RECENT DEVELOPMENTS

NATIVE TITLE ISSUES:
Legislative Reform and Current Issues

WIK
More than a Candle in the Wind

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That politics is more about perceptions than reality is a truism. Just how true this is was emphasised to me during the later stages of the Native Title negotiations in 1993.

Like the current debate post *Wik* a crucial issue post *Mabo* was the validity of statutory titles issued over potential Native Title land. Like now there was a powerful and emotive argument that the Racial Discrimination Act must be maintained in spirit and letter in framing legislation to respond to the High Court's decision.

As Attorney General I proposed that certainty of title could only be guaranteed by legislative validation. To achieve this legal outcome it was necessary by implication to impair or extinguish Native Title. This in turn required the suspension of the Racial Discrimination Act.

The perception of Aboriginal people to suspending the Racial Discrimination Act was extremely and loudly negative. Noel Pearson even described my proposal as "moral scurvy".

In the end Prime Minister Keating negotiated a legislative package that won the support of moderate Aboriginal leadership. Yet this legislation, the current Native Title Act, contained the same provision I proposed effectively suspending the operation of the Racial Discrimination Act to deliver validity of title.

The effect of the law did not change but the perception of it had. Keating's skill was to understand that each stakeholder in the Native Title debate had to take a win back to their own constituency. He also knew that winning is relative and not absolute and is determined by a person's perception as to whether they are a winner or not.

To a large extent the response the *Wik* decision has also been shaped as much by perceptions as reality. This paper is essentially about the real issues posed by *Wik* but the final analysis of the *Wik* debate will be much more about perceptions.

At its essence the *Wik* decision is about the co-existence of Native Title and other legal interests in the one parcel of land. The court amplified the basic rules outlined in the *Mabo* decision and the

Native Title Act on how this co-existence is to operate. In doing so it held as a matter of law a pastoral lease does not grant exclusive possession to the lessee.

We know that Native Title has been extinguished by some legal interests granted by government such as freehold. We know that when this has not happened statutory interests are to take precedence over Native Title. We know that a case by case examination is necessary to be certain of the relationship.

We also know the decision has particularly significant implications for the resource sector. There are five such implications I think can be readily identified.

First, the decision significantly expands the area of land potentially subject to Native Title to include pastoral leases and a broad range of other tenure types (other than freehold land).

While *Wik* was about Queensland pastoral leases the reasoning of the majority judges must also invite questions about whether other tenures do actually carry with them the right of exclusive possession. It should be noted that general statutory provisions concerning rights of lessees to exclude others do not operate to exclude Native Title holders from pastoral lease land.

In short grants issued under statute are like Native Title rights "sui generis" and the character of statutory grants such as leases do not reflect all the characteristics of leases known to common law.

Analysis of the relevant statute and lease instruments indicates that they are often thin on detail on defining the rights of the grantee. Rather the documents are predominantly concerned with defining obligations and duties rather than rights. Specifically it would be highly debateable whether a mining lease or other mining tenure will have extinguished Native Title.

Second, it enhances the prospects of Native Title not being extinguished by the vesting of resources into public ownership.

Prior to *Wik* it was assumed that vesting of resources such as minerals, timber and water into public ownership will have operated to extinguish Native Title. This was confirmed in the case of minerals by Justice Drummond in the *Wik* Federal Court decision and this point was not challenged by the High Court.

Extinguishment occurs where a government has exhibited a clear and plain intention to achieve this end. Given that governments operated in ignorance of Native Title, this intention will be found by necessary implication from the provisions of a statute when the statutory right created is inconsistent with Native Title so that the Native Title rights cannot co-exist with or be exercised without abrogating the statutory right.

In essence the majority adopted a presumption against extinguishment in order to emphasise the need for clarity of the necessary intention to extinguish.

While it is quite possible that the terms of a particular vesting provision may have extinguished Native Title the test would appear to be whether the statutory right is able to be interpreted in a way which allows Native Title to co-exist.

Third, it draws into doubt the validity of grants issued since 1 January 1994 and possibly any action taken since 1 January 1994 on valid grants including mining grants where Native Title has not been extinguished.

The validity of titles, permits and other approvals granted by governments since 1994 is the central issue thrown up by *Wik* and is of great relevance to the resource sector. I will return to this point.

