²²⁵ Although the approach which treats priority of time as the decisive factor only if the equities are equal has been followed in some judgments,²²⁶ other judgments have concluded that the 'important issue is to determine the means by which the courts have decided if "the equities are equal"',²²⁷ In *Rice v Rice*, three matters were identified for the purpose of assessing the relative merits of the parties: first, the nature and condition of the respective equitable interests; secondly, the circumstances and manner of acquisition; and thirdly, the whole conduct of the parties.²²⁸

Although the emphasis in subsequent decisions has been placed on the third criterion, the judgment of Mason and Deane JJ in *Heid v Reliance Finance Corporation Pty Ltd*²²⁹ reiterated the basic rule in *Rice v Rice* and the need to determine if the equities are equal by comparing fully the interests of each party.²³⁰ Due to the inherently unique nature and content of native title, it is suggested that the distinction between different types of equitable interests, such as an equitable native title interest and an equitable fee simple, would be important, if not crucial, to the resolution of a dispute between a prior native title interest and a subsequent ordinary title equitable interest. Furthermore, the criterion concerning 'circumstances and manner of acquisition' would have greater relevance per se to such a dispute, rather than simply being dealt with under the general criterion of 'conduct of the parties' as is often the case in the context of other disputes between holders of equitable interests.

Accordingly, on the assumption that native title is an equitable interest, in a

²²⁴ (1853) 2 Drew 73.

²²⁵ *Rice v Rice* (1853) 2 Drew 73, 78 per Kindersley VC; 61 ER 646.

²²⁶ See, for example, the judgment of Mason and Deane JJ in *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326, 339. This case concerned Torrens title land.

²²⁷ *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326, 33 per Gibbs CJ. In the course of deciding a dispute between equitable interest holders, Gibbs CJ quoted with approval the statement by Kindersley VC in *Rice v Rice*: 'In the present case, the interest of the appellant was first in time. The question therefore is whether his conduct ... has the consequence that [the holder of the second equitable interest] has the better equity, and that the appellant's interest should be postponed.' However, his Honour immediately added that '[I]t is doubted whether the order of consideration of these relevant matters is of practical importance in the resolution of individual cases. The important issue is to determine the means by which the courts have decided if "the equities are equal."' Thus, his Honour effectively reversed the order of the relevant matters for consideration.

²²⁸ (1853) Drew 73, 82; 61 ER 646, 649.

²²⁹ (1983) 154 CLR 326.

²³⁰ Cf Bradbrook et al's suggestion that '[I]t appears that distinctions between different types of equitable interests, for example, an equitable fee simple and an equitable mortgage, are unlikely alone to provide a solution in any dispute and that the criterion concerning circumstances and manner of acquisition, whilst important, is usually dealt with under the more general criterion of "conduct of the parties": A.J. Bradbrook et al, *Australian Real Property Law*, op cit (n 39), [3.45].

dispute between a prior native title interest and a subsequent ordinary title equitable interest, priority of time would never be a decisive factor, and consequently, in line with both the common law and statutory positions, the ordinary title equitable interest would prevail to the extent of the inconsistency.

A finding that, at common law, native title is an equitable proprietary interest in land (at least where the native title holders have exclusive (or shared exclusive) possession of the land) does not adversely affect the conclusions reached in relation to the possible classification of native title as an exception to indefeasibility. Indeed, the proposition that native title is akin to an equitable interest on account of its vulnerability not only supports the argument that native title, if neither registrable under the Torrens legislation nor capable of supporting a caveat, should be regarded as an exception to indefeasibility but also suggests that native title per se should be regarded as giving rise to a registrable Torrens interest which can be protected by caveat.

Shared Exclusivity

Where Aboriginal people are able to establish that they were in exclusive possession of lands at the time of European colonisation, then, as Brennan J said in *Mabo*, the ownership of those lands must be vested in that people.²³¹ Ownership in this context means that the people, as the High Court held to be the case for the Meriam people of the Murray Islands, are 'entitled as against the whole world to possession, occupation, use and enjoyment of the lands.' However, is exclusive occupation as understood in Anglo-Australian law necessary? Although native title arises from the physical reality of occupation of the land at the time of sovereignty, should it reflect the pattern of landholding under aboriginal law or correspond conceptually to Anglo-Australian landholding?

Furthermore, and more importantly, concentrating solely on the common law notion of exclusive possession in this context²³² overlooks an important common law doctrine: shared exclusivity. As Lamer CJ²³³ observed in *Delgamuukw v British Columbia*:²³⁴

²³¹ *Mabo*, at 51.

²³² And as the sole test for determining whether or not native title has been extinguished.

²³³ With whom Cory, McLachlin and Major JJ concurred. Although there were seven members of the Court (Lamer CJ, La Forest, L'Heureux-Dube, Sopinka, Cory, McLachlin and Major JJ), Sopinka J took no part in the judgment.

²³⁴ (1977) 3 SCR 1010 at [158] - hereafter referred to as '*Delgamuukw*'. See also [196] where LaForest J observed that '... exclusivity means that an aboriginal group must show that a claimed territory is indeed its ancestral territory and not the territory of an unconnected aboriginal society. On the other hand, I recognise the possibility that two or more aboriginal groups may have occupied the same territory and used the land communally as part of their traditional way of life. In cases where two or more groups have accommodated each other in this way, I would not preclude a finding of joint occupancy. The result may be different, however, in cases where one dominant aboriginal group has merely permitted other groups to use the territory or where definite boundaries were established and maintained between two aboriginal groups in the same

The meaning of shared exclusivity is well-known to the common law. Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared.