Fourth, it raises the capacity of the property law system to respond to the challenges of regulating co-existence.

The prospect of co-existing Native Title interests on a range of statutory land tenures raises many practical and legal issues. These include:

- the precise nature of both sets of rights;
- the legitimacy of claims to Native Title rights over statutory tenures in the attempt to exercise these rights by claimants prior to any determination;
- the capacity to upgrade statutory tenures or to change the use that tenures are put to;
- the capacity of Native Title holders to use the land for social and economic purposes of a contemporary nature.

Many of these practical issues have been addressed to some extent in States such as South Australia, Western Australia and the Northern Territory where co-existence has been a feature of pastoral life since settlement. Clearly the difficulties posed by co-existence along with the issue of validation has been the key issue canvassed in the Federal Government's response to the *Wik* decision.

Fifth, it has potential implications for the application of compensation payments.

The issue of compensation raises starkly the question of competing perceptions. For instance there is a belief on the part of Aborigines that Native Title rights are a high set of interests in land and that the nature of compensation for their loss is either beyond monetary compensation or will involve substantial compensation.

In contrast there has been a school of thought amongst some lawyers and policy makers that the rights can be readily extinguished and compensation payable in monetary terms. It is believed that compensation for such extinguishment could not amount to a figure greater than the equivalent freehold value of the land involved.

The resolution of this issue is likely to amount to a struggle between public policy and private rights. It will be the Parliaments that will attempt to shape the law by enacting legislation to reflect public policies. But the courts will ensure that the rights of those who are affected are compensated in accordance with the law. This means that the courts will progressively address the issue of compensation for any extinguishment or impairment of Native Title rights.

While there is considerable law on the question of "just terms" compensation there is next to no authority on a compensation for the impairment of Native Title rights. Two decisions of the Native Title Tribunal in Western Australia have indicated that compensation may well exceed the freehold value of the land in question. In considering the Tribunal considered the law of personal injuries may be more appropriate than that of traditional property law notions.

The scope of the compensation payable will depend on other future findings of the courts. If, for example, the statutory provisions vesting in natural resources (such as forest products, minerals, water, quarry material etc) are found not to have extinguished Native Title then compensation may be payable at the point in time they are used by the State or grants of them are made to third parties.

It should be noted that the existing exposure of governments to compensation is already potentially extensive. The *Wik* decision itself has considerably expanded the dealings in land and resources that are subject to the existing validation regimes. This will be further expanded if grants issued post 1994 are also subject to statutory validation.

These implications can be grouped as either validation issues or co-existence issues. I will look at each in turn.

VALIDATION

The issue of invalidity arises because of those provisions of the Native Title Act which aim to recognise and protect Native Title while providing a benchmark for land management regimes of the States.

The basic scheme is that Native Title is to be treated akin to freehold title. This means:

- a government can grant any interest over Native Title land which it can grant over freehold land; and
- Native Title holders are entitled to the same procedural rights as freeholders.

In short, if you can do it over freehold you can do it over Native Title. If you cannot do it over freehold then you cannot do it over Native Title land.

In addition to the freehold test a proposal to grant a mining title also triggers the special right to negotiate (RTN). Failure to comply with either the freehold test or the RTN means the title granted will be invalid at least to the extent it affects Native Title.

Since 1994 State Government land managers have adopted varying Native Title management strategies but all have had as a common feature an assessment of the likelihood of Native Title continuing to exist in particular areas. *Wik* has confounded these strategies by holding that pastoral leases (and by implication other tenures) do not extinguish Native Title but co-exist with Native Title.

This means a vast array of grants, titles and approvals have been undertaken by States over potential Native Title without any reference to the rights of the Native Title holders. Such grants may be invalid because:

- they fail the freehold test; or
- in the case of mining titles the special right to negotiate has not been triggered.

Naturally a core issue for industry is the validity of these titles.

CO-EXISTENCE

The practical workings of co-existence has attracted much attention in the pastoral industry. Questions have been asked about the exact rights attaching to a pastoral lease and whether particular activity undertaken by a pastoralist impacts on Native Title rights.

The mining industry has always exercised rights which co-exist with other land interests (eg exploration licences over pastoral leases) and seems more relaxed about co-existence. Equally the Native Title Act regime provides for the non-extinguishment of Native Title by mining titles. For miners *Wik* has not changed the expectation of co-existence but rather the extent of the Australian land mass on which it may occur.

Nonetheless, co-existence does raise some issues. For instance:

- how precisely are the rights of miners defined in the leases and authorising legislation and how much activity is impliedly part of the mining authority?
- how is a dispute to be resolved if a miner seeks to prevent some form of exercise of Native Title right when the Native Title holder disputes that the activity actually interferes with the miners' legal interest?

If it is the case that Native Title is progressively affected by the actions of a grantee rather than the full effect of an impairing or extinguishing grant occurring at the time of issue, then the "future act" regime of the Native Title Act may apply to actions that have occurred since 1 January 1994. Where these provisions have not been complied with the act may be invalid and the grantee would presumably be liable to some form of damages or compensation action. This would seem to apply in particular to valid grants that are not subject to the "past acts" regime of the Native Title Act.

It is also not altogether clear who would be liable to pay such compensation if it were resulting from the actions of a private individual or company. While government is liable for compensation for "future acts" attributed to government it is not certain that this form of extinguishing act would necessarily fall within this definition.

RESPONSES TO THE DECISION

The *Wik* decision has provoked a generally hostile response from economic interests such as the pastoral industry and State Governments and has been welcomed by indigenous interests. The resource sector through it peak associations has been more analytical than emotional, attempting to identify and work through complex issues.

All responses recognise the need for some legislative amendment to the Native Title Act but there is little agreement on what should be done.

THE STATES

The States have prepared an Options Paper for the Commonwealth. The options are said to include:

- the codification of some aspects of the common law developed in the *Mabo* and *Wik* decisions. This codification would modify the common law to some extent and narrow the potential evolution of the law by the High Court;
- the confirmation by legislation that particular tenures have extinguished Native Title;
- validation of post 1 January 1994 acts;
- several options to deal with co-existence including:
  - extinguishment of Native Title;
  - replacement of Native Title rights with statutory access rights;
  - allowing the States to develop their own "future act" regimes on their own terms, ie not meeting the standards in the Native Title Act;
  - codification of the rights of pastoralists.

THE RESOURCE SECTOR

For its part the resource sector has stressed the issue of validity of all mining and associated grants as the most pressing concern post *Wik*. The Minerals Council of Australia (MCA) holds the general position that the amendments to the Native Title Act advanced prior to *Wik* will satisfy the major needs of industry for a workable Native Title regime.

The key amendments identified by the MCA are:

- the introduction of a positive prima facie case test before Native Title claims are registered and able to trigger the "right to negotiate";
- limiting the "right to negotiate" process to one occasion per the life of a project rather than the current prospect of varying government approvals triggering the process on multiple occasions for the single project;
- the progressive application of the prima facie case threshold test to existing claims;
- improvements to the agreement process to provide greater flexibility, certainty and finality to agreements made between developers and Native Title holders or claimants.

In short the peak industry associations want validity of titles and amendments to the Native Title Act that address the practical problems manifested in the last three years.

THE COMMONWEALTH'S RESPONSE

The Howard Government has committed itself to reforms to the Native Title Act in order to make the regime "workable". The reforms were to be consistent with broad parameters stated to be:

- a commitment to the *Mabo* principles and to the preservation of the integrity of the High Court's decision;
- a commitment to retain the Native Title Act;
- a commitment to the principles of non-discrimination embodied in the Racial Discrimination Act;
- an understanding of the special relationship between indigenous people and land which is at the core of indigenous culture;
- a belief that the Native Title Act is causing problems to industry and the broader economic interests of the Nation;
- the legal constraints contained in the Constitution and the Racial Discrimination Act.

The Government's amendment proposals were presented to Parliament in late 1996 prior to the *Wik* decision. The key changes proposed included:

- a new means of excluding acts from the "right to negotiate" processes with the general expectation that all exploration activity would be excluded;
- the capacity to re-grant, re-make or extend a right to mine without undertaking the "right to negotiate" procedure if the original grant was negotiated or arbitrated under the Native Title regime and the area of the tenement is not extended;
- the renewal of all pre 1994 mining leases without the need to comply with the right to negotiate;
- expansion of the definition of a low impact "future act" so that some activities related to mining such as re-vegetation or rehabilitation would be included;
- earlier and more extensive power for ministerial intervention in the "right to negotiate" process.