In *Delgamuukw*, Lamer CJ identified the crucial element of proof of occupation as being that, at sovereignty, occupation must have been exclusive.²³⁵ Although this requirement for exclusivity flowed from the Chief Justice's definition of aboriginal title itself,²³⁶ Lamer CJ observed that the test must take into account both the perspective of the common law and the aboriginal perspective.²³⁷ Since exclusivity is a common law principle derived from the notion of fee simple ownership, it should be imported into the concept of aboriginal title with caution.²³⁸ Thus, the test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty.²³⁹ In this context, Lamer CJ adopted McNeil's analysis suggesting that the key issue was 'the intention and capacity to retain control.'²⁴⁰

As a result of adopting this approach, the Chief Justice indicated that, notwithstanding the requirement of proof of exclusive occupation, the finding of a joint title which is shared between two or more aboriginal groups was possible. His Honour observed that the requirement of exclusive occupancy and the possibility of joint title can be reconciled by recognising that joint title can arise from shared exclusivity.²⁴¹ In accordance with the meaning of 'shared exclusivity', Lamer CJ observed that '[t]here clearly may be cases in which two aboriginal nations lived on a particular piece of land and recognised each other's entitlement to that land but nobody else's.'²⁴² However, as this issue was not relevant to the case, his Honour expressly

territory.' See also *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185, 455-456 (SC(BC)), where McEachern CJ of the Supreme Court of Canada observed that: 'I suspect there are areas where more than one aboriginal group may have sustenance rights, such as in the areas between the closely related Wet "suwet" en and Babine peoples at Bear Lake and along the Babine River and possibly in other peripheral areas. I cannot accept that two aboriginal peoples who both used land for sustenance purposes would not each have aboriginal rights to continue to do so.' The Court of Appeal affirmed the Chief Justice's comments: (1993) 104 DLR (4th) 470, 512 per Macfarlane J, Taggart J agreeing; 585 per Wallace J; 710 per Lambert JA (who also referred to the United States jurisprudence in support.)

²³⁵ [1997] 3 SCR 1010 (SCC) at [155] and [159].

²³⁶ *Ibid* at [155].

²³⁷ *Ibid* at [156].

²³⁸ *Ibid* at [156].

²³⁹ *Ibid* at [156].

²⁴⁰ *Ibid* at [156], quoting K. McNeil, *Common Law Aboriginal Title* (Clarendon Press, Oxford, 1989), p 204.

²⁴¹ [1997] 3 SCR 1010 (SCC) at [158].

²⁴² *Id.* See also *La Forest* at [196] and n 234 *supra*.

declined to consider the complexities and implications of joint title further.²⁴³ Nevertheless, the Chief Justice did cite *United States v Sante Fe Pacific Railroad Co*²⁴⁴ as authority for the proposition that the possibility of joint title has been recognised by American Courts.²⁴⁵

In *Sante Fe Pacific Railroad Co*,²⁴⁶ Douglas J, delivering the judgment of the Court,²⁴⁷ observed that:²⁴⁸

[o]ccupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had "Indian title" which, unless extinguished, survived the railroad grant of 1866.

In *Mabo*, Toohey J emphasised that the reference to exclusivity in *Sante Fe Pacific Railroad Co* was used to distinguish such exclusively held lands from those 'wandered over by many tribes.'²⁴⁹ Accordingly, the principle of exclusive occupancy merely precludes 'indiscriminate ranging over land' rather than precluding title on the ground that more than one group utilizes land.²⁵⁰ This conclusion is also apparent from the decision in *Cramer v United States*,²⁵¹ which involved the problem of individual Indian occupancy. The Supreme Court of the United States²⁵² held that the unquestionable policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States,²⁵³ 'has had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well ...'²⁵⁴ Thus, individual Indian occupancy was not to be treated differently from the 'original nomadic tribal occupancy.'

²⁴³ [1997] 3 SCR 1010 (SCC) at [158]. In cases where exclusivity cannot be proved, Lamer CJ noted that shared non-exclusive aboriginal rights short of aboriginal title but tied to the land and permitting a number of uses might be established: *Ibid* at [159].

²⁴⁴ 314 US 339 (1941) - hereafter referred to as '*Sante Fe Pacific Railroad Co*'.

²⁴⁵ [1997] 3 SCR 1010 (SCC) at [158].

²⁴⁶ 314 US 339 (1941).

²⁴⁷ Stone, Roberts, Black, Reed, Frankfurter, Douglas, Murphy, Byrnes and Jackson JJ).

²⁴⁸ 314 US 339 (1941) at [251].

²⁴⁹ *Mabo* at 189.

²⁵⁰ *Id.*

²⁵¹ 261 US 219 (1923).

²⁵² Sutherland J delivering the opinion of the Court.

²⁵³ This policy was first recognized in *Johnson v. McIntosh* 8 Wheat. 543 (1823), and has been repeatedly reaffirmed: eg *Worcester v. Georgia* 6 Pet. 515 (1832).

²⁵⁴ 261 US 219 (1923) at [344].

Traditional lands may, therefore, be 'shared' by several distinct aboriginal groups. Indeed, the United States Court of Claims 'has acknowledged, on several occasions, that two or more tribes or groups might inhabit a region in joint and amicable possession, without destroying the "exclusive" nature of their use and occupancy, and without defeating Indian title...'²⁵⁵ Importantly, in *United States v Pueblo of San Ildefonso*,²⁵⁶ the United States Court of Claims upheld a finding by the Indian Claims Commission that a true 'joint aboriginal title' had been proven to exist over certain lands notwithstanding that the two Indian groups were regarded as 'separate entities' rather than a single or closely integrated entity. Senior Judge Durfee, delivering the judgment of the Court,²⁵⁷ observed that:²⁵⁸

[i]n order for an Indian claimant to prove aboriginal title, "[t]here must be a showing of actual, exclusive and continuous use and occupancy 'for a long time' prior to the loss of the land." ... Proof of these elements involves factual questions, and the findings of the Commission must be upheld on appeal if supported by substantial evidence.

The parties focused attention on the requirement of showing 'exclusive' occupancy and control over the lands claimed. It was suggested that, as a matter of law, it was impossible for the two Indian groups to have held joint Indian title because they were not a single or closely integrated entity.²⁵⁹ However, the Court upheld the Commission's finding that the two Indian groups were 'separate entities', rather than a 'super-entity' for the purpose of holding joint title to the subject tract of land.²⁶⁰ Accordingly, the Court

²⁵⁵ *United States v Pueblo of San Ildefonso*, 206 Ct. Cl. 649, 669; 513 F.2d 1383, 1394, 1395 (1975). See also *Turtle Mountain Band v United States*, 203 Ct. Cl. 426, 442, 490; F. 2d 935, 944 (1974); *Iowa Tribe of the Iowa Reservation in Kansas and Nebraska v United States*, 195 Ct. Cl. 365, 370 (1971), cert. denied, 404 US 1017 (1972); *Confederated Tribes of the Warm Springs Reservation of Oregon v United States*, 177 Ct. Cl. 184, 194 n.6 (1966); *Sac and Fox Tribe of Indians v United States*, 161 Ct. Cl. 189, 202 n. 11, 315 F. 2d 896, 903 n. 11 (1967).