Following the *Wik* decision the Government established a *Wik* task force headed by senior bureaucrat Greg Taylor. It is this task force which has developed the so-called "10 point plan".

Its job is to marry together the reality of the new issues thrown up by *Wik* against the existing proposed amendments and manage the perceptions and political demands of various constituencies. This is no easy job as the expectations of the pastoral industry and some State Governments rest uneasily against the legal reality of what the Commonwealth can achieve and the political reality of what the Senate will pass.

While the detail of the plan has not been released publicly the outline is known. The 10 points are:

1. ***The confirmation of all pastoral production activities carried out on a pastoral lease and the extinguishment of Native Title that is inconsistent with these activities***

   This amounts to the effective codification of pastoral activities possibly at a level which currently exceeds the actual rights afforded to a pastoralist under their lease. In terms of extinguishment it may do no more than confirm the position under the common law but it will extend beyond this if:

   - Native Title is only suppressed and not extinguished by the grant of inconsistent statutory rights; or
   - the codification goes beyond the rights already granted under the pastoral lease.

   Like the plan as a whole the devil is in the detail as this point may amount to nothing more than a restatement of the common law or potentially it might result in a significant upgrade of pastoral rights and a consequent extinguishment of Native Title rights.

2. ***Access rights to Pastoral Leases for Aborigines who can establish a continuing current physical connection to the land***

   The trade-off to achieve greater pastoral rights is said to be statutory access rights to Native Title holders. In some parts of Australia this may amount to nothing more than the current reservations in favour of Aboriginal access contained in pastoral leases. In Queensland it must mean something new as Aborigines currently have no statutory access rights to pastoral leases.

3. ***The Replacement of the Freehold Test and the Right to Negotiate on Pastoral Leases with a new comparable interest test***

   The aim here is two-fold. Firstly to allow a range of activities on pastoral leases and other tenures which are currently impermissible because the activities fail the freehold test. For instance, the issue of wood-cutting permits over Queensland pastoral leases is currently an impermissible future act if Native Title co-exists on the pastoral lease. The new test would allow the State Government to issue the permit over the Native Title land as such permits are allowed over the co-existing statutory tenure, eg a pastoral lease.

   The second result will be to remove the right to negotiate over mining activities proposed for pastoral leases. It would provide Native Title holders with the same rights viz-a-viz mining that pastoralists currently enjoy. This is a measure which miners will welcome and indigenous interests seek to have opposed in the Senate.

4. ***Native Title holders to have a Right to Negotiate over Government infrastructure (including that built by private operators) on unallocated State land but not on pastoral leases***

   It is a consequence of point 3 that the Right to Negotiate will be available over unallocated State land. However depending on the detail this proposal implies the Right to Negotiate will occur when Native Title is being acquired for all purposes including government

purposes. This extends the current position as the Right to Negotiate is only available when the acquisition is proposed for the benefit of a third party and not an acquisition for a public purpose.

5. ***No right to negotiate over the management of water or the extraction of timber or gravel***

This covers in part the effectiveness of vesting provisions of natural resources in public ownership which I canvassed earlier. The detail of this proposal is all important as merely removing the Right to Negotiate will not stop common law actions to enforce Native Title rights in relation to the exploitation of these resources.

6. ***A higher threshold test for Native Title claims***

This is an amendment already announced by the Government in its 1996 amendment package. Due to court interpretations there currently exists no threshold test for the acceptance of Native Title claims. There is no argument from indigenous interests that there should be a threshold test, the debate will be on how high the bar should be placed.

7. ***The promotion of regional and local land use agreements***

Again these changes have already been announced and have received support from all stakeholders. The idea here is to facilitate agreements that can incorporate Native Title and other indigenous land use issues, eg cultural and heritage considerations under State and Commonwealth laws.

8. ***Validation of Titles issued since 1994***

The trick here is to validate acts effectively undertaken in a mistaken belief of the law, ie Native Title had been extinguished but not acts taken in disregard of the Native Title Act.

The most straight forward and in my opinion only practical means of achieving this is by across the board validation as provided for pre 1994 titles in the Native Title Act. There are alternatives which:

- validate only acts taken over existing or historical pastoral leases; or
- acts over land where land interests co-exist with Native Title.

Case by case validation has been examined but its difficulties would be substantial.

9. ***Confirmation that Native Title has been extinguished over all land title giving exclusive possession***

This measure apparently has the aim to answer the question left somewhat unanswered by the *Wik* decision, ie is Native Title extinguished by the grant of an inconsistent interest in land or merely suppressed while this statutory interest continues in force.

This point will have considerable importance in terms of the payment of compensation as the extinguishment of all Native Title by legislative decree may lead to substantial compensation being paid by Australian governments.

10. ***Confirmation of all titles in Towns and Cities***

It would seem that this particular proposal is in response to a number of Native Title claims which have been lodged over urban and semi-urban areas. The prospect of Native Title continuing to exist in built out urban areas appears somewhat remote however it is possible that Native Title may still exist in public places such as foreshores and beach areas. Like all

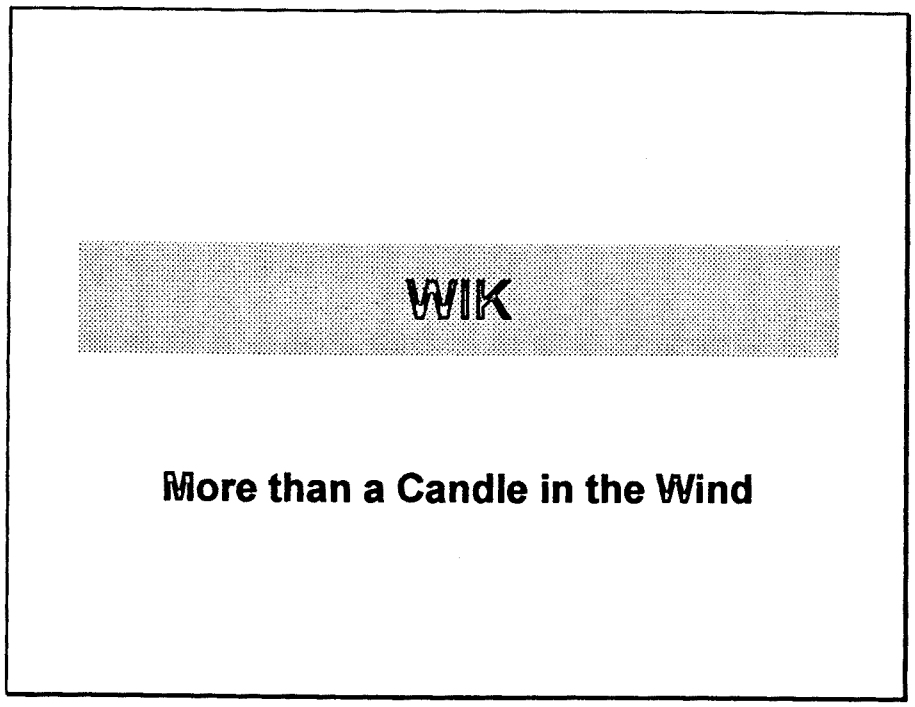
other measures in the Prime Minister's plan the detail of this particular item would need to be examined in order to undertake a more meaningful evaluation.

Putting aside all other considerations the package will face difficulties in the Senate unless it is perceived by the Opposition, minor parties and Senator Harradine to be balanced and fair towards the interests of Aboriginal Australians.

To meet this test the Government will have needed to have put as much intellectual effort into devising measures that allow moderate Aboriginal leadership to accept the outcome as it has into satisfying the needs of industry and its rural constituency.

As a survivor of this process in 1993 I know the problems ahead. There is a long *Wik* in the candle yet to burn!