²⁵⁶ 206 Ct. Cl. 649; 513 F.2d 1383 (1975).

²⁵⁷ The Court comprised Durfee SJ, Davis and Skelton JJ.

²⁵⁸ 206 Ct. Cl. 649, 669; 513 F.2d 1383, 1394 (1975).

²⁵⁹ *Id.*

²⁶⁰ Durfee SJ observed that: 'Four members of the Commission do not believe that a complete merger of two tribes into one entity is a prerequisite for applying the principle of joint occupancy. ... Chairman Kuykendall, on the other hand, who dissented in this aspect of the case, is of the opinion that "joint Indian title" can exist only where two or more tribes have become so closely allied or integrated in their land use and occupancy that they have in fact become virtually one land using entity. He does not believe that the concept is applicable to a situation where two separate entities, each possessing Indian title to its own lands, attempt to assert joint ownership to an area between their respective lands which is commonly used by both groups. The Chairman's stated position is espoused by the Government here on appeal. There are no holdings of this court which say that two Indian tribes or groups, each a separate "entity" and each with its own separate lands, can never assert joint ownership to other lands which are commonly used and occupied. ... On the record before us ... we held that the Iowas and the Sac and Fox may have used lands in common, but that the Commission could properly decide, on the basis of the evidence before it, that their occupancy was not

accepted that 'the complete merger of two or more tribes into one is not a prerequisite for claiming joint aboriginal title'.²⁶¹

Although there is no specific requirement of an exclusive relationship with the land in Australian native title jurisprudence, there can be no native title without native connection with the land. To prove the existence of native title, there must be an established entitlement to occupy or use particular land, which entitlement has sufficient significance to demonstrate a locally recognised special relationship between the users and the land.²⁶² Although the precise nature of the required 'presence' on the land remains to be elucidated,²⁶³ it need not amount to possession as understood at common law.²⁶⁴ The demands of the land and the society in question govern the quality of the required connection with the land. Thus, the relationship can flow from a nomadic lifestyle²⁶⁵ and need not involve more than the use of the land to acquire food.²⁶⁶ However, the presence on the land must be more than 'coincidental' only or truly 'random'.²⁶⁷ The relationship between the Aboriginal inhabitants and the land must be 'meaningful' from their perspective.²⁶⁸

Thus, although Australian courts have not expressly referred to the doctrine of shared exclusivity, native title can result from presence on land which is not exclusive to one group.²⁶⁹ Native title may be shared between different groups.²⁷⁰ Indeed, an aspect of the decision in *Milirrpum v Nabalco Pty Ltd*²⁷¹

proved to be truly joint, and therefore that each separate tribe's claims to Indian title would have to be tested on its own distinct basis': 206 Cl. Cl. 649, 669; 513 F.2d 1383, 1394 (1975).

²⁶¹ *Id.*

²⁶² *Mabo* at 86 per Deane and Gaudron JJ; 184-192 per Toohey J. The nature of the required presence is however equivocal: In *Mabo*, Toohey J considered that native title requires 'physical presence' on the land (at 188-190), whereas Brennan J spoke of a 'traditional connection' with the land (at 59-60 and 70), and Deane and Gaudron JJ referred to 'occupation and use' of the land (at 109-110). In *Coe v Commonwealth* (1993) 68 ALJR 110, Mason CJ, like Toohey J in *Mabo*, spoke of a 'physical connection' with the land: at 119. Later cases in both lower courts and the National Native Title Tribunal have, however, played down the requirement for physical presence on the land: see *Pareroultja v Tickner* (1993) 42 FCR 32, 39; *Mason v Tritton* (1994) 34 NSWLR 572, 578; *Re Waanyi People's Native Title Application* (1995) 129 ALR 118, 134; and the other authorities cited by P. Butt, *Land Law*, op cit (n 39), p 884, nn 16 and 17.

²⁶³ See generally P. Butt, *Land Law*, op cit (n 39), pp 883-885.

²⁶⁴ *Mabo* at 188 per Toohey J.

²⁶⁵ See *Mabo* at 189-190 per Toohey J (provided the presence on the land is not coincidental only or truly random).

²⁶⁶ *Mabo* at 84-86 per Deane and Gaudron JJ.

²⁶⁷ *Mabo* at 189-190 per Toohey J.

²⁶⁸ *Mabo* at 188 per Toohey J.

²⁶⁹ See, for example, *Mabo* at 190 per Toohey J (as where other groups come onto the land for ceremonial purposes). Actual exclusive occupancy will, nonetheless, necessarily manifest the required special relationship with the land: *Mabo* at 61 per Brennan J.

²⁷⁰ *Mabo* at 190 per Toohey J. According to Toohey J, where several groups maintain a connection with the land, it may be that '[o]f course each smaller group could be said to

that has been consistently overlooked is Blackburn J's obiter reference to this effect.²⁷² Although concluding that the 'doctrine of communal native title ... [did] not form, and ha[d] never formed, part of the law of any part of Australia',²⁷³ Blackburn J observed that if 'communal native title' existed, it could only be understood on the facts before him, to mean that:²⁷⁴

all those aboriginals, irrespective of clan, who at any time are or were accustomed to be on the subject land for any purpose regarded by them as lawful, are the joint holders of the communal native title in the whole of the subject land.

With the High Court's retrospective recognition of native title rights and interests in land, Blackburn J's obiter comment not only assumes greater importance, but conforms with the view of the Canadian Supreme Court in *Delgamuukw*.

More recently in Australia, the sharing of native title was found in both *Yarmirr v Northern Territory*²⁷⁵ and *Ward v Western Australia*.²⁷⁶ Furthermore, Australian judicial interpretation of the meaning of occupy in the context of s 47B²⁷⁷ of the *NTA* appears to endorse the doctrine of shared exclusivity. Section 47B of the *NTA*, which was enacted as part of Parliament's response to the decision in *Wik*, provides that :

A native title claim can be made over currently vacant Crown land notwithstanding any historical tenures, provided at least one member of the native title claim group occupies the area.

In *Hayes*, Olney J found that, for the purpose of s 47B of the *NTA*,²⁷⁸

have title, comprising the right to shared use of land in accordance with traditional use; or traditional title vests in the larger "society" comprising all the rightful occupiers': *Id*

²⁷¹ (1971) 17 FLR 141 (SC(NT)).

²⁷² Although Toohey J alluded to this view of Blackburn J in *Mabo* at 190.

²⁷³ (1971) 17 FLR 141 (SC(NT)) at 244-245.

²⁷⁴ *Ibid* at 273.

²⁷⁵ (1998) 156 ALR 370, 404.

²⁷⁶ (1998) 159 ALR 483, 550-551. 'Lee J held that the Miriuwung community and the Gajerrong community were once occupants of adjacent territories which overlapped in part. They shared economic and ceremonial links, knowledge of Dreaming myths, Dreaming tracks and Dreaming sites such that the Miriuwung and Gajerrong had now become regarded as a composite community with shared interests': *State of Western Australia v Ward* [2000] HCA 191, at [40] per Beaumont and von Doussa JJ. Lee J refused, however, to make a determination of shared native title where no application had been made by a group under the *NTA*: (1998) 159 ALR 483, 535-539 (1998).

²⁷⁷ Which was enacted as part of Parliament's response to the decision in *Wik*.

²⁷⁸ *Hayes v Northern Territory* [1999] FCA 1248, [125] per Olney J. In doing so, Olney J was applying the general thrust of a passage from the judgment of Toohey J in *Wik*: *Ibid* at [124]. Significantly, Olney J observed that '[g]iven the context in which s 47B was enacted, namely as part of Parliament's response to the decision in *Wik*, it is reasonable to assume that in referring to the occupation of land ... the legislature had in mind what had previously been said by the High Court concerning the occupation of land by indigenous people': *Id*.

[t]he occupation of the land should be understood in the sense that the indigenous people have traditionally occupied land rather than according to common law principles and judicial authority relating to freehold and leasehold estates. The use of traditional country by members of the relevant claimant group which is neither random nor co-incidental but in accordance with the way of life, habits, customs and usages of the group is in the context of the legislation sufficient to indicate occupation of the land.

The common law doctrine of shared exclusivity allows the finding of a joint title which is shared between two or more aboriginal groups. Even in Canadian jurisprudence where proof of exclusive occupation is expressly required, the requirement has not been regarded as dictating the need to show the actual exclusion of other groups. In Australian native title jurisprudence, the fact that there is no specific requirement of exclusivity implicitly embraces the theory of shared exclusivity.²⁷⁹ The doctrine of shared exclusivity is not, however, as novel a concept as might first appear. In the context of the common law relating to freehold and leasehold interests, the concept of co-ownership furnishes an analogy:²⁸⁰

[w]here two or more persons are entitled to the simultaneous enjoyment of land, they hold their interests in co-ownership. ... The essential characteristic of any form of co-ownership is that each co-owner has the right to possession of the whole of the land.

Thus, notwithstanding that a fee simple estate confers exclusive possession on the grantee, this exclusive possession is capable of being shared.²⁸¹

Although exclusivity is a common law principle derived from the notion of fee simple ownership, the concept of co-ownership, a form of shared exclusivity, is similarly derived. Accordingly, the doctrine of shared exclusivity, as understood in native title jurisprudence, could be imported into the common law principles relating to freehold and leasehold estates more readily than common law concepts relating to freehold and leasehold estates have been imported into native title jurisprudence. In this way, the common law doctrine of shared exclusivity has the potential to apply to native title holders and other title holders, whether indigenous or non-indigenous; each title holder simultaneously having exclusive possession of the relevant land. This analysis obviously has significant implications for the High Court's finding that native title is not necessarily inconsistent with, and therefore not necessarily extinguished by, pastoral leases.²⁸² Shared exclusive possession of land between native title holders and non-native title holders

²⁷⁹ Actual exclusive occupancy will, nonetheless, necessarily manifest the required special relationship with the land: *Mabo* at 61 per Brennan J.

²⁸⁰ A. J. Bradbrook et al, *Australian Real Property Law*, op cit (n 39), [10.01].

²⁸¹ See also the similar view of P. Butt, *Land Law*, op cit (n 39), p 238: '[O]ne co-owner may grant a lease of his or her interest, since the lease binds only that co-owners interest in the land and leaves untouched the rights of the other co-owners to (shared) possession of the land.'

²⁸² *Wik*.

would significantly increase the range of ordinary title interests which, at common law, are not inconsistent with native title.

Consequently, the doctrine of shared exclusivity has the potential to provide an underlying rationale for the classification of native title as an exception to indefeasibility. It also provides a solution to the difficulty of identifying the occupying group in the case of nomadic people or where no single band has exclusive use of any particular area. Moreover, it questions the relevance of exclusive possession as the test for determining whether or not native title has been extinguished under the confirmation provisions of the *NTA*, as amended by the *NTAA*. The importance of this latter issue is highlighted in the context of the legal implications of classifying native title as an exception to indefeasibility and as a ground for invoking the deferred indefeasibility theory.

PART IV: LEGAL IMPLICATIONS OF CLASSIFYING NATIVE TITLE AS AN EXCEPTION TO INDEFEASIBILITY AND AS A GROUND FOR INVOKING THE DEFERRED INDEFEASIBILITY THEORY.

In *Hayes*, Olney J drew a distinction between the legal consequences of registration for the purpose of curing an interest's invalidity and for the purpose of extinguishing any native title interests in the land.²⁶³ Olney J then applied these two distinct limbs of the consequences of registration to the facts before him. Applying the first limb, Olney J found that since the registration did not validate the interest, the registered proprietor did not obtain an indefeasible title (whether considered as an exception to indefeasibility or merely as a ground for applying the deferred indefeasibility theory). Applying the second limb, Olney J found that because only a valid exclusive possession act could extinguish native title, the native title was not extinguished.