Slide 1



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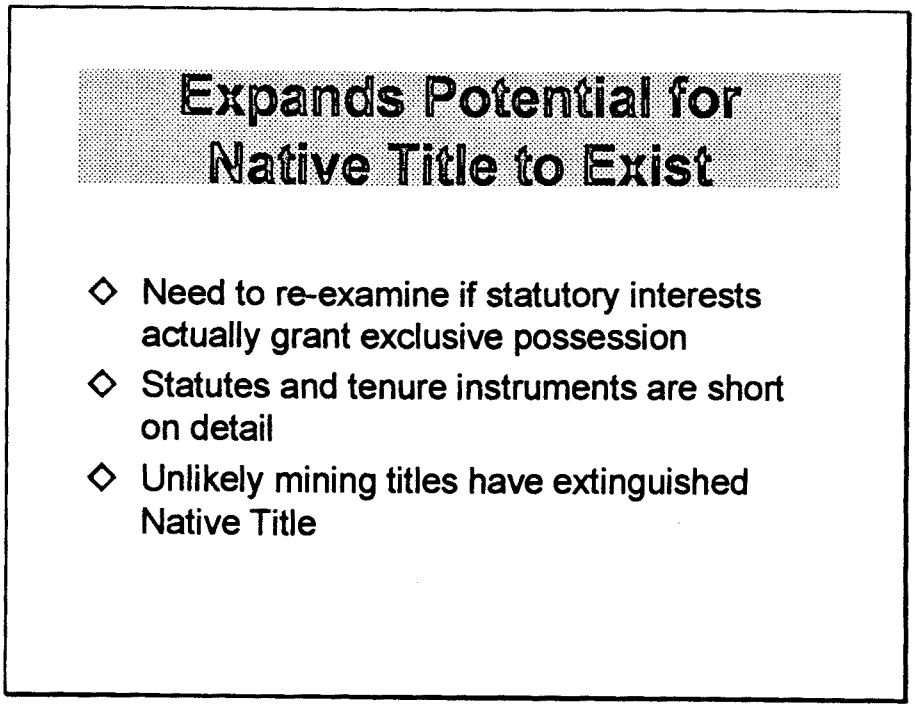


Slide 3

Co-existence

- ◇ *Wik* increases land mass which miners will deal with Native Title
- ◇ Are rights of miners well defined or do activities occur by implication?
- ◇ How will disputes be resolved?

Slide 4

The Response of the States

- ◇ Limit ability of High Court to further evolve the law by codification
- ◇ Validate post 1994 acts
- ◇ Several options for co-existence:
  - Extinguishment
  - Replacement of Native Title with statutory rights
    - Giving full discretion to States to set up own regimes
    - Codification of pastoralist rights

Slide 5

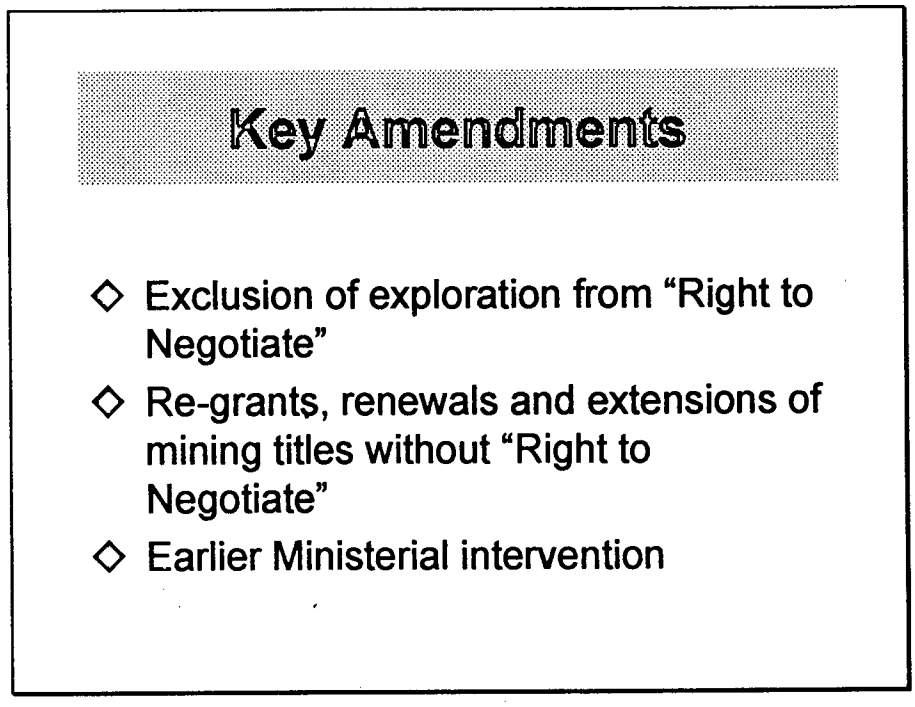
The Response of the Resource Sector

- ◇ Validate mining and associated grants
- ◇ Amend Native Title regime by:
  - Threshold test for all claims
  - Once only "Right to Negotiate"
  - Apply new threshold test to existing claims
  - Support indigenous land use agreements