Thus, in order to determine the legal consequences of any registered right vis a vis native title, two steps are involved. First, it must be considered whether, in the circumstances, native title constitutes either an exception to indefeasibility or sufficient grounds for applying the deferred indefeasibility theory. If this first step has a positive result, it must, secondly, be established whether or not, in the circumstances, native title has been extinguished. Thus, the legal ramifications of classifying native title as either an exception to indefeasibility or as a ground for invoking the deferred indefeasibility theory are not as radical as they first appear. Only where the circumstances are such that not only is native title so classified but, in addition, the relevant native title is not extinguished²⁶⁴ will the title of the registered proprietor be

²⁶³ [1999] FCA 1248, [90(iv)].

²⁶⁴ Because the common law doctrine of extinguishment does not contemplate the suspension and revival of native title, the non-extinguishment principle under the *NTA* represents a major departure from the common law as declared by the High Court in

subject to the native title. Accordingly, the finding that native is an exception to indefeasibility or a ground for applying the deferred indefeasibility theory does not necessarily entail the conclusion that the registered proprietor holds subject to any native title. The legal implications have to be decided on a case by case basis.

Native Title as an Exception to Indefeasibility

As a true exception to indefeasibility, native title is limited to situations in which it is not only classified as an exception but in which it has also not been extinguished. Thus, there are only two situations in which it can be definitively stated that native title will constitute an exception to indefeasibility of title: first, and independently of the decision in *Hayes*, when the overriding statute exception in the context of grants of statutory title applies, and, secondly, when a person registers a void instrument specifically because it fails to satisfy the requirements of s 23B(2)(a) of the *NTA*. In the former case, statutory title is not only excluded from the *NTA*'s implied subjection to the Torrens Acts but, at common law, a statutory grant of land does not extinguish any native title to the land; the grant being consistent with the preservation of native title. In the latter case, a document which is void for the purpose of the statutory confirmation of extinguishment of native title by previous exclusive possession act cannot be validated by registration, and, therefore, cannot amount to a valid previous exclusive possession act for the purpose of extinguishing native title.²⁸⁵ Thus, in both cases, it necessarily follows from the circumstances that give rise to the classification of native title as an exception to indefeasibility that native title is not extinguished.

Whether or not native title amounts to an exception to indefeasibility in other cases depends on whether any of the suggested interpretations of *Hayes* are accepted.²⁸⁶ If either the overriding statute exception in the context of acts invalid under the *NTA*²⁸⁷ or the common law interpretation requiring that a person registering any instrument which is void on ordinary principles of law does not obtain an indefeasible title²⁸⁸ is accepted, native title will also

Mabo. However, the non-extinguishment principle only operates to suspend native title to the extent that the relevant act is inconsistent with the continued existence, enjoyment or exercise of native title rights and interests. Owing to the lack of any statutory test for determining what amounts to 'inconsistency' for the purpose of the non-extinguishment principle, the question of inconsistency is left for resolution by the common law. Accordingly, the common law is incorporated into the *NTA*'s past act regime as the circumstances in which native title may be extinguished at common law continue to be relevant. This position is not only maintained under the amended *NTA*, but is also relevant to the new concept of 'suspension' of inconsistent native title introduced by the *NTAA* (see s 23C of the *NTA*).

²⁸⁵ Whether this is merely an application of the deferred indefeasibility theory or an exception to indefeasibility, the consequences for the registered proprietor's title vis a vis native title is the same. See Part IV, section entitled 'Native Title as a Ground for Applying the Deferred Indefeasibility Theory,' *infra*.

²⁸⁶ See text accompanying n 136-n 190 *supra*.

²⁸⁷ See text accompanying n 136-n 147 *supra*.

²⁸⁸ See text following n 148-n 151 *supra*.

constitute a true exception to indefeasibility. In the former case, registration of any invalid interest would not only be defeasible but, since the *NTA* requires that native title can only be extinguished by an act which, except for the presence of native title, is valid, would not extinguish native title. In the latter case, registration of a void instrument would also not attract the indefeasibility provisions, and, since the registration of a void instrument does not evince a clear and plain intention to extinguish native title,²⁸⁹ would also not extinguish native title. As in the case of the two situations in which native title unequivocally constitutes an exception to indefeasibility, the circumstances which give rise to the native title exception to indefeasibility in the context of these possible interpretations, also necessarily preserve native title.

If the broadest interpretation of *Hayes*²⁹⁰ is accepted, however, different considerations apply. Classified as a general common law (retrospective) exception to indefeasibility, the existence of native title would prevent the registered proprietor of any interest in land from obtaining the protection of the indefeasibility provisions vis a vis native title. Although the title of the registered proprietor would, prima facie, be subject to any native title interest in the land, in contradistinction to the consequences of the other possible interpretations, it does not necessarily follow from the circumstances which give rise to this exception that native title is preserved. Application of a general native title exception to indefeasibility and the extinguishment of native title may be mutually exclusive. Accordingly, only if other factors lead to the conclusion that native title has not been extinguished will the registered title be subject to any native title.

In practical terms, therefore, although the registered title is defeasible for native title, the registered proprietor only holds subject to the encumbrance of any native title rights which have not been extinguished.²⁹¹ If the relevant native title has in fact been extinguished, the registered proprietor holds free from any native title notwithstanding that, in the circumstances, native title was an exception to indefeasibility. On the basis of this interpretation, only unextinguished native title is an exception to indefeasibility. In terms of the common law, therefore, only native title which is 'consistent' with ordinary title is an exception to indefeasibility.²⁹²

Native Title as a Ground For Applying the Deferred Indefeasibility Theory

It can be stated that a document which is void because it fails to satisfy the requirements of s 23B(2)(a) of the *NTA* for the purpose of the statutory confirmation of extinguishment of native title by previous exclusive possession act cannot be validated by registration and, therefore, the deferred indefeasibility theory applies to the registration of such an invalid instrument

²⁸⁹ See text accompanying n 151 *supra*.

²⁹⁰ See text accompanying n 152-n 188 *supra*.

²⁹¹ See n 284 *supra*.

²⁹² *Mabo; Wik*.

vis a vis native title.²⁹³ The consequences of the deferred indefeasibility doctrine applying in such circumstances are significant. Because the interest is not a valid exclusive possession act for the purpose of extinguishing native title, the native title is not extinguished and consequently the registered proprietor holds subject to such native title. Thus, the circumstances are such that not only is native title classified as a ground for applying the deferred indefeasibility theory, but native title is also preserved.

Importantly, this result also necessarily follows if it is accepted that the existence of native title requires that the deferred indefeasibility doctrine applies to the registration of all invalid interests.²⁹⁴ In this context, however, native title is preserved because the registration of a void instrument does not evince a clear and plain intention to extinguish native title.²⁹⁵ Nevertheless, in both situations in which native title is classified as a ground for applying the deferred indefeasibility theory, the void interest when duly entered on the register becomes the root of a valid title in a bona fide purchaser by force of the Torrens statute. Thus, a third party who purchases in good faith from the registered proprietor and registers an instrument executed by him or her obtains the protection of the indefeasibility provisions vis a vis any native title.²⁹⁶

Native Title Claims Permitted Notwithstanding Prior Extinguishment

Two of the 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* are important in the context of the legal implications of the classification of native title. First, the *NTA* enables native title claimants who hold a pastoral lease to pursue a claim to the pastoral lease area.²⁹⁷ In such a case, any extinguishment by the pastoral lease or by any other interest in relation to the area are to be disregarded.²⁹⁸ Secondly, a native title claim can be made over currently vacant Crown land²⁹⁹ notwithstanding any historical tenures, provided at least one member of the native title claim group occupies the area.³⁰⁰ In such a case any prior extinguishment must also be disregarded.³⁰¹

²⁹³ See text accompanying n 148 *supra*.

²⁹⁴ See text following n 148 - n 151 *supra*.

²⁹⁵ See text accompanying n 151 *supra*.

²⁹⁶ *Gibbs v Messer* [1891] AC 248.

²⁹⁷ *NTA*, s 47.

²⁹⁸ *NTA*, s 47(2). Any determination of native title does not affect the validity of the pastoral lease: s 47(3) of the *NTA*.

²⁹⁹ That is, land where there is no contemporary freehold, lease, reservation or resumption process.

³⁰⁰ *NTA*, s 47B.

³⁰¹ *NTA*, ss 47A(2) and 47B(2). Any determination in relation to the land does not affect the validity of the land grant or trust (s 47A(3)) or the validity of any historical interest (s 47B(3)) as the case may be. Sections 47A and 47B were added to the *NTAB* by Government amendments, in part, in response to the recommendations of the Report of

The implications of these provisions are important if native title is considered as either a general exception to indefeasibility or as a general ground for applying the deferred indefeasibility doctrine to the registration of invalid interests. By providing that any extinguishment of native title is disregarded, these statutory provisions ensure that the title of the registered proprietor will hold subject to the full native title interest.

Registration of Invalid Future Acts

Notwithstanding the suggested interpretations of *Hayes*, it is clear from the actual decision in *Hayes* that a person registering a void instrument, specifically because of non-compliance with s 23B(2)(a) of the *NTA*, does not obtain an indefeasible title.³⁰² Although this is the position with respect to the registration of a void instrument for the purpose of confirmation of extinguishment by previous exclusive possession act, what are the consequences of registering a void instrument in the context of future acts?

The future act regime provides for future acts which fall into one of twelve categories,³⁰³ which include future acts which pass the freehold test.³⁰⁴ The twelve categories of future acts 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*.³⁰⁵ Under the original *NTA*, the freehold test was one of the fundamental safeguards for native title in on-shore areas.³⁰⁶

the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund on the Bill. A claim can be made under ss 47, 47A and 47B of the *NTA* in the Federal Court (s 61A(4)) and can be registered: s 190B(8) and (9).

³⁰² See text accompanying n 146 *supra*.

³⁰³ Future acts pursuant to a registered agreement with a native title party (Subdivisions B, C, D and E); future acts where procedures indicate an absence of native title (Subdivision F); future acts permitting primary production activity on non-exclusive agricultural and non-exclusive pastoral leases (Subdivision G; especially s 24GB); future acts permitting off-farm activities directly connected to primary production activities (Subdivision G, especially s 24 GD); future acts granting rights to third parties on non-exclusive agricultural and non-exclusive pastoral leases (Subdivision G, especially s 24GE); future acts in relation to water and living aquatic resources (Subdivision H); future acts which are pursuant to a pre-existing right or renewals of existing interests (Subdivision I); future acts pursuant to existing reservations or leases (Subdivision J); future acts which provide facilities for services to the public (Subdivision K); future acts which have a low impact (Subdivision L); future acts which pass the freehold test (Subdivision M); or future acts affecting offshore places (Subdivision N).

³⁰⁴ *NTA*, Subdivision M.

³⁰⁵ *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. 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 of Part 2 of the *NTA* (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 (Division 3, Part 2 of the *NTA*).

³⁰⁶ *NTA*, original s 235. This section essentially provided that an act could be done over land subject to native title only if it could be done over freehold land.

The amended *NTA* continues in part to preserve the original Act's 'freehold standard' for the treatment of native title,³⁰⁷ although this standard has been relaxed in a number of respects. While there has been an expansion in the types of government acts which are exempt from the freehold test,³⁰⁸ acts which affect native title but which do not pass any of the specific tests in Subdivisions B, C, D, F, H, I, J, K or L of Division 3 of Part 2 of the *NTA*, must pass the general 'freehold test' in Subdivision M of Division 3 of Part 2 of the *NTA* to be valid under the *NTA*'s future acts regime.

Although subdivision M ensures the validity of future acts which pass the 'freehold test',³⁰⁹ a future act which passes the freehold test is only valid to the extent that it relates to an onshore place.³¹⁰ Furthermore, the validity of the act is subject to the right to negotiate provisions³¹¹ which may require certain additional procedures to be followed before the act will be valid.³¹² Subdivision M covers two classes of future acts: legislative acts³¹³ and non-legislative acts. The act of registering a void instrument would fall within the non-legislative future act category.