Parameters for a Commonwealth Response

- ◇ Maintain *Mabo* principles and Native Title Act
- ◇ Commitment to non-discrimination
- ◇ Meet the needs of industry and Aboriginal people
- ◇ Limited by legal and political reality

Slide 7



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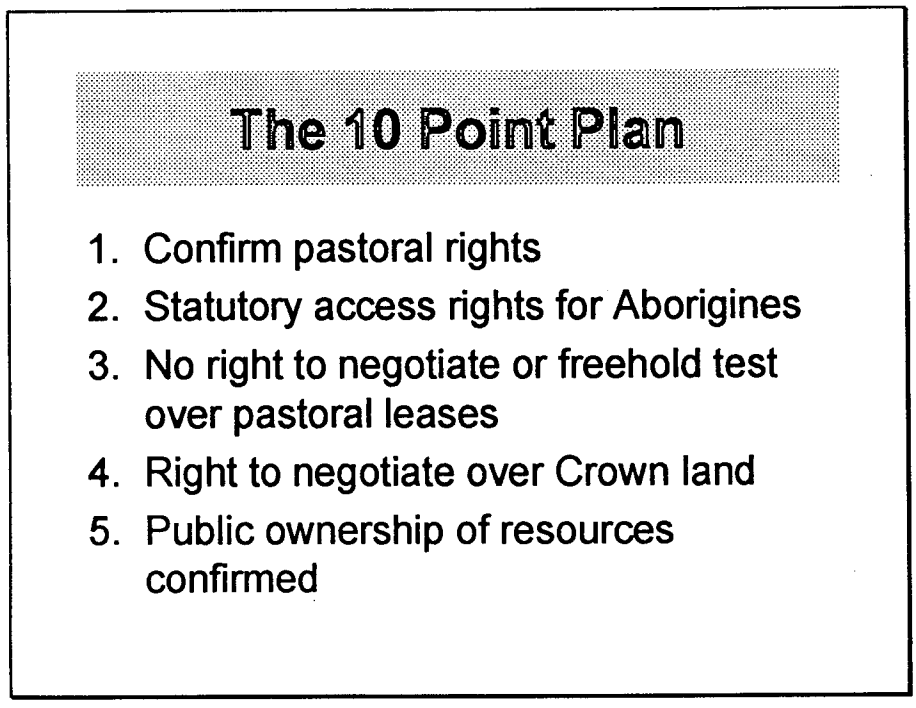

Slide 9

The 10 Point Plan

6. Higher threshold test for claims
7. Promotion of indigenous land use agreements
8. Validation of post 1994 titles
9. Extinguishment where there is exclusive possession
10. No Native Title in cities

Slide 10

Ownership of Crown Resources

- ◇ Assumed vesting of resources in public ownership would have extinguished Native Title
- ◇ Post *Wik* test stresses co-existence if this is possible - almost a presumption against extinguishment
- ◇ Possible timber, water, foreshores and even minerals may be within Native Title rights

Slide 11

Doubts on Validity of Post 1994 Titles

- ◇ Invalidity because of the failure to follow Native Title Act processes
- ◇ Many grants may be impermissible future acts

Slide 12

Invalidity of Titles

- ◇ Risk of invalidity because States issued titles believing Native Title had been extinguished
- ◇ Might arise because of failure to meet the freehold test; or
- ◇ Failure to go through the "Right to Negotiate" when issuing mining titles

Slide 13

Property Law Issues Raised by Co-existence

- ◇ Precise nature of both sets of rights
- ◇ Use of land by Native Title holders for contemporary social and economic purposes
- ◇ These issues dealt with to some extent in South Australia, Western Australia and the Northern Territory

Slide 14

Compensation

- ◇ Little guidance available
- ◇ Conflict of public policy and private rights
- ◇ Maybe law of personal injuries is relevant