Essentially there are two kinds of non-legislative acts. First, a non-legislative act, such as the grant of rights to third parties, is valid if it could be done on the assumption that the native title holders instead held ordinary title to the 'land'³¹⁴ or onshore 'waters'³¹⁵ affected by the act.³¹⁶ Secondly, a future

³⁰⁷ *NTA*, Subdivision M of Division 3 of Part 2 of the *NTA*. Subdivision M is based upon original ss 23 and 235 of the *NTA*, which were repealed by the *NTAA*.

³⁰⁸ For example, facilities for services to the public (Subdivision K); reserved land (Subdivision J); future water and airspace management (Subdivision H); primary production (Subdivision G) and opal and gem mining (Subdivision M).

³⁰⁹ Accordingly, subdivision M implements part of point four of the 10 Point Plan.

³¹⁰ *NTA*, s 24MC. The term 'onshore place' is defined in s 253 of the *NTA* to mean any land or waters within the territorial limits of a State or Territory (including an external Territory). The term 'offshore place' is defined in s 253 to mean any land or waters to which the *NTA* extends other than those that are in an onshore place. Acts dealing with offshore places are dealt with in Subdivision N. All future acts in an offshore place are valid even if that place is subject to native title: s 24NA(2). Nevertheless, native title can only be extinguished by a compulsory acquisition which meets the requirements of the freehold test regime: s 24NA(3).

³¹¹ *NTA*, Subdivision P of Division 3 of Part 2.

³¹² *NTA*, s 24MD(1).

³¹³ The making, amendment or repeal of legislation is valid only if it either applies to native title holders in the same way that it would apply to them if they instead held ordinary title to the land affected by the act (*NTA*, s 24MA(a) - 'Ordinary title' is defined to mean either freehold or, in the case of the ACT or Jervis Bay, leasehold: s 253 of the *NTA*) or if it does not put native title holders in a more disadvantageous position than they would have been if they had instead held ordinary title to the land affected by the act (*NTA*, s 24MA(b) - 'Ordinary title' is defined to mean either freehold or, in the case of the ACT or Jervis Bay, leasehold: s 253 of the *NTA*).

³¹⁴ Defined in s 253 of the *NTA*.

³¹⁵ Defined in s 253 of the *NTA*.

³¹⁶ *NTA*, s 24MB(1)(b)(i) and (ii). Future acts which may pass the freehold test under the former category of non-legislative act include the compulsory acquisition of native title rights where the rights of ordinary title holders can also be compulsorily acquired. In a

administrative act that is not covered by the first kind of non-legislative act is valid if it is the creation or variation of a right to mine opals and gems.³¹⁷ Thus, the act of registering a void instrument may pass the freehold test under the former category of non-legislative act. This result is achieved notwithstanding that the existence of native title may otherwise constitute an exception to indefeasibility or require the application of the deferred indefeasibility theory in the context of the registration of invalid interests. This is because the freehold test essentially treats native title in the same manner as ordinary title, effectively converting native title into ordinary title. Since the effect of registering any instrument, valid or invalid, vis a vis another ordinary title holder is that the registered proprietor acquires immediate indefeasibility,³¹⁸ this result would apply equally to native title's statutory ordinary title status. Although the non-extinguishment principle applies to most future acts with the result that native title is only suspended to the extent of and for the duration of the relevant inconsistent act, since native title does not constitute an exception to indefeasibility in these circumstances, the registered proprietor's title is unaffected by any native title. In this context, therefore, only if the classification of native title as a general exception to indefeasibility is accepted, would the registered proprietor hold subject to

significant departure from the original *NTA*, however, such a compulsory acquisition, of itself, extinguishes native title (s 24MD(2)(c)) provided that three conditions are met. First, the law under which the acquisition of native title rights takes place permits both the acquisition of native title rights and non-native title rights in relation to particular land or waters (s 24MD(2)(a)). Secondly, the whole or equivalent part of all non-native title rights in relation to which the native title rights are compulsorily acquired, are also acquired (s 24MD(2)(b)). And, thirdly, the practices and procedures adopted in acquiring the native title rights do not cause native title holders any greater disadvantage than is caused to the holders of non-native title rights when their rights are acquired (s 24MD(2)(ba)).

³¹⁷ *NTA*, s 24MB(2). By treating the latter kind of act as an act which passes the freehold test, the amended *NTA* has relaxed the freehold standard by allowing some activities which typically occur only on Crown land: J. Clarke, 'The Native Title Amendment Bill 1997' (1997) 4(6) *Indigenous Law Bulletin* 4, p 5.

³¹⁸ A registered proprietor acquires an indefeasible title notwithstanding that the dealing under which he or she claimed title was a forgery (*Frazer v Walker* [1971] 1 AC 569; *Mayer v Coe* (1968) WN (Pt 1) (NSW) 549; *Ratcliffe v Watters* (1969) 89 WN (Pt 1) (NSW) 497 (all cases involving forged mortgages); *Schultz v Corwill Properties Pty Ltd* (1969) 90 WN (Pt 1) (NSW) 529 (forged mortgage and discharge of mortgage); *Tessman v Costello* [1987] 1 Qd R 283 (transfer of voidable mortgage)) or that the dealing was void for breach of statutory prohibition (*Boyd v Mayor of Wellington* [1924] NZLR 1174 (void proclamation); *Breskvar v Wall* (1971) 126 CLR 376 (transfer void for breach of stamp duties legislation); *Rockhampton Permanent Building Society v Petersen* (No 2) [1989] 1 Qd R 670 (mortgage void for breach of lending rules)) or that the instrument was executed under a power of attorney that does not authorise its execution (*Broadlands International Finance Pty Ltd v Sij* (1987) 4 BPR 9420; *Co-operative Property Developments of Australia Ltd v Commonwealth Bank of Australia* (1992) 1 Tas R 308), or in the case of a registered proprietor of a lot in a subdivision, where the subdivision breached the statutory requirements for creating legal subdivisions (*Sutherland Shire Council v Moir* (1982) 49 LGRA 112). See generally P. Butt, *Land Law*, op cit (n 39), pp 698-699.

any unextinguished native title.³¹⁹

CONCLUSION

Although the classification of native title as an exception to indefeasibility or as a ground for applying the deferred indefeasibility doctrine is significant, the legal implications of such classifications are limited as a result of the Federal Court's two-step process for determining the consequences of a registered right vis a vis native title. Only where the circumstances of a case are such as to both classify native title as an exception to indefeasibility or as a ground for applying the deferred indefeasibility theory *and* conclude that the relevant native title interest is not extinguished will the title of the registered proprietor be subject to the native title interest. Thus, although the operation of the concept of indefeasibility has never been absolute, and the question which has 'transcended all others' is when 'the magical protective armour of indefeasibility is donned by a title,'³²⁰ in the context of native title a second question is equally important: has the native title been extinguished? For if it has, notwithstanding native title's classification as an exception to indefeasibility or as a ground for applying the deferred indefeasibility theory, there will be no native title for the registered proprietor to hold subject to.

There are only two situations in which it can be authoritatively stated that native title will constitute an exception to indefeasibility of title: first, when the overriding statute exception in the context of grants of statutory title applies, and, secondly, on the authority of *Hayes*, when a person registers a void instrument specifically because it fails to satisfy the requirements of s 23B(2)(a) of the *NTA*. In both cases, the circumstances that give rise to the classification of native title as an exception to indefeasibility are synonymous with the non-extinguishment of native title. Furthermore, in relation to the classification of native title as a ground for applying the deferred indefeasibility theory, it can only be definitively stated that a document which is void because it fails to satisfy the requirements of s 23B(2)(a) of the *NTA* for the purpose of the statutory confirmation of extinguishment of native title by previous exclusive possession act, cannot be validated by registration and, therefore, the deferred indefeasibility theory applies to the registration of such an invalid instrument vis a vis native title. Because the interest is not a valid exclusive possession act for the purpose of extinguishing native title, the native title is not extinguished and consequently the registered proprietor holds subject to such native title.

Whether or not native title amounts to an exception to indefeasibility or a ground for applying the deferred indefeasibility theory in other cases depends on whether any of the suggested interpretations of *Hayes* are accepted. If it is accepted that native title constitutes an exception to indefeasibility in the

³¹⁹ Nevertheless, rights registered under pre-1994 invalid interests are arguably defeasible for native title – see Part II, section entitled 'Another Exception to Indefeasibility or Ground for Applying the Deferred Indefeasibility Theory,' *supra*.

³²⁰ D.J. Whalan, *The Torrens System in Australia* (Law Book Company, Sydney, 1982), p 297.

context of the registration of invalid acts, either at common law or pursuant to statute, native title will also constitute a true exception to indefeasibility on the basis that the circumstances in which these particular exceptions apply also implicitly preserve native title. Similarly, if it is accepted that the existence of native title requires that the deferred indefeasibility doctrine applies to the registration of any invalid interests, the same result would be achieved on the basis that, at common law, registration of an invalid interest does not evidence a clear and plain intention to extinguish native title.

However, if it is accepted that native title constitutes a general common law (retrospective) exception to indefeasibility, although the registered proprietor's title is, *prima facie*, subject to any native title interest in the land, the circumstances which give rise to this exception are not necessarily synonymous with the preservation of native title. Consequently, only if other factors lead to the conclusion that native title has not been extinguished will the registered proprietor's title be subject to any native title. In this context, therefore, it is necessary to determine whether native title is consistent with the registered interest.

The classification of native title as a general common law exception to indefeasibility is, therefore, in a special position. The circumstances which give rise to all the other suggested classifications are confined to special facts which are synonymous with the preservation of native title. Accordingly, where these classifications apply, registered title *is* subject to native title. Because the general native title exception to indefeasibility applies universally, however, the circumstances of a particular case, although *prima facie* subjecting the registered title to native title, may or may not extinguish the native title. Thus, the registered proprietor will only hold subject to any unextinguished native title.

Notwithstanding the possible interpretations of *Hayes*, it is clear that native title does in fact constitute an exception to indefeasibility and a ground for applying the deferred indefeasibility theory in certain circumstances. Accordingly, native title is just another reminder that indefeasibility is not the all-protective concept it might appear to be.³²¹ Indeed, the following observation, was made in 1995: 'all Torrens legislation will soon need legislative overhaul to take account of the recognition of native title within the hierarchy of interests in land.'³²² In light of the discussion in this paper, however, it is evident that a legislative response to native title as either an exception to indefeasibility or as a ground for applying the deferred indefeasibility doctrine is unnecessary.

Whether native title is considered as a *retrospective* common law exception to indefeasibility, that is, as the appropriate judicial response to the High Court's retrospective recognition of native title, or whether native title is

³²¹ See P. Butt, *Land Law*, *op cit* (n 39), p 699.

³²² P. Babié, Case Notes- *James Smith Indian Band v Saskatchewan (Master of Titles): Is Native Title Capable of Supporting a Torrens Caveat?* (1995) *Melbourne University Law Review* 588, 599.

considered as a new exception to indefeasibility, that is, as the appropriate judicial interpretation of the interaction between the NTA and the Torrens Acts, the development of common law principles can effectively respond to the challenge presented by the High Court's recognition of this new source of title. The High Court has identified that '[p]erhaps the greatest detriment suffered by Aboriginal people as a result of legal injustice was their loss of homeland.'³²³ Accordingly, the classification of native title as an exception to indefeasibility when deciding questions that arise about the relationship between pre-existing native title rights and rights subsequently registered under the Torrens system is an example of when, in the words of Sir Gerard Brennan, 'a development of, or a change in, the law can be fashioned to eliminate the cause of an injustice revealed in a particular case.'³²⁴

³²³ *The Queen v Toohey; ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 354 per Brennan J; *Mabo*, esp at 104 per Deane and Gaudron JJ; *North Galanja Aboriginal Corporation and Another v The State of Queensland and Others* (1996) 185 CLR 595, 614. See also Gerard Brennan, 'Reconciliation' (1999) 22(2) *University of New South Wales Law Journal* 595, 596-597.

³²⁴ Gerard Brennan, 'Reconciliation' (1999) 22(2) *University of New South Wales Law Journal* 595, 595.